

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

CONDOMINIUM ASSOCIATION
OF GOLF VILLAS II, INC.,

CASE NO. 4D2024-1059
L.T. CASE NO.562022CA001919

Appellant/Plaintiff,
v.

FLORIDA INSURANCE GUARANTY
ASSOCIATION, INC., et al.,

Appellee/Defendant.

**REPLY BRIEF OF APPELLANT
CONDOMINIUM ASSOCIATION OF GOLF VILLAS II, INC.**

**ON APPEAL FROM A FINAL ORDER OF THE
CIRCUIT COURT OF THE NINETEENTH JUDICIAL
CIRCUIT IN AND FOR SAINT LUCIE COUNTY, FLORIDA
THE HONORABLE BRETT M. WARONICKI, PRESIDING**

John F. Lakin, Esq.
Florida Bar No.: 504009
LAKIN LAW FIRM, LLC
8881 Southern Orchard Road North
Davie, Florida 33328
Telephone: 786-865-4767
jlakin@LakinsLaw.com

Richard N. Asfar, Esq.
Florida Bar No.: 68154
ALMAZAN LAW
515 W. Bay Street, Suite 210
Tampa, Florida 33606
Telephone: (305) 665-6681
Facsimile: (305) 665-6684
service@almazanlaw.com
rasfar@almazanlaw.com
kpeter@almazanlaw.com

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TIMELINE¹

Following is a timeline of relevant events:

- Mar. 17, 2017 American Capital Assurance Corp. ("AmCap") issues Insurance Policy Number FAC3475 (the "Policy") to the Association. (R. 1448-49, 1639)
- Sept. 10, 2017 Hurricane Irma allegedly damages the Association's property. (R. 1639)
- Sept. 8, 2020 The Association reports the loss to AmCap. (R. 1640-41)
- Apr. 14, 2021 AmCap is declared insolvent and placed in receivership, all actions against AmCap or its receiver are permanently enjoined or stayed, FIGA is activated, all claims against AmCap's receiver must be filed within six (6) months, and all lawsuits in which AmCap is a party are stayed for six (6) months (R. 1641, 1744-70, 1757-59,); see also, §§631.67; 631.041(1) ("An application or petition under s. 631.031 operates as a matter of law as an **automatic stay** applicable to all persons and entities, other than the receiver and the office, which shall be **permanent** and survive the entry of an order of conservation, rehabilitation, or liquidation, and which shall prohibit: (a) The

¹ The following abbreviations or symbols are used herein:

Appellant CONDOMINIUM ASSOCIATION OF GOLF VILLAS II, INC. is referred to as "Appellant" or the "Association".

Appellee FLORIDA INSURANCE GUARANTY ASSOCIATION, INC. is referred to as "Appellee" or "FIGA".

(R.)- followed by the page number in the record.

IB at- followed by the page number in the Initial Brief.

AB at- followed by the page number in the Answer Brief.

commencement or continuation of judicial, administrative, or other action or proceeding against the insurer [AmCap] or against its assets or any part thereof”), (3) & (4), Fla. Stat.

- Sept. 9, 2021 The Association timely submits a claim in the AmCap receivership. (R. 1642-43)
- Oct. 12, 2021 The deadline to submit claims in the AmCap receivership is extended to April 14, 2022. (R. 1642, 1770)
- Feb. 14, 2022 FIGA stay expires. (R. 1643)²
- Sept. 10, 2022 Five-year anniversary of Hurricane Irma impacting Florida. (R. 1639)
- Oct. 13, 2022 The Association files suit. (R. 13-171)
- Apr. 14, 2023 One-year anniversary of the AmCap receivership claims deadline. (R. 1642, 1770)

SUMMARY OF THE ARGUMENT

Although FIGA’s arguments which resulted in the order on appeal are elaborate, the issue presented is simple once Appellant’s cause of action is

² Between the February 14, 2022 end of the FIGA stay and the September 10, 2022 five-year anniversary of Hurricane Irma, the Association sent FIGA numerous e-mails or letters (the first one was sent on March 2, 2022). (R. 2341-1408, 2247-2311). Those communications reference telephone conferences between FIGA and the Association’s counsel, and a March 2022 request from FIGA to “please allow me to review the file and I will be contacting you once the file has been reviewed.” (R. 2342-43) Additional communications between the Association’s counsel and FIGA between September 10, 2022 and the October 13, 2022 filing of the lawsuit include settlement discussions and the Association’s reference to **FIGA’s representation that the deadline to file suit is April 14, 2023**, which resulted in the Association’s counsel stating it would “hold off on filing suit pending our settlement negotiations.” (R. 2312-18, 2316)

properly recognized for what it is—a statutory claim for breach of FIGA’s duties:

[C]laims against FIGA are statutory claims based upon its alleged failure to meet its obligations under the FIGA Act[.]

De La Fuente v. Florida Ins. Guar. Ass’n, 202 So. 3d 396, 404 (Fla. 2016) (quoting Florida Ins. Guar. Ass’n, Inc. v. Bernard, 140 So. 3d 1023, 1033 (Fla. 1st DCA 2014) (italics in the original; bolding added for emphasis).

Since Appellant’s claim is not for breach of contract or insurance policy, the statutes of limitations and related accrual rules relied on by FIGA found in Fla. Stat. Sec. 95.11(2)(b) & (e) cannot apply. By their express terms, those statutes apply **only** to actions “on a **contract**” or for “breach of a property insurance **contract**[.]” §95.11(2)(b) & (e), Fla. Stat. (emphasis supplied (e.s.)).

Rather, because the instant case presents a **statutory** claim for FIGA benefits, the only statutes of limitations and related accrual rules that can apply are the ones relied on by Appellant and which expressly reference FIGA or guaranty associations—Fla. Stat. Secs. 631.68 and 95.11(5)(d):

Limitation; certain actions.—A covered claim as defined herein with respect to which settlement is not effected and suit is not instituted against the insured of an insolvent insurer or **[FIGA]** within 1 year after the deadline for filing claims, or any extension thereof, with the receiver of the insolvent insurer shall thenceforth be barred as a claim against the association and the insured.

* * *

An action against any **guaranty association** and its insured, with the period running from the date of the deadline for filing claims in the order of liquidation.

§§631.68 & 95.11(5)(d), Fla. Stat. (e.s.).

Application of the correct statutes of limitations and accrual rules confirms that Appellant timely filed this lawsuit within one year of the AmCap receivership claims deadline. The final summary judgment based on Appellee's statute of limitations defense is the product of harmful legal error, and must be reversed.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY APPLIED FLA. STAT. SEC. 95.11(2)(b) & (e) WHEN RULING THAT THE ASSOCIATION'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

Initially, it is important to note that the accrual date from which the limitations period runs, and not the duration of the limitations period, is the material issue.

As noted in a case cited in FIGA's "first contact letter" (R. 1703): "Generally, a cause of action on a contract accrues and the statute of limitations begins to run from the time of the breach of contract." State Farm Mut. Auto. Ins. Co. v. Lee, 678 So. 2d 818, 821 (Fla. 1996). Thus, if the Court were to apply Fla. Stat. Sec. 95.11(2)(b) (as indicated by the trial court (R.

2494-95) and argued by FIGA (AB at 17-40)), the Association’s claim would have “accrued” and began to run for statute of limitations purposes no earlier than September of 2020 when the Association reported the loss, and the October 2022 lawsuit would be timely under Fla. Stat. Sec. 95.11(2)(b)’s five-year statute of limitations (which would not have expired before September of 2025).

Fla. Stat. Sec. 95.11(2)(e) alters the general accrual rule for “action(s) for ***breach of a property insurance contract***” ***only***, and if applicable, would make the earlier “date of loss” the date on which the Association’s claim “accrued” and began to run for statute of limitations purposes.

Fla. Stat. Secs. 631.68 and 95.11(5)(d) provide a shorter one-year limitations period, but set the accrual date from which the limitations period begins to run at “the deadline for filing claims, or any extension thereof [with the insolvent insurer’s receivership]” or “the date of the deadline for filing claims in the order of liquidation.” Id. There is no dispute that the Association’s lawsuit would be timely if Fla. Stat. Secs. 631.68 and 95.11(5)(d) apply. Cf. AB at 17.

A. The Association’s claims are for breach of FIGA’s statutory duties, not breach of contract or insurance policy.

FIGA’s discussion of its powers and duties, and the nature of the Association’s claim (AB at 19-22)) require supplementation.

FIGA is a non-profit corporation created by the Florida Legislature in 1970. §631.55, Fla. Stat. In essence, it is a consortium of insurers (which included AmCap) authorized to conduct insurance business in Florida. §631.55(1), Fla. Stat. FIGA is **entirely** funded by payments made by private persons, like the Association. §631.57(3)(d), Fla. Stat. The Florida Supreme Court once observed that no state funds “of any kind” may be paid or allocated to FIGA. O’Malley v. Florida Ins. Guar. Ass’n, Inc., 257 So. 2d 9, 12 (Fla. 1971). Since FIGA is directly funded by Floridians like the Association, its statutory protections against insurer insolvency are not gratuitous.

As a creature of statute, Fla. Stat. Chap. 631 defines FIGA’s obligations. De la Fuente v. Florida Ins. Guar. Ass’n, 202 So. 3d at 401. Statutory benefits under the FIGA Act are available when a claimant presents a “covered claim.” §631.57, Fla. Stat.; Florida Ins. Guar. Ass’n, Inc. v. Garcia, 614 So. 2d 684 (Fla. 2d DCA 1993). Under the circumstances presented here, whether a claim is a “covered claim” is determined “[p]rior to adjudication of insolvency and arising within 30 days after the determination of insolvency.” §631.57(1)(a)1.a., Fla. Stat. This is material because it confirms that **FIGA does not merely inherit unripe defenses which**

AmCap may potentially have. Rather, it **only** “steps” into those defenses which AmCap had **around the time of insolvency.** Id.

The Florida Supreme Court has also made clear that claims against FIGA are **not claims for breach of contract or insurance policy.** De La Fuente v. Florida Ins. Guar. Ass'n, 202 So. 3d at 404 (“claims against FIGA are **statutory** claims based upon its alleged failure to meet its obligations under the FIGA Act[.]” (quoting Florida Ins. Guar. Ass'n v. Bernard, 140 So. 3d at 1033) (italics in the original; bolding added for emphasis)). This is because, as noted by Justice Canady when writing for a unanimous Florida Supreme Court: “FIGA **was not and is not a party to [the] insurance contract.**” Id. at 403 (e.s.). Rather, the Association’s claims are for breach of FIGA’s statutory duties because FIGA is “strictly a creature of statute.” Id. It is “the Florida Legislature — not the insurance policy — which determines” whether or to what extent a Floridian (like the Association) insured by an insolvent carrier (like AmCap) is entitled to FIGA benefits. Id. at 404. Accordingly, the Association’s claims are unquestionably for breach of FIGA’s statutory duties, **not** breach of insurance contract.³

³ Appellant respectfully submits that the Court should focus on the substance, and not the label, of the Association’s count against FIGA. Estate of Willis v. Gaffney, 677 So. 2d 949, 951 (Fla. 2d DCA 1996) (“[a] pleading will be considered what it is in substance, even though mislabelled.” (quoting

B. Accordingly, the statutes of limitation which apply to FIGA claims, i.e. Fla. Stat. Secs. 631.68 and 95.11(5)(d), are the only ones which apply to the Association’s claims.

In response to FIGA’s statutory interpretation analysis (beginning at AB 23): “In 2020, the Florida Supreme Court began to reformulate the paradigm of statutory interpretation.” State v. Crose, 378 So. 3d 1217, 1232-33 (Fla. 2d DCA 2024) (*en banc*). Now, under the “supremacy-of-text” rules of statutory interpretation, “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” Ham v. Portfolio Recovery Assocs., LLC, 308 So. 3d 942, 946 (Fla. 2020) (internal quotes and brackets omitted). Under the supremacy of text statutory interpretation paradigm, courts must solely “look to the text itself, as understood in its context, not to any purported intent underlying the text.” State v. Crose, 378 So. 3d 1217 at 1234.

Application of the supremacy-of-text principal to the statutes of limitations cited by the parties makes crystal clear that the FIGA-specific statutes of limitation found at Fla. Stat. Secs. 631.68 and 95.11(5)(d) are the only ones that apply the Association’s claims. These statutes are the only ones which expressly apply to claims against FIGA or guaranty associations.

Sodikoff v. Allen Parker Co., 202 So. 2d 4, 6 (Fla. 3d DCA 1967), cert. denied, 210 So. 2d 226 (Fla. 1968)).

The statutes of limitation argued by FIGA, Fla. Stat. Sec. 95.11(2)(b) & (e), expressly apply to breach of contract and breach of insurance policy claims only. For the reasons discussed in argument section I.A. above, ***the Association's claims cannot be for breach of contract or insurance policy.*** Accordingly, the limitations and accrual rules found in those statutes are inapplicable. It was harmful legal error to apply them to the exclusion of Fla. Stat. Secs. 631.68 and 95.11(5)(d). Reversal is most appropriate.

This analysis does not render Fla. Stat. Sec. 95.11(2)(b) & (e) “meaningless.” Those statutes continue to apply to countless breach of contract or insurance policy actions. But per their plain language, they cannot apply to claims for breach of FIGA’s statutory duties.

This analysis also does not render Fla. Stat. Sec. 631.57(1)(b) “meaningless.” That subsection provides, in relevant part, that FIGA is “deemed the insurer to the extent of ***its obligation on the covered claims,*** and, to such extent, shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent.” Id. (e.s.). FIGA’s attempt to use that subsection to leverage a statute of limitations defense that ***was not ripe when AmCap was declared insolvent*** overlooks that the applicable timeframe for determining FIGA’s “obligations on the covered claims” is set forth earlier in that same statute:

(1) The association shall:

(a)1. Be obligated to the extent of the covered claims **existing**:

a. **Prior to adjudication of insolvency and arising within 30 days after the determination of insolvency**;

b. Before the policy expiration date if less than 30 days after the determination; or

c. Before the insured replaces the policy or causes its cancellation, if she or he does so within 30 days of the determination.

§631.57(1)(a)1., Fla. Stat. (e.s.).

Reading Fla. Stat. Sec. 631.57 as a whole makes clear that the claims and defenses which FIGA “steps” into are those that exist when AmCap was declared insolvent and FIGA was activated (April of 2021). Accordingly, Fla. Stat. Sec. 631.57(1)(b) is not “meaningless” because FIGA can “step” into and assert any defenses which AmCap had at the time of insolvency (e.g., a late reporting defense). But it **cannot** assert AmCap’s statute of limitations “defense” because at the time of insolvency, **AmCap did not have a viable statute of limitations defense**—the Association still had over 17 months to file suit on its Hurricane Irma claim at the time of AmCap’s insolvency under Fla. Stat. Sec. 95.11(2)(e), and approximately four (4) years under Fla. Stat. Sec. 95.11(2)(b).

Once FIGA was activated, no one could assert a breach of contract or insurance policy claim against AmCap, because those claims were replaced with claims for statutory FIGA benefits. See, Argument section I.A., supra; see also, §631.041(1), Fla. Stat. (permanently enjoining claims/lawsuits against AmCap; which were replaced with claims against FIGA). As a result, any unripe breach of contract or insurance policy statute of limitations defenses against those claims based on Fla. Stat. Sec. 95.11(2)(b) or (e) were no longer available. Rather, just as FIGA was activated, the statute of limitations applicable to claims for statutory FIGA benefits was also activated—Fla. Stat. Secs. 631.68 and 95.11(5)(d). Under the facts of this case, these statutes set an April 14, 2023 deadline for **anyone** (including the Association) to file suit against FIGA.

This development provided FIGA with a net benefit, as it shortened the deadline for AmCap claimants with dates of loss between April 15, 2018 and AmCap's April 14, 2021 insolvency (e.g., Hurricane Michael claimants) to file suit. As a result, FIGA's complaint that adopting the Association's interpretation will somehow "unduly prolong[] the distribution of an insolvent insurer's assets to the detriment of other claimants" (AB at 43) rings hollow because the deadline applicable to the Association's claim is the same for

every other claimant, and collectively, all claims and lawsuits against FIGA will be filed years earlier.

FIGA's argument suffers from an additional fundamental flaw. As noted at the outset of this argument section, the material issue in this appeal is **not** the duration of the limitations period, but rather, the date from which it "accrues" or runs. Unquestionably, the Association did not have, and could not assert, any claim against FIGA until FIGA was activated in April of 2021. (R. 1641, 1744-70, 1757-59); State Farm Mut. Auto. Ins. Co. v. Lee, 678 So. 2d at 821 ("a cause of action cannot be said to have accrued, within the meaning of the statute of limitations, **until an action may be brought.**" (e.s.)) In recognition of this, the Legislature set the statute of limitations "accrual" date for claims against FIGA for a date **following** its activation. §§631.68 & 95.11(5)(d), Fla. Stat. But under FIGA's analysis, the statute of limitations applicable to the Association's lawsuit would have "accrued" or began to run **over two years before FIGA was activated.** That is contrary to the Florida Supreme Court's directive in Jones v. Fla. Ins. Guar. Ass'n, 908 So. 2d 435 (Fla. 2005) that the statute of limitations applicable to FIGA claims "cannot be held to apply to a cause of action which had not yet accrued [.]" Id. at 451.

In short, FIGA's complicated argument is contrary to the nature of the claims against FIGA, the plain language of the relevant statutes, and the Florida Supreme Court's analysis in other FIGA cases. FIGA's arguments cannot withstand scrutiny. Reversal is warranted

C. FIGA's case law is inapposite and does not control.

At the trial court level, FIGA candidly recognized that "[n]o case has directly answered this exact question." (R. 1650) All the cases it analyzes to support its argument are inapposite. None warrant affirmance.

Initially, because no prior case has "answered [the] exact question" presented in this appeal, none of the cases analyzed by FIGA are binding on the issue presented or require affirmance.

Moreover, many of FIGA's cases involve the third-party context, e.g., where FIGA is tasked with defending the insured of an insolvent insurer, rather than the first-party context presented here. E.g., Peoples v. Fla. Ins. Guar. Ass'n, 313 So. 2d 40 (Fla. 2d DCA 1975); Troso v. Florida Ins. Guar. Ass'n, Inc., 538 So. 2d 103 (Fla. 4th DCA 1989); Queen v. Clearwater Elec., Inc., 555 So. 2d 1262 (Fla. 2d DCA 1989); Blizzard v. W.H. Roof Co., 573 So. 2d 334 (Fla. 1991); Rubenstein v. Saldariagga, 699 So. 2d 754 (Fla. 4th DCA 1997); Florida Ins. Guar. Ass'n, Inc. v. Garcia, supra. While the trial court and FIGA do not see this as a material distinction, this Court has

previously deemed it material. E.g., Fla. Ins. Guar. Ass'n v. B.T. of Sunrise Condo. Ass'n, 46 So. 3d 1039, 1042 (Fla. 4th DCA 2010) (“The majority of the cases relied on by FIGA are distinguishable because these cases address insurance policy liability coverage for wrongful death and derivative tort claims, rather than first party property damage claims.”).

The first-party/third-party distinction is also highly-material to the specific issue presented here because ***the lynchpin of FIGA’s argument, Fla. Stat. Sec. 95.11(2)(e), does not apply to third party cases.*** In fact, with the exception of Donovan v. Fla. Peninsula Ins. Co., 147 So. 3d 566 (Fla. 4th DCA 2014) (which is discussed below in argument section I.D.), substantially all of the cases which FIGA attempts to analogize to the instant case ***predate the 2011 enactment of Fla. Stat. Sec. 95.11(2)(e).***

An analysis of one of those FIGA cases, Troso v. Florida Ins. Guar. Ass’n, Inc., *supra*, confirms the materiality of the first-party/third party distinction. In Troso, it appears FIGA was timely sued, but its insureds were not. Id. at 103-04. Still, the Troso Court affirmed dismissal of plaintiff’s claims against both FIGA and its insureds because plaintiff’s claim against the insureds did not relate back, and without viable claims against the insureds, FIGA could not be found vicariously liable. Id. at 104-05. Of course, that could not happen in the first-party context presented here. FIGA’s liability is

not dependent on any third-party “insured;” FIGA is directly liable for first-party FIGA statutory benefits. Moreover, the Association is not required to first sue its insolvent insurer under the FIGA Act. If it were, claimants like the Association would be deprived of access to courts with respect to “covered claims” which were not in-suit prior to insolvency. §631.041(1), Fla. Stat.

But perhaps the most compelling reason to reject FIGA’s case law-based analysis of the statute of limitations and accrual issue is that it is contrary to the simple and plain language of the cited statutes of limitations. Fla. Stat. Sec. 95.11(2)(b) & (e) apply to contracts and insurance policies, and therefore, cannot apply to the claim for FIGA statutory benefits presented here. By contrast, Fla. Stat. Secs. 631.68 and Fla. Stat. Sec. 95.11(5)(d) expressly apply to claims against FIGA and guaranty associations. FIGA led the trial court into harmful reversible error. Reversal is required.⁴

D. Whether Fla. Stat. Sec. 95.11(e) is a statute of repose is irrelevant to this appeal because the Association’s claims are for breach of FIGA’s statutory duties, not breach of insurance policy.

⁴ FIGA’s request for “judicial notice” of certain matters outside the record in connection with its analysis of Peoples v. Fla. Ins. Guar. Ass’n, *supra* (AB at 37 n. 9.) should be rejected under Thornber v. City of Fort Walton Beach, 534 So. 2d 754 (Fla. 1st DCA 1988) and on the ground that those matters are immaterial because the case law is inapposite.

Although the trial court did not reach the issue, FIGA exhorts the Court to hold that Fla. Stat. Sec. 95.11(2)(e) is a statute of repose that cannot be deflected. AB at 39-40. FIGA's request should be rejected for at least three reasons. **First**, as discussed above in preceding sections of this Argument, Fla. Stat. Sec. 95.11(2)(e) does not apply to the Association's claim for breach of FIGA's statutory duty. **Second**, it should not be addressed in this appeal because it was not ruled on by the trial court. See e.g., RJ Reynolds Tobacco Co. v. Grossman, 250 So. 3d 91, 94 (Fla. 4th DCA 2018) (rejecting appellee's cross-appeal where appellee "failed to obtain a ruling" on the issue presented by the cross-appeal). **Third**, the case on which FIGA relies, Donovan v. Fla. Peninsula Ins. Co., supra, is dicta on this issue because the Donovan Court's discussion on this issue was not on the decisional path. See, Heid v. Florida Ins. Guar. Ass'n, 311 So. 3d 94, 99 (Fla. 2d DCA 2020).

II. THE POLICY'S FIVE-YEAR SUIT LIMIT CANNOT BAR APPELLANT'S CLAIM BECAUSE IT SHORTENS THE APPLICABLE STATUTE OF LIMITATIONS.

FIGA's attempt to procure affirmance based on this defense fails for at least two reasons.

First, contract provisions which seek to shorten the deadline to file a lawsuit are void. §95.03, Fla. Stat. FIGA appears to recognize this when arguing that Florida courts enforce contractual limitations periods so long as

“they do not shorten the underlying statute of limitations.” AB at 30. Accordingly, if the Court rejects FIGA’s statute of limitations argument (it should—see Argument section I above), it should also reject this argument.

Second, the plain language of this provision only bars actions against AmCap, not FIGA, and this defense had not yet ripened at the time AmCap was deemed insolvent and FIGA was activated. See, (R. 49, 69, 133) (providing that defense applies to actions “against us,” which is defined as “the Company providing the insurance” (AmCap)); (R. 1639, 1641) (AmCap declared insolvent within five years of Hurricane Irma). Because AmCap was placed into receivership within five (5) years of Hurricane Irma, this provision did not provide AmCap with a “defense” which FIGA could “step” into. (R. 1639, 1641), see also, § 651.57(1)(a)1.a., Fla. Stat. (limiting obligation for “covered claims” existing “Prior to adjudication of insolvency and arising within 30 days after the determination of insolvency[.]”).

FIGA’s failback argument also lacks merit. Reversal is required.

CONCLUSION

For the foregoing reasons, the Association respectfully but adamantly submits that that the judgment should be reversed, and this action should be remanded for further proceedings.

Respectfully submitted,

ALMAZAN LAW

515 W. Bay Street, Suite 210

Tampa, FL 33606

Telephone: (305) 665-6681

Facsimile: (305) 665-6684

Service: service@almazanlaw.com

/s/ Richard N. Asfar

RICHARD N. ASFAR, ESQ.

Florida Bar No.: 68154

rasfar@almazanlaw.com

***Co-counsel for Appellant/Plaintiff
Condominium Association of Golf
Villas II, Inc.***

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been furnished to the following by e-mail or e-service on December 2, 2024:

**Bretton C. Albrecht, Esq., Jill L. Aberbach, Esq., and
Kameron Romaele, Esq.** Kubicki Draper, P.A., 110 E.
Broward Blvd., Suite 1400, Fort Lauderdale, FL 33301 [BCA-
kd@kubickidraper.com](mailto:BCA-kd@kubickidraper.com), pamela.verdejo@kubickidraper.com;
JLA-KD@kubickidraper.com, JLA-KD@kubickidraper.com;

Hinda Klein, Esq., Conroy Simberg, 3440 Hollywood Blvd.,
2nd Floor, Hollywood, FL 33021,
eservicehwdappl@conroysimberg.com,
hklein@conroysimberg.com, srupprecht@conroysimberg.com;
and

Tracy L. Kramer, Esq., John F. Lakin, Esq., Lakin Law Firm
LLC, 8881 Southern Orchard Road N., Davie, FL 33328,
tracy.kramer@LakinsLaw.com, JLakin@LakinsLaw.com.

/s/ Richard N. Asfar

Richard N. Asfar, Esq.

Florida Bar No.: 0068154

CERTIFICATE OF COMPLIANCE

I CERTIFY that this Brief complies with the applicable word and font requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2) (Jan. 1, 2021) (specifically, excluding cover sheet, tables, signature block, and certificates of service and compliance, there are exactly 3,883 words in this Brief, according to undersigned's word processing software).

/s/ Richard N. Asfar
Richard N. Asfar, Esq.
Florida Bar No.: 0068154