IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,268

TOWER HOUSE CONDOMINIUM, INC., etc.,

Petitioner,

vs.

MERTON MILLMAN and LILLIAN ARONOFF,

Respondents.

AN APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL, CASE NO. 80-1468

PETITIONER'S REPLY BRIEF

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EXPLANATION OF SYMBOLS

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References to the transcript of the trial of this cause will be prefixed by the symbol "T".

References to the Appendix to this Reply Brief will be prefixed by the symbol "A".

References to Respondents' Answer Brief will be prefixed by the symbol "RB".

STATEMENT OF THE CASE AND FACTS

With regard to the applicability of Chapter 711 or Chapter 718, the Association here makes clear that it asserts that Chapter 711 only applies to the creation of the TowerHouse Condominium, as that was the law in effect at the time. The actions at issue are governed by Chapter 718.

With regard to the Respondents' "new theory" argument, that is simply not the case. No "new theories" have been advanced. The argument is the same, although perhaps explained a little differently. (R.54-62).

Frankly, the Respondents' vehement attacks on the Association's version of the facts (RB. 7) is puzzling. The Association's Initial Brief in the District Court of Appeal stated, in the Statement of the Case and Facts, on page 5, that Mr. Millman "admitted that 172 parking facilities were necessary. (T.46)". (A.1). The Appellee Unit Owners' Statement of the Facts and Case did not take issue with that statement. (AA.2-4). Why are Respondents now reacting so emotionally to what the Association in its Initial Brief identified as a "controverted" fact, at page 10?

Respondents' reference in a footnote on page 9, and in the so-called "Soliloquy", of their brief to the "south parcel" is outside the record. Respondents tried to bring this subject matter up at the trial, and objections to it were sustained. (T.32, 37-38). Indeed, Respondents' counsel admitted that:

> Mr. Glass: So that the proffer does not go unchallenged, we will talk about the south lot at some other day and some other court, if that becomes necessary. (T.40)

REPLY TO RESPONDENTS' POINT I

(As stated by Respondents)

> THE SUPREME COURT WILL NOT ANSWER A CERTIFIED QUESTION OF GREAT PUBLIC "INTEREST" THAT IS UNSUPPORTED BY THE RECORD.

Respondents here attempt to justify the trial court's decision on the basis that the acquisition of the parking lot was a "form of mismanagement", and that there was "no reasonable justification for the acquisition". Questions of necessity, or justification, are irrelevant. Under the "business judgment" rule, wide discretion is vested in directors of a corporation in the exercise of their powers. Sec. 607.111(5), Fla. Stat.

> In Florida, corporate directors generally have wide discretion in the performance of their duties and a court of equity will not attempt to pass upon questions of the mere exercise of business judgment, which is vested by law in the governing body of the corporation.

Lake Region Packing Association, Inc. v. Furze, 327 So.2d 212, 216 (Fla. 1976). Therefore, just as a court of equity cannot be used to control the exercise of discretion by a private corporation, University of Miami v. Militana, 184 So.2d 701 (Fla. 3d DCA 1966), nor an administrative agency in the exercise of power vested in it, Hillsborough County Aviation Authority v. Taller & Cooper, Inc., 245 So.2d 100 (Fla. 2d DCA 1971), neither may it

here question the exercise of the discretion and judgment of the Board of Directors of the Association, as ratified by 81% of the unit owners, to purchase the parking lot. The Board of Directors is the business manager of the corporation, and so long as it acts in good faith, its orders are not reviewable by the courts, in the absence of fraud, self-dealing, etc. Lake Region Packing Association, supra.

This "business judgment" rule has been followed with respect to condominium and community associations in other jurisdictions. The California courts have held that every presumption exists in favor of the good faith of the directors of a community association, and that interference with such discretion is not warranted in doubtful cases. Neither the courts nor minority shareholders may substitute their business judgment for that of the directors. Beehan v. Lido Isle Community Association, 70 Cal. App. 3d 858, 117 Cal.Rptr. 528 (1977). The New Jersey courts have held that absent a demonstration of a board's lack of good faith, self-dealing, dishonesty or incompetency, its determination that an emergency exists requiring a special assessment should not be judicially reviewed. Papalexiou v. Tower West Condominium, 167 N.J. Super. Ct. 516, 401 A.2d 280 (1979).

Respondents would have the courts supervise and oversee all decisions of a condominium association. Respondents are asking this Court to substitute its judgment for that of the elected Board of Directors, and the 81% of the unit owners who voted in

favor of the purchase, and the 97.6% who acquiesced by paying the special assessment.

That is not the role of the courts, nor the issue here. The only issue is that one raised by the certified question: whether 100% approval was required.

REPLY TO RESPONDENTS' POINT II

(Petitioner's Point I)

(As certified by the District Court of Appeal)

> WHETHER A CONDOMINIUM ASSOCIATION MAY, UPON APPROVAL BY AT LEAST TWO-THIRDS BUT LESS THAN ALL CONDOMINIUM UNIT OWNERS, PURCHASE A SUBSTANTIAL TRACT OF ADJACENT LAND FOR USE BY ALL UNIT OWNERS AS PARKING SPACE IN ADDITION TO THE PARKING SPACE DESIGNATED AS A COMMON ELEMENT BY THE DECLARATION OF CONDOMINIUM, THEN LEVY A PRO-RATA SHARE OF THE PURCHASE PRICE AGAINST THOSE UNIT OWNERS WHO WITHHELD APPROVAL, WITHOUT FIRST SUBMITTING THE PROPERTY TO CONDOMINIUM OWNERSHIP BY AMENDMENT TO THE DECLARATION OF CONDOMINIUM.

The Association will, in this portion of its reply, respond to the various subsections as set forth in Respondents' brief.

Section 617.021, Florida Statutes

Respondents' "expressio unius est excluso alterius" argument, (R.B. 14-15), ignores the fact that Section 718.111(4) is not a limiting statute. Such a construction as urged by Respondents would mean that a condominium association does not have the power to buy even one typewriter, as their is no mention of office equipment in the Condominium Act or the Association's Articles of Incorporation or By-Laws.

Respondents' argument that some of a corporation's Section 617.021 powers are inconsistent with those enumerated in the Condominium Act is of no help to their position. Section 718.111(4)'s broad grant of powers contains only one limitation: "if not inconsistent with this chapter". Therefore, using one of Respondents' examples, an association can dispose of part of its property and assets, Section 617.021(11), so long as the disposition is not inconsistent with the Condominium Act, and so long as it is accomplished in accordance with the declaration and bylaws.

Respondents also attempt to strictly confine a condominium association's activities to the boundaries of the property submitted to the condominium form of ownership. (RB. 16-17). If this argument were to hold any water, then:

1. No condominium association could assess its unit owners for its obligations under a recreation lease (for the leased property is not submitted to the condominium form of ownership). This would mean the association could not pay the rent to the developer/lessor, nor would it have the funds to perform the maintenance and other obligations imposed under the typical net-net recreation lease.

2. No condominium association could expend funds to challenge a neighboring property owner's request for a zoning variance, which might impair the unit owners' use and enjoyment of the condominium property.

3. No condominium association could get involved in any local political activities, even though the results of that

activity could have a profound affect on the unit owners' use and enjoyment of the condominium property.

Section 718.111(12), Florida Statutes

Respondents' argument regarding the effective date of the statute was not raised below, either in the trial court or the District Court of Appeal. Respondents should not be heard to raise this point for the first time before this Court.

Respondents argue that the purpose of Section 718.111(12) was "...so that (the unit owners) might get the developers out of their hair once and for all...". The statute apparently has not succeeded, as the Association still has the recalcitrant builder of the condominium in its hair.

Waterford Point v. Fass

The Association takes issue with the statement (R.B. 22) that the Association "primarily relies upon" Waterford Point Condominium Apartments, Inc. v. Fass, 402 So.2d 1327 (Fla. 4th DCA 1981). That is just plain inaccurate.

The Association does find interesting Respondents' "direct line" into Judge Letts' thought processes. The Association would suggest that the Fourth District's refusal to follow the Third District's opinion in this case was more based on a desire to avoid what it clearly recognized as bad law.

Finally, Respondents are incorrect in stating that the recreation lease land at Waterford Point was part of the condominium property. The unit owners did not own the land, the developer did. Had the unit owners owned it, there would not have been any lease.

"Unless Otherwise Provided in the Declaration...."

Respondents' argument regarding the consent of all unit owners before they may be burdened with additional expenses ignores a crucial fact: the Respondent Unit Owners gave their consent to the Association's power to purchase the land when they accepted the deed to their units, subject to:

> 1. All the terms and conditions of that certain declaration of condominium of Towerhouse, a Condominium, and the exhibits attached thereto...(Plaintiff's Trial Exhibit No. 4).

See White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 4th DCA 1979).

The argument is also based on a complete misreading of Pepe v. Whispering Sands Condominium Association, Inc., 351 So.2d 755 (Fla. 2d DCA 1977). Pepe holds that the percentage of the common expenses which a unit owner is obligated to pay may not be changed without his consent. Respondent MILLMAN, for example, pays 1.1407370% of the common expenses of TowerHouse Condominium. This percentage is the "share" which cannot be changed without the unit owner's consent. Pepe does not hold that the amount of the assessment itself may not be changed without consent. If this were the rule, the Association's budget could never be increased without every unit owner's consent. That is not the law, nor is it what the condominium documents provide. See Article XI, Declaration of Condominium (Plaintiff's Exhibit No. 1); Article VII, §3, By-Laws (Plaintiff's Exhibit No. 2); Secs. 718.112(f), (h), Fla. Stat.

Further, in Pepe, the board of directors attempted to do by resolution what had to be done by amendment to the declaration of condominium, as the consolidated budget concept was expressly contrary to the declaration. In the instant case, the purchase was not only contemplated by the Declaration and By-Laws, but also accomplished in accordance with the Declaration and By-Laws.

Similarly, Respondents' quotation from Mr. McCaughan's article suffers from the same distorted view of what is meant by a "change" in a unit owner's share of the common elements and common expenses. Mr. McCaughan, at page 38, is discussing, for example, changing Respondent MILLMAN's percentage from 1.1407370% to, say, 1.5%. McCaughan, "The Florida Condominium Act Applied", 17 U.Fla.L.Rev. 1, 38 (1964).

The relevant section of Mr. McCaughan's article is that cited by the Association in its Initial Brief, in which he discusses Section 711.13(2), now 718.113(2), Florida Statutes. Id. 47-48. Mr. McCaughan's view is the same as the Association's: if the declaration provides for the acquisition, it may be accomplished, pursuant to the declaration. If it does not provide for it, the declaration must be amended.

Absurd Result

Respondents here want the court to place a "brake" on the Association "gobbl[ling] up expensive, huge chunks of Miami Beach real estate...." Respondents apparently have no faith in their fellow unit owners. A condominium association is not an amorphous monster with an insatiable appetite. It is instead an

association of unit owners. This Association cannot buy any property costing more than $20,000 without the affirmative consent of 75% of its members. As Professor Boyer has written, in discussing Section 718.110(6), Florida Statutes:

> This provision as initially enacted (Fla. Stat. §711.06[3] [1975]), seemed to envision that such additional common elements would be derived from land or property interests owned or possessed by the association.... Undoubtedly, the simplest way for the acquisition of additional common elements would be for the association to purchase or acquire the land and then submit it to condominium ownership via an amendment to the declaration.
> ...
> In the case of "buying out" an unpopular "rec" lease, or in acquiring new facilities for recreational purposes, the liberal interpretation indicated above would facilitate the transaction. There is, of course, a disadvantage to non-approving owners who may be outvoted in the meetings deciding on such activities. Obviously, their assessments will be increased to pay for the acquisition and the common expenses for maintenance and operation thereafter, and their "parcels" may be encumbered by possible liens in connection therewith. (See infra §39.45 [7]). Perhaps the answer is simply that that is the nature of condominium ownership.

3 Boyer, Florida Real Estate Transactions, §39.26, pp. 39-119-120 (1981). (Emphasis supplied).

By-Laws

Here, Respondents' argument must be followed to its absurd conclusion. By arguing that any acquisition of property which "enlarges the common elements" constitutes a "material" change in a unit owner's parcel, they urge a construction of the Condo-

minium Act which prohibits an association from accepting conveyance of title to even a narrow strip of land, for free!

Respondents' quotation from James v. Gulf Life Insurance Co., 66 So.2d 62, 63 (1953), in which this court was construing a life insurance policy, sums up this whole case. In James, this court stated that:

> An isolated sentence of the policy should not be construed alone, but it should be construed in connection with other provisions of the policy in order to arrive at a reasonable construction to accomplish the intent and purpose of the parties.

Id. at 62. Respondents' argument about not placing one party at the mercy of the other "unless it is clear that such was the intention..." Id. at 63, is precisely the point. The condominium concept is based on the theory that a man's home is not his castle when it is a condominium unit. The majority (or 75%) rules. What Respondents are urging, by harping on isolated provisions of the Condominium Act taken out of context, is not democratic rule by the majority or 75%, but instead tyranny by a minority of two.

REPLY TO RESPONDENTS' POINT III

(Petitioners' Point II)

WHETHER THE COURT BELOW ERRED IN DETERMINING THAT THE PURCHASE OF THE ADDITIONAL PARKING AREA MATERIALLY MODIFIES THE APPURTENANCES TO A UNIT, THEREBY REQUIRING AN AMENDMENT TO THE DECLARATION OF CONDOMINIUM WHICH MUST BE APPROVED BY ALL UNIT OWNERS.

The absurdity of Respondents' continued grasph on Section 718.110(4) to justify their refusal to pay becomes apparent

here. Respondents have offered no authority to dispute the clear authority of the Association to acquire (i.e., sign a contract for purchase, and accept a deed to) the subject property upon 75% approval. Instead, Respondents argue against this authority by insisting that the Association cannot add it to the common elements without 100% approval.

And what if the property is never added to the common elements? Section 718.114 allows an association to acquire possessory interests in all kinds of land for recreation purposes without adding the land to the common elements. Why should a parking lot be subject to a different rule? What if the Association had merely entered into a long-term lease of the subject parking lot? Do the two Respondent Unit Owners mean that such lease would also require their express consent?

Respondents' citation of Ackerman v. Spring Lake of Broward, Inc., 260 So.2d 264 (Fla. 4th DCA 1972), (R.B. 34), completely misreads the case. The court held the recreation area was common elements because it had been expressly included within the legal description of the property submitted to condominium ownership in the submission statement of the declaration of condominium. In that case the developer, frankly, blew it: the normal procedure for a recreation lease is to not describe it in the submission statement, and thereby not submit it to condominium ownership.

Respondents' description of Gundlach v. Marine Towers Condominium, Inc., 338 So.2d 1099 (Fla. 4th DCA 1976) is also

wrong. That parking lot was expressly found to not be part of the common elements.

Respondents' footnote citation to Section 718.49(sic) is completely irrelevant. They are quoting from the preamble to Section 718.401, which deals with both recreation leases and "ground" leases. In a ground lease condominium, nothing is owned in fee simple. Instead, the land on which the condominium is located is leased to the association. The unit owners do not own their share of the common elements in fee simple; they only hold an estate for years.

Therefore, the District Court erred in determining that the purchase of the parking area materially modified the appurtenances to the Respondents' units, requiring an amendment to the Declaration of Condominium which must be approved by the Respondents.

REPLY TO RESPONDENTS' POINT IV

(Petitioners' Point III)

WHETHER A CONDOMINIUM ASSOCIATION MAY ASSESS ITS UNIT OWNERS THEIR PRO RATA SHARE OF THE COST OF ACQUISITION OF PROPERTY BY THE ASSOCIATION.

The Respondents have completely blown the Association's argument on this point out of proportion. The Association's point is simple. If the Association has the power to do it, it has the power to assess its unit owners for their share of the cost of doing it.

REPLY TO RESPONDENTS' POINT V

(As stated in Respondents' Brief)

THE PETITIONERS' BRIEF DOES NOT SUPPORT CONFLICT JURISDICTION UNDER ARTICLE V, § 3(b)(3) OF THE FLORIDA CONSTITUTION.

This point is moot. This Court having accepted jurisdiction, argument about whether or not the District Court's opinion "expressly and directly" conflicts with other opinions is academic.

One statement however, does deserve comment. Respondents state that the issue before this Court is whether a condominium association has the power "to make a real estate investment". (R.B. 41). This is a gross distortion of the case. The Association is not speculating in the subject property with an eye toward producing capital gains or investment income. This is a parking lot purchased for the purpose of providing the unit owners with the number of spaces which the Declaration of Condominium says are to be available to them. (Article IV [D], Declaration of Condominium).

REPLY TO RESPONDENTS' CONCLUSION

Even though ability to pay is not an issue in this case, and was never raised below, Respondents, now bring it up. Once again, their argument is fallacious.

A unit owner's ability to pay an assessment has nothing to do with the legality of the assessment. In the instant case, what if the subject assessment had been for improvements to the lobby, pool area, etc.? What strained interpretations of the Condominium Act and the condominium documents would Respondents resort to in order to avoid payment of their fair share?

Respondents ask, "what if they can't afford the expense?" (R.B. 43). The answer is, that is the condominium way of life. Under the facts of this case, references to individuals in more modest condominium developments, living off their social security checks, are just another red herring. It is extremely doubtful that an assessment of this magnitude would have been affirmatively approved by 81% of the unit owners in such a condominium.

The answer to the concerns raised in Respondents' Conclusion is very simple. If a unit owner cannot afford an assessment, and must sell his unit as a result, so be it. For better or for worse, that is "the condominium way of life". However harsh the result to an individual, any other ruling would destroy the viability of a condominium as a form of housing in this state. If the actions of a condominium association were to be governed by 100% of its unit owners' ability to pay for the expense of those actions, no action could ever be taken by any condominium association. Any such ruling would only have this Court's imprimatur to tyranny by the minority.

The so-called "Soliloquy by a Condominium Unit Owner" (R.B. 2-4) deserves some comment here. The supposed ramblings from an

anonymous unit owner exhibit the same lack of understanding of the condominium concept and condominium law as counsel's arguments in the brief itself. The supposed "facts" contained in the soliloquy are, of course, not supported by the record.

The answer, of course, is very simple. If the Respondents do not like what their fellow unit owners have decided to do, they can move out.

CONCLUSION

Based on the foregoing, the Association had the power to purchase the parking lot in the manner it did. The Respondent Unit Owners' approval was not required, either by the Condominium Act or the subject Declaration of Condominium.

Therefore, the opinion of the District Court should be quashed, and the Final Judgment of the trial court reversed, and remanded with directions to enter judgment for the Association, as prayed for in its Complaints.

Respectfully submitted,

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By _____
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief and Appendix were furnished by mail this 6th day of January, 1982, to: ROBERT GOLDEN, ESQ., Attorney for Respondents, Suite 1205, 14 Northeast First Avenue, Miami, FL 33132.

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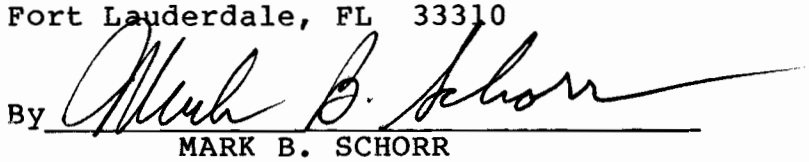
By 
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