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

HANI ENTERPRISES, INC.,

Appellant/Cross-Appellee,

v.

DARRELL PHILLIPS,

Appellee/Cross-Appellant.
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DCA Case No. 4D23-1844
(Consolidated with DCA Case No. 4D23-2003)
L.T. No. 50-2021-CA-006220

A1A GROCERY INC.,

Appellant,

v.

DARRELL PHILLIPS,

Appellee.

REPLY/CROSS-ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE HANI ENTERPRISES, INC.

An Appeal from a Final Judgment Entered in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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REPLY BRIEF ARGUMENT

While the Initial Brief filed on behalf of Hani Enterprises, Inc. ("Hani") presents the facts of the underlying case and applicable law accurately, Hani submits this Reply Brief to highlight that Darrell Phillips' arguments on appeal misconstrue Florida law and the record before this Court. For the reasons stated herein and in Hani's Initial Brief, this Court should reverse the trial court's final judgment and order the trial court to enter judgment in favor of Hani on remand, or alternatively, reverse and remand this case for a new trial.

I. THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT IN HANI'S FAVOR WHERE PHILLIPS FAILED TO ESTABLISH A VIABLE EVIDENTIARY BASIS FOR HIS PREMISES LIABILITY CLAIM AGAINST HANI

A. The trial court erred in failing to enter judgment in Hani's favor because there is no reasonable evidentiary basis to support Phillips' claim that Hani had a legal duty to him based on the argument that Hani "possessed" or "controlled" the premises at the time of the incident.

After acknowledging in his Answer Brief that courts in Florida describe "control" as the "ability to control access or exclude others from the property" when determining whether a defendant owes a plaintiff a duty of care in a premises liability action, Phillips argues that the lease between Hani and Co-Appellant/Co-Defendant, A1A

Grocery Inc. ("A1A"), shows Hani had this level of control over the premises of A1A's convenience store at the time of his trip and fall incident. (P.B., pp. 28-30).[1] Specifically, Phillips asserts in his Answer Brief that Hani's rights in the lease to approve contractors, enter the premises during business hours, consent to encumbrances on the premises, and make repairs in the event A1A failed to maintain the premises meets the requisite level of control necessary under Florida law to impose liability on Hani for his premises liability claim. (P.B., p. 30).

In making this argument, however, Phillips fails to acknowledge that the trial court correctly concluded below that the terms of the lease between Hani and A1A did **not** establish the requisite level of control over the premises necessary to establish a viable premises liability claim against Hani. (T. 1145). And for the reasons detailed in Hani's Initial Brief, this Court should hold that the terms of the lease do not show Hani had the right to control access by third parties to the premises. (I.B., pp. 33-35).

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[1] References to Phillips' Answer/Cross-Initial Brief shall be cited as "(P.B., pp. ___)," while Hani's Initial Brief shall be cited as "(I.B., pp. ___)."

Additionally, Phillips' attempt to distinguish the lease in this case from the lease at issue in the Sixth District Court of Appeal's recent favorable decision in *Johnson v. Garrett*, No. 6D23-1205, 2024 Fla. App. LEXIS 2569 (Fla. 6th DCA April 4, 2024), on the basis that the lease here is not a "triple net lease" is unpersuasive.[2] First, there is no law in Florida that requires a lease between a landlord and tenant to be a triple net lease in order to insulate a landlord from premises liability claims. Nor did the Sixth District in *Garrett* discuss the effects of a triple net lease on a landlord's liability in a premises liability action. Instead, the Sixth District in *Garrett* held that even when a lease between a landlord and tenant grants the landlord the right to enter the premises, inspect the premises, make repairs, and operate the tenant's business on the premises upon certain conditions, these rights do "**<u>not</u> constitute sufficient control for purposes of establishing liability**." *Garrett*, 2024 Fla. App. LEXIS 2569 at *14 (emphasis added).

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[2] "Under a triple net lease, the tenant is obligated to pay all taxes, insurance and cost of maintenance on the leased premises." *Hochhauser v. Jacobson*, 795 So. 2d 232, 233 n.1 (Fla. 4th DCA 2001).

Notably, the Sixth District in *Garrett* ultimately concluded that a directed verdict should have been entered in favor of the premises owner since—just like in the present case—the evidence did not show the owner "maintained sufficient control over the premises to establish a duty of care toward" the plaintiff. *Garrett*, 2024 Fla. App. LEXIS 2569 at *15. Thus, in line with the Sixth District's recent favorable decision in *Garrett* and the cases detailed in Hani's Initial Brief, this Court should hold that the lease between Hani and A1A does not provide evidence of the requisite level of control needed to impose liability on Hani for Phillips' premises liability claim.

Next, recognizing that the terms of the lease are insufficient to establish Hani's right of control for purposes of maintaining a premises liability claim against Hani, Phillips asserts in his Answer Brief that because Hani cleaned the back of the premises in response to the County's Code violations prior to his incident, Hani is liable for his premises liability claim. (P.B., pp. 30-32). In support of this argument, Phillips primarily relies on the First District Court of Appeal's decision in *Braxton v. McBride*, 241 So. 2d 716 (Fla. 1st DCA 1970). *Braxton*, however, does not support imposing liability on Hani here.

First, unlike the facts of the instant case, in *Braxton*, there was evidence that prior to the incident at issue, a landlord's tenant informed the landlord's agent that the porch on the tenant's rental home needed repair. *Braxton*, 241 So. 2d at 717. The landlord failed to make the requested repair and subseuqnetly one of the tenant's guests was injured when her legs fell through rotting flooring on the front porch. *Id*. Thereafter, the guest filed a premises liability lawsuit against the landlord and in response, the landlord argued unsuccessfully via a motion for directed verdict that the tenant was responsible for the guest's injuries since the tenant was in possession of the rental home. *Id*.

In rejecting the landlord's argument, the First District in *Braxton* detailed that it was "undisputed" that the city had an ordinance requiring a landlord of a dwelling to repair deterioration through normal wear and tear, which relieved the tenant of this responsibility. *Braxton*, 241 So. 2d at 717-18. Thus, the First District ruled that this ordinance, coupled with evidence showing the landlord had notice of the defect prior to the incident, was sufficient to support holding the landlord liable for the guest's injuries based on the Florida Supreme Court's 1917 decision in *Simms v. Kennedy*, which noted that a landlord may be liable to third persons for injuries caused by defects on leased premises "when the lessor … is required by law or undertakes to keep or to assist in keeping the premises in repair[.]" *Id.* (quoting *Simms v. Kennedy*, 76 So. 739, 740 (Fla. 1917)).

Here, unlike in *Braxton*, there is no state or local law that makes the landlord of a commercial property responsible for repairing and maintaining the premises while relieving the tenant of this responsibility.[3] And contrary to Phillips' arguments in the Answer Brief (and for the reasons detailed in Hani's Initial Brief), Hani's correction of the Code violations before Phillips' incident did not result in Hani having the requisite level of control over the premises to impose liability on Hani since the actions taken to correct the Code violations did not result in Hani having any right to control access of third parties on the premises, nor did the corrections result in Hani

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[3] Nor is there any law or case in Florida that suggests how a local government handles the enforcement of code violations pertaining to commercial properties is a substitute for the standards to impose premises liability on a landlord for injuries sustained by third parties on leased premises.

undertaking a continuing duty to maintain the premises. (I.B., pp. 37-38).[4]

It must also be noted that while Phillips asserts in his Answer Brief that the Code violations were not corrected until after his incident, the record before this Court shows that the County's Code Enforcement Officer stated in her Affidavit of Compliance that **all of the violations** "**have been corrected as of March 5, 2020**," which was **nine days before** Phillips' incident on March 14, 2020. (R. 1592-93) (emphasis added). Thus, the evidence below showed that just days before Phillips' incident, according to the County, the back of the premises was not in a state of disrepair as asserted by Phillips on appeal.

Furthermore, while Phillips attempts to make much of the fact that one of A1A's co-owners, Mohammed Abdul Gafur, initially testified that he believed the landlord was responsible for keeping the back of the premises safe, as detailed in Hani's Initial Brief, Mr.

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[4] Phillips' premises liability claim against Hani is not based on Hani negligently correcting the Code violations; and thus, Hani's prior actions in connection with the Code violations cannot support a premises liability claim under Florida law. (*See* I.B., pp. 31-32, 37 n.9).

Gafur's trial testimony reflected that he does not know who the landlord is and he agreed that per the lease, it was A1A's job to ensure the driveways, landscaping and parking lot are in good order. (T. 431:16 – 432:5, 434:13-20).

Mr. Gafur also testified that his English is not good and that A1A's other co-owner, Mohammed Shahid Zaman, was the one who dealt with the landlord. (T. 432:2-5). Thus, Mr. Gafur's testimony lends no support to Phillips' argument that Hani had sufficient control over the premises at the time of his incident. But even more importantly, Mr. Gafur's mistaken testimony cannot change the plain language of the lease. *See, e.g.*, *Fla. Power & Light Co. v. Morris*, 944 So. 2d 407, 413 (Fla. 4th DCA 2006) (explaining the contractual terms would not be changed by the testimony of the defendant's manager regarding his understanding of who was responsible for maintaining the premises).

Under modern-day Florida law, "'[p]remises liability is not predicated on ownership of the property;' instead, the 'duty to protect others from injury resulting from a dangerous condition on the premises rests on the **right to control access to the property**.'" *Bechtel Corp. v. Batchelor*, 250 So. 3d 187, 196 (Fla. 3d DCA 2018) (quotation omitted; emphasis added). "For this reason, control of property for purposes of premises liability **means control that rises to the level of the ability to control access or exclude others from the property**." *Id.* (emphasis added).

In this case, there is no evidence that Hani had the requisite level of control of the leased premises for purposes of imposing liability on Hani for Phillips' premises liability claim. Moreover, if this Court were to accept Phillips' arguments on appeal, this Court "would be treading on a slippery slope because the result of such an approach would be that, in some cases, a landlord could be held responsible for negligence of the tenant as a matter of law." *Brown v. Suncharm Ranch*, 748 So. 2d 1077, 1079 (Fla. 5th DCA 1999).

Thus, for the reasons stated above and in Hani's Initial Brief, this Court should hold that the evidence below showed Hani did not maintain sufficient control over the premises to establish a duty of care owed toward Phillips. The final judgment against Hani should therefore be reversed and the trial court should be instructed on remand to enter final judgment in Hani's favor.

B. Alternatively, assuming *arguendo* Hani had a duty to maintain the premises, the trial court erred in failing to enter judgment in Hani's favor based on a proper application of the "open and obvious" doctrine.

As an initial matter, this Court should reject Phillips' preservation argument pertaining to the application of the open and obvious doctrine because Hani moved for a new trial based on the insufficiency of the evidence and expressly adopted the arguments raised by A1A in its post-trial motions, which included arguments pertaining to the open and obvious doctrine. (R. 1460). *See, e.g.*, *Scarfone v. Magaldi*, 522 So. 2d 902, 903-04 (Fla. 3d DCA 1988) (holding the issue was preserved for appellate review since the party moved for a new trial based on the insufficiency of the evidence even though no motion for directed verdict was made); *J.T.A. Factors v. Philcon Servs.*, 820 So. 2d 367, 371 (Fla. 3d DCA 2002) (holding appellant preserved the right to challenge the sufficiency of the evidence on appeal since the argument was raised in a motion for new trial).

Additionally, Phillips' reliance on the Fourth District Court of Appeal's decision in *Eagleman v. Korzeniowski* pertaining to co-defendants joining objections is misplaced here because unlike the facts in *Eagleman*, Hani's counsel did not inform the trial court below that Hani "was not involved with the motion for directed verdict and would not be taking a position on the motion." *Eagleman v. Korzeniowski*, 924 So. 2d 855, 859 (Fla. 4th DCA 2006). Phillips also did not object to Hani joining A1A's post-judgment motions that concerned the application of the open and obvious doctrine, (R. 1492-1514); nor did the trial court refuse to permit Hani's adoption of A1A's arguments.

Moreover, as detailed in Hani's Initial Brief, whether the wire mesh is a dangerous condition is part of the application of the open and obvious doctrine in a trip and fall case. (I.B., p. 40). Thus, Phillips' claim that Hani did not move for a directed verdict on the open and obvious doctrine is without merit as the record reflects that Hani addressed whether the wire mesh was inherently dangerous and the evidence showing Phillips successfully avoided tripping on the wire mesh several times prior to his incident as part of its directed verdict arguments. (T. 1020-21). The application of the open and obvious doctrine was thus properly brought to the trial court's attention during trial and post-trial by both Defendants. Phillips' lack of preservation argument should therefore be rejected by this Court.

As it concerns the merits of the application of the open and obvious doctrine, this Court should hold that contrary to Phillips' arguments on appeal, the cases relied on by Hani and A1A pertaining to individuals walking in areas not designated for walking are instructive here since the record before this Court shows that the grassy area where Phillips fell was not an area designated for walking. Notably, in arguing that the area behind the back of the premises does not fall within the scope of Hani and A1A's cited authorities, Phillips asserts in his Answer Brief that he fell in "an open area where one could be expected to walk," given that he fell in an area located by the back door of the store, "in the line of ingress and egress from that door[.]" (P.B., pp. 37-38).

However, the record on appeal shows that Phillips knew before the day of the incident that the back door of the premises did not work. In fact, Phillips testified at trial that he was told the back door did not work and he never used the back door when previously completing repair work at the convenience store. (T. 579:7-24). Thus, the record refutes Phillips' claim that he fell in area he expected to be maintained for walking, especially given that Phillips also testified that upon his arrival to the convenience store, he observed rocks and broken concrete in the grassy area where he would be walking and working. (T. 516, 523-24, 594, 605, 622-23). As a result, the legal authorities discussing liability for injuries occurring in areas not designated for walking are applicable.

Additionally, while Phillips relies heavily on federal caselaw pertaining to whether the wire mesh was a dangerous condition as a matter of law, this Court should hold that the Florida state legal authorities cited by Hani in the Initial Brief are more instructive here. As detailed in Hani's Initial Brief, even if the wire mesh could be considered dangerous, Florida law recognizes that a business owner will not be subjected to premises liability if the evidence shows "a reasonable person could have easily avoided the obstacle and thereby prevented injury." *Brookie v. Winn-Dixie Stores, Inc.*, 213 So. 3d 1129, 1131 (Fla. 1st DCA 2017). And since the evidence here showed that Phillips using his ordinary senses successfully avoided tripping over the wire mesh (which he admitted was partially exposed on the asphalt) three or four times before he fell, this Court should hold that Hani cannot be subjected to liability as a matter of law under Florida's open and obvious doctrine.

C. Alternatively, assuming *arguendo* Hani had a duty to maintain the premises, the trial court erred in failing to enter judgment in Hani's favor because there is no evidence that Hani had actual or constructive notice of the alleged dangerous condition prior to the incident.

Once again Phillips claims on appeal that Hani failed to preserve its argument concerning its notice of the wire mesh on the premises because Hani did not separately move for a directed verdict on this issue. However, Phillips' lack of preservation claim should be rejected by this Court since Hani moved for a new trial based on the insufficiency of the evidence and expressly adopted the arguments raised by A1A in its post-trial motions, which included arguments pertaining Hani's lack of notice of the alleged dangerous condition. (R. 1460; R. 1375). *See Scarfone*, 522 So. 2d at 903-04; *J.T.A.*, 820 So. 2d at 371. Phillips also did not raise any issue with Hani adopting A1A's arguments on this issue below. (R. 1492-1514). This Court should therefore hold that the notice issue was preserved for appellate review.

This Court should also hold that the record on appeal does not include any evidence that would support a <u>**reasonable**</u> inference that Hani had constructive notice of the wire mesh prior to Mr. Phillips' incident. Specifically, this Court should find Phillips' argument that the wire mesh was on the ground for a sufficient length of time is unsupported by the record since Phillips' self-serving testimony that grass had grown over the wire mesh is contradicted by the fact that Phillips acknowledged the wire mesh was partially on the asphalt and visible; and the photographs of the mesh do not reflect any grass growing over or clinging to the wire mesh. (T. 607-08; R. 1535, 1539, 1555-56).

Nor does the County's Affidavit of Compliance support Phillips' speculative constructive notice argument since contrary to Phillips' statements in his Answer Brief, the County's Code Enforcement Officer stated in the Affidavit that **all of the violations** "**<u>have been corrected as of March 5, 2020</u>**," which was **<u>nine days before</u>** Phillips' incident on March 14, 2020. (R. 1592-93) (emphasis added). Thus, the evidence below showed that just days before Phillips' incident, there was no "leftover debris" on the back of the premises as claimed by Phillips on appeal. (P.B., pp. 45-46).

Additionally, A1A's co-owner unequivocally testified at trial that when Hani turned over the premises to A1A, there was no wire mesh on the premises. (T. 380-81). Therefore, contrary to Phillips' argument in his Answer Brief, it would be unreasonable for the jury to disregard this testimony and find the wire mesh had been on the premises since 2018 when the prior tenant left the premises. (P.B., pp. 45-47).

Furthermore, it must be noted that while Phillips refers to notice of “debris” generally on the premises while discussing Defendants’ constructive notice in his Answer Brief, any inferences of Defendants’ awareness of “debris” in general is insufficient to establish that Hani had constructive knowledge of the specific wire mesh on the premises that allegedly caused Phillips to trip and fall, which is what is required under Florida law to impose liability on Hani. *See*, *e.g.*, *Johnson v. Cumberland Gulf Group of Companies*, 2018 WL 11251530, at *3 (M.D. Fla. Aug. 17, 2018) (granting summary judgment to defendant despite evidence the parking lot had dips and oil slicks when there was no evidence the defendant had actual or constructive knowledge of the specific hole that caused the plaintiff’s injury).

Moreover, Phillips’ own arguments on appeal show that his constructive notice claim is based on impermissible inference stacking as he offers varying interpretations of the evidence to support his speculative timeframes as to how long the wire mesh could have been on the premises. (P.B., pp. 44-45). Indeed, Phillips' arguments pertaining to inferences about Hani's constructive notice ignore the well-established rule that if a party depends on "inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact **unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences**." *Wilson-Greene v. City of Miami*, 208 So. 3d 1271, 1275 (Fla. 3d DCA 2017) (quotation omitted; emphasis added); *accord Tallahassee Med. Ctr., Inc. v. Kemp*, 324 So. 3d 14, 16 (Fla. 1st DCA 2021). Importantly, "[t]his rule against stacking inferences 'protect[s] litigants from verdicts based on conjecture and speculation.'" *Kemp*, 324 So. 3d at 16–17.

As detailed in the Initial Brief, none of Phillips' speculative inferences pertaining to Hani's constructive notice of the wire mesh have been established to the exclusion of all other reasonable inferences. (I.B., pp. 46-48). Accordingly, the trial court should have entered judgment in Hani's favor. *See Kemp*, 324 So. 3d at 16 (reversing judgment in slip and fall case where the verdict was based on impermissible inference stacking, conjecture, and speculation).

Lastly, post-incident photographs of the wire-mesh on the premises cannot support a finding of Hani's constructive notice; and Phillips' reliance on *Hirschenson v. Westway*, 728 So. 2d 1216 (Fla. 3d DCA 1999), does not change this outcome given that the facts of *Hirschenson* are distinguishable from this case. Specifically, in *Hirschenson*, the evidence showed that the owner of the premises hired a contractor to perform demolition work on the property and approximately one month later, the plaintiff tripped over a metal bar that was part of a debris pile near a sidewalk. *Id.* at 1217.

While the Third District in *Hirschenson* agreed that there was no evidence of the owner's actual notice of the metal bar in the debris pile, the Third District reversed the summary judgment ruling in favor of the owner on the issue of constructive notice and explained that "[a] reasonable inference is that the debris pile was a product of the demolition job, which had been completed a month earlier." *Hirschenson*, 728 So. 2d at 1217. The Third District further noted that "[a] one-month time interval would be sufficient to create constructive notice to the owner of the dangerous condition." *Id.*

Here, unlike in *Hirschenson*, there is no evidence that the concrete wire mesh was part of a demolition or construction project on the premises. In fact, Hani and A1A's representatives testified at trial that no concrete work was being done on the premises and there was no reason why the wire mesh would have been on the premises. (T. 351:22 – 352:14; 357:6-15; 380:7-24; 398:19 – 399:7). Thus, unlike in *Hirschenson*, there is no evidentiary basis to conclude why the wire mesh was on the premises or to show how long it was on the premises. *Hirschenson* is thus inapplicable here.

Similarly, Phillips' reliance on *Johnson v. Treasure Coast Plaza*, 670 So. 2d 1199 (Fla. 4th DCA 1996), in support of his argument that the post-incident photographs are evidence of Hani's pre-incident constructive notice of the wire mesh is misplaced. First, contrary to Phillips' statement in his Answer Brief, this Court in *Johnson* did not state or imply that post-incident photographs can support a showing of pre-incident constructive notice. *Johnson*, 670 So. 2d at 1200-01. Nor did this Court in *Johnson* reverse the summary judgment ruling based on a genuine issue of material fact "as to the frequency with which the parking area was cleaned" due to plaintiff's testimony that she observed broken pieces of the bumper on the premises for weeks after her incident, as asserted by Phillips in his Answer Brief. (P.B., pp. 48-49). Instead, this Court in *Johnson* reversed the trial court's summary judgment ruling as it concerned constructive notice based on evidence showing the concrete bumper was "eroding," which suggested the condition had existed for a sufficient length of time. *Johnson*, 670 So. 2d at 1201.

Because the evidence below did not provide a reasonable basis for the jury to find Hani had constructive notice of the wire mesh on the premises before Phillips' incident, this Court should reverse the final judgment and direct the trial court to enter judgment in Hani's favor on remand.

II. ALTERNATIVELY, THIS COURT SHOULD REMAND THIS CASE FOR A NEW TRIAL BASED ON PHILLIPS' COUNSEL'S HIGHLY IMPROPER, GROSSLY INFLAMMATORY, AND EXTREMELY PREJUDICIAL COMMENTS TO THE JURY, AS WELL AS THE TRIAL COURT'S ERRONEOUS ADMISSION OF IRRELEVANT, CONFUSING, EXTREMELY PREJUDICIAL EVIDENCE THAT INDIVIDUALLY AND/OR CUMULATIVELY INFECTED THE VERDICT, DEPRIVED HANI OF A FAIR TRIAL, AND RESULTED IN A MISCARRIAGE OF JUSTICE

A. The highly improper, inflammatory, and extremely prejudicial comments made by Phillips' counsel to the jury, which undoubtedly improperly influenced the jury's reasoning and its verdict, warrant a new trial.

Phillips' attempt to downplay his counsel's accusations that Defendants destroyed evidence before the jury should be rejected by this Court. As detailed in Hani's Initial Brief, "statements by counsel in closing argument which accuse opposing counsel of hiding evidence and of fraudulently preventing the presentation of relevant evidence constitute reversible error." *SDG Dadeland Assocs. v. Anthony*, 979 So. 2d 997, 1001 (Fla. 3d DCA 2008). *See also Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) (ordering new trial when counsel accused the opposing party of concealing evidence where "[n]o pretrial discovery violation was ever established"); *Int'l Sec. Mgmt. Grp., Inc. v. Rolland*, 271 So. 3d 33, 51 (Fla. 3d DCA 2018) (ordering new trial where counsel may improper comments regarding missing video surveillance when there was no evidence the video was missing due to spoliation or concealment).

In the present case, after informing the jury that Defendants told Phillips there was no video surveillance on the day of the incident, Phillips' counsel stated Defendants should not "be heard to say [Phillips] didn't report it if **<u>they destroyed the very evidence</u>** showing that" Phillips reported the incident to the cashier. (T. 232) (emphasis added). This statement prompted Hani's counsel to move for a mistrial, and outside the presence of the jury, Phillips' counsel conceded that **there was <u>no evidence</u> Defendants destroyed evidence**. (T. 232-34).

Phillips' counsel, however, did not drop the issue. Instead, during the questioning of A1A's co-owner Mr. Zaman, Phillips' counsel once again suggested there were videos on the outside the premises, which Mr. Zaman explained in response that there were no cameras on the outside of A1A's convenience store. (T. 375:3-8). Nonetheless, Phillips' counsel insinuated that Mr. Zaman was lying when his follow-up question to Mr. Zaman suggested that Mr. Zaman's partners testified differently (despite there being no testimony to the contrary). (T. 375:9-11). Then, during closing arguments, Phillips' counsel again suggested Defendants destroyed evidence by asking the jury "where's the surveillance video?" (T. 1052:12-21).

These comments that accused Defendants of destroying evidence fall squarely within the cases in Hani's Initial Brief and warrant a new trial given that these comments are egregious, highly prejudicial, and inflammatory. *Rolland*, 271 So. 3d at 50-51 (collecting cases that hold a new trial is required when counsel implies the opposing party is hiding evidence); *Emerson Elec. Co.*, 623 So. 2d at 525 (describing counsel's comments that suggested defendants were concealing evidence as egregious and ordering a new trial); *Anthony*, 979 So. 2d at 1001 ("statements by counsel in closing argument which accuse opposing counsel of hiding evidence and of fraudulently preventing the presentation of relevant evidence constitute reversible error").

And while Phillips asserts that his counsel is entitled to argue adverse inferences based on "inadvertent" spoliation of evidence, Phillips never made a spoliation claim below in connection with any surveillance footage. Nor did Phillips file any pre-trial discovery motion concerning the existence of any surveillance footage of the outside of the premises, which is unsurprising given that no footage exists. Thus, Phillips' reliance on Jury Instruction 301.11 (pertaining to adverse inferences based on a party's failure to maintain evidence or keep a record) and *Jordan v. Masters*, 821 So. 2d 342 (Fla. 4th DCA 2002) (pertaining to jury instructions when a party fails to produce evidence) are not applicable here. In fact, as highlighted in *Anthony* and *Emerson Elec. Co.*, such comments are impermissible when "[n]o pretrial discovery violation was ever established[.]" *Emerson Elec. Co.*, 623 So. 2d at 525; *see also Anthony*, 979 So. 2d at 1002. "Moreover, even if a violation had occurred, 'an appropriate sanction was a matter for the court and not for the jury.'" *Anthony*, 979 So. 2d at 1002 (quoting *Emerson Elec. Co.*, 623 So. 2d at 525).

Furthermore, contrary to Phillips' argument in his Answer Brief, Defendants were not required to request a mistrial **and** a curative instruction in order to preserve this issue on appeal, as this Court has explained that either action would preserve this issue for appellate review. *R.J. Reynolds Tobacco Co. v. Neff*, 325 So. 3d 872, 879 (Fla. 4th DCA 2021) ("a party must request a mistrial or curative instruction to preserve the issue for appeal") (citation omitted). Additionally, a curative instruction would not have been sufficient here given the egregious nature of Phillips' counsel's comments pertaining to Defendants destroying evidence. Nor did the trial court offer to give a curative instruction below; and thus, the cases relied on by Phillips in his Answer Brief pertaining to a party's rejection of a curative instruction are inapplicable here.

This Court should therefore hold that a new trial is warranted based on the egregious, highly prejudicial, and inflammatory comments by Phillips' counsel suggesting that Defendants destroyed evidence. And while these comments alone are sufficient to warrant a new trial under Florida law, the statements by Phillips' counsel that appealed to the conscience of the community also provide alternative grounds for a new trial.

Specifically, Phillips' counsel stated to the jury that they were brought together "to pursue the cause of justice;" which was later followed by Phillips' counsel stating: "So justice here is closure. He's waited three years for the other shoe to drop. And, ladies and gentlemen, you have the power to make things right for him." (T. 1045, 1067). Contrary to Phillips' argument in his Answer Brief, these statements fall directly within the Florida Supreme Court's 2016 decision in *Cardona v. State*, which explained that Florida law condemns pleas for a jury to return a verdict that brings justice to the plaintiff. *Cardona v. State*, 185 So. 3d 514, 519-22 (Fla. 2016).

Furthermore, the Second District Court of Appeal's 1961 decision in *Sappington v. Town Props., Inc.*, 126 So. 2d 906 (Fla. 2d DCA 1961), does not provide Phillips any support on appeal pertaining to this issue since *Sappington* did not address the issue of improper comments to bring the plaintiff's justice. Instead, the issues in *Sappington* concerned the trial court's decision to continue trial and submit the case to the jury. *Id.* at 906-07.

Here, counsel for Phillips sought to appeal to the jury's sense of outrage at what happened to Phillips and asked the jurors to return a verdict to bring justice to Phillips. These are precisely the type of statements that the Florida Supreme Court condemned in *Cardona* given that these statements result in a jury basing their decision on sympathy for the plaintiff and not the facts. *Cardona*, 185 So. 3d at 519-20. This Court should thus hold that the statements to the jury urging them to bring justice to Phillips warrant a new trial.

Finally, the statements by Phillips' counsel that bolstered Phillips' credibility while claiming one of A1A's co-owners was not credible, denigrated Defendants and their defenses, suggested Defendants were not telling the truth, and misstated the law may be considered on appeal since these comments constitute reversible, fundamental error as explained in Hani's Initial Brief, (I.B., pp. 52-75); and, an appellate court "may consider 'the cumulative effect' of preserved and unpreserved error" when determining whether "the overall fairness of the trial court proceedings." *Neff*, 325 So. 3d at 879 (quotation omitted).

As concerns the improper bolstering and credibility comments made by Phillips' counsel, it must be noted that the case relied on by

Phillips in his Answer Brief in support of the argument that his counsel's comments were proper does not state counsel may give his personal opinion as to the credibility of a witness. Instead, the Florida Supreme Court in *Williamson v. State* noted that statements to the jury asking them to think about a witnesses' demeanor, which "encourage[es] the jurors to rely on their own impressions as to the witness's credibility" do not amount to bolstering a witness or attacks on a witness's credibility. *Williamson v. State*, 994 So. 2d 1000, 1013 (Fla. 2008).

Phillips' counsel, however, did not ask just the jurors to think about the demeanor of Phillips or A1A's co-owner Mr. Zaman. Instead, Phillips' counsel expressed his own personal opinion that Mr. Zaman "gave testimony that wasn't credible;" while bolstering Phillips' credibility. (R. 1052, 1062, 1064). These statements were improper under Florida law and should be considered when determining the overall fairness of the trial court proceeding.

Additionally, this Court should hold that the comments by Phillips' counsel that suggest Defendants engaged in shameful conduct by defending the claim, sought to avoid liability, and were hiding the truth, also detracted from Hani's right to a fair trial. And while Phillips argues on appeal that these comments were appropriate because defense counsel challenged Phillips' credibility throughout trial, such an argument is unpersuasive as there is no law in Florida that holds challenges to the plaintiff's credibility open the door to the plaintiff's counsel being allowed to attack the defendant for defending the claim.

Lastly, this Court should reject Phillips' argument that his counsel did not misstate the law when he informed the jury that Hani was fined by the County for Code violations because it was Hani's responsibility as the owner of the property to maintain the premises. (T. 1111). Simply put, paying fines to the County for a Code violation as the record owner of real property does not equate to the property owner being liable for injuries sustained by a third party on leased premises under Florida law. And to suggest otherwise is a misstatement of the law, which in combination with the other improper comments made by Phillips' counsel shows that Hani did not receive a fair trial.

Based on the foregoing, this Court should hold that the improper comments by Phillips' counsel necessitate a new trial on remand.

B. The trial court's erroneous admission of irrelevant, confusing, and extremely prejudicial evidence, evidence that undoubtedly improperly influenced the jury's reasoning and its verdict, warrants a new trial.

Phillips' arguments pertaining to the relevancy of the Code violations in his Answer Brief (and thus the trial court's admission of the same), have been thoroughly addressed by Hani in its Initial Brief. (I.B., pp. 57-61). Similarly, Phillips' arguments in his Answer Brief pertaining to the admission of the post-incident photographs do not assert any grounds for their admission that have not already been addressed by Hani in its Initial Brief. (I.B., pp. 61-63).[5]

Thus, Hani writes briefly herein to reiterate that contrary to Phillips' arguments otherwise, the evidence of prior Code violations does not show Hani had the ability to control access or exclude others from the premises. The Code violation materials also fail to support Phillips' constructive notice argument since there is no evidence the wire mesh was part of the violations and even if it was (as speculated

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[5] The motion to exclude the post-incident photographs was not directed to the photographs taken by Phillips on the day of the incident. (R. 973-79). Thus, there is no merit to Phillips' argument that the photographs taken days after the incident were necessary to show the jury what the mesh looked like since the photographs taken on the day of the incident were admitted without objection.

by Phillips), the Affidavit of Compliance established that all the code violations were corrected prior to Phillips' incident. Hani also highlights that—as detailed above—this Court's decision in *Johnson v. Treasure Coast Plaz*a, does not support Phillips' argument that the post-incident photographs are evidence of Hani's constructive notice of the wire mesh prior to his trip and fall incident.

Additionally, while Hani acknowledges that there is no written order in the record on the motions seeking to exclude the evidence of the prior Code violations and post-incident photographs, the record before this Court shows that a definitive ruling was made by the trial court as to these issues. Specifically, during trial, Phillips' counsel acknowledged that the trial court previously ruled that only 3 of the 21 post-incident photographs were admissible after the trial court determined that the other photographs were cumulative. (T. 280:21 – 281:3). And when Phillips' counsel moved to admit into evidence Exhibit 11 consisting of the Code violation materials, he once again acknowledged that the admission "was subject to the Court's rulings previous." (T. 342:11-22).

This Court should therefore reject Phillips' argument on appeal that these issues were not preserved for appellate review since

Phillips' counsel expressly acknowledged during trial that the court made definitive rulings on these issues. *See also Neal v. Swaby*, 975 So. 2d 431, 433 (Fla. 2d DCA 2007) (acknowledging that an oral ruling may constitute "a definitive ruling."). Thus, contrary to Phillips' argument on appeal, neither Defendant was required to renew their objection when this evidence was admitted at trial in order to preserve the issue for appeal. *See USAA Cas. Ins. Co. v. Allen*, 17 So. 3d 1270, 1272 (Fla. 4th DCA 2009) (explaining that a party does not need to renew their objection to the introduction of evidence when the trial court definitively ruled on a party's motion in limine).

Accordingly, this Court should hold that a new trial is required in this case because the trial court abused its discretion when admitting irrelevant and prejudicial evidence that was misleading and confusing to the jury, and which contributed to the verdict against Hani.

CROSS-ANSWER BRIEF STATEMENT OF THE CASE AND FACTS

In 2021, Phillips initiated the underlying action by filing a Complaint that alleged separate negligence counts against Hani and A1A in connection with Phillips' trip and fall incident. (R. 28-31). Phillips acknowledged in his Complaint that Hani owned the premises and A1A leased the premises. (R. 28, 30). And while the Complaint alleged separate causes of action against Hani and A1A that asserted each Defendant was liable for Phillips' injuries since each Defendant breached their duties to maintain the premises; correct dangerous conditions that they knew or should have known about; and warn Phillips of the dangerous condition, Phillips also alleged that Hani had (and breached) a non-delegable duty to keep the premises in a reasonably safe condition pursuant to this Court's decision in *Pembroke Lakes Mall, Ltd. McGruder*, 137 So. 3d 418 (Fla. 4th DCA 2014). (R. 28-31).

Notably, Defendants were initially represented by joint defense counsel but after the trial court's hearing on Defendants' motion for summary judgment, separate counsel for Hani sought (and was granted) permission to represent Hani. (R. 549-54, 867, 869). However, prior to the substation of counsel, Phillips filed an opposition to Hani's motion that argued Hani had a non-delegable duty to maintain the premises, and that while Hani could "delegate the maintenance work," Hani could not "delegate the duty" pursuant to *Pembroke*. (R. 608). Phillips also filed an opposition to Hani's motion in limine pertaining to the evidence of the prior Code violations that similarly argued that while Hani could delegate its responsibility to A1A to maintain the premises in a reasonably safe condition, Hani could not delegate the duty. (R. 1063).

Ultimately, this case proceeded to trial and during opening statements, Phillips' counsel contended that both Hani and A1A were responsible for the maintenance of the premises and that both were negligent for failing to maintain the premises. (T. 221-23, 228-30). Thereafter, while the Parties' counsel discussed the jury instructions outside the presence of the jury, Phillips' counsel raised the issue of non-delegable duty; however, the trial court in response noted that Phillips' non-delegable duty argument had been overruled since the non-delegable duty standard is not the standard that applies in a landlord/tenant premises liability case. (T. 983).

On June 9, 2024, the jury returned a verdict in favor of Phillips. (R. 1165-66). As indicated on the verdict form, the jury found that there was negligence on the part of Hani, which was a legal cause of loss, injury, or damage to Phillips. (R. 1165). The jury also separately found A1A negligently caused damage to Phillips. (R. 1165-66). Thereafter, the jury apportioned fault between Hani and A1A on the verdict form and found Hani was 25% negligent and A1A was 75% negligent. (R. 1166).

Following the jury's verdict, Phillips requested the trial court to hold Hani jointly and severally liable for the amount of damages attributed to A1A based on the argument that Hani had a non-delegable duty to maintain the premises pursuant to this Court's decision in *Pembroke*. (R. 1191-92, 1229-32). In response, Hani explained that the non-delegable duty standard did not apply here because a landlord's premises liability does not depend solely on a landlord's ownership; and instead, the non-delegable duty standard generally applies when a defendant operating a business hires an independent contractor to perform the defendant's duties. (R. 1239-40). Hani further highlighted that Florida eliminated joint and several liability through the enactment of the comparative fault statute in section 768.81, Florida Statutes; and that since the jury found Hani and A1A to be joint tortfeasors, each Defendant is only responsible for its share of apportioned fault. (R. 1240-43).

The trial court correctly agreed with Hani and entered final judgment against Hani based solely on the jury's apportionment of fault. (R. 1469). And after Hani filed a Notice of Appeal pertaining to the final judgment, (R. 1521); Phillips filed a Notice of Cross-Appeal on August 31, 2023, regarding the trial court's ruling on his non-delegable duty argument.

CROSS-ANSWER BRIEF ARGUMENT

I. THE TRIAL COURT CORRECTLY REFUSED TO HOLD HANI JOINTLY AND SEVERALLY LIABLE FOR THE NEGLIGENCE THE JURY ATTRIBUTED TO A1A

In the event the final judgment against Hani is not reversed for the reasons detailed above and in Hani's Initial Brief, this Court should affirm the trial court's ruling that rejected Phillips' non-delegable duty argument and the imposition of joint and several liability against Hani for the negligence of A1A, a joint tortfeasor.

In 2018, this Court in *Brown & Brown, Inc. v. Gelsomino*, explained that "over a period of years," the Florida legislature enacted "several laws narrowing and eventually **eliminating the doctrine of joint and several liability**." *Brown & Brown, Inc. v. Gelsomino*, 262 So. 3d 755, 756 (Fla. 4th DCA 2018) (emphasis added). Specifically, this Court highlighted in *Brown* that while "[j]oint and several liability was the standard under the common law … [t]he Florida legislature began to limit the doctrine in 1986 until it **completely eliminated joint and several liability in 2006**." *Id.* at 758 (emphasis added).

This Court further detailed in *Brown* that,

> [i]n 2006, the legislature amended the comparative fault statute to provide that '[i]n cases to which this section applies, **the court <u>shall</u> enter judgment against each party liable <u>on the basis of such party's percentage of fault</u> and <u>*not on the basis of the doctrine of joint and several liability*</u>**.'

Brown, 262 So. 3d at 758 (quoting § 768.81(3), Fla. Stat. (2006)) (emphasis added). Notably, the comparative fault statute was amended again in 2011 to state the statute applied retroactively and add statutory language pertaining to products liability. *Brown*, 262 So. 3d at 758. And at the time of the underlying case, Florida's comparative fault statute provided in pertinent part: "In a negligence action, the court **<u>shall</u> enter judgment against each party liable <u>on the basis of such party's percentage of fault</u> and <u>not on the basis of the doctrine of joint and several liability</u>**." § 768.81(3), Fla. Stat. (2023) (emphasis added).[6]

As recognized by this Court in *Grobman v. Posey*, the Florida Supreme Court explained that "[t]he impetus for enacting section

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[6] While section 768.81 was amended again in 2023 to change comparative negligence in Florida to a modified comparative negligence standard, this amendment is not relevant to the issue on cross-appeal. § 768.81(2) and (6), Fla. Stat. (2023).

768.81 was the perceived <u>**unfairness**</u> **of 'requiring a defendant to pay more than his or her percentage of fault**.'" *Grobman v. Posey*, 863 So. 2d 1230, 1234 (Fla. 4th DCA 2003) (quotation omitted; emphasis added). Therefore, "in cases involving **joint tortfeasors**" it is well-known that Florida's comparative fault statute requires apportionment of damages. *Id.* (citation omitted; emphasis added). Importantly, as explained by this Court in *Grobman v. Posey*, "[j]oint tortfeasors are 'those **who act together in committing wrong**, or **whose acts if independent of each other, unite in causing a single injury**.'" *Id.* (emphasis added).

In the present matter, Phillips alleged separate negligence claims against Hani and A1A in his Complaint based on Hani's role as the owner of the premises and A1A's role as the lessee of the premises. (R. 28-31). Phillips further asserted in his Complaint and before the jury that both Hani and A1A were responsible for the maintenance of the premises and that both were negligent for failing to maintain the premises. (R. 28-31; T. 221-23, 228-30). The jury agreed with Phillips and determined that Hani and A1A were joint tortfeasors. (R. 1165-66).[7]

Specifically, the jury separately found that both Hani and A1A negligently caused damage to Phillips and apportioned fault between Hani and A1A as follows: Hani 25% and A1A 75%. (R. 1165-66). Florida Statute section 768.81(3) therefore required the trial court to enter judgment against Hani and A1A "on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." § 768.81(3), Fla. Stat. Therefore, this Court should hold that the trial court did not err in refusing to enter judgment against Hani for the full amount of the verdict as argued by Phillips on cross-appeal.

Indeed, this outcome is supported by this Court's decision in *Letzter v. Cephas*, 792 So. 2d 481, 487 (Fla. 4th DCA 2001), which acknowledged that the issue of whether defendants are joint tortfeasors "is for the jury to decide." And when the jury apportions fault amongst defendants as joint tortfeasors in a negligence action,

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[7] For the reasons detailed in Hani's appeal, this Court should conclude that the jury's finding regarding Hani was incorrect as a matter of law.

the trial court is required under section 768.81 to enter judgment in accordance with the jury's allocation of fault. *Id.*

Importantly, this Court's decision in *Pembroke Lakes Mall Ltd v. McCruder*, does not change the outcome here as argued by Phillips below and on cross-appeal since *Pembroke* is factually distinguishable from this case. Specifically, *Pembroke* involved a claim against the owner of a mall who hired an independent contractor to clean and maintain the premises. *Pembroke*, 137 So. 3d at 421. The plaintiff filed suit against the mall and the cleaning company after a slip and fall incident and after the jury returned a verdict in favor of the plaintiff, the plaintiff moved for the mall to be held jointly and severally liable for the negligence of the cleaning company on the basis that the mall could not reduce its liability by contracting with the cleaning company. *Id.* at 422-23.

While the trial court denied the plaintiff's post-trial motion, this Court reversed on appeal primarily relying on *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864 (Fla. 2d DCA 2010), which held that a business operator cannot avoid liability by contracting the maintenance and cleaning functions to an independent contractor. *Pembroke*, 137 So. 3d at 430. And since the facts in *Pembroke* reflected that the mall hired the cleaning company to clean and maintain the mall, this Court held in *Pembroke* that the mall was jointly and severally liable to the plaintiff for her injuries. *Id.* at 430-31.

Similarly, in *Armiger v. Associated Outdoor Clubs, Inc.*, the Second District Court of Appeal held that the operator of a greyhound track that hired an independent contractor to clean the premises could not avoid liability for the plaintiff's slip and fall claim. *Armiger*, 48 So. 3d at 873-75.[8] And in *U.S. Sec. Servs. Corp. v. Ramada Inn*, the Third District Court of Appeal held that the operator of a hotel could not avoid liability arising from a criminal attack on an invitee by hiring an independent contract to provide security services. *U.S. Sec. Servs. Corp. v. Ramada Inn*, 665 So. 2d 268, 269-70 (Fla. 3d DCA 1995).[9]

Importantly, the above cases all stand for the proposition that when a business operator hires an independent contractor to perform

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[8] Florida's comparative fault statute and the elimination of joint and several liability was not addressed in this Court's opinion in *Pembroke* or by the Second District in *Armiger*.

[9] The *Ramada* decision was issued before the elimination of joint and several liability in section 768.81, Florida Statutes.

maintenance functions and/or security services on the premises, the business operator generally cannot avoid liability for injuries to third parties on the premises since the business owes the invitee non-delegable duties of care.[10] Here, however, the facts of this case do not show that Hani was operating a business on the premises where Phillips was injured. Nor do the facts of this case show that Hani hired A1A as an independent contractor to provide maintenance services on the premises on Hani's behalf. Instead, the facts of this case show that Hani is a landlord who entered into a lease agreement with A1A for A1A to operate its own convenience store on the premises; and that A1A hired Phillips to repair a cooler at A1A's convenience store.

Thus, the standard to impose liability on Hani for Phillips' premises liability claim is governed by Florida's caselaw pertaining to a landlord's liability for injuries to third parties on leased premises as correctly acknowledged by the trial court below. In fact, if this

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[10] As recognized in *Ramada* and the Third District Court of Appeal's recent decision in *Ortega v. Burger King Corp.*, a landowner is not always liable for the torts of an independent contractor. *Ortega v. Burger King Corp.*, No. 3D23-0740, 2024 Fla. App. LEXIS 4794, at *2-*3 (3d DCA June 19, 2024) (citing *Ramada*, 665 So. 2d at 271).

Court were to accept Phillips' argument that Hani as a landlord is jointly and severally liable for the negligence of its tenant A1A, this holding would eradicate decades of Florida premises liability caselaw in the landlord/tenant context and run afoul of Florida's comparative fault statute that eliminated joint and several liability.

Furthermore, contrary to Phillips' argument on cross-appeal, the Third District's decision in *Walters v. Beach Club Villas Condo., Inc.*, 301 So. 3d 343 (Fla. 3d DCA 2020), supports the trial court's ruling. In *Walters*, the plaintiff attended a party at a condominium hosted by condo residents and fell into a hole on a dock in the common area of the premises that had been undergoing construction work by an independent contractor hired by the condominium. *Id.* at 345. The jury returned a verdict in favor of the plaintiff and apportioned fault as follows: 15% to the condominium, 25% to the independent contractor, 10% to the plaintiff, and 50% to the hosts of the party. *Id.* at 346-47.

After trial, the plaintiff moved for entry of a final judgment and requested that the condominium and independent contractor be held jointly and severally liable for 90% of her damages. *Walters*, 301 So. 3d at 347. While the trial court denied the plaintiff's post-trial motion, the Third District reversed in part relying on this Court's decision in *Pembroke* and held that the condominium would be jointly and severally liable for the negligence attributed to the independent contractor that it hired. *Id.* at 348-49.

However, the Third District in *Walters*—just like the trial court below—correctly refused to hold the condominium jointly and severally liable for the negligence attributed to the hosts of the party who were classified as **joint tortfeasors** as defined by this Court in *Letzter*. *Walters*, 301 So. 3d at 349 (citing *Letzter*, 792 So. 2d at 486 (defining "joint tortfeasors" as "[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury")). And in support of this holding, the Third District in *Walters* highlighted that while the complaint alleged both the condominium and party hosts owed the plaintiff duties to maintain the premises, these duties were separate; and, more importantly, that the hosts were not hired by the condominium to perform any acts on behalf of the condominium. *Id.*

Notably, Phillips asserts on cross-appeal that here—unlike in *Walters*—he has not alleged separate duties against Hani and A1A; and therefore, *Walters* is not applicable. However, Phillips' analysis of *Walters* is misguided as both the condominium owner and hosts were alleged to have breached duties to maintain the common area of the premises—just like Phillips alleged below that both Hani and A1A breached their duties to maintain the premises. *Walters*, 301 So. 3d at 346, 349. But more importantly, Phillips overlooks the critical distinction highlighted by the Third District in *Walters*, which is that the hosts were not hired by the condominium to perform any duties on behalf of the condominium. *Id.* at 349. *Walters* therefore provides support here for affirming the trial court's ruling since the facts of this case align with those in *Walters*.

Phillips' analysis of the Sixth District Court of Appeal decision in *Johnson v. Garrett*, No. 6D23-1205, 2024 Fla. App. LEXIS 2569 (Fla. 6th DCA April 4, 2024), is also flawed. Specifically, Phillips asserts on cross-appeal that the Sixth District in *Garrett* held the non-delegable duty argument did not apply because the owner of the property did not maintain sufficient control of the property. (P.B., pp. 75-76). However, this is not the reason the non-delegable duty argument was rejected in *Garrett*.

Indeed, a review of *Garrett* reflects that the Sixth District held that the non-delegable duty standard did not apply because the facts in *Garrett* did not align with those in the non-delegable duty context. *Garrett*, 2024 Fla. App. LEXIS 2569 at *9-*10. Specifically, the Sixth District in *Garrett* highlighted that in *Ramada*, the non-delegable duty standard applied because a hotel operator hired an independent contractor to provide security services for the hotel. *Id.*

However, unlike the facts in *Ramada*, the Sixth District in *Garrett* noted that the plaintiff was not pursuing a claim against the operator of the club who was disclaiming liability based on contracting with an independent contractor for security services. *Garrett*, 2024 Fla. App. LEXIS 2569 at *10. Instead, the plaintiff's claim in *Garrett* was against a property owner who was **<u>not</u>** the operator of the business and who did **<u>not</u>** hire the company providing security services. *Id.* Thus, the Sixth District held that the trial court's reliance on the non-delegable duty standard "was misplaced." *Id.* at *11.

Thereafter, the Sixth District in *Garrett*—just like the trial court correctly noted below—explained that the correct standard to determine whether the landlord owed a duty under the circumstances would be based "case law involving facts where the owner of a commercial property has leased the premises to another."

Garrett, 2024 Fla. App. LEXIS 2569 at *11. The Sixth District then looked at the facts of the case to determine whether the landlord maintained the requisite level of control over the property and ultimately held that it did not based on the terms of the lease and circumstances surrounding the incident. *Id.* at *11-*15.

The Sixth District's decision in *Garrett* is thus directly on point as it supports the trial court's ruling that the non-delegable duty standard does not apply here since this case involves a premises liability claim against the owner of a commercial property leased to another. And similar to the facts in *Garrett*, Hani was not operating business where Phillips was injured, and Hani did not hire A1A to perform any services on Hani's behalf.

This Court also recently issued a decision in *Publix Super Mkts., Inc. v. Safonte*, which addressed the application of the non-delegable duty doctrine and explained that when determining whether this narrow exception applies, "the **key question** is whether the [negligent party] was hired or retained by [the business owner] to 'perform services encompassed within [its] duty[.]'" *Publix Super Mkts., Inc. v. Safonte*, Nos. 4D2023-0216, 4D2023-0815, 2024 Fla. App. LEXIS 4842, at *7-*8 (4th DCA June 20, 2024) (quotation omitted; brackets added and in original; emphasis added). Thus, only when a business owner hires or retains the negligent party "to service its premises" may the business owner be held "'vicariously liable' under the non-delegable duty doctrine if 'those services [are] performed negligently.'" *Id.* (quotation omitted; bracket added).

Here, Hani "cannot be held liable for [A1A's] negligence because [Hani] never hired or retained [A1A] to perform its duty of maintaining the premises in a safe condition for its patrons." *Safonte*, 2024 Fla. App. LEXIS 4842, at *8. This Court should therefore conclude that the trial court correctly refused to apply the non-delegable duty standard to the facts of this case <u>and</u> correctly applied Florida's comparative fault statute in this case after the jury apportioned fault amongst Hani and A1A as joint tortfeasors. In sum, if this Court determines that the final judgment should not be reversed for the reasons detailed in Hani's Initial Brief and above, Phillips' argument on cross-appeal should be rejected and the final judgment should be affirmed.

CONCLUSION

Based on the foregoing and the arguments raised in the Initial Brief, Hani respectfully requests that this Court reverse the trial court's final judgment and order the trial court to enter judgment in favor of Hani on remand, or alternatively, reverse and remand this case for a new trial. And in the event this Court does not reverse the final judgment in Hani's direct appeal, Hani respectfully requests that this Court affirm the trial court's ruling on Phillips' cross-appeal that refused to impose joint and several liability against Hani for the negligence attributed to A1A by the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 26, 2024, a true and correct copy of the foregoing has been filed with the Florida Court's E-Filing Portal and served via E-Mail to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.045(b) and 9.210, and that the Reply/Cross-Answer Brief does not exceed 13,000 words, excluding the cover sheet, table of contents and authorities, certificates of service and compliance, and signature blocks.

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