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

CASE NO: 4D23-2279
L.T. CASE NO.: CACE21-012231

Tracy Milburn

Appellant

v.

Gateland Village Condominium, Inc.

Appellee

An Appeal from the Fifteenth Judicial Circuit, Palm Beach County, Florida

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Overview

This is an appeal of an action brought by a condominium association to enforce its rules prohibiting unit owners from storing personal property on the common elements.

Appellant Tracy Milburn stored a large amount of personal property on the common elements behind her condominium unit. Faced with Milburn's ongoing failure to remove her personal belongings from the Association's common areas, the Association filed a complaint for injunctive relief to compel her to remove her personal items and trash from the common areas outside of her unit. (R. 18; T. 77).

The evidence at trial showed that Milburn did not remove all of her personal items from the common areas until after the complaint was filed. In a nonjury trial, the trial court ruled that Milburn violated the Association's rules by failing to timely remove her personal items from the common elements until after suit was filed. The trial court also rejected Milburn's defenses.

B. The Association's Presuit Demand

The Association encountered repeated problems with Milburn storing items on common areas in violation of the Association's rules. (R. 25; 175 ¶4; 685-693). Milburn's violations of the Association's rules were an ongoing problem, and occurred in 2010, 2015, 2016, and 2018. (R. 175 ¶4).

In April 2021, the Association sent notice to all unit owners about removing personal items from the common areas. (R. 697). In May 2021, the Association served Milburn with a demand letter requiring her to remove her personal items from the Association's common areas, among other things, within thirty days:

> [I]t is hereby demanded that you immediately cease and desist from further violation of the Association's Governing Documents, including but not limited to **the immediate and complete removal of all personal items from the common areas outside of your Unit** . . . within thirty (30) days from the date of this letter and by **refraining from any further repeat of such improper conduct** . . . .

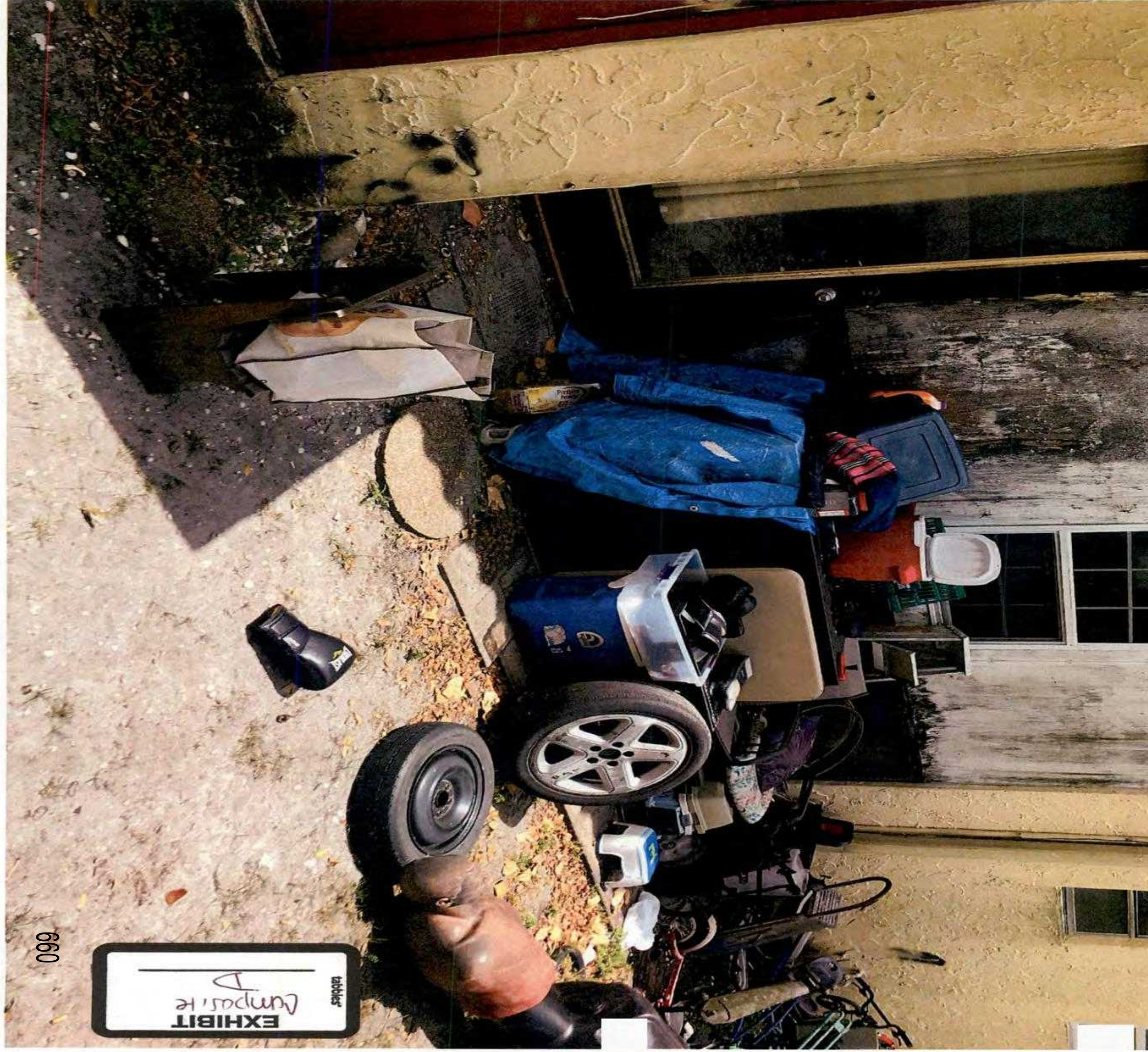
(R. 40; 700; T. 77) (emphasis in original). According to the Demand, Milburn had stored:

> numerous items outside on the common property, including but not limited to bicycles, a birdcage containing a live bird, tires, coolers,

> an unknown covered item, chairs, a barbeque grill, a handcart, and trash, constituting a fire and safety hazard in addition to a nuisance and violation of the Governing Documents. (R. 40).

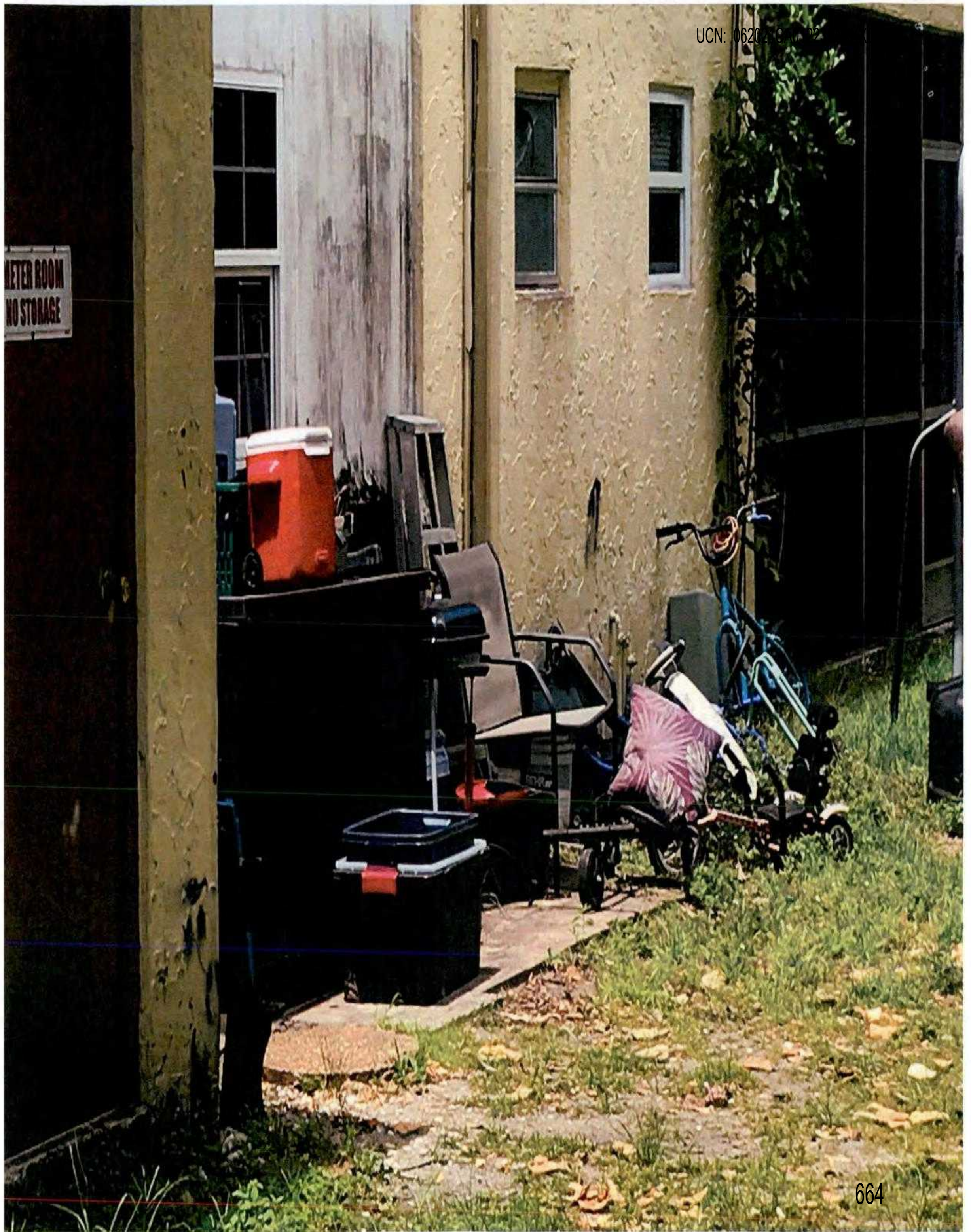
The Demand further stated: “Rules 1 through 5 of the Rules and Regulations provide that personal property must be stored inside the unit and may not be placed or stored on common property, and refuse/garbage shall only be deposited in the area provided per the specific rules regarding same.” (R. 40)

The following photos show how Milburn stored personal property on the common elements in violation of the Rules and Regulations governing the Association (R. 659–67):


660
EXHIBIT
D
Campsite

UCN: 062021CA012231AXXXCE

662


METER ROOM
NO STORAGE
UCN:
664

C. Milburn's Active Participation in the Litigation

After the 30-day period expired, the Association filed a complaint for injunctive relief against Milburn. (R. 18). Milburn's initial motions and pleadings did not seek to compel arbitration or mediation under section 718.1255, *Florida Statutes*. Milburn filed two motions to dismiss that did not mention arbitration. (R. 43; 166). Then Milburn participated in court-ordered mediation. (R. 74). Milburn served discovery on the Association, and argued that the Association's discovery responses were necessary "in order to file an answer." (R. 90). Milburn later served a second set of discovery on the Association that Milburn labeled "Defendant's Discovery." (R. 169). Milburn's discovery requests included:

> (1) a request for production that seeks "All Association records" about Defendant's "obstruction of the egress, ingress and passageways inside her unit"
>
> (2) interrogatories that ask about the "Hazardous condition" and ask about "all Association records" about Defendant's "obstruction of the egress, ingress, and passageways inside her unit"; "if the association is seeking relief…for prior violations… [then] details regarding the [prior] violations and the relief the association is seeking"

(R. 169). Next Milburn served an answer that failed to request arbitration. (R. 99). Milburn also served a notice of deposition duces tecum on the Association, where the "Matters for examination" include "Allegations in the complaint" and the six categories of documents in the duces tecum are:

1. All Association documents reviewed in preparation for this deposition.
2. Driver's license for identification . . . of the corporate representative.
3. All records the Association has regarding any unit in the Section E condominium for years 2020 and 2021, that reflects that personal items are in front of that unit, or behind a unit, in a common area.
4. All records the Association has regarding any unit that is part of the other condominium properties that the Association manages (other than Section E condominium) for hears 2020 and 2021, that reflects that personal items are in front of that unit, or behind a unit, in a common area.
5. All records the Association has regarding any unit in the Section E condominium, for years 2018 and 2019, that reflects that personal items are in front of that unit, or behind a unit, in a common area.
6. All records the Association has regarding any unit that is part of the other condominium properties that the Association manages (other than Section E Condominium), for years 2018 and 2019, that reflects that personal items are in front

> of that unit, or behind a unit, in a common area.[1]

After all of this, Milburn moved for summary judgment asserting that the Association failed to arbitrate. (R. 104). That motion did not seek to compel arbitration, and was denied. (R. 104, 206). The trial court determined that Milburn waived any claim to presuit mediation or arbitration "by her active participation in the litigation, engaging in discovery." (R. 207).

D. Milburn Cures The Personal Property Violation During the Pendency of the Litigation

At some point before trial, Milburn complied with the Association's demand and removed her personal items from the common areas. (T. 89–91). A photograph from May 2023, shortly before the July 2023 trial, shows that Milburn cleaned up the area to the satisfaction of the Association. (T. 90–91).

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[1] The Association has filed with this brief a motion to supplement the record to include this deposition notice.

E. The Trial

1. *The Witnesses*

At the beginning of trial, the Association announced that its only witness was its corporate representative, property manager Kelly Ladwig. (T. 11). Milburn identified her witnesses as herself, her daughter Emily Morowski, her niece Candice Crespo, and Marlena Stettner, vice-president of the Association in 2021 and president at the time of trial. (T. 11, 44–45). These witnesses all testified at trial.

2. *Evidence of Milburn's Violation of Association Rules*

Kelly Ladwig testified that she has been the Association's property manager since 2019. (T. 64–65). Ms. Ladwig testified that Ms. Milburn stored her personal property outside of her unit in the common area. (T. 66). Milburn was asked many times to remove her personal property from the common areas, but did not do so. (T. 66–69). Ms. Ladwig testified that Milburn kept "tires, coolers, ladders, a bunch of other items, boxing items, chairs, things of that nature, junk, [and] garbage" as well as "a large storage container," "a large birdcage," "a large item under a tarp of some sort," and "bikes and grills" in the common area behind her unit. (T. 70–71).

Ms. Ladwig testified that these items were present in the common area without being approved by the board, in violation of the Association's rules and regulations. (R. 71–74).

Despite the Demand, Milburn failed to clean up all items from outside of her Unit within 30 days, which was confirmed by Corporate Representative Ladwig and then vice-president of the Association, Ms. Stettner. (T. 77, 309, 311, 475, 539–540). Photographs taken by Ms. Stettner on July 5, 2021—shortly after the 30-day demand period expired and after the Association filed the proceeding below—show Milburn's personal items located on the Association's common property behind Milburn's unit. (T. 309, 311). Ms. Stettner testified that she took the photographs on July 5, 2021, and the July 5th date appears on the photograph. (T. 341–342).

According to Ms. Ladwig and Ms. Stettner, as of July 5, 2021, numerous items remained on common areas in the back of Milburn's unit: a bird cage with a live bird inside, a deck box, hardware, and a ladder belonging to Milburn all remained on the common elements. (T. 238, 342–343, 468–469). Milburn herself did

not dispute that the pictures were taken on July 5th: "I wouldn't remember how the back of the property looked." (T. 246).

The trial court overruled Milburn's objection to these photographs being admitted into evidence but noted the trial court would take Milburn's objection under consideration when evaluating the evidence. (T. 246–249). These photographs were authenticated and admitted into evidence at trial, despite Milburn's repeated arguments that the photographs were not authenticated and not admitted into evidence. (T. 246–249).[2] The trial court later referred to these pictures as part of the evidence: "There's pictures that are in evidence from Marlena Stettner . . . July 5, 2021 Is when that picture was taken." (T. 604–05). The photos were taken by Ms. Stettner on July 5, 2021. (T. 610–11, 613).

Ms. Ladwig testified that Ms. Milburn finally removed all of her personal property from the common areas only after the lawsuit was filed. (T. 89–90). Ms. Milburn had cured the violation to the Association's satisfaction as of May 2023 (T. 90–91).

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[2] These photos are included in the Appendix and are the subject of the Association's motion to supplement the record. The photographs were admitted into evidence as composite exhibit 12 but were omitted from the record, notwithstanding that the trial court overruled Milburn's admissibility objection.

Contrary to Milburn's testimony, Ms. Stettner denied having ever told Milburn that she had complied with the Demand. (T. 311–13). Milburn could not say with certainty that she had complied with the Association's Demand either, explaining that "I felt like I was in compliance to the best that I could be." (T. 224).

3. *The Association's Enforcement of the Rules Against Other Owners Who Placed Items on the Common Elements*

The Association's Corporate Representative testified that the Association took action against other unit owners for violating the rule against placing items on common elements (T. 493). She testified that the majority have or are working toward curing the violations (T. 508–09). She also testified that "a lot of the violations [in the photographs in evidence] don't exist today" (T. 493) and that the Association would communicate with unit owners about violations by phone or email before finding a violation (T. 490). Ms. Ladwig testified that Milburn's violations were egregious and ongoing: "every time she does clean it up, it . . . comes back again." (T. 77, 451, 522). and that Milburn did not cure the violations until after the lawsuit was filed (T. 89–91).

Similarly, Ms. Stettner testified that the Association was diligent in making sure residents do not leave items outside. (T. 343). Ms. Stettner often went "unit to unit" talking to people and sending letters about cleaning up. (T. 343).

Milburn conceded that she "wouldn't be privileged" to knowing if other unit owners also received violations for leaving items on common property. (T. 252–253). The Association, based on advice of its counsel, believed it unlawful to remove unit owner's items from common areas without a court order. (T. 103–104).

4. *The Trial Court Granted the Association's Motion for Directed Verdict and Denied Milburn's Motion for Directed Verdict*

The Association filed a trial memorandum and a supplemental memorandum. (R. 349–62; 383–91). Toward the end of trial, the Association reminded the trial court of its motion for summary judgment that could be renewed as a directed verdict, per the trial court's instructions. (R. 340; T. 545–546). The Association made an *ore tenus* motion for a directed verdict and relied on the evidence presented at trial. (T. 545–53). Milburn also moved for a directed verdict on her defenses. (R. 392–419; T. 553–92).

5. The Trial Court's Findings and Rulings

The trial court made findings from the bench that were incorporated into a written trial order. (T. 603–18; R. 712–19). The trial court found that Milburn had violated the rules by failing to comply with the Demand and not timely removing her personal property from the common elements. (R. 712; T. 604–613). The trial court found that the Association had put Milburn on notice of the violations, and that Milburn had not cured the violation before the expiration of the 30-day notice provided in the Demand. (R. 714). The trial court found that the photographs taken by Ms. Stettner were taken on July 5, 2021, which was "undisputed," and the photographs show the bird cage present on common areas on that date. (T. 610–611, 613). The trial court added that the "most significant fact" is there's no dispute that there is property outside Milburn's unit on July 5th, based on the testimony of Ms. Stettner and her photographs. (T. 610). The trial court determined that these facts were undisputed and any reasonable factfinder would not find otherwise. (R. 714). Thus, the trial court granted The Association's Motion as to the issue of Milburn storing personal property on common areas.

Next the trial court made detailed findings of fact and conclusions of law rejecting Milburn's defenses. The trial court found, based on all the evidence, that Milburn waived arbitration under § 718.1255 by not demanding arbitration in her initial filings, engaging in discovery, and actively participating in the litigation. (T. 605–610; R. 713–16). Then the trial court rejected Milburn's "judicial admission" argument (R. 716), selective enforcement defense (R. 716), and duty to maintain defense. (R. 717).

SUMMARY OF ARGUMENT

Appellee Gateland Condominium Association sued Tracy Milburn, an owner of a unit in the condominium, because Milburn ignored the Association's requests that she remove her personal property from the common elements behind her unit. Following a bench trial, the trial court found that Milburn violated the Association's rules and regulations by failing to timely remove her property from the common elements.

The trial court did not err in ruling that Milburn violated the Association's rules and regulations. The trial court's findings of fact were supported by competent, substantive evidence. The trial evidence showed that Milburn was sent a letter requiring her to remove her property from the common elements within 30 days. Milburn failed to comply, and did not remove all of her property until after the Association filed suit.

Milburn makes five arguments on appeal. Milburn has not shown reversible error on any of these issues.

First, the trial court correctly found that Milburn waived the any right she may have had to compel arbitration. Milburn acted inconsistently with the right to arbitrate by failing to demand

arbitration at the beginning of the case, actively litigating the merits of the case, and actively engaging in discovery.

Second, the trial court's judgment for the Association was supported by competent, substantial evidence. The trial testimony supported the trial court's ruling that Milburn did not remove all of her personal property from the common elements after the 30-day deadline. The trial court's ruling was on the merits after both parties had presented their evidence, even though the parties and the trial court mislabeled the relief sought as a motion for directed verdict.

Third, the trial court correctly rejected Milburn's argument that judgment could not be entered against her because one paragraph of the complaint mistakenly stated that Milburn kept her personal property "outside of" the common elements. This statement was clearly a typographical error, as the Association consistently argued throughout the case that Milburn improperly kept personal property on the common elements. Therefore, the trial court properly rejected Milburn's request to treat this typographical error as a judicial admission.

Fourth, the trial court's finding that the Association did not selectively enforce the rules prohibiting storage of personal property on the common elements is supported by competent, substantial evidence. The evidence at trial showed that the Association took action to enforce the rules as to any unit owner who was in violation. Nor did Milburn present evidence suggesting that the rules were not being enforced against other unit owners.

Fifth, the trial court correctly found that the Association's general duty to maintain the common elements did not require it clean up a unit owner's personal property. The Association reasonably exercised its authority to require Milburn to remove her personal property from the common elements. Thus, the trial court did not err by ruling that Milburn was responsible for cleaning up after herself.

Therefore, because there was no reversible error on any of these issues, the trial court's judgment should be affirmed.

ARGUMENT

I. JURISIDICTIONAL STATEMENT

This appeal was initially premature, as the notice of appeal was filed before the trial court entered a final judgment. The trial court later entered a final judgment on November 20, 2023. Therefore, this Court now has jurisdiction to review the issues on appeal.

II. MILBURN WAIVED HER ARBITRATION RIGHTS BY NOT TIMELY MOVING TO COMPEL ARBITRATION, PROPOUNDING DISCOVERY, AND ACTIVELY PARTICIPATING IN LITIGATION

A. Standard of Review

"Whether a party has waived the right to arbitrate is a question of fact, reviewed on appeal for competent, substantial evidence to support the lower court's findings." *Ibis Lakes Homeowners Ass'n, Inc. v. Ibis Isle Homeowners Ass'n, Inc.*, 102 So. 3d 722, 730 (Fla. 4th DCA 2012) (internal citation omitted).

Milburn's citations to *Anthony v. Gary J. Rotella & Associates, P.A.,* 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005) and *B.Y. v. Dep't of Children & Families,* 887 So. 2d 1253, 1255 (Fla. 2004), for the standard of review on this issue are irrelevant because those cases did not involve arbitration.

B. The Trial Court's Ruling that Milburn Waived the Right to Arbitrate is Supported By Competent, Substantial Evidence

Competent, substantial evidence supports the trial court's ruling that the Milburn waived any right to arbitration or mediation under section 718.1255, *Florida Statutes* by actively participating in litigation and engaging in discovery. Participation in litigation and engaging in discovery each constitute separate grounds for waiving the right to arbitrate. *Gordon v. Shield*, 41 So. 3d 931, 933 (Fla. 4th DCA 2010) (explaining that the active participation in litigation or the propounding of discovery result in waiver of the right to arbitrate). (T. 609–610; R. 712).

A party's actions inconsistent with the right to arbitrate can waive the right. *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So. 2d 707, 711 (Fla. 2005). "[T]he right to arbitrate 'must be safeguarded by a party who seeks to rely upon that right and the party must not act inconsistently with the right.'" *Id.* (internal citation omitted). Milburn's actions throughout the proceeding were inconsistent with a right to arbitrate, which the trial court recognized first when it denied Milburn's motion for summary judgment and rejected Milburn's same position in the Trial Order.

Far from safeguarding any right to arbitrate, Milburn never moved to compel arbitration during the years-long proceeding. This alone requires rejecting Milburn's argument because "[f]iling an answer without claiming the action should be referred to arbitration waives the right to arbitrate." *Glenn B. Wright Const. & Dev., Inc. v. Cohara*, 87 So. 3d 1276, 1278 (Fla. 4th DCA 2012) (quoting *Bland v. Green Acres Grp.*, 12 So. 3d 822, 824 (Fla. 4th DCA 2009)). Just like the *Glenn B. Wright* defendant, Milburn filed an answer and affirmative defenses but "did not move to compel arbitration (either as an affirmative defense or as a separate motion)." *Id.* (citation omitted). This failure to move to compel arbitration led to a waiver. *Id.* Milburn ignores that she failed to move to compel arbitration and necessarily waived any right to arbitrate.

Aside from failing to move to compel arbitration, Milburn also waived any arbitration rights by actively litigating and propounding discovery. Milburn filed two motions to dismiss, but did not raise the issue of arbitration in either motion. (R. 43, 166). Then Milburn participated in court-ordered mediation. (R. 74). Then Milburn asserted that she required discovery from the Association "in order to file an answer." (R. 90). Then Milburn served substantive

discovery on Plaintiff that Milburn labeled "Defendant's Discovery." (R. 169). The trial court recognized this in its ruling from the bench and in its Trial Order. (R. 715–16; T. 608–10).

"Florida's appellate courts have consistently found waiver where a party participates in discovery on the merits before moving to compel arbitration." *Lion Gables Realty Ltd. v. Randall Mech., Inc.*, 65 So. 3d 1098, 1100 (Fla. 5th DCA 2011).[3] Here, Milburn propounded three separate discovery requests without ever moving to compel arbitration. Milburn's discovery requests to the

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[3] *Lion Gables* cites many other cases that have held that propounding discovery waives the right to arbitrate: *Gordon v. Shield,* 41 So. 3d 931, 933 (Fla. 4th DCA 2010) (recognizing that propounding discovery would waive right to arbitrate); *Green Tree Servicing, LLC v. McLeod,* 15 So. 3d 682, 688 (Fla. 2d DCA 2009) (agreeing that participating in merits discovery waived a claimed right to arbitration and noting that both "the Third District and the Fifth District have unequivocally held that propounding discovery related to the merits of pending litigation before moving to compel arbitration results in a waiver of the right to arbitration.") (citations omitted); *Olson Electric. Co. v. Winter Park Redev. Agency,* 987 So. 2d 178, 179 (Fla. 5th DCA 2008) (reversing order compelling arbitration because, under the totality of circumstances, the defendant acted inconsistently with the right to arbitrate by propounding discovery requests directed to the merits of the lawsuit); *Estate of Orlanis ex rel. Marks v. Oakwood Terrace Skilled Nursing & Rehab. Ctr.,* 971 So. 2d 811 (Fla. 3d DCA 2007) (recognizing that defendants availed themselves of benefit of discovery rules by propounding interrogatories, requests to produce and notices to produce to non-parties).

Association overwhelmingly constitute a waiver, which the trial court rightly recognized. Milburn's discovery requests include:

- a request for production that seeks "All Association records" about Defendant's "obstruction of the egress, ingress and passageways inside her unit";
- interrogatories that ask about "all Association records" about Defendant's "obstruction of the egress, ingress, and passageways inside her unit"; "if the association is seeking relief…for prior violations… [then] details regarding the [prior] violations and the relief the association is seeking"

Next Milburn served an Answer that failed to request arbitration as an affirmative defense or in a separate motion. *Id.* Then Milburn served a notice of deposition duces tecum on the Association's corporate representative, where the "matters for examination" broadly include the "allegations in the complaint" and the six categories of documents requested include every conceivable document related to the case.

In her initial brief, Milburn attempts minimize her discovery, claiming it was "limited" and "narrow." (Initial Brief 21). Even so, she concedes the discovery sought "clarification and details on allegations made in the Complaint" (Initial Brief 21), and was aimed at "understanding the allegations against her." (Initial Brief 22). By her own admission, Milburn propounded discovery directed to the

merits of the case. Further, by arguing that the discovery was necessary to answer the complaint, Milburn admitted that the discovery was directed to the merits of the case. As a result, the trial court's ruling that any right to arbitrate was waived by engaging in discovery is supported by competent, substantial evidence.

Milburn glosses over the facts of *Ibis Lakes*, which lend no support to her position. *Ibis Lakes Homeowners Ass'n, Inc. v. Ibis Isle Homeowners Ass'n, Inc.,* 102 So. 3d 722 (Fla. 4th DCA 2012). In *Ibis Lakes*, an association first moved to compel arbitration, then served a request to produce. The trial court stayed the request to produce pending a ruling on the motion to compel. *Id.* at 732. This Court affirmed the trial court's finding that no waiver of arbitration occurred because the request for production "was nipped in the bud by the circuit court's stay" and the defendant's "first response" was to "file for arbitration and move to compel arbitration." *Id.* The actions of the Milburn below stand in contrast with the *Ibis* defendant who immediately acted on its right to arbitrate.

III. COMPETENT, SUBSTANTIVE EVIDENCE SUPPORTS THE TRIAL COURT'S RULING THAT MILBURN VIOLATED THE ASSOCIATION'S RULES AGAINST STORING PERSONAL PROPERTY ON THE COMMON ELEMENTS

The trial court, as the finder of fact in this nonjury trial, found that Milburn violated the Association's rules by failing to timely remove her personal property from the condominium's common elements. This finding was supported by the competent, substantial evidence that Milburn's belongings remained in the common areas after the 30-day deadline to remove them had passed. The trial court's ruling was on the merits after both parties had presented their evidence, even though the parties and the trial court mislabeled the relief sought as a motion for directed verdict. Therefore, the trial court's ruling that Milburn violated the Association's rules by storing her personal property in the common elements should be affirmed.

A. Standard of Review

A judgment entered after a nonjury trial is reviewed for competent, substantial evidence. *Vieira v. Pennnymac Corp.*, 241 So. 3d 193, 195 (Fla. 4th DCA 2018). When reviewing a judgment rendered after a nonjury trial, the trial court's findings of fact come to the appellate court with a presumption of correctness, and will not be disturbed unless clearly erroneous. *Id.*

B. Competent, Substantial Evidence Showed that Milburn Violated the Association's Rules By Failing to Timely Remove Her Personal Property from the Common Elements

In its trial order, the trial court found that Milburn had violated the Association's rules by failing to timely remove all of her belongings from the common elements. This finding is supported by competent, substantive evidence. Therefore, the trial court's judgment should be affirmed.

A trial court's findings of fact in a nonjury trial are reviewed under a competent, substantive evidence standard because the trial judge is in the best position to evaluate and weigh the testimony and evidence based on its observation of the bearing, demeanor, and credibility of the witnesses. *Acoustic Innovations, Inc. v. Schafer*,

976 So. 2d 1139, 1143 (Fla. 4th DCA 2008). "The findings of the trial court are to be presumed correct and are to be given the same weight as a jury verdict." *Lonergan v. Estate of Budahazi*, 669 So. 2d 1062, 1063 (Fla. 5th DCA 1996) (citation omitted). "It is the role of the finder of fact . . . to resolve conflicts in the evidence and to weigh the credibility of witnesses. Great deference is afforded the finder of fact because it has the first-hand opportunity to see and hear the witnesses testify." *Siewert v. Casey*, 80 So. 3d 1114, 1116 (Fla. 4th DCA 2012) (internal citation omitted). "It is not the role of appellate courts to reweigh evidence presented to trial courts, to assess whether there is contradictory evidence in the record which supports a different conclusion than that reached by the trial court, to retry the case, or to substitute its judgment for the trial court's on factual matters." *Griffin Indus., LLC v. Dixie Southland Corp.*, 162 So. 3d 1062, 1066 (Fla. 4th DCA 2015). "[C]ase[s] may not be retried on appeal, and a ruling which is supported by competent, substantial evidence will be upheld even though there may be some persuasive evidence to the contrary." *Id.* (internal citation omitted).

After all sides presented their evidence, the trial court found that the Association mailed a letter to Milburn on May 17, 2021, requiring her to remove her property from the common areas within 30 days. (T. 603). The trial court found that, after the 30-day deadline passed on June 16th, Milburn still had personal property in the common areas, even though some items had been removed. (R. 714; T. 603–05, 610–11, 613). The trial court found that Milburn's personal property remained in the common areas on July 5, 2021, based on Ms. Stettner's testimony. (R. 714; T. 604–05, 610).

The trial court's findings are supported by competent, substantive evidence. Ms. Stettner testified that she took photos of the common areas behind Milburn's unit on July 5, 2021. (T. 341–42). Ms. Stettner's July 5th inspection showed that a bird cage and a deck box remained in the common areas behind Milburn's unit. (T. 342–43). The property manager, Ms. Ladwig, also testified that a ladder, a storage box, and a bird cage with a live bird remained behind Milburn's unit on July 5th. (T. 468–69).

Milburn relies heavily on a purported statement by board member Marlena Stettner, claiming that Ms. Stettner had informed

Milburn that she had complied with the Demand before the deadline. (Initial Brief 31). Ms. Stettner denied ever telling Milburn that she had timely cured the violation. (T. 311–13). Even if Ms. Stettner did make such a statement, an Association cannot be bound by the statement of a single board member on an issue that requires a decision to be made by a vote of the board of directors. *See Curci Village Condominium Assoc., Inc. v. Maria*, 14 So. 3d 1175, 1177-8 (Fla. 4th DCA 2009).

The Association was also entitled to a judgment in its favor even though Milburn cured the violation shortly before trial. An action seeking injunctive relief under the Condominium Act does not become moot by the occurrence of the act for which a party sought the injunction. *Patchen v. Quadomain Condo. Ass'n*, 304 So. 3d 28, 30 (Fla. 4th DCA 2020). Allowing a party to unilaterally render a dispute moot before a trial can be held is contrary to the system of self-government created by the Condominium Act. *See Smulders v. Thirty-Three Sixty Condo. Ass'n*, 245 So. 3d 802, 804–05 (Fla. 4th DCA 2018). A party is also entitled to a judgment on the merits due to the collateral legal consequence of prevailing party attorney's fees and costs. *Patchen*, 304 So. 3d at 30. Thus, although

Milburn may have cured the violation shortly before trial, the Association was forced to file suit to compel Milburn's compliance. *See 51 Island Way Condo. Ass'n v. Williams*, 458 So. 2d 364, 366–67 (Fla. 2d DCA 1984). Thus, Association was still entitled to seek a judgment on the merits and to obtain a determination that it was the prevailing party entitled to attorney's fees.

As a result, the trial court's findings of fact are supported by competent, substantive evidence. The trial court, as the finder of fact, was free to reject Milburn's evidence claiming that her personal property had been cleaned up before the deadline. Therefore, the trial court's judgment that Milburn violated the Association's rules by not timely removing her personal property from the common areas should be affirmed on appeal.

C. The Trial Court Ruled on the Merits of the Association's Claims Despite Describing its Ruling as a Grant of a Directed Verdict

The trial court's ruling at the conclusion of the trial should be treated as a judgment on the merits, rather than an order granting directed verdict. Although the trial court characterized its ruling for the Association as granting its motion for directed verdict, there is no mechanism under the Florida Rules of Civil Procedure for a plaintiff in a nonjury trial to move for a directed verdict or an involuntary dismissal. The record also shows that the trial court made affirmative findings of fact after all the trial evidence had been presented. Therefore, the trial court's judgment should not be reviewed under a directed verdict or involuntary dismissal standard.

The true nature of a motion is determined by its content, and not by the label the moving party has used to describe it. *Fire & Cas. Ins. of Conn. v. Sealey,* 810 So.2d 988, 992 (Fla. 1st DCA 2002). Because Florida's courts place substance over form, if a motion is mislabeled, the court will look to the substance of the motion, rather than its label. *Mandelko v. Lopresti*, 345 So. 3d 314,

317 (Fla. 4th DCA 2022) (quoting *IndyMac Fed. Bank FSB v. Hagan,* 104 So. 3d 1232, 1236 (Fla. 3d DCA 2012)).

Once all of the evidence had been presented at trial,[4] the Association moved for a directed verdict. However, motions for directed verdict are not available in a nonjury trial. *See Tillman v. Baskin*, 260 So. 2d 509, 510–11 (Fla. 1972). Rather, a motion for involuntary dismissal is the proper remedy for a defendant to argue in a nonjury case that the plaintiff has not made a prima facie case. *Tillman v. Baskin*, 260 So. 2d 509, 510–12 (Fla. 1972); *see also* Fla. R. Civ. P. 1.420(b) (allowing any party other than the party seeking affirmative relief to move for involuntary dismissal in an action tried without a jury).

Thus, there was no mechanism under the Florida Rules of Civil Procedure for the Association, as the plaintiff seeking affirmative relief in a nonjury trial, to move for a directed verdict or involuntary dismissal. As a consequence, the Association's motion

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[4] The trial transcript does not show that Milburn explicitly rested her case at the close of the evidence. However, this issue has been waived on appeal: Milburn did not object at trial, did not raise the issue in her motion for new trial, and did not argue the issue in the initial brief. *See Casserly v. City of Delray Beach*, 228 So. 3d 135, 139 (Fla. 4th DCA 2017).

for directed verdict should be treated as a request for entry of judgment in accordance with the trial evidence.

When a trial court has heard all the evidence in a bench trial, the better practice is for the trial court to simply enter a judgment, rather than an involuntary dismissal. *United States Bank, N.A. v. Martinez*, 341 So. 3d 1165, 1166 (Fla. 2d DCA 2022). When the evidentiary portion of a nonjury trial has concluded, a trial court should not enter an involuntary dismissal when it could just as easily enter a final judgment on the merits. *Provident Fundings Assocs. v. MDTR*, 257 So. 3d 1114, 1117 n.1 (Fla. 2d DCA 2018). If the parties have had the opportunity to put on their case, a new trial should not be granted when a trial court grants of a motion for involuntary dismissal rather than entering a judgment on the merits. *Martinez*, 341 So. 3d at 1166–67.

Furthermore, the record shows that the trial court ruled on the merits of the Association's claims at the end of the trial. The trial court stated that was making "findings" when it concluded that Milburn did not timely remove her personal property from the common elements. (T. 610–11). The trial court's trial order also stated that the court made findings "after hearing all the testimony

and reviewing all of the evidence." (R. 714). Therefore, the record on appeal shows that the trial court ruled on the merits of the Association's claims even though it labeled its ruling as a granting of the Association's motion for directed verdict.

Thus, although the parties and the trial court mislabeled the motions at the end of the trial as motions for directed verdict, the record shows that the trial court ruled on the merits of the Association's claims. The trial court's ruling should be reviewed on appeal as a judgment on the merits because the Rules of Civil Procedure do not provide for a plaintiff in a nonjury trial to move for directed verdict or involuntary dismissal. Therefore, the trial court's judgment for the Association cannot be reviewed as if it were an order granting a motion for directed verdict in a jury trial.

IV. The Trial Court Did Not Err By Not Deeming a Typographical Error in the Complaint to be a Judicial Admission

Milburn argues that the Association's statement in the complaint that Milburn stored her personal items "outside the common property" should be treated as a judicial admission. However, statements in a complaint are not evidence. Therefore, the trial court did not err in ruling that this obvious mistaken statement did not constitute a judicial admission.

A. Standard of Review

The trial court made an evidentiary ruling when it ruled that the typographical error in the Association's complaint was not a judicial admission. *Hernandez v. CGI Windows & Doors, Inc.*, 347 So. 3d 113, 118 (Fla. 3d DCA 2022). Such a ruling is reviewed for abuse of discretion, as limited by the evidence code and applicable case law. *Id.*

B. The Typographical Error In The Complaint Could Not Be Used as Evidence and Was Not a Judicial Admission

A complaint is not admissible into evidence to prove or disprove a fact in issue. *Straub v. Village of Wellington*, 941 So. 2d 1269, 1270 (Fla. 4th DCA 2006). This is because a complaint "is merely a tentative outline of the pleader's positions." *Id.* Thus, a mistake in a party's pleadings cannot be used as evidence of a fact in issue. *Id.*

Unsworn pleadings drafted by an attorney are not generally admissible in evidence because they reflect a party's initial position before the case is fully developed on the facts. *Hernandez v. CGI Windows & Doors, Inc.*, 347 So. 3d 113, 118 (Fla. 3d DCA 2022). Thus, inconsistencies in a pleading "may not [ordinarily] be used by an opposing party as proof of an issue." *Hernandez v. CGI Windows & Doors, Inc.*, 347 So. 3d 113, 118 (Fla. 3d DCA 2022) (citation omitted, alteration in original).

For example in *Straub*, a party's complaint alleged that an easement was in favor of "Palm Beach Polo." 941 So. 2d at 1270. However, the party consistently argued in the litigation that the easement was in favor of Palm Beach *County*. *Id.* This Court ruled

that the statement in the complaint was a "mistake" that could not be used to defeat a motion for summary judgment: "the statement in the complaint appears to be a mistake, as throughout the litigation Wellington has claimed exactly the opposite conclusion as to the ownership of the property, namely that the easement was in favor of Palm Beach *County*, not Palm Beach Polo." *Id.*

Here, although paragraph 15 of the Association's complaint suggests that Milburn had stored items "outside the common property" the remainder of the complaint, including the wherefore clause and exhibits, made clear that injunctive relief was sought against Milburn for storing items on "the common areas" that belong to the Association. Specifically, the wherefore clause requests "an injunction . . . compelling the ***removal of all personal items from the common areas outside the Defendant's Unit*** . . . ." (R. 22-23). Similarly, the Association's demand letter attached to the complaint demanded that Milburn effect "the immediate and complete removal of all personal items ***from the common areas outside of your Unit*** *. . .*" The evidence at trial consistently reflected the Association's position that Milburn improperly stored her property on the common elements.

Thus, the trial court correctly ruled that the obvious typographical error in the Association's complaint did not constitute a judicial admission. The trial court's ruling is consistent with this Court's opinion in *Straub v. Village of Wellington*, 941 So. 2d 1269, 1270 (Fla. 4th DCA 2006), which prohibits use of a mistaken statement in a pleading as evidence. The trial court's ruling is also consistent with the rule that "[e]xhibits attached to a pleading become a part of the pleading for all purposes." *Fladell v. Palm Beach Cnty. Canvassing Bd.,* 772 So. 2d 1240, 1242 (Fla. 2000). The trial court recognized that the Association consistently argued in the case that Milburn was improperly storing her personal property on the common elements. The trial court's ruling also fits this Court's policy that pleadings be evaluated "with some generosity and tolerance." *Gouveia v. Phillips*, 823 So. 2d 215, 218 n.1 (Fla. 4th DCA 2002).

Milburn cites *Ash v. Ash*, 332 So. 3d 563, 568–69 (Fla. 3d DCA 2021), which holds that "parties are bound by the allegations in their pleadings" and that "admissions contained in the pleadings as between the parties themselves are accepted as facts without the necessity of supporting evidence." However, *Ash* involved a situation where a party took an explicit position in its pleadings that it later tried to disavow for strategic reasons. *Id.* Thus, the holding in *Ash* is irrelevant to analyzing the effect of an obvious typographical error in a party's complaint.

Therefore, because the typographical error in the Association's complaint was not admissible in evidence and could not constitute a judicial admission, the trial court did not abuse its discretion in so ruling.

V. Competent, Substantial Evidence Supports The Trial Court's Finding That The Association Did Not Selectively Enforce The Rule Prohibiting Storage of Personal Property on the Common Elements

The record evidence supports the trial court's ruling that the Association did not selectively enforce its rules against storing personal property on the common elements. The trial evidence showed that the Association made efforts to compel all owners who were violating the rules to remove their personal property from the common elements.

A. Standard of Review

A trial court's finding on whether an association selectively enforced its rules is reviewed for competent, substantive evidence. *See Foonberg v. Thornhill Homeowners Ass'n*, 975 So. 2d 601, 603 (Fla. 4th DCA 2008).

Milburn's citations to *Anthony v. Gary J. Rotella & Associates, P.A.,* 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005); *B.Y. v. Dep't of Children & Families,* 887 So. 2d 1253, 1255 (Fla. 2004); and *Klinow v. Island Court at Boca W. Prop. Owners' Ass'n*, 64 So. 3d 177 (Fla. 4th DCA 2011) are irrelevant to the standard of review here because they did not involve selective enforcement issues.

B. The Trial Court's Finding that the Association Did Not Selectively Enforce its Rules was Supported By Competent, Substantive Evidence

To prevail on a selective enforcement affirmative defense, an association member must prove that the association "arbitrarily and selectively" enforced a rule. *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 348 (Fla. 1979). The burden is a "heavy" one. *Lakeridge Greens Homeowners Ass'n, Inc. v. Silberman*, 765 So. 2d 95, 97 (Fla. 4th DCA 2000). Selective enforcement does not exist where the evidence shows "a consistent effort by the association to enforce the restriction." *Estates of Fort Lauderdale Prop. Owners' Ass'n, Inc. v. Kalet*, 492 So. 2d 1340, 1342 (Fla. 1986).

To obtain reversal on this point, Milburn must establish that the rules prohibiting storage of personal property on the common elements was selectively enforced. *See Foonberg v. Thornhill Homeowners Ass'n*, 975 So. 2d 601, 603 (Fla. 4th DCA 2008). She has not met that burden on appeal.

Rather, the testimony at trial that supported the trial court's finding that the rules were not selectively enforced. The Association's Corporate Representative testified that the Association took action against other unit owners for violating the rule against

placing items on common elements (T. 493); that the majority have or are working toward curing the violations (T. 508–509); that "a lot of the violations (in the photographs) don't exist today" (T. 493); that the Association would communicate with unit owners about violations by phone or email before finding a violation (T. 490); that the egregiousness and ongoing nature of Milburn's violations ("every time she does clean it up, it . . . comes back again") necessitated the instant litigation (T. 77, 451, 522); and that Milburn did not cure the violations until after the lawsuit was filed (T. 89–91).

Similarly, Association President Ms. Stettner testified that the Association was diligent in ensuring that residents do not leave items outside. (T. 343). Ms. Stettner testified that she went "unit to unit" talking to people and sending letters to clean up. (T. 343).

Furthermore, the Association sent a letter in April 2021 to all unit owners informing them that the prohibition against personal property would be enforced going forward. (R. 697). Selective enforcement does not exist if an association adopts a uniform policy that will be enforced only prospectively. *Chattel Shipping & Invest. v. Brickell Place Condo. Ass'n*, 481 So. 2d 29, 30 (Fla. 3d DCA 1985).

Finally, Ms. Milburn admitted that she had no knowledge as to whether other unit owners also received violations for leaving items on common property. (T. 252).

Milburn suggests in the initial brief that selective enforcement is present here because the Association sued her, but not other unit owners. (Initial Brief at 31). However, the filing of lawsuits alone does not establish selective enforcement. *McMillan v. Oaks of Spring Hill Homeowner's Ass'n*, 754 So. 2d 160, 162 (Fla. 5th DCA 2000). In *McMillan*, a defendant failed to establish selective enforcement even though the association "did find and attempt to enforce many known violations, but did not file suit in these other instances." *Id.*

Similarly, in *Miami Lakes Civic Ass'n v. Encinosa*, 699 So. 2d 271, 272 (Fla. 3d DCA 1997), a defendant failed to establish selective enforcement even though defendant was "the only one against whom the association filed a civil action. The record reflects, however, that this is because those homeowners . . . ultimately voluntarily complied with the association's requirements."

Like the defendant in *Miami Lakes Civil Ass'n*, Milburn ignores the evidence that others who had been storing personal property on the common elements worked to cure the violations, and the other

violations were not as egregious as Milburn's ongoing violations. Ample evidence supports the trial court's findings regardless of whether Milburn disagrees. The Trial Order should be affirmed as to Milburn's failure to prove selective enforcement.

VI. The Trial Court Correctly Ruled that the Association's Duty to Maintain the Common Areas Did Not Require the Association to Clean Up Milburn's Personal Belongings

Finally, Milburn argues that the Association should have been the one to clean up the mess Milburn made on the common elements. This argument is not supported by Florida law, the Association's governing documents, or the evidence at trial. The Association's decision to require unit owners such as Milburn to remove their personal property from the common elements was within its authority and reasonable. Thus, the trial court did not err by ruling that Milburn was responsible for cleaning up after herself.

A. Standard of Review

Florida's courts apply the business judgment rule to condominium associations in order to avoid second-guessing an association's management decisions. *Hollywood Towers Condo. Ass'n v. Hampton*, 40 So. 3d 784, 787 (Fla. 4th DCA 2010). Courts must give deference to a condominium association's decision if that decision is within the scope of the association's authority and is reasonable. *Id.* An association's action is reasonable if it is not arbitrary, capricious, or in bad faith. *Id.*

Milburn's citations to *Anthony v. Gary J. Rotella & Associates, P.A.,* 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005); *B.Y. v. Dep't of Children & Families,* 887 So. 2d 1253, 1255 (Fla. 2004) are irrelevant to the standard of review here because they did not involve a condominium association's discretion to act.

B. The Association Acted Reasonably and Within Its Authority By Requiring Milburn to Remove Her Personal Property From the Common Elements

Milburn argues that the Association had an affirmative duty to remove unit owners' personal property from the common elements. This argument is not supported by Florida law, the Association's governing documents, or the evidence at trial. Therefore, the trial court correctly ruled that the Association could compel Milburn to remove her personal property from the common elements.

Milburn first relies on Section 718.113(1), *Florida Statutes*, which states that "Maintenance of the common elements is the responsibility of the association." Milburn also cites to similar language in the Association's bylaws. However, Milburn cites no authority suggesting that an Association's general duty to maintain the common elements forbids it from requiring unit owners to

remove personal property that they have improperly placed in the common elements.

Milburn also relies on a letter the Association sent in 2015, stating that the Association would remove personal property improperly stored in the common areas. (R. 696). However this letter, which predates the present demand by about seven years, is not a rule or regulation that the Association is bound to follow. Nothing in the May 2021 letter to Ms. Milburn, which forms the basis of the violation here, suggests that the Association would clean up after unit owners who failed to remove their personal property from the common elements. (R. 700–01). Rather, the May 2021 letter explicitly demands that Milburn completely remove all of the personal items from the common areas outside her unit. (R. 701).

The Association's property manager, Ms. Ladwig, likewise explained the Association's rationale for not removing unit owners' personal property from the common areas. She testified: "The association wouldn't remove a personal item if it belonged to somebody. Garbage maybe, but not a personal item itself." (T. 75). The Association was unwilling to remove a unit owner's personal

items without a court order because “[y]ou can’t just take their personal stuff from them.” (T. 76). Ms. Ladwig testified that this policy is supported by the Association’s declarations, which require the Association to seek an injunction to address a unit owner’s violation of the condominium’s governing documents. (T. 106; R. 521).

Thus, the evidence at trial showed that it was within the Association’s authority to seek an injunction to require a unit owner to remove personal property from the common areas. Nothing in the evidence at trial suggests that the Association exercised this authority in an unreasonable manner. Thus, the Association acted within its business judgment in seeking an injunction to require Milburn to clean up her own personal property from the common elements. Conversely, no evidence at trial suggested that the Association had a mandatory duty to clean up after unit owners who violated the Association’s rules by storing personal property on the common elements. Therefore, the trial court’s ruling on this issue should be affirmed.

CONCLUSION

The trial court did not err in its ruling that Milburn waived any right she may have had to compel arbitration. The trial court's ruling that Milburn violated the rules against storing personal property on the common elements was supported by competent, substantial evidence. The trial court did not err in rejecting Milburn's defenses. Therefore, the trial court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document has been served via the Florida E-Filing portal on September 10, 2024, to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font and word count requirements set forth in Florida Rules of Appellate Procedure 9.045 and 9.210. The brief is presented in Bookman Old Style, 14-point font.

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