D/A 5-9-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,380

PENTHOUSE NORTH ASSOCIATION, INC.,

Petitioner,

vs.

REMO M. LOMBARDI, et al.,

Respondents.

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

This Court has accepted jurisdiction to review a decision of the Fourth District Court of Appeal, Penthouse North Association, Inc. v. Lombardi, 436 So.2d 184 (Fla. 4th DCA 1983), which affirmed the dismissal of a condominium association's Second Amended Complaint for failure to state a cause of action, and reversed a subsequent Order Granting Motion to Strike Request for Attorney's Fees.

Petitioner, PENTHOUSE NORTH ASSOCIATION, INC., Plaintiff below, is a Florida corporation, not for profit. Petitioner is a Condominium Association, and will be referred to herein as "Association".

Respondents, Defendants below, were the initial directors of the Association, who executed a 99-Year Recreation Lease (R.147-173) 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 (R.142-178) 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. (R.174-178).

The Lease, naturally, contains such an escalation clause, even though the Lease is "triple-net"; i.e., the Lessee Association is responsible for the payment of all taxes, insurance, maintenance,

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 everescalating rental for 99 years.

The escalation clause (R.168-169), 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 ten 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 that year, and that they gave the Association no indication they would enforce the escalation clause until 1979.

The Second Amended Complaint further alleges that the Respondent Directors/Lessors continued to control the Association until February, 1968, at which time they first allowed unit owners other than the Developer to elect a Board of Directors, as part of what is known as "turnover of control" of a condominium association to its unit owner members.

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 2, 1981, the trial court dismissed the Association's Second Amended Complaint with prejudice, reserving ruling on costs and attorney's fees (R.202). The appeal in Case No. 81-347 ensued. Subsequently, the Directors/Lessors filed a Motion to Tax Costs and Attorney's Fees (R.207-212), to which the Association filed a Motion to Strike. (R.213). On May 8, 1981, the trial judge

entered an Order Granting Motion to Strike Request for Attorney's Fees (R.214). 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, 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.

On October 5, 1983, the Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction. This Court accepted jurisdiction by Order dated February 15, 1984.

There are presenting pending in the Fourth District Court of Appeal two appeals which have been abated, pending this Court's decision. Riviera Apartments "A" of Hallandale, Inc., etc. v. S. David Gates, etc., Case No. 83-2156, and Casa Paradiso, Inc., et al. v. Peter Hotchkiss, etc., et al., Case No. 83-2336. In both cases, the trial court granted summary judgment in favor of the defendants on the same cause of action as is involved in the instant case, based upon the decision of the Fourth District now being reviewed.

The two appeals have been abated because this Court's decision in the instant case will have a great affect thereon. The relevant factual situations in those cases, with respect to the dates on which events occurred, differ somewhat from the case at bar.

Petitioner can only discuss those cases' factual settings as hypotheticals, but will do so in the argument section of this Brief, to illustrate the unjust and inequitable effect of the rule of law announced by the Fourth District Court of Appeal.

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.

The Fourth District's opinion is unclear as to on what basis it affirmed the dismissal. Two issues were strenuously argued in both the trial court and the District Court: the statute of limitations question, and what will here be called the "legal at the time" argument.

In a nutshell, the "legal at the time" argument is that since at the time the Lease was executed, the case law sanctioned the kind of self-dealing at issue, no fiduciary duty on the part of the Respondents existed. Thus, their conduct was "legal at the time". The argument continues that this Court's subsequent decision in Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977) does not apply retroactively.

The "legal at the time" and the statute of limitations defense are two different issues. The "legal at the time" argument does not depend on the passage of time. If the argument had any merit, then it would excuse a defendant's conduct, even if the suit was brought within the supposed limitations period. For example, if the subject Lease was executed in 1976, with Avila South, supra, decided in 1977, with suit filed in 1978, there would be no limitations argument made; yet, Respondents would be making the same invalid argument, that their conduct was "legal at the time", and that

Avila South cannot be applied retrospectively.

Dismissal on this basis would be erroneous because:

(a) Assuming, arguendo, the legal correctness of the argument, Respondents' conduct was not "sanctioned" by the case law in 1966.

(b) This Court's decision in Avila South applies retrospectively to create a cause of action for breach of fiduciary duty and self-dealing.

What Was the Law When the Lease Was Executed?

This is the threshold issue, as, for the purposes of Respondents' "legal at the time" argument, if the Lease was executed after the decision in Avila South, the argument does not exist. Similarly, if the Lease was executed at a time when there was no case law in Respondents' favor, the argument does not exist.

The subject Lease is dated December 1, 1966.

The earliest decision which could be cited by Respondents in support of their proposition that Florida case law sanctioned such breaches of fiduciary duty is Fountainview Association, Inc., #4 v. Bell, 203 So.2d 657 (Fla. 3d DCA 1967), rehearing denied November 29, 1967. Further, it must also be emphasized that the District Court of Appeal certified the case to this Court on the grounds of great public interest. Indeed, Justice Ervin, in his stinging dissent, joined in by Justice Roberts, noted that the Third District Court of Appeal "had sufficient doubts of the Bird case to give us jurisdiction of the instant case by its certificate". Fountainview Association, Inc., #4 v. Bell, 214 So.2d 609 (Fla. 1968).

Therefore, at the time of the execution of the subject Lease, the Fountainview decision was merely a glimmer in some developer's attorney's eye.

It is also important to note that there was no allegation of secrecy or non-disclosure in the Fountainview case, as in the case at bar.

Instead, the only Florida case law on the subject which had any finality in 1966 was Lake Mable Development Corp. v. Bird, 99 Fla. 253, 126 So. 356 (1930), and News-Journal Corp. v. Gore, 147 Fla. 217, 2 So.2d 741 (1941).

As this Court subsequently pointed out in Avila South, supra, the Lake Mable decision is really not applicable at all. In Lake Mable, the complainants were four promoters of the corporation. There was no allegation in the pleadings or showing made by the record that any stock was ever issued or sold by the corporation to the public. Accordingly, this Court held that a corporation cannot, while its promoters own all its outstanding stock, avoid in equity a purchase of property sold to it by its promoters at a large profit, since the corporation had full knowledge of the facts and the rights of innocent purchasers of stock had not arisen. This Court in Lake Mable did not pass on the rights of innocent purchasers of stock, and expressly stated that it was not faced with a situation where ownership interests were "ever issued or sold by the corporation to the public." 126 So. at 358; Avila South, supra at 606.

Instead, in reaching its holding in Avila South, this Court stated that it was re-affirming its decision in News-Journal Corp. v. Gore, supra, by holding:

> That any officer or director of a condominium association who has contracted on behalf of the association with himself, or with another corporation in which he is, or becomes substantially interested, or with another for his personal benefit may be liable to the association for that amount by which he was unjustly enriched as a result of his contract. However, no officer or director shall be required to return any portion of monies paid by the association where it is shown that he received the funds with the consent of the association or with the consent of a substantial number of the individuals comprising the association.

Avila South, supra, 347 So.2d at 607.

In Avila, this Court made it clear that self-dealing by officers and directors of condominium associations, without more, is not actionable. But, this Court continued,

> ... There is absolutely nothing to recommend a rule of law which encourages persons in positions of trust secretely to betray their trust for inordinate personal gain, at the expense of those to whom they owe a fiduciary duty.

Id.

Thus, the holding was consistent with the basic law governing the duty owed by persons in positions of trust to the corporation and its members to whom stock has been sold.

An officer and director occupies a fiduciary relationship to the corporation, and may not act in hostility to the corporation by acquiring any intangible assets of the corporation. Jacksonville Cigar Co. v. Dozier, 53 Fla. 1059, 43 So. 523 (1907). A director

or officer cannot make a private profit from his position, or, while acting in that capacity, acquire an interest adverse to that of the corporation. He must always act with utmost good faith, and cannot deal in funds and property of the corporation to his own advantage. Orlando Orange Groves Co. v. Hale, 107 Fla. 304, 144 So. 674 (1932); Pruyser v. Johnson, 75 So.2d 516 (Fla. 2d DCA 1966).

Subsequent "pro-developer" cases, decided after the subject Lease was executed, are entirely irrelevant, even from the Respondents' point of view. Cases decided in 1973, Point East Management Corp. v. Point East One Condominium Corp., 282 So.2d 628 (Fla. 1973), cert. denied, 415 U.S. 921 (1974) and Commodore Plaza at Century 21 Condominium Association, Inc. v. Saul J. Morgan Enterprises, Inc., 301 So.2d 783 (Fla. 3d DCA 1974) and Plaza del Prado Condominium Association, Inc. v. GAC Properties, Inc., 295 So.2d 718 (Fla. 3d DCA 1974) are completely irrelevant.

On this regard, therefore, the Court need not even reach the issue of the "legal at the time" defense, as it has no relevancy to the instant case.

Avila South Applies Retroactively.

On the question of retroactive application, it must be initially recognized the Second Amended Complaint does not allege a statutory cause of action. Retroactive civil statutes, of course, are subject to the constitutional prohibition against impairment of contracts. Rather, we are dealing with retroactive application of overruling case law which construes the common law.

Contrary to the arguments made by Respondents below, the law in Florida is as follows:

> 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.

Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944) (emphasis added).

Avila South contained no such limitation. Not only does Avila South fail to contain an express limitation on retrospective effect, but the actual holding speaks in terms of retroactive application. This Court holds that any officer or director "who has contracted ...." This Court does not use the words "who contracts", or any other expression of the future tense. Instead, it uses the past tense, as an expression of the general rule of Florida Forest, supra.

This Court in Florida Forest announced one exception: when property or contract rights have been acquired in accordance with a decision construing a statute. The Florida Forest case involved a workmen's compensation claim. The Florida Industrial Commission denied the claim, and the claimant appealed directly to the Circuit Court, a procedure sanctioned by then-existing case law construing the Workmen's Compensation Act. The Circuit Court reversed. The employer then appealed to this Court. The issue was whether the Circuit Court had the authority to render the judgment reversing the Florida Industrial Commission, for after the claimant had appealed to the Circuit Court, an intervening decision of this

Court overruled existing case law which construed the workmen's compensation statute to allow direct appeals to the Circuit Court. Accordingly, this Court held that the overruling case law would not have retrospective effect. This was because the prior case law construed a statute. No such statute is involved in the instant case.

This Court has consistently held to its general rule that overruling case law will have retrospective as well as prospective effect, unless the overruling opinion specifically declares that it is to have prospective effect only. In Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), this Court overruled the common law and adopted comparative negligence in Florida. In the opinion, this Court specifically stated that this rule would apply to all cases except those in which trial had already begun, or a verdict or judgment rendered, unless the applicability of comparative negligence was raised in the litigation. Thus, even though at the time of the accident comparative negligence was not the law in Florida, if the trial had not begun, it would be the law. Id.; see, Linder v. Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977) (applying same applicability rule to strict liability in tort).

Hoffman, therefore, was an exception to the general rule that, if there is a change in the law, even pending appeal, that law will be applied. If the change in the law requires reversal on appeal, then the decision must be reversed. Ryter v. Brennan, 291 So.2d 55 (Fla. 1st DCA 1974). The Ryter decision is very much on point. In 1968, a married couple was involved in an automobile

accident. At the time of the accident, the common law did not recognize any property right of the wife in her husband's services which would give her a cause of action for loss of consortium. The husband and wife filed their Complaint in January, 1971. On April 4, 1971, this Court decided Gates v. Foley, 247 So.2d 40 (Fla. 1971), which overruled the common law and held that a wife does have a cause of action for loss of consortium. The First District properly held that the Gates decision would apply to give the wife a cause of action. Thus, even though the defendant in Ryter was not liable to the wife at the time of the accident, he could be found liable upon trial.

This rule was also apparently followed in the wake of Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), which permitted suit against a municipality for torts committed by its agents and employees. Hargrove was decided on June 28, 1957. Five and a half months later, on December 10, 1957, the First District decided City of Daytona Beach v. Baker, 98 So.2d 804 (Fla. 1st DCA 1957), applying the rule of Hargrove, but reversing a judgment against the City on the grounds of insufficient evidence to support the verdict. Unless that lawsuit set a record for the time elapsed between filing, jury trial, and appeal, the accident clearly occurred prior to the decision in Hargrove, at a time when the case law said a city could not be liable.

Turman v. Florida East Coast Railway Co., 195 So.2d 604 (Fla. 4th DCA 1967), presents the converse situation. There, at the time of the accident, Florida had a comparative negligence statute.

Prior to trial, this Court declared the statute unconstitutional. Accordingly, the Fourth District held that the trial court was correct in not instructing the jury on comparative negligence, for a trial judge must apply the law as it exists at the time of trial.

The United States Supreme Court has taken the same approach. As long ago as 1801, the Court decided that, even if subsequent to judgment, but before an apellate decision was rendered, a law intervenes and positively changes the rule which governs the case, that law must be obeyed. U.S. v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801). The Schooner Peggy rule has been followed consistently up to the present day. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 3327 (1941); Mosser v. Darrow, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951). Mosser involved bankruptcy proceedings. The Supreme Court held that a re-organization trustee would be held to a very strict fiduciary standard of trust, and be liable for acts of his agents, even if he was without knowledge of those acts. The holding was very similar to that of this Court in Avila South, supra, in placing a strict fiduciary duty on the trustee. This holding, of course, applied retroactively, which troubled the lone dissenter, who argued against retroactive application, as the standard did not exist until the decision. Such is not the case here, as the strict standard of fiduciary duty imposed upon directors in the Avila South decision has always existed at common law in Florida.

The cases relied on by Defendants before the Fourth District do not support their argument that the Avila South decision should not apply to their acts. They cite Florida Forest and Park Service v. Strickland, supra, but as discussed, supra, that case involved statutory construction. At issue here is a common law cause of action.

Culpepper v. Culpepper, 147 Fla. 632, 3 So.2d 330 (1941) involved a prisoner seeking recalculation of his release date, after final judgment had been rendered. This Court there held that the overruling case law upon which the prisoner relied would apply retroactively. No contract was involved.

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965) raised the issue of whether the Supreme Court's decision in Mapp v. Ohio, which applied the exclusionary rule to the states through the Fourteenth Amendment, would apply retrospectively to cases which were finally decided prior to the decision in Mapp. The Supreme Court held that while a change of law will be given affect while the case is on appellate review, the exclusionary rule would not be applied retroactively to invalidate cases which had already reached final judgment. The Linkletter decision reached the same result as the earlier decision in United States v. Fay, which also held that the exclusionary rule will not be applied retroactively so as to overturn convictions where the appeal was concluded prior to the decision in Mapp. United States v. Fay, 333 F.2d 12 (2nd Cir. 1964), aff'd, 381 U.S. 654 (1965).

Therefore, it is clear that a decision such as that of this Court in Avila South, supra, overruling prior case law and announcing a new rule of common law, will have retrospective effect, unless the court declares otherwise. No such limitation is contained in the Avila South, supra, decision. Further, the contract rights involved in the instant case were not acquired in accordance with any decision construing a statute, so as to come within the exception to the general rule of retrospective effect. Florida Forest and Park Service, supra.

Therefore, if the dismissal was based in whole or in part on the "legal at the time defense", it was erroneous.

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.

Insofar as the dismissal was based on the statute of limitations, the dismissal was erroneous on any or all of the following grounds:

1. The cause of action was inherently unknowable until the decision in Avila South, and the statute did not begin to run until that time.

2. The cause of action did not accrue until the first demand for rent.

3. The breach of duty is a continuing one, giving rise to a cause of action upon each demand for rent.

4. This being an equitable cause of action, there remain questions of fact as to whether it is barred by laches.

When Did the Cause of Action Accrue?

Generally, a cause of action does not "accrue", for limitations purposes, until the last element constituting the cause of action occurs. Sec. 95.031(1), Fla. Stat. Also, the clock does not begin to run until the plaintiff is put on notice of an invasion of his legal right of action, Smith v. Continental Insurance Co., 325 So.2d 189 (Fla. 2d DCA 1976), or until he is put on notice of his right to a cause of action. City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954). Further, a cause of action cannot be said to have accrued until an action can be instituted thereon. There must be some person capable of suing or being sued upon the claim

in order for the statute to begin to run. Berger v. Jackson, 156 Fla. 251, 768, 23 So.2d 265 (1945).

When Was the Association Capable of Suing?

A condominium association, prior to turnover of control, is completely at the mercy of the developer who created it, and who continues to appoint its Board of Directors. For these purposes, it may be viewed as equivalent to a business corporation still in its promotion stage. There may be shareholders, but no meeting has been held at which the shareholders may vote. The corporation is at the mercy of its promoters.

In another sense, a pre-turnover condominium association is like an infant. It is incompetent to exercise a will of its own, and the statute must be deemed tolled until it is competent. Berger v. Jackson, supra.

To hold a condominium association "capable" of suing in these circumstances is totally unreasonable and inequitable. Why would the developer who controls the association cause the association to sue him?

This principle was recognized by the Legislature in 1977, when it adopted §718.124, Fla. Stat., which provides:

> The statute of limitations for any actions in law or equity which a condominium association or cooperative association may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration.

As the First District recognized in Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc., 405 So.2d 440, 441

(Fla. 1st DCA 1981):

> Section 718.124 was intended to prevent a developer from retaining control over an association long enough to bar a potential cause of action which the unit owners might otherwise have been able and willing to pursue. To this end, the statute provides that an association's cause of action does not accrue until the unit owners have acquired control over the association.

In the case at bar, the Petitioner's "incompetency" until turnover of control must be considered. While execution of the subject Lease by Respondent Directors/Lessors was not "legal at the time" in 1966, by the time of turnover of control, Petitioner Condominium Association's cause of action was shut off by the intervening decision in Fountainview Association, Inc., No. 4 v. Bell, supra. Thus, at the time its incompetency was lifted, it did not have the ability to sue. Berger v. Jackson, supra.

The Association's Cause of Action Was "Inherently Unknowable" Until 1977.

This is the issue on which the Fourth District acknowledges it is in conflict with the Third District's opinion in Burleigh House Condominium, Inc. v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA), cert. denied, 379 So.2d 203 (Fla. 1979).

Again, crucial to the determination of when a plaintiff's cause of action accrues is the concept of when it first has the ability to assert the cause of action. In the instant case, upon turnover of control, its cause of action was "inherently unknowable".

Two United States Court of Appeals decisions are directly on point: United States v. One 1961 Red Chevrolet Impala Sedan,

457 F.2d 1353 (5th Cir. 1972); Neely v. United States, 546 F.2d 1059 (3rd Cir. 1976).

In One 1961 Red Chevrolet, the owner of the car brought an action to recover the vehicle. It had been seized by the government in 1962, and ordered forfeited to the government in 1963 pursuant to a libel of information, on the grounds it had been used in conducting a gambling business without payment of taxes.

Six years later, on January 29, 1968, the United States Supreme Court handed down two landmark decisions dealing with the privilege against self-incrimination (Marchetti v. United States, 390 U.S. 39, and Grosso v. United States, 390 U.S. 62), which were followed in the subsequent case of United States v. United States Coin and Currency, 401 U.S. 715 (1971). Coin and Currency held that the privilege against self-incrimination was a complete defense to a forfeiture proceeding based on criminal prosecutions against a gambler for failure to register and pay the related gambling tax. The court also held this rule would be retroactively applied.

In reliance on Coin and Currency, the owner of the Red Chevrolet then instituted an action seeking the return of what had become an improperly forfeited vehicle. The Fifth Circuit upheld the trial court's denial of a motion to set aside the forfeiture, but held the owner could maintain an action under the Tucker Act, 28 U.S.C. §1346(a)(2), for return of the improperly forfeited car. The government, however, argued that the six-year statute of limitations had run, since the unlawful taking had occurred almost ten years earlier, in 1963.

The Fifth Circuit rejected the government's argument, and held that the cause of action did not accrue until 1968, when Marchetti and Grosso were decided:

> The period of limitations does not always begin on the date of the wrong .... No cause of action generally accrues until the plaintiff has a right to enforce his cause .... The right to sue is hollow indeed until the right to succeed accompanies. Patently, appellant in the instant case had no reasonable probability of successfully prosecuting his claim against the government prior to the enunciation of the new Marchetti-Grosso rule on January 29, 1968. We realize that mere ignorance of one's rights will not toll the limitations period .... This is not, however, a case in which a plaintiff is ignorant of his rights, but rather a case of a plaintiff without a right.

United States v. One 1961 Red Chevrolet, 457 F.2d at 1358 (citations omitted) (emphasis added). The same result was reached by the Third Circuit in Neely v. United States, supra, which involved the same limitations issue.

The Fourth District's analysis of One Red Chevrolet appears to have "(found) no parallel between (Burleigh House) and Chevrolet", 436 So.2d at 186, based on the relative odds of success on the merits. Probability of success on the merits is irrelevant to the statute of limitations issue, and it was not the basis of the Fifth Circuit's holding that the government had no defense.

Indeed, the Third Circuit, in Neely, did not even consider the "odds":

> The government contends that the statute of limitations commenced to run at the time of payment of the fines and that the exception for inherently unknowable claims did not suspend its running. The government's argument is

> that there was notice prior to Marchetti and Grosso, in lower court cases and in the Supreme Court's decision in Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), that wagering tax convictions could be successfully challenged on Fifth Amendment grounds. However persuasive this contention might be elsewhere, it simply does not wash in this court. It requires a litigant to possess constitutional prescience that this court itself does not possess.
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> . . .
>
> To require clairvoyance in predicting new jurisprudential furrows plowed by the Supreme Court, under these circumstances, would be to impose an unconscionable prerequisite to asserting a timely claim.
>
> Accordingly, we hold that rights accruing under Marchetti and Grosso were inherently unknowable prior to January 29, 1968, when those cases were decided. The statute of limitations on such claims was, therefore, suspended and did not begin to run until that date.

Neely, 546 F.2d at 1068 (emphasis added).

These two cases are directly on point. The cause of action asserted in the Second Amended Complaint was similarly "inherently unknowable", Neely, supra, until 1977, when this Court virtually reversed itself and held that an association could maintain actions on behalf of its unit owners challenging recreation leases on this ground.

Prior to 1977, the law in Florida was very different. An association could not maintain an action to overturn or modify the terms of a long-term lease when it called for exorbitant rentals resulting in excessive profits for self-dealing developers/lessors who had executed the lease on behalf of the association at a time

when they constituted all the members of the association. Wechsler v. Goldman, 214 So.2d 741 (Fla. 3d DCA 1968). Nor could the association seek to require the individual officers who had contracted with themselves on behalf of the association to disgorge the excessive profits accruing to them under the contract or lease. Fountainview Association, Inc., #4 v. Bell, 203 So.2d 657 (Fla. 3d DCA 1967), cert. discharged, 214 So.2d 609 (Fla. 1968). This Court followed Wechsler and Fountainview in holding that an association and its unit owners could not overturn a recreation lease or management contract which arose from the dealings of the developers with themselves while the developers constituted all the members of the association and at the same time owned all the stock in the corporation with which the association contracted. Point East Management Corp. v. Point East One Condominium Corp., 282 So.2d 628 (Fla. 1973), cert. denied, 415 U.S. 921 (1974).

In 1977, however, the law underwent a metamorphosis which resulted in the opening of many doors previously closed to condominium and cooperative associations and their unit owner members. The change, which culminated in the landmark decisions of this Court in Avila South, supra; and the Third District in Point East One Condominium Corp. v. Point East Developers, Inc., 348 So.2d 32 (Fla. 3d DCA 1977), were as far-reaching and fundamental as some of the historic steps taken by the United States Supreme Court in cases such as Brown v. Board of Education, 347 U.S. 483 (1954) and Miranda v. Arizona, 384 U.S. 436 (1966).

The first glimmer came in Fleeman v. Case, 342 So.2d 815 (Fla. 1976) decided December 22, 1976. Fleeman contained dicta raising the possibility of challenging a lease on grounds of unconscionability, at common law, even if it could not be challenged based on retroactive application of a statute. 342 So.2d at 818.

On March 31, 1977, Avila South was decided. Rehearing was denied on June 13, 1977. This Court re-examined the Fountainview decision, and for all intents and purposes announced a new right of action which previously did not exist, and which is reflected in the Complaint. 347 So.2d at 607.

Avila South, supra, also made new law in the area of the standing of an association to bring actions of this type. Prior to the enactment of §711.12(2), Fla. Stat. (1975), there was serious doubt as to the capacity of an association to bring a class action of this type. See, Wittington Condominium Apartments, Inc. v. Braemar, 313 So.2d 463 (Fla. 4th DCA 1975); Hendler v. Rogers House Condominium, Inc., 234 So.2d 128 (Fla. 4th DCA 1970). Section 711.12(2) removed these doubts by granting an association the capacity to bring such a suit on behalf of its unit owners, after control of the association is obtained by unit owners other than the developer. Avila South, however, held this statute unconstitutional, but simultaneously amended the Florida Rules of Civil Procedure and adopted the substance of the statute as the Condominium Association Class Action Rule, now Rule 1.221, Fla.R.Civ.P., 347 So.2d at 608; The Florida Bar, In re Rule 1.220(b), Florida Rules of Civil Procedure, (Petition to Modify), 353 So.2d 95 (1977).

Avila South also discussed unconscionability, holding that an association and its unit owners are not precluded from stating such a cause of action, independent of any section of the Condominium Act. 347 So.2d at 605.

Two weeks later, on June 28, 1977, the Third District specifically held that a cause of action based on unconscionability might be stated. Point East One Condominium Corp., Inc. v. Point East Developers, Inc., supra. Thus, in one year, the metamorphosis was complete. Suddenly an association could bring an action on behalf of its unit owner members as a class, and attack a long-term lease on the grounds of unconscionability and self-dealing. Prior to December 22, 1976, there was not even a hint that such rights of action existed. It was not until June 13, 1977, when rehearing was denied in Avila South, that it became clear that they did.

Thus, to rule that the Petitioner Association was on notice of its right of action or of its ability to bring the action as a representative of its unit owners prior to June 13, 1977, would be "to impose an unconscionable prerequisite to asserting a timely claim". Neely v. United States, supra. Because this right of action was "inherently unknowable" prior to Avila South, supra, this cause of action cannot be said to have accrued until June 13, 1977. City of Miami v. Brooks, supra; Berger v. Jackson, supra; Burleigh House v. Buchwald, supra.

Indeed, Respondents' "legal at the time" argument supports the inherently unknowable theory: just as they claim they "looked at the law books" and decided nothing they were doing was actionable,

this presumption of knowledge of the law is a two-edged sword: this cause of action was similarly beyond Petitioner's knowledge. Respondents cannot have it both ways.

No Cause of Action Arose Until the First Demand for Escalated Rent.

Notwithstanding the equitable nature of this cause of action, King Mountain Condominium Association, Inc. v. Gundlach, 425 So.2d 569 (Fla. 4th DCA 1983), a breach of fiduciary obligations is a tort. Eason v. Lau, 369 So.2d 600 (Fla. 1st DCA 1978). It is breach of a duty imposed by law, Woodbury v. Tampa Waterworks Co., 57 Fla. 243, 249, 49 So. 556 (1909), and an injury inflicted other than by a mere breach of contract. Shaw v. Fletcher, 137 Fla. 519, 188 So. 135 (1939).

In tort actions, of course, the statute runs from the time of the injury or damage, and not from the time of the breach of the duty. Neff v. General Development Corp., 354 So.2d 1275 (Fla. 2d DCA 1978). Until the damage has actually been incurred, a party cannot state a cause of action, and the statute does not begin to run. The breach and the injury may be separated by a significant period of time. Town of Miami Springs v. Lawrence, 102 So.2d 143 (Fla. 1958); Airport Sign Corp. v. Dade County, (Fla. 3d DCA 1981).

Therefore, until there has been some actual unjust enrichment, no cause of action for damages or restitution exists. Any suit prior to actual damage is merely one for declaratory relief. See, Smith v. Milwaulkee Insurance Co. of Milwaulkee, Wis., 197

So.2d 548 (Fla. 4th DCA 1967). Indeed, this is such a case, which should have been one for declaratory relief, as the suit was filed in 1979, while the first escalation in rent was not due until 1981.

Similarly, in contract actions, the statute of limitations on a debt does not accrue until the debt is due. Briggs v. Fitzpatrick, 79 So.2d 848 (Fla. 1955).

This Court has also noted that a statute of limitations cannot operate to bar a cause of action before it even accrues; this would be violative of Article I, §21 of the Florida Constitution. E.g., Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981); Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979).

It is hard to conceive of how a party can be required to bring suit by one date when the supposed obligation he is contesting is still contingent, such as rent due in the future.

A lease which contains an obligation to pay rent in the future, this Court holds, is an executory contract. DeVore v. Lee, 158 Fla. 608, 30 So.2d 924 (Fla. 1947). Indeed, "(a) ninety-nine year lease is by its very nature highly speculative and contingent". Dundee Corp. v. Lee, 156 Fla. 699, 24 So.2d 234, 235 (1946).

Therefore, an undertaking to pay rent under a lease

> ... is contingent, and the undertaking to pay rent periodically ripens into a debt only as the times for payments of rent arrive. (citations omitted). In other words, the debt becomes fixed from time to time as the amount of rental is earned by the use of the property by the lessee. An obligation for the full amount ... would not be established merely upon the execution of the instrument, for "rent does not accrue to the lessor as

> a debt or claim, unless payable in advance, until the lessee has enjoyed the use of the premises. It may never become due; for the lessee may be evicted, or the premises become untenable. It is neither debitum nor solvendum. It is not an existing demand, the cause of action on which depends on a contingency, but the very existence of the demand depends on a contingency. It is wholly uncertain whether the lease will ever give rise to an actual debt or liability."

DeVore v. Lee, supra, 30 So.2d at 926 (emphasis added); see also, Association of Golden Glades Condominium Club, Inc. v. Golden Glades Club Recreation Corp., 441 So.2d 154, 156 (Fla. 3d DCA 1983) (Ferguson, J., dissenting).

When this contingent rent constitutes the unjust enrichment, it is difficult to see how Petitioner can be required to sue on this contingency before it occurs.

Thus, it has been held that in action to recover overcharges for violation of a rent control act, the statute of limitations begins to run from the date the excessive rent was demanded, accepted or received by the lessor. Shockley v. Winkler, 196 F.2d 927 (5th Cir. 1952).

Analogy to the rule in usury cases is also proper, for "(a) loan of money for interest is an advance thereof for a rental. No rental is received until it is paid ..." A note does not pay the interest, instead it is merely evidence of a borrower's agreement to pay such interest in the future. Wenck v. Insurance Agents Finance Corp., 99 So.2d 883, 886 (Fla. 3d DCA 1958).

If a note is usurious, the statute of limitations on a borrower's cause of action for the imposition of a penalty or forfeiture

runs from the date of payment, and not from the date of the execution of the usurious note. Wenck, supra; Financial Federal Savings and Loan Association v. Burleigh House, Inc., 305 So.2d 59 (Fla. 3d DCA 1975), cert. discharged, 336 So.2d 1145 (Fla. 1976); Vance v. Florida Reduction Corp., 263 So.2d 585 (Fla. 1st DCA 1972). Indeed, the Second District holds that the statute does not begin to run until the last installment is due and payable. General Capital Corp. v. Tel Service Co., Inc., 212 So.2d 369, 379 (Fla. 2d DCA 1968), aff'd, 227 So.2d 667 (Fla. 1969).

The reasoning behind this rule is that the payment is the last element of the cause of action. Wenck, supra.

This analogy is not misplaced, as usurious interest is "unjust enrichment" of a lender. Indeed, the courts have recognized that usury cannot even be measured at the inception of the transaction, and is not based on the contingencies inherent in the transaction. Instead, it is based on what actually develops. If no usurious interest is ever, in fact, demanded and paid, there is no cause of action. Home Credit Co. v. Brown, 148 So.2d 257 (Fla. 1962).

Indeed, the Fourth District has noted that unless and until a borrower actually pays usurious interest, he has no affirmative cause of action. Cerrito v. Kovitch, 423 So.2d 1008 (Fla. 4th DCA 1982).

Therefore, the cause of action for breach of fiduciary duty did not accrue until the first unjust enrichment: the demand for, and receipt of, escalated rent.

The Continued Enforcement of the Lease Constitutes a Continuing Invasion of Rights and Continuing Injury.

The actions complained of in the Second Amended Complaint are in the nature of a continuing tort, or continuing conspiracy. It is, therefore, submitted that each demand for, and payment of, rent constitutes a new invasion of Petitioner's rights, and starts the statute running afresh each time payment is made.

Where an express contract requires periodic payments, the statute of limitations for an action on those payments runs anew from each payment. The obligee is barred from recovering only those installments due beyond the limitations. Isaacs v. Deutsch, 80 So.2d 657 (Fla. 1955); Bishop v. State, Division of Retirement, 413 So.2d 776 (Fla. 1st DCA 1982); Central Home Trust Co. of Elizabeth v. Lippincott, 392 So.2d 931 (Fla. 5th DCA 1980). As this Court stated in Isaacs:

> And we think it is much more logical to hold that in a case such as this, as in the case of an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.

80 So.2d at 660.

The Fourth District's analogy to personal injury cases involving a single car crash, a single explosion, or a slip and fall, is simply not called for. In such cases, the defendant commits a single act causing injury. He drives his car under the influence of alcohol but once, and collides with the plaintiff but once. Or, he designs and manufactures a machine which blows up in the

plaintiff's face but once. Or, he fails to clear the aisle and the plaintiff slips and falls but once. True, the plaintiff may suffer for a long period of time, but what the defendant did to cause that suffering he did but once. The damage was inflicted but once: the skull was crushed, the face burned, the leg broken, but once.

An even better example of this is a wrongful death case: the decedent is killed but once.

But what if the defendant's actions are continuing in nature, causing new damage to the plaintiff every day? In such a case this Court holds it is a continuing tort, for which the statute will commence to run anew from each act causing injury. Seaboard Airline R. Co. v. Holt, 92 So.2d 169 (Fla. 1957).

In a case very much on point, the Fifth Circuit has held that the four-year statute of limitations for an antitrust action based on a condominium lease would similarly begin to run afresh from each payment of rent. Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029 (5th Cir.), cert. denied, 434 U.S. 859 (1977). There, the lease was challenged on the grounds that tying the lease to the sale of condominium units constituted an illegal tie-in sale, which is a per se violation of the Sherman Act. Although the action was brought more than four years from the signing of the lease, the Court held that each separate collection of rent by the defendants constitutes a new cause of action for violation of the antitrust laws. The Court reasoned that each collection of rent under the lease constitutes another overt act

in furtherance of the conspiracy to restrain trade. "Indeed, such collections are the very goal of such a conspiracy." Id. at 1043. Thus, the fact that the lease was signed, or that the condominium association became bound, beyond the limitations period would not bar the action for injunctive relief. The lessee would be barred only from recovering damages for those rent payments made beyond the limitations period.

Similarly, in Braun v. Berenson, 432 F.2d 538 (5th Cir. 1970), a lessor refused to lease to the plaintiff new or additional space in a shopping center. Refusals occurred in 1957, 1961, and 1964. The court held a 1964 suit, brought on the theory of a secret agreement between the lessor and another lessee, was not barred by the statute of limitations, as each refusal constituted a separate overt act in violation of the antitrust laws, giving rise to new and independent damages. Again, the Court held that while injunctive relief would not be barred, the plaintiff would be barred only from recovering damages for those rent payments made beyond the limitations period.

In the instant case, each demand, and receipt, of rent constituting unjust enrichment gives rise to a separate cause of action. The Association and the unit owners, who are otherwise obligated to continue paying rent and unjustly enriching the Respondents for another 81 years, are barred only from recovering damages measured by excessive rentals paid more than four or five years prior to filing suit.

The Statute of Limitations is Not a Defense in Equity.

The cause of action in the Second Amended Complaint is equitable in nature. The Fourth District has denied a jury trial on that very basis. King Mountain Condominium Association, Inc. v. Gundlach, supra. Thus, the cause of action is not governed by the statute of limitations. Instead, it is governed by the doctrine of laches. Laches, like the statute of limitations, must be proved by clear and convincing evidence. Van Meter v. Kelsey, 91 So.2d 327 (Fla. 1956); Tower v. Moskowitz, 262 So.2d 276 (Fla. 3d DCA 1972). The existence of laches can only be determined upon all the facts of the case. Wiggins v. Lykes Brothers, Inc., 97 So.2d 273 (Fla. 1957).

To support a finding of laches, there must have been unreasonable delay on the part of the plaintiff, and resulting disadvantage to the defendant. E.g., Horowitz v. United National Corp., 324 So.2d 189 (Fla. 1976). Another element of laches is lack of knowledge on the part of the defendant that the plaintiff will assert the right on which the suit is based. Van Meter v. Kelsey, 91 So.2d 327 (Fla. 1956). Another finding the court must make in order to preclude a party from obtaining equitable relief on the basis of laches is that:

> ... his adversary must have suffered some injury or the party asserting a right must have gained an unconscionable advantage as the result of the passage of time.

Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Co., 198 So.2d 74, 84 (Fla. 1st DCA 1959).

Tested against these settled principles, therefore, the passage of time is not a ground for dismissal of the claim for equitable relief. No disadvantage to the Respondents, or unreasonable delay on the part of Petitioner exists on the face of the Complaint. Just the opposite is true. Immediately upon being notified that the escalation clause would be enforced, the Petitioner filed suit.

Even if it is argued that §95.11(6), Fla. Stat. (Supp. 1974), bars the equitable claims, by virtue of a statutory definition of laches, such a statutory limitation is clearly unconstitutional. Section 95.11(6) attempts to impose the statute of limitations for legal actions on equitable claims, "regardless of ... whether the person sought to be held liable is injured or prejudiced by the delay."

Section 95.11(6), as well as other statutes of limitation which seek to place an express limitation on equitable actions, clearly violates Article 2, Section 3, of the Florida Constitution, which provides for the separation of powers concept which is at the very heart of our system of government. Specifically, such attempts by the Legislature to abrogate the equitable doctrine of laches (§95.11[6]), and to place time limitations on the institution of equitable actions on contracts (§95.11[2][b]), constitute impermissible encroachments upon the power of the judiciary to grant relief in equity.

> Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.

Simmons v. State, 160 Fla. 626, 628, 36 So.2d 207, 208 (1948). For this reason, the Legislature cannot by statute mandate a court of equity to exercise its powers and issue an injunction, without regard to the equities of the case before it, Rich v. Ryals, 212 So.2d 641 (Fla. 1968); nor may it abridge or take away the jurisdiction of equity to foreclose a lien. Sivort Co. v. State, 135 Fla. 179, 186 So. 671 (1939). For the same reason, it is submitted that the Legislature cannot by statute tell a court of equity that it may not exercise its inherent powers simply because of the mere passage of time alone. The statutes upon which Respondents rely, therefore, are unconstitutional attempts to impinge upon the power of the judiciary to determine equitable claims.

It is true that when legal claims are brought in equity, equity will "follow the law" and apply the analogous statute of limitations unless there are strong equities compelling a different result. H. K. Realty Corp. v. Kirtley, 14 So.2d 876 (Fla. 1954); Jefferies v. Corwin, 363 So.2d 600 (Fla. 4th DCA 1978). In the instant case, such strong equities do exist:

1. Probably because long term condominium and cooperative leases involve their homes, or are secured by liens on their homes, unit owners in Florida do not act like the typical business man and wait to be sued before raising their defenses. Not wishing to walk into court in a "default" situation, they usually seek affirmative relief first. Prior to this Court declaring unconstitutional §718.401(4), Fla. Stat., they used to also deposit their rent into the registry of the court, rather than withholding same

and waiting to be sued. Pomponio v. The Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980).

Thus, many of the affirmative claims raised in these kinds of suits have historically been defenses. Since these defenses would also be available, as to any action the lessor might bring for non-payment of rent, over the full life of the lease, to deny associations the right to use the doctrine involved offensively would create an unjust and absurd result.

What would happen if a condominium or cooperative association withheld the rent when it filed suit? The lessor would surely file a compulsory counterclaim for the unpaid rent. But what if it were the other way around; i.e., the lessor sued first for the unpaid rent? Then, the association's claims would be the compulsory counterclaim. In such an instance, their causes of action would not be barred by the statute of limitations. Beekner v. Cawthorn, 145 Fla. 152, 198 So. 795 (Fla. 1940); Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA 1982); Evans v. Parker, ___ So.2d ___ (Fla. 1st DCA 1983).

Indeed, in the Riviera "hypothetical", the lessor allowed three escalations in rent to pass, undemanded. He then demanded not only an escalation in rent, but also demanded the retroactive arrearages, for a period spanning almost seven years.

2. The inequity of running the clock from the date of execution of the Lease is illustrated by the facts of this case, and of the Riviera hypothetical.

If the date of the Lease is used, then the first escalation in rent was not demandable until almost ten years after the expiration of the statute of limitations. Thus, when a lease has a 15 year escalation clause, the statute has run before the association is even any sure any cause of action potentially exists.

What if an escalation in rent was demandable within five years from the execution of the lease, but the lessor made no such demand? It is reasonable to assume that an association would react to a timely demand for escalated rents (leaving aside the fact that any suit on similar grounds would clearly have been barred by Fountainview, supra and succeeding cases). Let us assume such a suit could have been brought with some hope of success. What if escalations under the lease were allowed to pass, undemanded? Again, the first escalation might not have occurred until more than five years after the date of the lease.

This hypothetical is not outlandish, and is entirely proper, for it illustrates the lack of reason in a rule of law (as announced by the Fourth District) measuring the statute of limitations from a date prior to an actual demand for, or enforcement of, an escalation clause in a long-term lease. A developer could, even today, plan some other scheme, and time things so as to automatically insure that the statute will have run by the time he seeks to enforce whatever nefarious scheme he dreams up.

Or, he could do what the lessor did in the Riviera hypothetical: sit back, let escalations go undemanded and unenforced, and then nine years after the lease was executed, suddenly demand

an escalation, retroactively, and cry "statute of limitations" when the association complained.

Or, the developer could do what was done in the case at bar: insert an escalation clause which does not take affect for 15 years, stay completely silent until 13 years later, and then move to dismiss any lawsuit based on the passage of time.

For all of any of the above-described reasons, dismissal of the Second Amended Complaint based on the statute of limitations was error.

POINT III

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

The Respondents' Motion to Tax Costs and Attorneys' Fees (R.207-212) did not state any grounds for the request for fees. At the hearing held on the Motion (R.215-242), two grounds were argued: §57.105, Fla. Stat. (lack of a justiciable issue), and a provision of the Articles of Incorporation of the Association, Article VII, entitled "Indemnification". (R.46).

The trial judge correctly denied the Motion, finding the action was not frivolous, and finding that the indemnification provision does not apply, for the reasons set forth in Century Village, Inc. v. Chatham Condominium Associations, 387 So.2d 523 (Fla. 4th DCA 1980).

A judgment of a trial court reaches the appellate courts clothed with a presumption of validity. Accordingly, if there is any theory or principle of law which would support the judgment, the appellate court is obliged to affirm. E.g., Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962). Further, a trial court's construction of a contract or any other written instrument will be affirmed unless clearly erroneous. Clark v. Clark, 79 So.2d 426 (Fla. 1955).

The Fourth District should not have reversed the striking of the request for attorneys' fees, for any of the following reasons:

The Claim for Indemnification Was Not Properly Raised.

One such reason is that a claim for indemnification must be pled, and proved, through a counterclaim. Indemnity is a sub-

stantive obligation of contract. Jemco, Inc. v. United Parcel Service, Inc., 400 So.2d 499 (Fla. 3d DCA 1981).

> In order ... to prevail on his indemnity claim the pleadings must allege and the proof must support the fact (of) appellant's liability, if any ...

Olnick v. Robert Myers Painting, Inc., 384 So.2d 54, 55 (Fla. 4th DCA 1980); see, Berenson v. World Jai-Alai, Inc., 374 So.2d 35 (Fla. 3d DCA 1979); see also, Hull & Company, Inc. v. McGetrick, 414 So.2d 243 (Fla. 3d DCA 1982).

The alleged indemnitor must have the opportunity to raise defenses to the claim. Berenson, supra. The complaint (or counter-claim) must allege a cause of action for indemnity. It must contain sufficient ultimate facts to show the relationship of the parties, the basis of liability, and the amount of damages. Vermont Mutual Insurance Co. v. Cummings, 372 So.2d 990 (Fla. 2d DCA 1979).

Further, in an indemnification claim, the actual attorney's fee contract must be pled, and proved, as the indemnity is limited to recovery of amounts actually paid or incurred under the actual agreement under which he seeks indemnity, i.e., his contract with his attorney. Jemco, Inc., supra.

In addition, jury questions may be raised by these pleadings. Eller & Co., Inc. v. Morgan, 393 So.2d 580 (Fla. 1st DCA 1981); Continental Casualty Co. v. Reddick, 196 So.2d 239 (Fla. 1st DCA 1967).

Respondents' motion, therefore, was clearly insufficient to "state a claim" for indemnification.

Further, indemnification being a contractual right, and an obligation owed by the indemnitor to the indemnitee upon the occurrence of a specified contingency, even the motion stated no basis for relief. There is no allegation of any demand for indemnification, or refusal. As with any contract, a party is not entitled to relief from a court until there has been a breach of the contract or failure to perform under the contract.

Therefore, Respondents did not state a proper claim for indemnity.

Properly Construed, the Indemnification Provision is Inapplicable.

The trial court, by reference to Century Village, supra, construed the indemnification provision in the Articles of Incorporation to not apply to an action such as this, by a corporation against its promoters/original directors. The District Court distinguished this case from Century Village, supra, on the basis that this indemnification clause is contained in the Articles of Incorporation and purports to indemnify the Respondents as directors, whereas the Century Village provision was in the recreation lease itself, and purported to indemnify those defendants as the lessors.

The distinction is without a difference, as in both cases the purported indemnitees are the authors of the instruments, and in both cases, as the Fourth District held in Century Village:

> It is quite obvious that the indemnification clause was not intended to apply to actions between the lessor and lessees, but rather to claims of third parties against the lessor. Accepting the lessor's contention would amount to accepting the incongruous theory that although the appellees may be successful in

> their litigation, they would nevertheless have to satisfy their own judgment in addition to paying the lessor's costs. The law will not sanction such an anomaly.

Id., at 524 (emphasis supplied).

The issue is whether this indemnification provision can be construed as a contract between the Petitioner Association and the Respondents to include indemnification when the litigation is between the Association and the Respondents. A close reading reveals that it was obviously intended to protect persons who serve on the board from lawsuits which might be filed against them by third persons. This form of indemnification in articles of incorporation is common. It is designed to encourage persons to serve on the board of directors of a condominium association without exposing them to personal liability for actions brought against the association by third parties. This provision, however, was not intended to indemnify the initial promoters of the corporation when the association is bringing an action against them in a case such as this.

In reviewing the trial court's construction of this indemnification provision, certain rules of construction must be applied:

1. Attorney's fee provisions in contracts, like attorney's fee statutes, are strictly construed. E.g., Ohio Realty Investment Corp. v. Southern Bank, 300 So.2d 679 (Fla. 1974). A provision for attorney's fees must be clearly and definitely provided for. There must clear and definite intent from the face of the contract that it is the intent of the parties that fees be awardable. Fred Howland, Inc. v. Gore, 154 Fla. 781, 13 So.2d 303 (1943);

Gralynn Laundry, Inc. v. Virginia Bond & Mortgage Corp., 121 Fla. 312, 163 So. 706 (1935).

2. This indemnification provision was drafted by the Respondents, who were the incorporators of the Association. They drew these Articles just as they drew the Recreation Lease. Accordingly, the indemnification provision must be construed strictly against the Respondents, as the draftsmen. E.g., Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 517 (Fla. 1978); see, Century Village, Inc. v. Wellington, etc. Condominium Association, 361 So.2d 128 (Fla. 1978); Cole v. Angora Enterprises, Inc., 403 So.2d 1010 (Fla. 4th DCA 1981), aff'd 439 So.2d 832 (Fla. 1983).

3. When an indemnity is given by one not in the business of insurance, but is instead provided for incident to a contract whose main purpose is not indemnification, the agreement must be strictly construed in favor of the indemnitor. Sol Walker & Co. v. Seaboard Coastline R. Co., 362 So.2d 45 (Fla. 2d DCA 1978); Thomas v. Atlantic Coastline R. Co., 201 F.2d 167 (5th Cir. 1953).

The instant indemnification provision does not expressly state that it is applicable when the directors are sued by the Association. In the absence of such an express provision, it must be strictly construed to not apply in such a case.

§607.014, Fla. Stat., Is Not Applicable.

Finally, the District Court grounded its reversal in part on a basis never urged by the Respondents, either below, or to the District Court of Appeal: §607.014, Fla. Stat. The District

Court's application of this statute was erroneous, as the statute is not applicable, and even if it were, applying it retroactively impairs the obligation of contracts, in violation of Article I, §10 of the United States and Florida Constitutions.

Petitioner Association, of course, is a Florida corporation not-for-profit. It is not governed by the provisions of Chapter 607, Fla. Stat.; instead, it is governed by the provisions of Chapter 617, Fla. Stat. Thus, the section of the general Florida Corporation Act relied on by the District Court is inapplicable. Instead, if any statute applied, it would be §617.028, Fla. Stat. (1972 Supp.) which provides that §607.014 applies to corporations not-for-profit. This statute, however, was not enacted until over one year after the appeal was docketed. Ch. 82-177, §18, Laws of Florida (eff. April 21, 1982).

The applicability of statutory provisions for attorney's fees is generally measured by the date of filing suit. Tuggle v. Government Employees Ins. Co., 227 So.2d 355 (Fla. 1969); Love v. Jacobson, 397 So.2d 782 (Fla. 3d DCA 1980). Thus, if §607.014 (as incorporated by reference in §617.028) is to be deemed a statutory provision for attorney's fees, it cannot apply to a lawsuit instituted in 1979.

If §617.028 is instead deemed a statutory contractual provision, it cannot apply retroactively to pre-existing contracts without impairing the obligation of contract, in violation of Article I, §10, of the United States and Florida Constitutions. Commodore Plaza at Century 21 Condominium Association, Inc. v. Cohen, 378

So.2d 307 (Fla. 3d DCA 1980); see also, Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Pompanio v. The Claridge of Pompano Condominium, Inc., supra.

This constitutional protection, of course, applies with equal effect to corporate charters. Marion Mortgage Co. v. State, 145 So. 222 (Fla. 1932); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

Even if §607.014 was applicable to the instant case, it is still not a basis for reversing the trial court's striking of the request for fees. Its provisions are not automatic; instead, they are discretionary. Both subsections (2) and (6) state that a corporation "shall have power to indemnify" and "shall have the power to make any other or further indemnification". In this context, the statute is merely a grant of corporate powers. These powers, therefore, may be exercised by a vote of the board of directors or the membership. §617.014(4), Fla. Stat.

Once again, the procedural issue raises its head; there is no claim of demand or refusal to indemnify. Further, even if this Court agrees with the District Court, on rehearing, that by virtue of §607.014(3), the statute is self-activating, no proper claim for indemnification has been pled, as discussed, supra.

Accordingly, the District Court's application of §607.014, Fla. Stat., as a basis for reversal, was erroneous.

Respondents, in their Jurisdictional Brief, argued that the District Court's opinion on the application of the statute is "simple dictum", and unnecessary to support the decision. Petitioner

does not read it to be dictum; the opinion on rehearing bears out that the statute is part of the basis of the holding. Either way, the decision is erroneous, and should be reversed.

Based on all of the foregoing, the District Court erred in reversing the Order striking the prayer for attorneys' fees, and the opinion of the District Court on this issue should be quashed.

CONCLUSION

Based on all of the foregoing, Petitioner Association's cause of action is not barred by the statute of limitations, and this Court's decision in Avila South, supra, applies to the Respondents' actions. The decision of the District Court of Appeal affirming dismissal of the Complaint for failure to state a cause of action should be quashed, and the cause remanded to the trial court with directions that Respondents be required to file their Answer and Affirmative Defenses.

The decision of the District Court reversing the striking of the prayer for attorneys' fees should be similarly quashed, regardless of the decision this Court reaches on the cause of action. Regardless of whether Petitioner is ultimately successful on the merits or not, the trial court's determination that Respondents are not entitled to attorneys' fees for successful defense should be affirmed.

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Initial Brief on the Merits was furnished by mail, this 6th day of March, 1984, to: 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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