HINT: TO MOVE FROM FIELD TO FIELD, USE F11 KEY. PLEASE NOTE THAT FONT HAS TO BE TIMES NEW ROMAN 14 OR COURIER NEW 12 PURSUANT TO RULE 9.210(a)(2).

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

HARBOR HILLS DEVELOPMENT, L.P., ETC., ET AL.,

Appellants.

vs.

LARRY BELL, AS CO-TRUSTEE, ETC., ET AL.,

Appellees.
_____/

5TH DCA CASE NO.: 5D14-2349
Lake County, Florida
L.T. CASE NO.: 2011-CA-005664-O

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

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The Trial Transcript ("TT") will be to the volume number, followed by the page number. For example, the trial testimony of witness Timothy Moulton found at Volume 40 on page 4 will be cited as: (TT 40, 4)

The Lake County Circuit Court presiding over the subject action is identified herein as "Trial Court."

The Harbor Hills Homeowners Association, Inc., a Florida not-for-profit corporation, will be referred to as the "HOA" or the "Association".

The Plaintiffs/Appellees, Larry Bell and Esther Line, will be referred to as "Plaintiffs".

Defendant/Appellant, Harbor Hills Development, L.P., a Delaware limited partnership registered to do business in Florida as Harbor Hills Development, Ltd., will be referred to as the "Developer".

Defendants/Appellants, Michael Rich, Adam Rich, Lu Ann Miller, Steve Henne, Van Albanese, Ed Frayer and Michelle Pinder will be referred to as the

"Director Defendants".

The Developer and Director Defendants will collectively be referred to as "Defendants".

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case and Facts

Larry Bell and Esther Line own homes in a subdivision called Harbor Hills which is located in Lady Lake, Florida. (TT 43, 722 & 746). Founded in 1989, Harbor Hills consists of 639 platted lots with seventy-five percent (75%) containing single-family residences. (R 34, 6346; P Ex 22).

The Developer remains in control of the HOA and appointed the Directors. (TT 44, 928-29). Michael Rich is the President of both the Developer and the HOA. (R 19, 3369-70). Four of the seven Director Defendants are on the payroll of Harbor Hills entities controlled by Michael Rich. (TT 44, 921-22).

The crux of the lawsuit is that the Developer did not properly pay his share of assessments from 2005 to 2010. (R 11, 1837). This occurred for three reasons. (R 11, 1837-41).

First, the Developer specifically *excluded his own lots* in determining the pro-rata share of assessments owed. (TT 42, 575-76; R 33, 6046, P Ex 5). As a result, in 2005 the Developer owned 18% of the lots but paid only **2%** of the total operating expenses, in 2006 he owned 38% of the lots but paid only **9%** of the expenses, in 2007 the Developer owned 24% of the lots but paid **0%** of the expenses, and in 2008 he owned 14% of the lots but paid only **1%** of the expenses. (TT 42, 580-85).

Second, in November 2009, the Developer finally *included his own lots*, but he created a new controversy. (TT 44, 948-49; R 33, 6047; P Ex 5). The Developer now claimed that owners of vacant lots would only have to pay *half as much* as owners of homes. (TT 44, 949). This new position, known as "two-for-one", was quite favorable for the Developer because he owned 146 of the 164, or 89%, of the vacant lots. (R 34, 6346; P Ex 22).

The Developer attempted to minimize the controversy by representing to the Court at the bench trial that homeowners, such as Mr. Bell, were already paying twice as much as vacant lot owners before 2009, and claimed that lots have been assessed on a two-for-one basis "since I've been here [Sept. 29, 2003]." (R 8, 1369-70 & 1374; TT 44, 1058).

However, at the jury trial, two homeowners, who owned homes with adjacent vacant lots, testified that their vacant lots had always been assessed at the same rate as their homes -- a *course of dealing* consistent with Plaintiffs' interpretation, and inconsistent with the Developer's representations. Further, three Directors, along with a homeowner who regularly attended board meetings, testified that they, like the Plaintiffs, also never heard anything about two-for-one before the Developer first mentioned it in November 2009. (TT 39, 272; TT 41, 541; TT 44, 945-46; TT 46, 1220-21; R 15, 2805).

Third, the Developer failed to pay *any* assessments for the commercial

property he owned. (TT 45, 1067). Commercial property is defined within the Declaration as "any improved *or unimproved* parcel of land within the property which is intended and designed to *accommodate* retail commercial enterprises." (R 33, 5972; P Ex 3).

The Developer, who owns the commercial property, repeatedly represented to the Trial Court at the bench trial that "I don't know" if the property is zoned commercial. (R 8, 1364-65). However, at the jury trial, the engineers for both Plaintiffs and Defendants testified in 100% agreement that the property is zoned commercial. (TT 41, 438 & 447; TT 46, 1175). Plaintiffs also introduced six trial exhibits showing the property to be zoned and platted as commercial property. (R 33, 6091, 6105, 6107, 6139, 6141 & 6143; P Ex 11, 13, 14, 15, 16 & 17).

Significantly, the engineering experts for both Plaintiffs and Defendants also agreed that there is no doubt that there is an intention for this property to accommodate retail commercial enterprises. (TT 46, 1182; TT 41, 447-451 & 456-57)

Indeed, the extrinsic evidence showed that the *original* developer, Route 347 Realty Corporation, submitted applications for rezoning and for a planned unit development ("PUD") which indicated the developer intended to develop a "commercial shopping center" on the commercial property. (R 34, 6145 & 6152; P Ex 18 & 19).

Further, the extrinsic evidence included documents filed with government agencies which showed that the *current* Developer, Harbor Hills Development, L.P., (R 34, 6174-76, 6180; P Ex 20) intended to construct a shopping center beginning in 2011-12 on the existing 3.2 acres of commercial property, in combination with additional property across the street, because there was no grocery or convenience stores within miles of Harbor Hills. (R 34, 6202-03, 6207-08, 6215; P Ex 20; TT 41, 453-57).

Moreover, consistent with this written extrinsic evidence, Mr. Bell testified that the current Developer's employee and salesperson represented to him in 2005 that the Developer would be constructing a gas station and convenience store at the commercial property because there were no such facilities within miles of Harbor Hills. (R 16, 2907; TT 43, 750-53).

The Declaration and Bylaws included several confusing provisions, and undefined key terms (such as "designed", "improved property" and "residential parcel"), which created ambiguities as to their meaning. (R 33, 5929, 5933, 5935 & 5943; P Ex 1; R 33, 5972, 5975, 5998-99 & 6033; P Ex 3).

Even Ed Frayer, a Director Defendant with a doctorate degree from Yale, testified that he found the language in the Declaration and Bylaws to be "confusing," "ambiguous," and "never clear" because, among other things, he said "there are three different things in there." (R 15, 2800, 2803-05; TT 41, 537-39).

The Developer argued he had the option of paying his share of the assessments or paying the deficit at the end of the year not covered by the share owed by the remaining homeowners. (R 33, 5998; P Ex 3). Defendants' own trial exhibits and witnesses indicated that this so-called deficit provision was "reinforced by Florida Statute 720.308", which provides that a developer in control of an association "may be excused from payment of *its share* of the operating expenses." (R 37, 6873-76; *D Ex 8*; TT 46, 1218-20).

Step one is determining what the share is, and step two is deciding to either pay the assessments or fund the deficit. (TT 42, 576). As long as the Developer includes his lots, Plaintiffs did not care which option was chosen because, as their forensic accounting expert testified, the amount owed under either approach was about the same. (TT 42, 595). The problem was: *How can the Developer determine what his share is if his lots were never included?* (TT 46, 1220; TT 42, 575-76).

The jury found in favor of Plaintiffs as to all of these issues, and found that the entire Board of Directors acted in bad faith. (R 31, 5575-78). The jury awarded damages of $640,000 against the Developer, and $2,400 against Defendant Michael Rich for breach of fiduciary duty. (R 31, 5576 & 5578). The damages awarded against the Developer were consistent with the testimony of Plaintiffs' accounting expert who estimated the damages to be $640,000. (TT 42, 591).

Mr. Rich, as President of the Developer and the Association, improperly

used HOA funds to pay to maintain the Developer's Commercial Property. (R 31, 5575-76; TT 45, 1079-80). Even Dr. Frayer, a Director Defendant, testified it was inappropriate and unfair for the HOA to pay for mowing of the Developer's commercial property. (TT 41, 550-52).

B. Course of Proceedings and Disposition in the Court Below

On February 24, 2010, Plaintiffs filed the instant action, both individually and as a derivative action on behalf of HOA. The Complaint asserted two causes of action for declaratory relief relating to the calculation of assessments against the Developer and Director Defendants. (R 5, 664-771).

On April 27, 2011, the Court held a three and a half hour bench trial to address two preliminary issues regarding: (1) whether the Developer had the authority to amend the Declaration to add Amendment 2, and (2) whether specific sections of Chapter 720 were applicable. (R 8, 1267-1400). On May 13, 2011, the Trial Court ruled that the Amended Declaration allowed the Developer to amend the Declaration to add Amendment 2, and that specific sections of Chapter 720 were not applicable to an association created before October 1, 1995[1]. (R 6, 993-

[1] Defendants' Initial Brief repeatedly cites the bench trial and "Amendment 2." However, the assessments challenged in this case are from 2005 to 2010 (R 32, 5724). Regrettably, the Initial Brief failed to disclose that Amendment 2 *did not go into effect until January 1, 2011.* The Audited Financial Statement from 2011 states: "Amendment 2 was made effective January 1, 2011, by the Board of Directors." (R. 23, 4318). Further, Lu Ann Frazee, a Director Defendant, testified that Amendment 2 was not implemented until 2011. (TT 44, 900-01 & 950). In short, Amendment 2 has no effect on the definitions, or assessments, in place from

95).

On August 27, 2012, Plaintiffs filed their Verified Amended Complaint, retaining the two causes of action for declaratory relief relating to the calculation of assessments, while including for the first time a claim for breach of fiduciary duty against the Director Defendants. (R9, 1457-1555). On February 22, 2013, Plaintiffs filed their Verified Second Amended Complaint, which is the operative pleading in this case.[2] (R 11, 1833-1937).

From November 4 through November 8, 2013, a five-day jury trial was held in which the Plaintiffs presented their claims relating to the calculation of assessments, and breach of fiduciary duty relating to the use of HOA funds to mow and maintain the commercial property owned by the Developer. (R 32, 5721).

There were 19 witnesses who testified at trial, and 40 trial exhibits admitted into evidence. (R 33, 5929; R 37, 6921; TT 38, 3-7). The parties stipulated their acceptance of the jury instructions and verdict form. (TT 47, 1371-92). There were no motions for mistrial. (R 32, 5723).

After deliberation, the jury returned a verdict in favor of the Plaintiffs awarding damages of $640,000 against the Developer and $2,400 solely against

[2] This pleading is identical to the Verified Amended Complaint, but merely corrected the style of the case to reflect that the properties owned by the Plaintiffs were now technically held by a trust. Ms. Line's husband passed away on September 5, 2009.

Michael Rich for breach of fiduciary duty.[3] (R 31, 5575-78).

On November 12, 2013, Plaintiffs filed and served their Motion for Entry of Judgment after Jury Verdict. (R 31, 5579-80). On November 15, 2013, Defendants filed and served their Motion for Judgment in Accordance with Motion for Directed Verdict ("DV") or Judgment Notwithstanding the Verdict ("JNOV") or, in the alternative, Motion for New Trial. (R 31, 5585-5608).

On June 13, 2014, the Court entered an Order granting Plaintiffs' Motion for Entry of Judgment after Jury Verdict and denying Defendants' Motions for DV, JNOV, and New Trial, as to Plaintiffs' claims for declaratory and supplemental relief against all Defendants, and as to Plaintiffs' claim for breach of fiduciary duty as to Defendant, Michael Rich. (R 32, 5712-5715).

On June 13, 2014, the Court entered judgments in favor of Plaintiffs of $640,000 against the Developer, and $2,400 against Michael Rich. (R 32, 5716-5719). On June 27, 2014, the Defendants filed a Notice of Appeal of the two judgments. (R 32, 5908-21).

On February 26, 2015, the Trial Court entered an Order granting Plaintiffs' Amended Motion for Award of Attorneys' Fees and Costs, and specifically found that Plaintiffs are the prevailing party in this litigation and are entitled to attorneys'

[3] During closing argument, the Plaintiffs' counsel requested damages of no more than $1 against the Director Defendants other than Michael Rich. (TT 47, 1409). The jury awarded $0 in damages against the other Director Defendants, but found that the entire Board of Directors acted in bad faith. (R 31, 5575-76).

fees and costs.

STANDARD OF REVIEW

The interpretation of a contract, including whether the contract or one of its terms is ambiguous, is a matter of law subject to de novo review. *Life Care Ponte Vedra, Inc. v. Kathleen Wu*, 2015 Fla. App. LEXIS 1560, *5 (Fla. 5th DCA 2015)

.

However, once the Court has determined that contract language is ambiguous, the standard of review for a trial court's ruling on a motion in limine, including the admission or rejection of parol evidence, is abuse of discretion. *Patrick v. State*, 104 So. 3d 1046, 1056 (Fla. 2012) ("The standard of review of a trial court's ruling on a motion in limine is abuse of discretion."); *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 49 (Fla. 1st DCA 2005) ("As to the admissibility of parol evidence, a trial court enjoys broad discretion in matters relating to the admissibility of relevant evidence, and a ruling in such regard will not be overturned absent a clear abuse of discretion.")

The standard of review regarding a trial court's use of verdict forms, including special interrogatory forms, is also abuse of discretion. *CDS Holding I, Inc. v. Corp. Co. of Miami*, 944 So. 2d 440, 442 (Fla. 3rd DCA 2006)

.

"The standard of review on appeal of a trial court's ruling on a motion for directed verdict is the same as the test used by the trial court in ruling on that motion." *Etheredge v. Walt Disney World Co.*, 999 So. 2d 669, 671 (Fla. 5th DCA 2008)

. A motion for directed verdict or JNOV should be granted only if no view of the evidence could support a verdict for the non-moving party. *Id.* at 671. "If there are conflicts in the evidence of if different reasonable inferences could be drawn from the evidence, then the issue is a factual one that should be submitted to the jury and not be decided by the trial court as a matter of law." *Id.*

SUMMARY OF THE ARGUMENT

The Trial Court correctly found ambiguities in the Governing Documents could be susceptible to at least two different meanings which presented issues of fact for the jury's determination. (SR 2, 61-62; R 28, 5100; R 32, 5720-5727). The Trial Court was correct for at least three reasons.

First, the fact that reasonable people could differ as to disputed provisions was readily apparent from the testimony of Ed Frayer, one of the Director Defendants, who holds a PhD from Yale. Even Dr. Frayer testified that the language was "confusing", "ambiguous", and said "there were three different things" in the Governing Documents. (TT 41, 537-39; R 15, 2800, 2803-05).

Second, there were factual disputes associated with the course of dealings between the parties as to whether vacant lots and homes had always been assessed at the same rates as homes. (TT 40, 408-09; T 44, 1058). Accordingly, because the contract was ambiguous, extrinsic evidence was admissible relating to the parties' course of dealings. (SR 2, 61-62).

Third, the Governing Documents had several undefined terms, including "designed", "improved property", and "residential unit" which justified the admission of extrinsic evidence regarding the parties' intent and course of dealings. (R 33, 5972, 5975 & 6033; P Ex 3). The definition of these terms constituted a latent ambiguity or, at the very least, fell into the category of

"intermediate" ambiguities and therefore extrinsic evidence was properly considered.

The Defendants' arguments are themselves ambiguous. First, the Defendants claim that it is so "clear" that the contract language is *"unambiguous"* that the Court should rule as a matter of law. (R 13, 2390 & 2398). Second, the Defendants argued that there can be "no question" that the terms are so patently *"ambiguous"* that a jury should decide the issue. (R 31, 5517-18; SR 2, 24 & 55). And third, having argued *against* the admission of parol evidence, Defendants then proceeded to introduce parol evidence they considered favorable via the testimony of three witnesses. (TT 44, 964; TT 45, 1023; TT 46, 1204).

The Trial Court correctly ruled that factual issues in connection with the breach of fiduciary duty claim against Defendant Director Michael Rich required a jury determination, and that Plaintiffs' claims are not barred due to the statute of limitations or standing. (R 32, 5720-5727).

Finally, the collateral estoppel and claim preclusion issues were not presented to the Trial Court and lack merit. Among other things, Defendants' Initial Brief repeatedly cites the bench trial and "Amendment 2." However, the assessments challenged in this case are from 2005 to 2010 (R 32, 5724), and the Initial Brief failed to disclose that Amendment 2 did not go into effect until January 1, 2011. (TT 44, 900-01 & 950; R 23, 4318). Accordingly Amendment 2

has no affect on the definitions, or assessments, in place from 2005 through 2010.

ARGUMENT

II. THE TRIAL COURT CORRECTLY FOUND THAT AMBIGUITIES IN THE GOVERNING DOCUMENTS, AND FACTUAL ISSUES IN DISPUTE, REQUIRED A JURY DETERMINATION.

A. Defendants' arguments themselves are ambiguous

It is difficult to determine what the Defendants think the Trial Court did wrong in this case. First, the Defendants claim that it is so "clear" that the contract language is *"unambiguous"* that the Court should rule as a matter of law. (R 13, 2390). Second, the Defendants argued that there can be "no question" that the terms are so patently *"ambiguous"* that a jury should decide the issue. (R 32, 5724). And third, having argued *against* the admission of parol evidence, Defendants then proceeded to introduce parol evidence they considered favorable via the testimony of three witnesses. (TT 44, 964; TT 45, 1023; TT 46, 1204).

1. Defendants first argued the "unambiguous" language is to be decided as matter of law

First, Defendants are critical of the Trial Court for not granting their Motion for Partial Summary Judgment based on the "unambiguous" contract language. Defendants stated:

- "The requested relief concerns interpretation of an *unambiguous* written contract" (R 13, 2390).
- The Court should interpret the written language as a matter of law because it *"is clear and unambiguous"* (R 13, 2390).
- "Defendants respectfully request that this Court enter a partial summary judgment declaring the rights of the parties pursuant to this *unambiguous* contract language." (R 13, 2398).

2. Defendants next argued that the contract language is clearly "ambiguous" and requires a jury determination

Second, in their Motion in Limine and arguments of counsel, Defendants reversed course and claimed that terms used in the Declaration are patently "ambiguous" and require a jury determination. Defendants stated:

- "There can be no question that the *ambiguities* at issue are patent" (R 31, 5517).
- "The Defendants assert that the *ambiguities* within the Declaration are clearly patent in nature." (R 31, 5518).
- "The *jury* should be able to define the term 'designed' for itself" (R 31, 5520).
- "With respect to the commercial property argument, you're sitting here with the words intended and designed for commercial retail enterprises. Intended and designed are clearly very normal words…That is clearly for the *jury* to decide" (SR2, 24).
- Expert will not be giving opinion as to whether the word "designed" meets the definition of commercial property…"We think that is solely for the *jury* to decide" (SR2, 55).
- "The document was found to be ambiguous by the Court. So it is now for the *jury* to decide what it means…" (SR 2, 56).
- "Once the Court finds it ambiguous, I think it has to go to the *jury*. And I think it's *not* going to be an issue for a *directed verdict*." (TT 47, 1365-66)
- "The Court shouldn't rewrite the contract. It should simply allow, if there is an ambiguous term, for the *jury* to decide what it means…" (SR 2, 30).

3. Defendants then introduced parol evidence via their own witnesses regarding prior course of dealings

Having previously objected to the admission of extrinsic evidence for purposes of determining the course of dealings between the parties, Defendants

then proceeded to introduce parol evidence themselves via three witnesses. Defendants' witnesses stated:

- Defendant Director Lu Ann Frazee testified that the prior developers, community manager, and U.S. trustee calculated assessments in the same way: "Nothing was changed. Everything was calculated the same way from day one, from when John McNamara's accounting team was there to when the U.S. Treasury appointed PricewaterhouseCoopers to come in." (TT 44, 964).
- Director Tom Warren testified that "It was my understanding that what we were doing was exactly the same way as it had been done from day one" (TT 46, 1204).
- Michael Rich testified that his manner of handling assessment calculations was "the same way it was done by the United States Trustee" (TT 45, 1023).

Tellingly, at trial Defendants did not call any of the prior developers, or the U.S. Trustee. Rather, Directors Tom Warren and Lu Ann Frazee simply claimed that the assessments were being done in the same way as when John McNamara (the original developer) and Kravitz (the former community manager) were handling the assessments. (TT 46, 1216; TT 44, 909 & 964).

Ms. Frazee admitted that John McNamara and the community manager from Kravitz were both *criminally indicted* for misappropriation of funds. (TT 44, 910 & 963). Upon further questioning, Lu Ann Frazee disclosed "I never met the man [John McNamara]" and, therefore, she did not have any personal knowledge as to this issue. (TT 44, 963). Similarly, at the bench trial, Michael Rich was specifically asked under oath how assessments were calculated prior to his coming to Harbor

Hills on September 29, 2003 and he testified "I don't know" and "I can't tell you what happened prior to me coming here." (R 8, 1368-69 & 1374). Thus, Mr. Rich had no personal knowledge of how the U.S. Trustee handled the issue.

Moreover, Lu Ann Frazee testified that "I have absolutely no idea" whether anyone from the U.S. Trustee's office ever even reviewed the provisions of the Declaration and Bylaws relating to the calculation of assessments (TT 44, 975-77), nor did she know who that person would have been. (TT 44, 974-75).

In short, Defendants take the contradictory position that testimony from Plaintiffs' witnesses Tom Bacsik and Tim Moulton, who have personal knowledge of their own course of dealings with assessments, should not be allowed as parol evidence.[4] However, Defendants contend there is nothing wrong with their presenting hearsay parol evidence regarding the course of dealings from witnesses who admittedly have no personal knowledge as to how things were done by prior developers.

B. Director Defendant admits ambiguities

Ed Frayer served on the board from 2007 to 2010. (TT 41, 536). Even though he holds a doctorate from Yale (TT 41, 539), Dr. Frayer testified that the

[4] Defendants' Motion in Limine went so far as to request that the Trial Court exclude all parol evidence from the Plaintiffs regarding course of dealings, *even if the Court finds there are latent ambiguities*. Specifically, Defendants argued: "Even if the Court were to consider that certain ambiguities in Exhibit "C" are latent in nature, the parol evidence the Plaintiffs seek to introduce should not be admitted…" (R 31, 5518).

meaning of certain provisions in the Governing Documents was "ambiguous" and "confusing" to him:

> **A: Because, to me, at first, it was somewhat *confusing* when I read all the documents. Because in one spot it says you take all the lots and you divide in order to get the assessments. In another place it says that a residence, which I assume to be a house, is one assessment, a lot is one assessment. So a homeowner has two assessments, a lot owner would have one. And, thirdly… there is a provision that the developers may choose to pay the deficits rather than assessments. And, so, *there are actually three different things in there*.**
>
> ***
>
> **Q: With your doctorate from Yale, your review of the declaration, while you served on your three-year term on the board of directors, you found some of the provisions to be *confusing*; is that correct?**
>
> **A: Well, the part about assessments and covering deficits…to me, reading it, *there were three different things in there* that you either had to do or could choose to do.**

(TT 41, 537-539)

***

> **Q: Mr. Frayer, what is your educational background?**
>
> **A: I've got a bachelor's from Penn State, a masters and doctorate from Yale.**
>
> ***
>
> **Q: What were your years of service on the board?**
>
> **A: January 2007 till January 2010.**
>
> ***
>
> **Q: Do you believe before Amendment 2[5] was approved by the**

Board there was some *ambiguity* about who would pay what in terms of assessments?

A: Yes. I could read it, and I was *never clear* on it…

****

Q: And I'm referring to the bylaws, section 2…And this is the provision I'd like to get your thoughts on. It says, "Fix the amount of the annual assessment against each lot at least 30 days in advance of each annual assessment by dividing the adopted budget by the number of lots in Harbor Hills." Did I read that correctly?

A: Yes.

Q: What does that mean to you?

A: Well, it almost reads as if every lot would be assessed the same thing. This always *confused* me…

Q: Do you think reasonable people could read that provision you just read differently?

A: Sure.

Q: Did you ever hear of any two-for-one concept being used before October of 2009 with respect to a homeowner paying twice as much as a vacant lot owner?

A: No, I don't recall hearing anything.

(R 15, 2800, 2803-05)

C. Key Language in Governing Documents and Undefined Terms

The Association's Governing Documents consist of the Articles of Incorporation, Bylaws, and Declaration. The original Declaration was recorded in

1989, and the Amended Declaration was recorded in 1995.[6]

The Governing Documents emphasize a consistent theme of equality. The Plaintiffs' interpretation of the Governing Documents has been consistent: "If you're an owner of property, whether developer or non-developer, whether it's a vacant lot or it's a home, you pay the same assessment." (R49, 54).

A review of the Governing Documents explains how even someone as bright as Dr. Frayer could rationally find the meaning of certain provisions to be ambiguous. The method of calculating assessments begins with Article VII, Section 7 of the Declaration, which provides:

> Section 7. Allocation of Assessments. The total Assessment attributable to the Common Property (exclusive of the Individual Assessments provided for in Section 4)[7] ***shall be determined in the manner more particularly set forth in the Bylaws of the Association.*** Any unpaid Assessments resulting from foreclosure or a deed in lieu of foreclosure shall be spread among the Members and included in the total Assessment attributable to the Common Property. The total costs, fees, expenses and *other liabilities of the Association, as described in this Declaration, due in any given year shall be paid pro-rata, as set forth in attached Exhibit "C" incorporated herein.* (R 33, 5999; P Ex 3).

This takes us to the Bylaws. Specifically, Article VII, Section 2 provides:

> "It shall be the duty of the Board of Directors to… fix the amount of the annual assessment ***against each Lot*** at least thirty (30) days in

[6] The Amended Declaration is the operative declaration. It is simply referred to as the "Declaration" throughout the brief. None of the references herein concern the original 1989 declaration.

[7] Section 4 relates to fines levied for things such as failing to follow the rules of the Design Review Committee, which are not an issue in this case.

advance of each annual assessment period, by dividing the adopted budget ***by the number of lots in Harbor Hills***." (R33, 5943; P Ex 1).

Next, the previously cited provision of the Declaration also takes us to Exhibit "C" which provides:

> The **Owners** of various portions of the Property shall be obligated to pay Assessments on a **pro rata basis** with the total Assessments divided by the total number of assessment units and with the result thereof multiplied by the assessment unit allocated to each interest in the Property as set forth below:
>
> 1. **Residential Unit** – One (1) assessment unit per each Residential Unit owned.
> 2. **Residential Parcel** – One (1) assessment unit per each Lot owned.
> 3. **Commercial property** – One (1) assessment unit for each 500 square foot of property owned.
> 4. Membership Recreational Facility – One (1) assessment unit for each Membership Recreational Facility.
>
> The total assessment units for the Property shall be found by adding the respective assessment units above.

The Declaration defines the term Owner:

> **"Owner" shall mean and refer to the Owner as shown by the records of the Association, *whether it be the Developer*, one or more persons, firms, associations, corporations, or other legal entities of fee simple title to any portion, Lot or parcel of the Property…(R 33, 5975; P Ex 3).**

Accordingly, Plaintiffs argue that all Owners, developers and non-developers alike, are obligated to pay Assessments on a pro rata basis[8]. However,

[8] "It is not uncommon for a developer to be held responsible for its pro rata share of the operation and maintenance costs of a development and the defendant should be held responsible in this case also." *Continental Country Club, Inc. v. Savoie*, 538 So. 2d 464, 467 (Fla 5th DCA 1988)

the terms underlined in Exhibit "C" (and their definitions) all have meanings susceptible to at least two rational interpretations. For example, the definition of Commercial Property from the Declaration provides:

> **"Commercial Property" shall mean any improved or unimproved parcel of land within the Property, which is intended and designed to accommodate retail commercial enterprises…" (R 33, 5972; P Ex 3).**

There are conflicting interpretations of the undefined term "designed". First, the Defendants argue that the word "designed" requires detailed drawings and a constructed building that is in use. In contrast, the Plaintiffs argue that the term means to "conceive and plan."

The jury was provided with competing dictionary definitions of the word "designed." Plaintiffs introduced into evidence a definition from the Merriam Webster Dictionary, Online Edition, which stated "to conceive and plan out in the mind." (R 33, 6101; P Ex 12). In contrast, Defendants introduced into evidence a definition of design from the Oxford American Dictionary, 3rd Edition, 2010, which stated "A plan or drawing produced to show the look and function or workings of a building." (R 35, 6377; D Ex 1).

Defendants argued during the motion *in limine* hearing that it should be up to "the jury" to interpret the term "designed", and the Court agreed. (SR 2, 24 &

55). However, the Court permitted the parties to put on evidence as to whether the Commercial Property was intended to accommodate retail commercial enterprises.

At trial, Defendants' engineering expert, David Springstead, testified that his firm completed the application to change the zoning on the subject property to commercial. Further, he confirmed the Developer's intention for this property to accommodate retail commercial enterprises:

> **Q: When Springstead Engineering prepared this application for rezoning, they were truthful, in that it was proposed to be a use of the property for a commercial shopping center, correct?**
>
> **A: That's correct.**
>
> ***
>
> **Q: So there's no doubt in your mind that there is an intention for this property to accommodate retail commercial enterprises?**
>
> **A: In the future, yes, sir.**

(TT 46, 1179 & 1182)

Next, the term "Residential Unit" is defined in the Declaration as:

> **"Residential Unit" shall mean and refer to any <u>improved property</u> intended for use as a complete and separate single-family dwelling, including, but not limited to, any detached dwelling, patio home, garden home or townhouse unit located within the Property. For the purposes of this Declaration, any such dwelling shall not be deemed to be improved until a certificate of occupancy has been issued by the appropriate governmental authorities for the dwelling constructed or until said dwelling is determined by the Association, in its reasonable discretion, to be substantially complete. (R 33, 6033; P Ex 3).**

The undefined term "improved property" has a direct bearing on the "two-for-one" argument between the parties. Plaintiffs argue that an "improved property" is distinguishable from a "property improvement". From the Plaintiffs' perspective, a "property improvement" consists only of the improvement (i.e., a house), whereas an "improved property" is the aggregate of the subject property (i.e., a lot) and its improvements (i.e., a house). Therefore, according to the Plaintiffs, a Residential Unit would not receive two assessments for both the home and the lot because the Residential Unit has already included the lot as an "improved property". In contrast, according to the Defendants, the Residential Unit would receive two assessments because one assessment would be for the home as the property improvement and a second assessment would be for the lot.

Even the Defendants' accounting expert testified he found the meaning of the term "improved property" to be "confusing" and "ambiguous":

> **Q: Wouldn't you agree that the term improved property as used in the definition of residential unit would mean a lot with an improvement on it, such as a home?**
>
> **A: Well, almost - - I mean, it's kind of *confusing*. It says shall mean and refer to improved lot. I would take improved, again, to be, maybe, utilities, water, things like that. But then it says intended for use as a complete and separate single-family - - so intended almost means that there is not a home there yet.**
>
> **Q: It says improved property?**
>
> **A: Right.**

Q: Ambiguous to you?

A: Some. Yes.

(R 26, 4752-53)

A review of the voting rights provisions in the Declaration, Articles of Incorporation, and Exhibit "B" shed further light on the use of the term "Residential Unit". Significantly, these provisions demonstrate that the Plaintiffs' interpretation of the two-for-one issue and term "property improvement" treats the Owners equally, but Defendants' interpretation leads to an "unfair" outcome that defies common sense.

Specifically, Articles V and VI of the Articles of Incorporation state: "Every Owner of a *Residential Unit* or Residential Property shall be a member of the Association" and "Each Owner will have one (1) vote in the Master Association." (R 33, 5957; P Ex 2). Similarly, Article III, Section 1(c) of the Declaration states: "Each *Residential Unit* or Residential Lot shall be entitled to one vote in all Association matters." (R 33, 5978, P Ex 3).

Turning to Exhibit "B", one can see it shares the identical terms as Exhibit "C" with respect to the terms "Residential Units", "Residential Parcels", and "Commercial Property". (TT 45, 1106-07; R 33, 6032; P Ex 3). Moreover, consistent with Plaintiffs' interpretation of the term "Residential Unit," it provides that the Owners shall have one vote for Residential Unit (not two) and one vote for

a Residential Parcel. Therefore, if the Defendants two-for-one interpretation of Residential Unit was implemented, even Defendant Michael Rich admitted the outcome would be unfair:

> **Q: So does the owner of a residential unit, which we know to be a home, have one vote or does he have two votes?**
>
> **A: Well, according to this document [Exhibit "B"], he has one vote...**
>
> ***
>
> **Q: A guy with a lot has one vote, one assessment, and a guy with a home has one vote and two assessments? It doesn't quite seem fair, does it?**
>
> **A: Well, if I would have wrote those documents, they would have been a lot different. There's a lot of unfair things about the documents.**

(TT 45, 1106-07)

In any event, regardless of whether a person prefers one party's interpretation of "Residential Unit" over the other, it is fair to say the term is reasonably susceptible of having two different meanings.

Third, there is also a dispute over the meaning of the term "Residential Parcel", which is used in Exhibit "C" but "undefined" by any of the Governing Documents. This created confusion as to its meaning. The parties dispute whether the meaning of Residential Parcel is closer to the defined term "Lot" or, in the alternative, whether it is more like the defined term "Residential Property", or is it none of the above. (R 13, 2394-96).

Finally, as Dr. Frayer testified, there was ambiguity associated with the meaning of the deficit provision language in the Declaration which provides:

> "Developer and its affiliate entities may be excused from the payment of Assessments for any property owned by it during such period of time that the Developer shall obligate itself to pay any amount of expenses of the Association incurred during that period not produced by the Assessments receivable from other Members. In any event, the Developer shall be excused from paying the portion of the Assessments allocated to reserves." (R 33, 5998; P Ex 3).

The Developer argued he had the option of paying his share of the assessments or paying the deficit at the end of the year. Plaintiffs contend step one is determining what the share is, and step two is deciding whether to pay the assessments or choose the deficit option.

During the testimony of Michael Rich, Defendants introduced into evidence Defendants' trial Exhibit 8, which stated that the Developer-controlled HOA's interpretation was "***reinforced*** by Florida Statute 720.308", which provides that a developer in control of an association "may be excused from payment of ***its share*** of the operating expenses." (*D Ex 8*; R 37, 6873-76; TT 44, 1021-23). Similarly, Director Tom Warren also testified that the deficit provision was reinforced by 720.308. (TT 46, 1218-20).

At trial, Tom Warren, a Director who testified as a defense witness, candidly acknowledged the flaw with the Developer's interpretation:

> **Q: Can you explain to me as first step, how do we know what the developer's share is if its lots are not included in the initial**

allocation of assessments?

A: I'm not sure I can answer that.

Q: Tough question, right?

A: Well, it's complex, yes.

Q: Hard to know what share you are being excused of, would you agree, until you determine what that share is, right?

A: I guess. I don't know.

(R 46, 1219-20)

In contrast, under the Plaintiffs' interpretation, the Developer's lots, like all other owners, must be allocated its pro rata share of the assessments in the budgeting and assessment process. However, once the Developer and non-developer assessment units are included in the budget allocation, the Developer may be excused from the payment of any assessments for any property owned by it if it had obligated itself to pay the deficit.

In the alternative, if the Developer paid the assessments, he would not be on the hook for any deficit obligations because the Declaration states "The Board of Directors shall levy a supplemental assessment in the amount of the deficit" if the original assessment revenues are insufficient. (R 33, 5999; P Ex 3).

As long as the Developer includes his lots, Plaintiffs did not care either way which option was chosen because the amount owed under either approach was

about the same. (TT 42, 595). The gist of the Plaintiffs' interpretation is that *the Developer cannot know what share he is being excused of until he first determines what that share is by including the lots in the initial pro rata allocation*. (TT 46, 1220; TT 42, 575-76).

D. Florida law provides that ambiguous language requires a jury determination

"The construction of a contract term is ordinarily a question of law so long as the terms used are 'open, unequivocal, clear, undisputed and not subject to conflicting inferences'." *Termaforoosh v. Wash*, 958 So. 2d 1247, 1249 (Fla. 5th DCA 2007). However, if the terms are disputed and rationally susceptible to more than one construction, an issue of fact is presented. *Id.* at 1249.

In the instant case, various undefined terms were highly disputed and understandably subject to conflicting inferences. Indeed, Defendant Director Ed Frayer testified that reasonable people could disagree over the ambiguous provisions. (R 15, 2805).

The courts have found language in declarations, articles and bylaws to be ambiguous where language could be fairly understood in more than one way. *Berkowitz v. Delaire Country Club, Inc.*, 126 So. 3d 1215, 1219 (Fla. 4th DCA 2012)

(Holding that an ambiguity was created where the articles and bylaws of the association were silent as to the format of materials a member could submit to propose changes to governing documents); *Barnett v. Destiny Owners Association, Inc.*, 856 So. 2d 1090, 1092 (Fla. 1st DCA 2003)

.

In *Barnett*, there was a similar dispute between the parties regarding the interpretation of certain language found within the declaration of covenants for a homeowners' association. The appellate court recognized that the last sentence of a particular section in the declaration was susceptible to "at least two meanings". Accordingly, the court held that the section was ambiguous and the trial court erred by prohibiting the introduction of parol evidence to assist in resolving the ambiguity. *Id.* at 1092.

In the instant case, the Declaration and Exhibit "C" have several undefined terms, including "designed", "improved property", and "residential unit". The courts have repeatedly found ambiguities under similar circumstances where the contract language contained undefined terms. *Emerald Pointe Property Owners' Association, Inc. v. Commercial Construction Industries, Inc.*, 978 So.2d 873 (Fla 4th DCA 2008)

(Holding that the term "leak" was undefined in the contract and ambiguous); *Life Care Ponte Vedra, Inc. v. Wu*, 2015 Fla. App. LEXIS 1560 *5-*7 (Fla. 5th DCA 2015) (Affirming the trial court's finding of ambiguity where the contract did not define the words "occupied" or "occupancy"); *Termaforoosh*, 952 So. 2d at 1250 (Reversing a final partial summary judgment where contract failed to define the term "appraisal" and parties submitted competing dictionary definitions).

E. Defendants' remaining criticisms of Trial Court not well-founded

Defendants make three additional arguments. First, the Initial Brief attempts to downplay the conflict between the pertinent provisions of the Declaration and the Bylaws by pointing to a section of the Bylaws which indicates that in the case of any conflict between the Declaration and the Bylaws, the Declaration shall control.

In the instant case, there are numerous ambiguities contained within the Declaration itself, including the various undefined terms discussed *supra*. Moreover, Article VII, Section 7 of the Declaration specifically incorporates the Bylaws into the Declaration by stating that the assessments "*shall be determined in the manner more particularly set forth in the Bylaws of the Association.*" (R 33, 5999; P Ex 3). Accordingly, this language is construed as part of the Declaration, and is *not* subservient. *Wellington Property Management v. Parc Corniche Condominium Association, Inc.*, 755 So. 2d 824, 827 (Fla. 5th DCA 2000)

("The declaration must be construed in light of the bylaw provision specifically incorporated into the declaration"); *Whitley v. Royal Trails Property Owners' Association, Inc.*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005)

("Where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing.").

Second, Defendants cite Article XVII, Section 6 of the Declaration for the proposition that the Board of Directors has the right to make a final and binding interpretation of the Declaration and Bylaws. This provision provides:

> "The Board of Directors shall have the right, ***except as limited by*** any other provisions of this document or ***the Bylaws***, to determine all questions arising in connection with this Declaration and to construe and interpret its provisions, and its ***good faith*** determination, construction or interpretation shall be final and binding…"

In the instant case, the jury specifically found that the Board of Directors acted in bad faith. (R 31, 5576). Moreover, the Board of Directors did not comply with the Bylaws because they failed to place an assessment against each Lot and divide the adopted budget by the number of Lots in Harbor Hills, as required by Article VII, Section 2 of the Bylaws. (R 33, 5943; P Ex 1)

Third, Defendants argue that the jury should not have been able to decide

whether or not the commercial property was designed to accommodate commercial retail enterprises, as set forth in question no. 6 of the Verdict Form. There are three obvious flaws with this argument.

First, the Trial Court properly found Defendants *waived* this issue (R 32, 5724) by agreeing to the verdict form:

> **MR. SMITH: So Plaintiffs and Defense Counsel both - - you can speak for yourself, but the verdict form we find acceptable for the Defendants.**
>
> **THE COURT: Okay.**
>
> **MR. MAIN: It was a joint effort, Your Honor. And we agree.**
>
> **THE COURT: Okay.**

(TT 47, 1371); *Horizon Leasing v. Leefmans*, 569 So.2d 73, 74 (Fla 4th DCA 1990) ("We find unpersuasive Horizon's initial allegation of error in the use of a special verdict form, as Horizon agreed to the form and stipulated to the jury instructions, thereby waiving the matter.").

Second, Defendants repeatedly argued before the Trial Court that the term "designed" used in the Commercial Property definition is "clearly for the jury to decide" and "solely for the jury to decide". (SR 2, 24 & 55).

Third, Florida law provides that it is appropriate for the Court to submit factual issues to the jury in a declaratory judgment action, particularly were there are undefined or ambiguous contract terms which require extrinsic evidence.

Florida Department of Transportation v. Florida Gas Transmission Co., LLC, 126 So. 3d 1095, 1101 (Fla. 4th DCA 2012)

(Court held it was appropriate to submit factual issues to the jury in a declaratory judgment action where the term "compensable interest" was susceptible to more than one meaning and also held that trial court properly admitted extrinsic evidence); *Higgins v. State Farm Fire and Casualty Co.*, 894 So. 2d 5, 19 (Fla. 2004)

("The Legislature clearly contemplated fact-finding in declaratory actions. Section 86.071 expressly provides a mechanism for jury trials when an action under the Act concerns the determination of an issue of fact.").

Indeed, Section 86.071, Florida Statutes, expressly provides:

> **Jury trials.**—When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending. To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury...

Accordingly, for the foregoing reasons, the Trial Court correctly found that ambiguities in the Governing Documents required a jury determination.

III. THE TRIAL COURT CORRECTLY PERMITTED THE INTRODUCTION OF PAROL EVIDENCE AS IT RELATES TO THE INTERPRETATION OF THE GOVERNING DOCUMENTS.

A. Florida courts recognize three types of ambiguities: latent, patent, and "intermediate"

Florida courts have recognized three types of ambiguities: latent, patent, and "intermediate". *Ace Electric Supply Co. v. Terra Nova Electric, Inc.*, 288 So. 2d 544 (Fla. 1st DCA 1973)

; *Life Care Ponte Vedra, Inc. v. Wu*, 2015 Fla. App. LEXIS *8, n. 4 (Fla. 5th DCA 2015). Extrinsic evidence is allowed to explain latent and intermediate ambiguities, but not patent ambiguities. *Ace Electric Supply Co.*, 288 So. 2d at 547; *Crown Management Corp. v. Goodman*, 452 So. 2d 49, 53 (Fla. 2nd DCA 1984)

.

A patent ambiguity is one that appears on the face of a contract, and arises from the use of "defective, obscure, or insensible" language. *Ace Electric Supply*, 288 So. 2d at 547. A latent ambiguity is said to exist when the language employed is clear and intelligible, but a contract fails to specify the rights or duties of the parties in certain situations and extrinsic evidence is necessary for interpretation or a choice among two or more possible meanings. *Ace Electric Supply*, 288 So. 2d at 547; *Crown Management Corp. v. Goodman*, 452 So. 2d at 52.

Florida courts have recognized a third category of "intermediate" ambiguity.

Under this intermediate category, a term can appear on the face of a document, but the words used are "sensible" and admit of two interpretations, as opposed to being "defective, obscure, or insensible." *Ace Electric Supply Co.*, 288 So. 2d at 547; *Life Care Ponte Vedra, Inc. v. Wu*, 2015 Fla. App. LEXIS 1560 at *8, fn. 4. In other words, a single term can be both patent and latent. The rationale for the "intermediate" category provides:

> **"It has been suggested that those cases in which words all are sensible and have a settled meaning, but at the same time consistently admit of two interpretations according to the subject matter in the contemplation of the parties, constitute an *intermediate class partaking of the nature both of patent and latent ambiguities, and in such case evidence ought to be admitted* showing the circumstances under which the contract was made in the subject matter to which the parties refer."**

Ace Electric Supply Co., 288 So. 2d at 547.

In *Life Care Ponte Vedra, Inc. v. Wu*, this Court referenced the "intermediate" category of ambiguities, and held that the trial court should have considered extrinsic evidence where the contract did not define the words "occupy" or "occupancy." This Court stated:

> **"Here, we agree with the trial court that the Contract was ambiguous as to the meaning of occupancy, but believe that the court should have considered extrinsic evidence of the parties' intent.**
>
> *******
>
> **The parties disagree about whether the ambiguity is latent or patent… We find the definition of occupancy to be a latent ambiguity or, at the very least, it falls into the category of "intermediate" ambiguities. *See Ace Elec. Supply Co. v. Terra***

> ***Nova Elec., Inc.*, 288 So. 2d 544 (Fla. 1st DCA 1973). Thus, extrinsic evidence should have been considered."**

Id. at *8, and n. 4

In the instant case, the term "designed" does appear on the face of the definition of Commercial Property, and the parties have two separate interpretations of its meaning. Moreover, the term is *normal* as opposed to "defective, obscure or insensible." Indeed, at the hearing on their Motion in Limine, Defendants' counsel argued:

> "With respect to the commercial property argument, you're sitting here with the words intended and designed for commercial retail enterprises. Intended and designed are clearly ***very normal words***…That is clearly for the *jury* to decide" (SR 2, 24)

The courts have frequently found contracts with undefined terms to be either "latent" or "intermediate" ambiguities. *Emerald Pointe Property Owners' Association, Inc. v. Commercial Construction Industries, Inc.*, 978 So.2d 873 (Fla. 4th DCA 2008 (Finding a latent ambiguity where the term "leak" was undefined in the contract and ambiguous, and admitting extrinsic evidence); *Life Care Ponte Vedra, Inc. v. Wu*, 2015 Fla. App. LEXIS 1560 *5-*7 (Fla. 5th DCA 2015) (Finding latent or intermediate ambiguities where the words "occupied" or "occupancy" were undefined, and admitting parol evidence).

In the instant case, the undefined terms used were latent ambiguities or, at the very least, intermediate ambiguities.

B. Parol evidence is admissible to show course of dealings and intentions of parties

This Court has looked to the conduct of the parties in their course of dealings prior to, and *during*, the contract to determine its meaning. *Brevard County Fair Association, Inc. v. Cocoa Expo, Inc.*, 832 So. 2d 147, 152 (Fla. 5th DCA 2002)

("We conclude the trial judge properly relied on the parties' course of dealing during the lease to determine the meaning of the ambiguous provision in the lease."); *Danforth Orthopedic Brace & Limb, Inc. v. Florida Healthcare Plan, Inc.*, 750 So. 2d 774, 776 (Fla. 5th DCA 2000)

(Reversing entry of summary judgment where there were there were ambiguities and factual issues because of the parties' intent "as evidence by the parties' course of dealing both prior and subsequent to the original contract.").

At trial, Timothy Moulton confirmed the course of dealings between the parties relating to treating vacant lots and homes equally:

> **Q: So, as it currently stands, then, you own a home within Harbor Hills and you own the adjacent vacant lot, and you've owned both those pieces of property since April 1999; is that correct:**

A: Correct.

***

Q: And, in particular, as it relates to the time period that the jury is interested in, for the years 2005 through 2010, is it your testimony that the quarterly assessment that you paid for the lot on which your home sits is the same as the quarterly assessment that you paid for the adjacent vacant lot?

A: Yes.

(TT 40, 408-09)

Similarly, Tom Bacsik testified that he also owned both a vacant lot and a home within Harbor Hills during the 2005-2009 timeframe, and paid the same quarterly assessment for his home as his vacant lot. (TT 40, 401-03).

During the bench trial in 2011, Michael Rich testified that homeowners were already paying twice as much as vacant lot owners back in 2007 and 2008, and told the Court that lots have been assessed on a two-for-one basis "since I've been here [Sept. 29, 2003]." (R 8, 1369-70 & 1374; TT 44, 1058). However, at the jury trial, Michael Rich conceded that Plaintiffs' version of events is correct and that the Developer made a mistake:

Q: Again, this may be confusion on my end, Mr. Rich, but I thought about two minutes ago we established that Tim Moulton and Tom Bacsik and all 32 lot owners did not pay two assessments for the home and one for the lot. They paid one assessment for the lot and one assessment for the home.

A: But I agreed with you several minutes ago, sir, that we made a mistake.

Q: Well, it looks like you made a mistake there when you told the Court that it was two-for-one back in 2005.

A: Ok. We - - we - - I told you - - I'm here in court today and I'm telling the court that the HOA made a mistake. We told our auditors that we made a mistake and we - - we told everybody here that, depending on how the court rules, we will do whatever the court says we're supposed to do.

(TT 44, 1058)

Accordingly, because the contract contained ambiguous provisions, the Court properly admitted parol evidence relating to the course of dealings of the parties.

IV. THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS OR LACK OF STANDING.

Defendants argue that the Court should have entered a directed verdict based upon the statute of limitations to reduce the damages for the years 2005 and 2006. As a threshold matter, the Trial Court properly noted that to the extent the Developer seeks to reduce damages, the Developer did not file a timely motion for remittitur, nor did it suggest a figure to the Court. (R 32, 5725). *Hendry v. Zelaya*, 841 So.2d 572, 575 (Fla 3rd DCA 2003) ; Fla. Stat. §768.74.

Defendants argue that the statute of limitations began to run in "November or December of 2004" when the budget was prepared for 2005. The lawsuit in this matter was filed on February 24, 2010. Plaintiffs' contended (at trial and in pleadings) that "from 2005 to 2010" the Developer did not properly pay its fair

share of assessments owed for each year. (R 32, 5724).

The statute of limitations for a contract founded on a written instrument is 5 years. Fla. Stat. §95.11(2)(b). The statute of limitations for breach of fiduciary duty is 4 years. Fla. Stat. §95.11(3)(o); *Berg v. Wagner,* 935 So.2d. 100 (Fla. 4th DCA 2006)

.

"A cause of action accrues when the last element constituting the cause of action occurs." Fla. Stat. §95.031(1); *Penthouse North Association v. Lombardi*, 461 So.2d. 1350, 1352 (Fla. 1984)

(directors breached fiduciary duties in 1966, but claim filed 13 years later was not time barred since damages did not actually materialize until 1981).

Defendants miss the mark in suggesting that perhaps the statute should begin to run in "November or December of 2004" when the budget for 2005 was adopted[9]. Plaintiffs submitted evidence from which the jury could find that the actual damage in the form of the Developer's underpayment for calendar year 2005

[9] The budget does ***not*** provide an indication of how much the Developer would pay for 2005. For example, Plaintiffs Exhibit 9 contains the 2005 budget in which the "Developer subsidy" is listed as "$58,566." (R 33, 6075). In contrast, Plaintiffs' Exhibit 21 contains the Audited Financial Statement for the year ending December 31, 2005,which indicates that the Developer's total contribution to the operating fund was actually only "$8,808," or 15% of the estimated budget amount. (R 34, 6262).

did not occur until January 1, 2006 at the earliest[10], or September 5, 2006 at the latest[11]. Accordingly, the Court properly concluded that the suit was filed on February 24, 2010 before the (5) year statute of limitations period expired[12].

The Court also properly found that the breach of fiduciary duty 4 year statute of limitations does not impact the amount of damages awarded against Michael Rich. (R 32, 5725).

[10] According to the Audited Financial Statement from 2005 (Plaintiffs' Exhibit 21), the Developer opted to wait until the year ended December 31, 2005, and then paid operating expenses incurred and not produced by operating revenues. (R 34, 6267)

[11] Plaintiffs introduced into evidence, as Plaintiffs' Exhibit 23, a letter indicating the Developer was still seeking confirmation as to the amount it would pay for calendar year 2005 as late as September 5, 2006. (R 34, 6351).

[12] Plaintiffs are entitled to recover for continuing damages for the remainder of 2010 after suit was filed on February 24, 2010, since damages are determined up through the date of trial, not on the date the suit was filed. *Tampa Transit Lines, Inc., v. Smith,* 155 So.2d. 557, 559 (Fla. 2nd DCA 1963)

("The plaintiff's medical expenses and loss of wages to date of trial were shown to aggregate close to $4,000.00…"

It is undisputed that Shepherd's began mowing the Commercial Property in October 2009. (R 32, 5725; TT 42, 679-81). Plaintiffs presented expert testimony which supports the jury's award of $2,400, which is less than 20% of the expert's estimated cost of mowing the commercial property for only one year. (R 32, 5725). Therefore, the Court correctly found that a reasonable inference from the evidence submitted by Plaintiffs is that damages could exceed the $2,400 awarded. (R 32, 5725).

Finally, as to the standing issues, Plaintiffs brought this derivative action on behalf of other homeowners similarly situated for the years 2005 through 2010. Ms. Line, having lived in the property from 2002 to the present, certainly had standing to bring this derivative action on behalf of herself and other similarly situated for the years 2005 through 2010.

As for Mr. Bell, the evidence shows that he purchased his property from the Developer in 2007. Defendants argue that he did not have standing for the years 2005 and 2006 unless he automatically because a member of the Association without the act or cooperation of himself. However, he did automatically become a member pursuant to Article V of the Articles of Incorporation, which states: "A membership shall be transferred automatically by conveyance of the Residential Unit or Residential Property." In any event, Ms. Line clearly had standing to obtain all the relief provided for by the Court and jury in this action.

Accordingly, Defendants' standing argument lack merit.

V. THE COURT CORRECTLY FOUND THAT THE BREACH OF FIDUCIARY DUTY CLAIM AGAINST MICHAEL RICH PRESENTED FACTUAL ISSUES REQUIRING A JURY DETERMINATION.

Defendants argue that jury should not have been able to determine whether Michael Rich breached his fiduciary duties. As grounds, the Initial Brief argued there was no evidence that he worked "directly" for the Developer or that he was a "partner".

In reality, Mr. Rich testified that "I'm the president of the Harbor Hills Development, L.P. (R 8, 1357). Further, Lu Ann Frazee, the CFO of the Developer, testified that Michael Rich is the "president" of the Developer, that he receives "compensation" from the Developer, and that he is a "general partner" of the Developer's holding company, HHCC. (TT 44, 921-22 & 928).

Moreover, Michael Rich repeatedly holds himself out as the Developer. He testified at the bench trial that "I became the Developer sometime in 2004." (R 8, 1357). Similarly, he testified at the jury trial that "I've been the Developer at Harbor Hills since 2003." (R 44, 1001).

At trial, Mr. Rich gave conflicting accounts of who decides to use HOA money to mow his property. On the one hand, he testified that at the trial that "I'll stop doing it tomorrow" if additional Directors besides Dr. Frayer tell him that it's

improper for the HOA to be paying to mow the Developer' commercial property. (R44, 1080). On the other hand, he testified that he asked his landscaping supervisor, Carl Gessner, "fifty times" to stop mowing the commercial property, and the Initial Brief blames Mr. Gessner. (R 44, 1075). Tellingly, at trial Mr. Gessner testified he didn't even know that the Developer owned the Commercial Property, and he never sent the Developer an invoice. (R 42, 707 &709)

Section 617.0834 mentions at least two different ways the jury could have found Mr. Rich liable for breach of fiduciary duties. First, a director can be personally liable if a director commits a "reckless" act, defined as something "so obvious that it should have been known." Second, a director can be liable for self-dealing if he benefited "directly *or indirectly.*" *Fla. Stat.* §617.0834.

In the instant case, as an owner, president, and receiver of compensation from the Developer, there is some evidence that Michael Rich, at minimum, indirectly benefited by having the HOA mow his commercial property.

There is also evidence that is was obvious that he should have known better (and was therefore reckless under 617.0834) since even a Director appointed by the Developer, Ed Frayer, testified that it was unfair and inappropriate to use HOA funds to mow the Developer's property. Why would Mr. Rich tell someone "50 times" to stop mowing it if there was nothing wrong with mowing it? Further, Mr.

Rich's testimony that he could "stop doing it tomorrow" shows that he personally had control over the improper actions.

Under these circumstances, the Court properly found there were factual issues for the jury to consider. *Terry Taylor v. Wellington Station Condominium Association, Inc.*, 633 So.2d. 43, 45 (Fla. 5th DCA 1994)

("Taylor served on the Association's board of directors and was listed as an officer of the developer;" Court reversed summary judgment and held that issue of whether Taylor breached his fiduciary duty is "one for the jury"); *Berg v. Wagner,* 935 So.2d. 100, 101 (Fla. 4th DCA 2006)(Reversing summary judgment based upon immunity under Section 617.0834 on the grounds that a factual issue was presented as to whether the directors engaged in self-dealing or bad faith.).

VI. COLLATERAL ESTOPPEL AND ISSUE PRECLUSION ARGUMENTS WERE NOT PRESENTED TO TRIAL COURT AND LACK MERIT.

As a threshold matter, Defendants are precluded from raising these collateral estoppel and issue preclusion arguments on appeal because these issues were not presented to the Trial Court in either the motion for directed verdict or in the post-trial motion for JNOV, DV and New Trial. (TT 43, 779-792; R 31, 5585-5608). *Mariani v. Schleman*, 94 So. 2d 829, 831 (Fla. 1957) ("Matters not presented to the trial court by the pleadings and evidence will not be

considered by this court on appeal."); *Dober v. Worrell*, 401 So. 2d 1322, 1323-1324 (Fla. 1981) ("[A]n appellate court will not consider issues not presented to the trial judge").

Next, the Initial Brief incorrectly states that the "identical issues" were "already extensively litigated" in the bench trial. This is inaccurate. For example, the definition of the term "Commercial Property" in effect from 2005 to 2010:

> "Any improved or *unimproved* parcel of land within the property which is intended and designed to accommodate retail commercial enterprises." (R. 33, 5972; P. Ex 3).

In contrast, the definition of commercial property used in Amendment 2 is:

> "One (1) assessment unit for each 500 square feet of each *developed commercial building* that has been *constructed* and is *in use*. This square foot calculation is for improved, usable commercial space, as opposed to land being zoned or *designated* for commercial use." (R. 35, 6381-83; D Ex 3).

There is a dramatic difference between an "unimproved" parcel of land versus the new definition, which was readily conceded at trial by the Developer's engineering expert, David Springstead:

> **Q: Would you agree with me that, as an engineer, it would be possible to have an unimproved parcel of land without a *developed commercial building*?**
>
> **A: That's correct, yes.**
>
> **Q: It would be possible to have an unimproved parcel of land without a building that has been *constructed* and *in use*?**

A: Correct.

(TT. 46, pp. 1190-191)

At the bench trial, Defendants' counsel stated to the Court:

> **"*The issue of liability of the Developer to pay assessments, I think, by agreement, we said that's for another day* because we don't know what the court's gonna rule as to these issues. The court is hearing, *today*, item number four in their request, and that's *the rights or limits on the right of the developer to unilaterally amend the declaration*."**

(R 8, 1312).

Obviously, it is challenging for Defendants to now claim that all these issues were "already extensively litigated" in the bench trial. Further, as a matter of common sense, a 3 ½ hour bench trial could not possibly cover all of the issues litigated over a five day jury trial with 19 witnesses.

Finally, the Initial Brief fails to disclose that Amendment 2 did not go into effect until January 1, 2011, and therefore could not possibly have covered issues relating to the 2005 to 2010 assessments. (See fn. 1). Accordingly, these collateral estoppel and issue preclusion defenses lack merit and, in any event, are improperly raised on appeal for the first time.

CONCLUSION

The Final Judgments, and Order denying Defendants' motion for DV and JNOV, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2015, I electronically filed the foregoing with the Clerk of the Courts by using the eDCA portal, and sent by electronic mail to: **Phillip S. Smith, Esquire,** at: phils@mclinburnsed.com, mattb@mclinburnsed.com, lindseyp@mclinburnsed.com and **Donna Greenspan Solomon, Esquire** at Donna@SolomonAppeals.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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