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IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 64,380

PENTHOUSE NORTH ASSOCIATION, INC.,

Petitioner,

vs.

REMO M. LOMBARDI, et al.,

Respondents.
_____/

BRIEF ON THE MERITS OF RESPONDENTS LOMBARDI, SUBRIC & NOVOTNY

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PREFACE

The petitioner association will be referred to as the plaintiffs and the respondents will be referred to as the defendants.

The following symbol will be used:

R - Record.

STATEMENT OF THE CASE AND FACTS

We cannot agree with plaintiff's statement of the case and facts because it contains statements which are not true. For instance, on page 1 of plaintiffs' brief it is stated in the fourth paragraph that the purchase agreements: ". . . stated that the rent would be a fixed amount, with no escalation." This is not true. The agreements (R 174) contain no such statement.

Since this case comes before this Court on certified conflict between the decision of the Fourth District in the present case and the decision of the Third District in Burleigh House Condominium, Inc. v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA 1979), the necessary and relevant facts can be taken as set forth in the opinion of the Fourth District.

Plaintiffs' second amended complaint, which was dismissed with prejudice, alleged the following. In 1966 the

defendants breached their fiduciary duty as officers and directors of the condominium association by executing a recreation lease containing cost of living increases. These facts did not constitute a cause of action in 1966. In 1977 this Court changed the law and recognized a cause of action for this type of factual situation in Avila South Condominium Association, Inc. v. Kappa Corporation, 347 So.2d 599 (Fla. 1977).

Plaintiffs filed suit for damages in 1979, 13 years after the facts occurred on which the complaint was based. In Burleigh House, supra, the Third District held, under similar facts, that such a claim was not barred by the statute of limitations. In the present case the Fourth District disagreed with Burleigh House, holding that the suit was barred by the statute of limitations, and recognized direct conflict.

ARGUMENT

POINT I

WHETHER A DECISION OF THE SUPREME COURT OVERRULING A PRIOR DECISION OPERATES RETROSPECTIVELY SO AS TO ALLOW SUIT FOR A WRONG COMMITTED PRIOR TO THE OVERRULING DECISION.

POINT II

WHETHER THE TRIAL COURT ERRED IN DISMISSING THE SECOND AMENDED COMPLAINT FOR FAILING TO STATE A CAUSE OF ACTION BASED ON THE STATUTE OF LIMITATIONS.

Plaintiffs have separated the one issue before this Court by virtue of conflict into two separate points, neither of which accurately set forth the precise issue, which we submit is:

> WHETHER A CHANGE IN THE LAW IN 1977, RECOGNIZING A CAUSE OF ACTION THAT WAS NOT PREVIOUSLY RECOGNIZED, REVIVES A CLAIM ARISING OUT OF FACTS OCCURRING IN 1966, ON WHICH THE STATUTE OF LIMITATIONS HAS RUN.

Plaintiffs begin by suggesting that the opinion of the Fourth District is "unclear" as to why it affirmed the dismissal. We disagree. The Fourth District did not hold that a suit brought within the period of the statute of limitations would be barred because court decisions at the time of the incident sanctioned the transaction. The Fourth District determined that Burleigh House was decided solely

on the applicability of the statute of limitations and recognized that this decision was in direct conflict with Burleigh House. It is thus clear that the basis of the Fourth District's decision was that a cause of action which is barred by the statute of limitations is not revived by a change in the law.

While plaintiffs have set forth in detail their version of the history of the case law in Florida on if and when a condominium association could bring this type of lawsuit, we shall not belabor that subject since it is fully covered in this Court's decision in Avila South Condominium Association, Inc. v. Kappa Corporation, 347 So.2d 599 (Fla. 1977).

The sales of apartments and execution of the lease on which the present cause of action is brought occurred in 1966 (R 147). The statute of limitations then in effect, Section 95.11, Florida Statutes, provided a three-year period of limitation for fraud, five years for an action brought upon a written contract, and four years for any action not specifically provided for in the statute.

We agree with the statement by plaintiffs, on page 26 of their brief, that this suit involves a tort claim. The

lawsuit was filed in 1979, 13 years after the alleged tort occurred. In Burleigh House Condominium, Inc. v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA 1979), cert. denied 379 So.2d 203 (Fla. 1979), the Third District held that the statute of limitations did not begin to run on similar facts occurring in 1969, until the time of the Avila decision in March of 1977, because the cause of action did not accrue until Avila. The essence of Burleigh House is that where an incident is not actionable under the case law at the time it occurs, the statute of limitations does not begin to run until such time in the future as a court decision changes the law and makes such facts actionable.

The ramifications of the holding in Burleigh House are far reaching, to say the least. For example, plaintiffs who negligently contributed to an automobile accident, prior to Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), had no cause of action against the defendant because they were contributorily negligent. Under Burleigh House, they would now have four years to bring such a cause of action after the decision in Hoffman v. Jones, even though the accident might have occurred 5, 10, or even 50 years earlier. If this Court abolishes interspousal immunity, under Burleigh House, the statute of limitations on any claims by one spouse

against another, no matter when the incident occurred, would begin to run at the time of the decision.

In Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), this Court receded from previous decisions and held that a municipal corporation could be sued for the tort of a police officer. Under Burleigh House, people who were injured by the torts of municipal police officers 20 or 30 years earlier, would have had four years from the Hargrove decision, in 1957, to bring a tort action against a city.

There is presently pending before this Court the issue of whether the impact rule should be abolished and recovery allowed for negligent infliction of emotional distress. Champion v. Gray, Case No. 62,830. Also pending is the issue of whether recovery should be permitted for intentional infliction of emotional distress. Metropolitan Life Insurance Company v. McCarson, Case No. 63,739. If this Court follows Burleigh House and reverses the Fourth District, it will mean that if this Court changes the law and permits recovery for those torts, plaintiffs could now bring suits for emotional distress based on facts which occurred 5, 10 or even 50 years ago. Or, as the Fourth District said, from year "1".

On page 12 plaintiffs argue that this Court has consistently applied overruling case law retrospectively as well as prospectively. Retrospective application has never been allowed, however, in Florida, to permit claims barred by the statutes of limitation.

The only cases from any jurisdictions cited by plaintiffs, which allowed circumvention of the statutes of limitation, are the cases discussed and distinguished by the Fourth District in the present case, United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, (5th Cir. 1972), and Neely v. United States, 546 F.2d 1059 (3rd Cir. 1976). We cannot improve on the discussion of the Fourth District which demonstrates that those cases are distinguishable because they involved forfeiture, which the government had no right to. Of crucial importance is that the government lost no defenses or evidence because of the passage of time.

It is of course well-established that the legislature cannot pass a law which impairs previously existing contract rights. We recognize, however, that this constitutional limitation does not apply to court decisions. Thus the Burleigh House decision does not violate the federal constitution. One of the more intellectual and

comprehensive discussions regarding the retroactive application of a change in case law is found in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965). In that case the U.S. Supreme Court was confronted with the question of whether a change in the case law on search and seizure (Mapp v. Ohio) would be retroactively applied to cases decided prior to the Mapp decision. The Supreme Court concluded that there is no constitutional prohibition against retroactively applying a change in case law and that states were free to do it or not do it. As to whether it should be done by Federal Courts, on federal questions, the Court, after analyzing earlier cases and other authorities, concluded that retroactivity should be decided on a case by case basis, depending on the particular facts and the ramifications of the decisions. Under any analysis of the facts in the present case, or the ramifications of a decision allowing suit to be brought, there is only one logical conclusion. A change in the law cannot be applied retroactively to a commercial transaction involving contract or vested rights or to any incident for which the statute of limitations has run.

In the present case, as the second amended complaint shows, one of the defendants was deceased when suit was brought. Another has died during the pendency of this

appeal. Unlike the forfeiture cases, the present case involves a tort, in which the testimony of the witnesses and the parties will be of paramount importance. The complaint alleges that the respondents, two of whom are now dead, knew or should have known certain facts, that members of the plaintiff association were not informed about certain facts, that respondents made certain representations, and that documents were not distributed to purchasers at a certain point in time. In Foremost Properties v. Gladman, 100 So.2d 669 (Fla. 1st DCA 1958), the court stated on page 672:

> In construing F.S. § 95.23, F.S.A. we must bear in mind that statutes of limitations are designed to prevent undue delay in bringing suit on claims and to suppress fraudulent and stale claims from being asserted, to the surprise of parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witness. 34 Am.Jur., Limitations of Actions, § 10.
>
> While the courts will not strain either the facts or the law in aid of a statute of limitations, nevertheless such enactments will receive a liberal construction in furtherance of their manifest object and are entitled to the same respect as other statutes, and ought not to be explained away. 34 Am.Jur., Limitations of Actions, § 14.

Also not to be overlooked is the insurance factor. If suits are now to be permitted for torts which occurred many years ago, it is possible that insurers which covered the parties at the time will be out of business. If insurers

cannot rely on statutes of limitations, insurance premiums will have to be adjusted because of the possibility that the law will change in the future and that the insurer could be sued for occurrences 20 or 30 years earlier.

Another reason why Burleigh House should not be followed is because recreation leases are often sold or mortgaged. If the parties to such a transaction cannot rely on existing law and the statute of limitations, it will create chaos.

A CHANGE IN CASE LAW IS NOT APPLIED RETROACTIVELY WHERE IT WILL IMPAIR CONTRACT RIGHTS, EVEN WHERE THE STATUE OF LIMITATIONS HAS NOT RUN.

Assuming for purposes of argument that the statute of limitations had not run Avila would still not be applied retrospectively. The cases on which plaintiffs rely to the effect that overruling case law will be applied retrospectively do not involve contracts or vested rights. In Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944), this Court stated on page 253:

> Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. 14 Am.Jur. p. 345, Sec. 130; 21 C.J.S., Courts, p. 326, § 194. Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as though the

> overruling decision had been originally embodied therein. To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.... (Emphasis added)

In the present case apartments were sold and a 99-year lease executed in 1966, at a time when the law sanctioned this type of transaction. The law changed 11 years later. To apply that law retrospectively to this 11-year old transaction clearly impairs contractual and vested rights.

In Culpepper v. Culpepper, 3 So.2d 330 (Fla. 1941), the defendant filed a special appearance and request for change of venue, based on the law existing at that time. Subsequently there was a change in the law and the case on which defendant relied was overruled. This Court nevertheless held that the defendant had the right to rely on the earlier decision.

In Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, at 435 (Fla. 1973), this Court held a statute providing for valuation of property for purposes of taxation unconstitutional, by virtue of the 1968 constitution, but that the

decision would only operate prospectively and not retrospectively, "...because persons relying on the state statute did so assuming it to be valid despite the new provisions of the 1968 State Constitution."

It is clear that this Court has consistently refused to apply changes in the law retroactively where there could have been reliance on existing law. While some changes in the law have been applied retroactively (where suit was brought within the statute of limitations) those cases do not involve situations in which contractual or vested rights are impaired. An example of a situation in which there would be no policy reasons not to apply a change in the law retroactively would be a court decision abolishing contributory negligence or interspousal immunity. A defendant who negligently inflicts personal injury or property damage on another has had no vested or contractual rights affected by a change in the law nor is there any other policy reason not to permit the plaintiff to recover, assuming the statute of limitations has not run.

On page 26 the plaintiffs begin an argument to the effect that they had no cause of action until the first escalation of rent in 1981, and therefore the statute of limitations did not begin to run when the tort occurred in

1966. This is the first time this argument has been raised. The most obvious problem with this argument is that if the cause of action did not accrue until the first escalation of rent in 1981, then the cause of action had not accrued when this lawsuit was filed in 1979.

A careful reading of the complaint makes it clear that this argument, that the cause of action did not accrue until the rent escalation clause went into effect, is without merit. The second amended complaint (R 142) alleges that the defendants owned the recreation facilities and leased them under a long-term lease to the association. It is alleged that when sales contracts were executed for sales of units, defendants did not advise purchasers that defendants were executing the lease which would contain an escalation clause. It was alleged that the defendants breached a fiduciary duty they owed the association, as officers and directors, that they were guilty of willful and wanton misconduct, and that they were liable for compensatory and punitive damages. The facts of the alleged tort most clearly occurred, according to plaintiff's complaint, in 1966, not 1981, and the argument that no cause of action accrued until the rent escalation clause went into effect is without merit.

The cases relied on by plaintiffs are distinguishable because they involved situations in which there was something wrong with the lease, such as where it was usurious or violated a rent control law. It has not been alleged in the complaint in the present case that there is anything wrong with the lease itself. The allegations are only that the defendants committed a tort by failing to advise the purchasers of the existence of the lease or the provisions of the lease, and the only relief sought is compensatory and punitive damages. The complaint does not seek rescission of the lease or any relief which would affect the lease. The plaintiffs have not alleged any wrongdoing by the defendants other than conduct which occurred in 1966.

The weakness of plaintiffs' entire position becomes apparent from some of the absurd arguments which they advance, most of which need no reply. A perfect example is the argument advanced on page 33 that this is an equitable cause of action and therefore laches, not the statute of limitations, is applicable. Even if this were an equitable suit (which it is clearly not since the only relief sought is compensatory and punitive damages) plaintiffs cite no authority that the period of laches is any different than the statute of limitations.

It is undisputed that at the time the apartments were sold and the lease executed in 1966 the law in Florida sanctioned the actions of the defendants. Relying on this law the defendants sold apartments and executed a lease on the recreation facilities. No one would argue that the legislature, by statute, could subsequently invalidate recreation leases which were valid when executed, as this would be a classic example of a law which impairs the obligation of a contract. To permit rights under this contract to be impaired by a change in the case law occurring 11 years later is no more justifiable than to permit those rights to be impaired by the legislature.

POINT III

WHETHER THE TRIAL COURT PROPERLY DENIED RESPONDENTS' MOTION FOR ATTORNEYS' FEES.

The Fourth District only noted conflict in regard to the applicability of the statute of limitations to this claim. There is no conflict created by the holding that the defendants were entitled to attorney's fees under the indemnification provision contained in the Articles of Incorporation, the material portion of which is:

> INDEMNIFICATION
>
> Every director and every officer of the Association shall be indemnified by the Association against all expenses and

> liabilities, including counsel fees, reasonably incurred by or imposed upon him in connection with any proceedings to which he may be a party, or in which he may become involved by reason of his being or having been a director or officer of the Association,...

The Fourth District held that the above provision means what it says. Since this portion of the decision creates no conflict it is respectfully submitted that this issue should not be reviewed by this Court.

The defendants were sued for alleged breach of their fiduciary duties as officers and directors. The case against them was dismissed by the court. The indemnification provision could not be more clear that they are entitled to be indemnified for their attorney's fees and expenses in connection with this litigation. But for being officers and directors they would not have been sued.

The trial court denied attorneys fees, citing Century Village, Inc. v. Chatham Condominium Associations, 387 So.2d 523 (Fla. 4th DCA 1980). That case is distinguishable. It involved an indemnification provision in a lease, in which the lessee agreed to indemnify the lessor for any claims made against lessor arising out of the execution of the lease. The lessee had sued the lessor in Federal Court for violation of Federal anti-trust laws. The suit was dismissed and the lessor filed suit in state court to

recover attorney's fees incurred in the federal court litigation. The indemnification provision in that case was in a lease, not Articles of Incorporation, and was similar to standard indemnification provisions usually found in leases. In Century Village, Inc., the Fourth District cited no authority for its holding. Certainly no court is better qualified to determine whether the rationale of Century Village, Inc., supra, is applicable to the present factual situation, than is the Fourth District. The Fourth District found the cases distinguishable and its decision should be affirmed.

Unlike Century Village, Inc., supra, the provision in the present case was not in a lease. The provision was contained in the articles of incorporation of a non-profit organization, and was to protect officers and directors of the condominium association. The first important distinction between the two situations is that an indemnification provision in a lease is between two parties in an arms length transaction who are receiving consideration for execution of a contract. An indemnification provision to protect officers and directors of a corporation is totally different because the officers and directors, particularly of a non-profit corporation, are not receiving consideration as the result of an arms length bargain. The officers and

directors are performing a service, and the obvious intent of the indemnification provision is to indemnify them, unless they are guilty of willful misconduct in the performance of their duties.

The Fourth District also held that Section 607.014(3), Florida Statutes (1977) would support the award of attorney's fees. That statute provides:

> To the extent that a director, officer, employee, or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in subsection (1) or subsection (2), or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses (including attorney's fees) actually and reasonably incurred by him in connection therewith.

Plaintiffs argue on page 44 that this statute was not made applicable to nonprofit corporations until 1982, taking the opposite approach from that taken with regard to the main issue on this appeal. This statute, however, does not impair any vested rights or contracts and simply provides for a remedy, costs and attorney's fees. There is thus no logical reason not to apply the statute, even though the application of the statute is unnecessary in the present case because of the indemnification provision in the Articles of Incorporation.

The plaintiffs advance some technical arguments to the effect that claims for indemnification must be pled, proved, and tried before a jury. These arguments were not raised in the lower court or the Fourth District. The arguments are also without merit because the use of the word indemnification in the Articles of Incorporation simply means that directors and officers shall be reimbursed for attorney's fees and costs by the Association. This is not common law indemnification.

The meaning of the indemnity provision in the Articles of Incorporation could not be more clear and the Fourth District correctly held it was applicable.

CONCLUSION

The opinion of the Fourth District should be approved.

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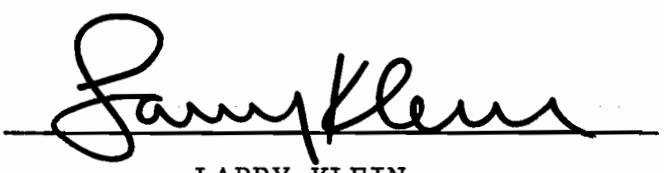
By 

LARRY KLEIN

CERTIFICATE OF SERVICE

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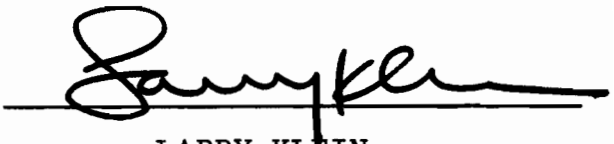

LARRY KLEIN