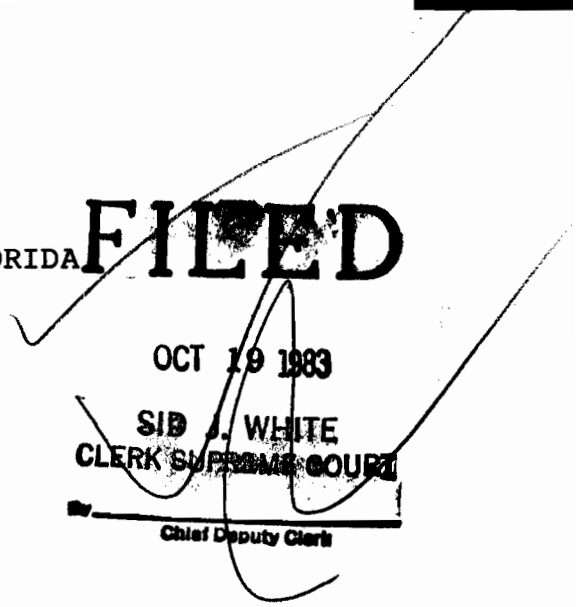
IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,380



PENTHOUSE NORTH ASSOCIATION, INC.,

Appellant/Petitioner,

vs.

REMO M. LOMBARDI, et al.,

Appellees/Respondents.

REMO M. LOMBARDI, et al.,

Appellants/Respondents.

vs.

PENTHOUSE NORTH ASSOCIATION, INC.,

Appellee/Petitioner.

Discretionary Review From the Fourth District Court of Appeal
Case Nos. 81-347 and 81-1011 (Consolidated)

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner seeks review of the decision of the Fourth District Court of Appeal (A.1-9), which, in consolidated appeals, affirmed a final judgment of dismissal of the Petitioner's Second Amended Complaint (A.65), and reversed the trial court's Order Granting Motion to Strike Respondents' Request for Attorney's Fees (A.66).

Petitioner, PENTHOUSE NORTH ASSOCIATION, INC., Plaintiff below, is a Florida corporation not-for-profit, and is a Condominium Association. Petitioner will be referred to herein as "Association". Association was Appellant in Fourth District Court of Appeal Case No. 81-347, and Appellee in Case No. 81-1011.

Respondents, Defendants below, were the initial directors of the Association, who executed a 99-year recreation lease (A.24-50) on behalf of the Association with themselves. They were also the officers, directors, and shareholders of the developer corporation. They will be referred to herein as "Directors/Lessors".

The Second Amended Complaint (A.19-23) alleges that the subject Lease was executed on December 15, 1966, and recorded in the Public Records on December 22, 1966. By the date of recording, a substantial number of purchase contracts for units at the subject condominium had been signed, and numerous closings had occurred. The purchase agreements, while disclosing the existence of the Lease, stated that the rent would be a fixed amount, with no escalation.

The Lease, naturally, contains such an escalation clause, even though the Lease is "triple-net"; i.e., the Lessee Association

repairs, etc. relative to the leased premises. In addition, the Lease provides for a lien on the individual units owned by the members of the Association, to secure the Association's rental obligation.

The Second Amended Complaint also alleges that the Lease was executed in secret, without disclosure to, or the assent of, the members of the Condominium Association who were the purchasers of, or had already closed on, the units. It is alleged that copies of the condominium documents, including the Lease, were not distributed by Directors/Lessors to the members of the Association prior to the closing on their units.

The Second Amended Complaint further alleges that Directors/Lessors, as directors, controlled all activities of the Association, and as such had a fiduciary duty to act in good faith and in the best interests of the Association and its members, but that Directors/Lessors breached their duty to the Association by entering into the Lease with an escalation clause because: the escalation clause was inserted in the Lease secretly, with no disclosure to the members of the Association; the escalation clause was designed to enrich the lessors at the expense of the Association without the consent of its members; and the Directors/Lessors acted in wanton and willful bad faith by intentionally inserting the escalation in the Lease without the knowledge and consent of the members of the Association. It alleges that the Association has been damaged by being obligated to pay ever-escalating rental for 99 years.

The escalation clause (A.45-46), which is separated from the basic rental provisions of the Lease by 18 pages of text, calls for increases in the rent in accordance with increases in the Consumer Price Index, the first increase to take effect on January 1, 1981, and every 10 years thereafter.

Thus, at the time the initial Complaint was filed on October 31, 1979, no escalation in rent had yet taken effect. The Second Amended Complaint alleges that Directors/Lessors did not give notification to the Association of an intent to escalate until 1979, and that they gave the Association no indication they would enforce the escalation clause until 1979.

The Amended Complaint (A.10-15), the dismissal of which was also appealed by Association, had also alleged that the escalation clause was so ambiguous that escalation of rent could not be computed.

On February 9, 1981, the trial court dismissed the Association's Second Amended Complaint with prejudice, reserving ruling on costs and attorney's fees (A.65). The appeal in Case No. 81-347 ensued. Subsequently, the Directors/Lessors filed a Motion to Tax Costs and Attorney's Fees, to which the Association filed a Motion to Strike. On May 8, 1981, the trial judge entered an Order Granting Motion to Strike Request for Attorney's Fees (A.66). Directors/Lessors appealed that Order, in Case No. 81-1011. The two appeals were consolidated before the Fourth District.

On April 27, 1983, the Fourth District filed its opinion (A.1-7), affirming the dismissal of the Association, and reversing the denial of attorney's fees to Directors/Lessors. Association

filed a Motion for Rehearing and Motion for Rehearing En Banc.

On September 7, 1983, the District Court filed its opinion on Motion for Rehearing, denying same (A.8-9).

On October 5, 1983, the Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction (A.67).

ARGUMENT

THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH:

A. THE DECISION OF THE THIRD DISTRICT IN BURLEIGH HOUSE CONDOMINIUM, INC. v. BUCHWALD

B. THE DECISION OF THIS COURT, IN FLORIDA FOREST AND PARK SERVICE v. STRICKLAND

C. THE DECISIONS OF THIS COURT IN FLEEMAN v. CASE AND POMPONIO v. THE CLARIDGE OF POMPANO CONDOMINIUM, INC.

This Court has jurisdiction under Article V, Section 3(b)(3), Florida Constitution, as the District Court's decision directly and expressly conflicts with the following decisions of this Court and other District Courts:

A. Conflict with Burleigh House v. Buchwald.

The Fourth District's decision expressly disagrees with, and announces a rule of law contrary to, Burleigh House Condominium, Inc. v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA), cert. denied, 379 So.2d 203 (Fla. 1979), on the issue of the commencement of the running of the statute of limitations in a condominium recreation lease case.

In this case, the Fourth District "expressly recognize(d) the decision on this issue to be in conflict with (Burleigh House v.) Buchwald" (A.4).

In Burleigh House, the Third District held, in the exact same factual setting, that a condominium association's cause of action against its initial directors for breach of fiduciary duty and self-dealing in signing a rec lease with themselves, did not

accrue until March 31, 1977, the date of this Court's decision in Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977). In the decade preceding Avila South, such a cause of action was "inherently unknowable", as decisions of this Court and the District Courts held an association had no standing to bring such an action, or that there was no actionable wrong.

Thus, the Third District held an association's cause of action could not be said to have accrued prior to the date of the decision in Avila, for a cause of action cannot be said to have accrued until an action can be instituted thereon, or until a Plaintiff has been put on notice of his right to a cause of action. The cause of action, accordingly, was inherently unknowable until the decision in Avila, and the statute of limitations on such claims was, therefore, suspended and did not begin to run until that date.

The Fourth District, however, simply rejected the Burleigh House analysis, holding that the association's cause of action accrued at some earlier, unspecified date or event (presumbably when the Lease was executed by Directors/Lessors).

A plainer example of conflict jurisdiction could not exist.

B. Conflict With Florida Forest.

Implied in the original opinion, and expressed in the opinion on rehearing, is the holding that Avila South was not intended to have retroactive effect, in the sense that at the time the subject lease was executed, Florida case law did not consider such conduct to give rise to a cause of action for breach of fidu-

ciary duty.

This is a separate issue from the statute of limitations question, as the holding implies that the passage of time is irrelevant. In other words, even if the Lease was executed only one year before Avila (or Avila was decided only one year after the Lease was signed) no cause of action could exist because the Directors/Lessors' conduct was somehow "lawful" at the time.

Such a holding is in direct conflict with the rule announced by this Court in Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944):

> 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.

Avila South, of course, contained no such limitation. This Court has consistently followed this rule. On occasion, it has announced limitations on the retrospective effect of its decisions. E.g., Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Linder v. Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977).

On other occasions, this Court has changed the common law, but not announced a limitation on the retrospective effect of its decision. Gates v. Foley, 247 So.2d 40 (Fla. 1971). As a result, such a decision would apply retrospectively. Ryter v. Brennan, 291 So.2d 55 (Fla. 1st DCA 1974) (giving Gates v. Foley retrospective effect to an accident occurring three years prior to the decision in Gates).

Again, this is a separate issue from the statute of limitations. For example, the Fourth District's holding on this issue

could be applied to bar a suit for breach of fiduciary duty instituted only three years after the Lease was signed, so long as the Lease was signed prior to the decision in Avila.

C. Conflict With Fleeman v. Case and Pomponio v. Claridge.

On the question of attorney's fees, Association concedes there is no conflict in the District Court's interpretation of the indemnification clause in the Articles of Incorporation, as, while the holding conflicts with Century Village, Inc. v. Chatham Condominium Associations, 387 So.2d 523 (Fla. 4th DCA 1980), the conflicting decision is from the same District Court of Appeal.

However, in also justifying the award on the basis of the provisions of §607.014, Fla. Stat. (1977) the decision does conflict with Fleeman v. Case, 342 So.2d 815 (Fla. 1976) and Pomponio v. The Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980) in giving retroactive effect to the statute.

By creating contractual liabilities under the Articles of Incorporation, which did not exist when the Association was created or the Declaration of Condominium recorded, in 1966, the Court gives retroactive effect to the statute where none was intended by the Legislature, Fleeman, supra, and thereby impairs the obligation of contracts, Pomponio, supra.

To compound the problem, §607.014 is not the applicable statute: Association is a not-for-profit corporation, formed pursuant to and governed by Chapter 617, Florida Statutes.

§617.028, Fla. Stat. (Supp. 1982) does state that §607.014 applies to corporations not for profit. §617.028, however, was not enacted until 1982, ch. 82-177 §18, Laws of Florida, over

one year after the appeal was filed. Thus, in the alternative, the District Court's reliance on §607.014 constitutes an impermissible departure from the essential requirements of law, also giving this Court jurisdiction, under its "all writs" jurisdiction.

CONCLUSION

This being a Jurisdictional Brief, Petitioner has attempted to avoid any argument on the merits of the District Court's opinion. While the conflict with Burleigh House is clear, Petitioner cannot help but here mention the gross injustice which the District Court's opinion creates, in direct contravention of this Court's decision in Avila South, which created a framework for case by case adjudications of the validity and enforceability of long-term condominium leases. With the District Court's opinion, a real and embarrassing lack of harmony in the decisional law exists. Had Petitioner's condominium been located in Dade County, for example, it could continue to pursue its case. Because it is located in Broward, however, it is stuck with this Lease and its escalation clause, for another 83 years.

Accordingly, Petitioner urges this Court to exercise its discretion and accept jurisdiction, and review the entire case on its merits.

Respectfully submitted,

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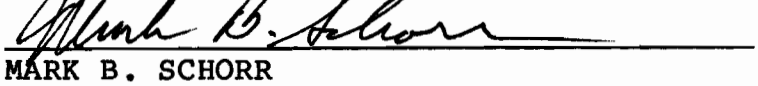
By 
MARK B. SCHORR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Jurisdictional Brief was furnished by mail, this 17th day of October, 1983, to: ROD TENNYSON, ESQ., Powell, Tennyson & St. John, P.A., 319 Clematis Street, Comeau Building Arcade, West Palm Beach, FL 33401; LEVY, SHAPIRO, KNEEN & KINGCADE, P.O. Box 2755, Palm Beach, FL 33480; COLEMAN, LEONARD & MORRISON, P.O. Box 11025, Fort Lauderdale, FL 33301; and LARRY KLEIN, ESQ., Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401.

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