IN THE SUPREME COURT OF FLORIDA

CASE NO. 65-620

STORER CABLE T.V. OF FLORIDA, INC.,
a Florida corporation,

Appellant,

vs.

SUMMERWINDS APARTMENTS ASSOCIATES, LTD.,
a Florida limited partnership,

Appellee.

ON APPEAL FROM THE THIRD DISTRICT COURT
OF APPEAL OF FLORIDA

REPLY BRIEF OF APPELLANT

DIXON, DIXON, HURST & NICKLAUS
Suite 1500, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
-and-
DANIELS AND HICKS, P.A.
1414 duPont Building
169 E. Flagler Street
Miami, Florida 33131

Attorneys for Appellant

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I.

ARGUMENT

For the reasons stated in the initial brief and those set forth below, the Appellant respectfully submits that the enactments should be sustained as constitutional. The decision of the lower court should be reversed and the cause remanded.

A. There Is No Permanent Physical Occupation of Summerwinds' Property So As To Constitute An Unconstitutional Taking.

Summerwinds has not addressed Section 83.43(5), Fla. Stat. (1973) which defines "premises" as including the tenant's dwelling unit, its structure, appurtenant facilities, grounds, and property which are held out for tenant use. The lack of such a pre-existing legislative definition in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), distinguishes the Loretto analysis from that required in this case. Moreover, this unchallenged definition of "premises" applied in the context of the pre-existing law of waste, renders this case directly within the framework of analysis of Wynmoor Limited Partnership v. Coconut Creek Cable TV, Inc., Case No. 81-145304 CL (17th Jud.Cir., July 9, 1982), aff'd., 434 So.2d 903 (Fla. 4th DCA 1982), pet. dismissed, 436 So.2d 101 (Fla. 1983), rev. dismissed, ___ U.S. ___, 79 L.Ed.2d 158, 104 S.Ct. 690 (1984).

Summerwinds attempts to restrict the effect of Wynmoor to condominium unit owners by contending that only unit owners were involved. However, the trial judge's disposition of Wynmoor

indicates that Section 718.1232, Fla. Stat. (1981) was challenged on the basis of facial invalidity. That statute regulates access to any resident "whether tenant or owner". (App. C. at 6).

Summerwinds also seems to shift to an argument that Section 83.66, Fla. Stat. (1982) is unconstitutional in its application, relying upon Multach v. Adams, 418 So.2d 1254 (Fla. 4th DCA 1982) for the proposition that the roof and walls of a residential unit are not reasonably essential to the tenant's use.[1] The Multach case did not apply any such rule of law. What the trial court did was find as fact that a commercial tenant, who changed the premises by installing an air conditioner and a garage door in an exterior wall, owed damages to the landlord for breach of the lease agreement to repair. The lessee had failed to correct those changes at the end of the tenancy. Multach supports Storer's position because:

(1) It supports the principle that whether Summerwinds' property will be damaged by cable television service is a question of fact;

(2) It supports the principle that the pivotal finding of damage depends upon whether repair can be or is accomplished at the end of the tenancy;

(3) It illustrates the workability of the action for waste provided by Section 83.66(5), Fla. Stat. (1982).

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[1] On this record, there is no evidence that proposed service will involve a roof or walls.

If Summerwinds chooses to shift horses mid-stream, this cause should be remanded with directions to require access. Until waste has been committed or is evident on the record, and until the action for waste available under 83.66 (5) is shown to be inadequate or unjust, Summerwinds has suffered no injury. On the other hand, if Summerwinds maintains its contention that the enactments are facially unconstitutional, then Storer remains an invitee of the requesting tenants, not an "uninvited stranger", and the cable television service is not required to occupy property whose full ownership is in Summerwinds.[2]

B. Payment Is Available Under the Enactments.

Summerwinds does not address the availability of payment under Section 8A-132(b), Code of Metropolitan Dade County. Even if Loretto is found by this Court to be applicable, it requires that this exercise of police power be upheld. The cause should be remanded to determine proper payment under the ordinance, if Summerwinds' property interests are permanently occupied.

As for the statute, the case again distills down to the question of whose property will be "occupied" by proposed cable television service. If it is the tenant's property and if fixtures are removable, then Summerwinds simply has no right to charge for "use and occupancy".

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[2] Contrary to Summerwind's assertion that the issue of the common-law property interests of the tenant was adversely decided in Loretto, the United States Supreme Court declined to venture an opinion on New York tenants' property interests. 102 S.Ct. at 3178.

Nor was such a result "squarely rejected" in Loretto, because that statute did not link installations to tenant rights, much less tie television service to a definite lease-term. And even if Loretto did require compensation for use and occupancy of the tenant's premises in addition to rent, Summerwinds cites no reason to reject the compensation scheme contained within 83.66(5) as not being just.

Storer finally points out that Summerwinds has misquoted the "proscription" against payment contained in the statute. Summerwinds has said the statute provides:

> nor shall such tenant or cable television service be required to pay anything of value in order to obtain or provide such service...

but the statute completes that statement with this qualification:

> except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

Section 83.66(1), Fla. Stat. (1982). The legislative intent cannot be determined by half a sentence. The whole statement contemplates that damages for waste, if any, guaranteed by 83.66(5), will be assessed by reference to similar payments for single-family homes. Clearly the intent is to preclude a surcharge for multi-unit dwellings that bears no relationship to actual fixtures used or degree of intrusion suffered. See, Princeton Cablevision, Inc. v. Union Valley Corp, Docket No. D-356-83 (Sup.Ct. N.J. Dec. 29, 1983). Moreover, such a construction will not render subparts (1) and (5) in conflict, for sub-

part (5) states that payments pursuant thereto "shall not be construed as a payment of value in order to obtain or provide cable television services."

C. Constitutional Issues Premature

Summerwinds has itself raised factual arguments that underscore this alternative basis for reversal. See, argument supra at 1-2. Reversal is required if Summerwinds relies upon an unconstitutional application of the enactments to render them invalid. Summerwinds must show the application - else it has no standing - and Summerwinds has not refuted the leases, ordinances, or easements whose terms might preclude constitutional inquiry.[3]

D. Loretto Inapposite to a Use - Regulatory Statute.

The New York law did not allow a landlord to furnish his own cable television services and so exclude franchisees. The Florida statute does. Just as a landlord is required to install washing machines, mailboxes, or fire extinguishers, so a Florida landlord must now furnish cable television services when his tenants request it. He may do so by providing his own service,

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[3] Summerwinds seems to rely on the allegation that Storer sought to enter "the premises of Summerwinds Apartments." But see, definition of "premises", supra at 1, and paragraph 4 of complaint, R.7. (Apartment complex known as "Summerwinds Apartments"). All inferences should be made in favor of the party opposing the motion for judgment on the pleadings. The quoted allegation cannot be read to establish the fact of permanent physical occupation of the landlord's property or damage to his reversionary interest, since it only alleges service was intended for the complex.

or by permitting the area licensee to do so. Summerwinds has failed to refute this vital distinction.

E. Sections 14 and 25 of Chapter 82-66 Consistent and Constitutional - Reply to Amicus Curiae Brief.

The Florida Apartment Assocation relies upon Section 14 of Chapter 82-66 as establishing a legislative intent to accomplish a taking without just compensation, because that section contains only the first clause of Section 83.66, Fla. Stat. (1983). This argument is misdirected for the following reasons:

(1) The specific enactment is given priority over the general in determining legislative intent, if there is conflict between the two, Littman v. Commercial Bank & Trust Co., 425 So.2d 636 (Fla. 3d DCA 1983);

(2) Every part of the statute must be given effect, thus making the remedy for waste provided in 83.66(5) of special significance, State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977).

(3) The two are not harmonized by deleting 83.66(5), but are harmonized by augmenting Section 14 with Section 25. State v. Nourse, 340 So.2d 966 (Fla. 3d DCA 1976);

(4) The Florida Apartment Association overlooks the qualification of Section 14 that allows payments to be made by reference to single-family home charges.

If we are to inquire as to the significance of Section 14, Storer respectfully suggests that it is an analogue of Section 718.1232, Fla. Stat. (1981), and that it was intended for inclusion in Part III of Chapter 83, Mobile Home Park Lots. Sections

83.750 et. seq., Fla. Stat. (1983). It follows six sections dealing with mobile homes. Sections 8-13, Chapter 82-66, Laws of Florida. It precedes nine sections amending Part II of Chapter 83, Residential Tenancies. Sections 15-24, Chapter 82-66, Laws of Florida. These nine sections amend Part II in seriatim fashion, culminating in Section 25, the statute with which we are concerned. It thus appears that the legislative intent was to provide support for television signal access for mobile home parks as well as for apartments and condominiums.

Finally, the Wynmoor case indicates that the language of Section 14 is constitutionally unoffensive.

II.

CONCLUSION

The order of the lower court should be reversed and the cause remanded.

Respectfully submitted,

DIXON, DIXON, HURST & NICKLAUS
Suite 1500, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
-and-
DANIELS AND HICKS, P.A.
1414 duPont Building
169 E. Flagler Street
Miami, Florida 33131
(305) 374-8171

BY: Louise H. McMurray
LOUISE H. McMURRAY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellants was mailed this 5th day of November, 1984 to: Greenberg, Traurig, Askew, Hoffman, Lipoff & Quentel, 1401 Brickell Avenue, PH-1, Miami, Florida 33131; ROBERT W. PERKINS, ESQ., Perkins & Collins, Post Office Drawer 5286, Tallahassee, Florida 32314; PAIGE AND CATLIN, 800 Alfred I. DuPont Building, 169 E. Flagler Street, Miami, Florida 33131; and DOW, LOHNES & ALBERTSON, 1255 Twenty-Third Street, N.W., Suite 500, Washington, D.C. 20037.

LOUISE H. McMURRAY