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IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,834

DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, DEPARTMENT OF BUSINESS REGULATION; and THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC.,

Petitioners,

v.

HERMAN E. SIEGEL, on behalf of himself and other unit owners of THE TOWERS OF QUAYSIDE NO. 2 CONDOMINIUM,

Respondent.

FILED
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OCT 3 1984
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

On Appeal from the District Court of Appeal, Third District of Florida, Case No. 83-2113

RESPONDENT'S ANSWER BRIEF ON JURISDICTION TO THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC.

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<u>TABLE OF CONTENTS</u>

	Page
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2-4
ARGUMENT:	
THE DECISION OF THE DISTRICT COURT DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER DISTRICT COURT OR OF THIS COURT	4-9
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

CASES	Page
Neilsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960)	4
Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981)	4,6,7
Raines v. Palm Beach Leisureville Community Association, Inc., 413 So.2d 30 (Fla. 1982)	4,5,6,7

FLORIDA STATUTES

§718.103(2)	1,7
§718.103(11)	5,8
§718.303(1)	7
§718.501(1)(g)	1,7

STATEMENT OF THE CASE

Petitioner, THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC. ("Homeowners' Association") neglects to inform this Court of the manner in which it became a party to these proceedings.

After Respondent filed his Petition for Declaratory Statement with the DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS (the "Division") pursuant to §718.501(1)(g), Fla. Stat., the Division sent a copy of the Petition to HOMEOWNERS' ASSOCIATION, which filed a lengthy reply in letter form, *ex parte*. Neither Homeowners' Association nor the Division provided a copy of same to Respondent SIEGEL, who first became aware of Homeowners' Association's response upon reading the Declaratory Statement from which the appeal was taken. In the Declaratory Statement, the Division took note of the letter, which it treated as a Motion to Intervene, which it granted.

Further, the issue before the Third District was *not* whether Homeowners' Association was a "*condominium association*", and contrary to Petitioner's Brief, the Court did not so hold. Instead, the issue was whether the Homeowners' Association was an "*association*" within the meaning of §718.103(2), Fla. Stat., and the Court so held.

STATEMENT OF THE FACTS

Petitioner's Statement of the Facts contains omissions, obfuscations and inaccuracies which distort the controlling, relevant facts of this case.

The Towers of Quayside is comprised exclusively of condominiums (existing and proposed) and "common properties" which serve the entire community, including recreational facilities and roads. Petitioner Homeowners' Association owns and operates the "common properties" under the Declaration of Covenants, and has a lien on every condominium unit in the community to secure the payment of assessments against the unit owners, including Respondent SIEGEL.

The "common properties" are appurtenances to each and every condominium unit in the community. The unit owners' rights in the common properties are set forth in intertwined provisions in the Declaration of Covenants and the Declarations of Condominium, all set forth by the District Court in its opinion. We say "intertwined" because the Declaration of Covenants is expressly incorporated into the Declaration of Condominium.

The Submission Statement of the Declaration of Condominium submits to condominium ownership

> ... the Land and Building (each as hereinafter defined), all other improvements erected thereon, and all other property, real, personal or mixed, <u>intended for use in connection therewith</u> (collectively called the "Property") ... (Emphasis supplied by District Court of Appeal).

Article 2.9 of the Declaration of Condominium defines "condominium property" as:

> (T)he land and personal property that are subject to condominium ownership under this Declaration, all improvements on the Land, and easements and rights appurtenant thereto which are intended for use in connection with the Condominium.

Article 21 of the Declaration of Condominium requires that each unit owner shall become a member of the Homeowners' Association, and shall have a right to enjoy the common properties, and further provides:

> All rights, privileges, benefits, liabilities and obligations set forth in said Declaration of Covenants, Restrictions and Easements _are incorporated herein by reference_ and each Unit Owner shall be bound thereby in all respects. (Emphasis supplied).

Article II, §1 of the Declaration of Covenants provides that each unit owner shall have:

> ... a right and easement of ingress and egress and of enjoyment in, to and over the Common Properties _which shall be appurtenant to and shall pass with title to_ every Dwelling Unit ... (Emphasis supplied).

Article I, §10 of the Declaration of Covenants which defines "common properties", states again that said properties are for the common use and enjoyment of the unit owners.

It must be emphasized that nothing in the record shows that any of the condominiums in The Towers of Quayside were created by the conversion of existing buildings to the condominium form of ownership, rather than by the construction of new improvements as condominiums. Even if this were so, there are no residences in the community which are not condominium units, nor are any

proposed residences planned to be anything other than condominium units.

THE DECISION OF THE DISTRICT COURT DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER DISTRICT COURT OR OF THIS COURT

This Court lacks jurisdiction because the requisite conflict does not exist. The decision of the Third District neither applies a rule of law to reach a different result in a case which involves substantially the same controlling facts as the prior case, nor announces a rule of law which conflicts with a rule previously announced. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

Lack of a Different Result on the Same Controlling Facts.

There is a crucial factual distinction between the decision in this case and the decisions in Raines v. Palm Beach Leisureville Community Association, Inc., 413 So.2d 30 (Fla. 1982), and Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981). Namely, while The Towers of Quayside community consists exclusively of condominiums, Palm Beach Leisureville consisted of 502 condominium units and 1,803 improved lots with single-family homes not subject to the condominium form of ownership. The underlying declarations governing the Palm Beach Leisureville community were separate documents, and the declarations of covenants governing the single-family home properties contained no contemplation of that land being subject to the condominium form of ownership. While the condominium units were condominiums, the declaration of restrictions for the single-family lots did not create a condominium

form of ownership for those lots. 413 So.2d at 32. As the Fourth District put it, "the 1803 improved lot owners were never 'condominiumized' as such. ... the improved lot owners held deeds to their property which were free of condominium-type restrictions."

Here, on the other hand, the Common Properties are "condominium property", as defined by §718.103(11), Fla. Stat., as both the Declaration of Condominium and Declaration of Covenants provide that the unit owners' rights therein are appurtenant to and are intended for use in connection with the condominium. Further, the Declaration of Condominium contains the same definition of "condominium property" as §718.103(11), and submits to condominium ownership all other property "intended for use in connection (with)" the actual condominium land and building. The lack of "different result" conflict is highlighted by this Court's refusal in Raines to answer the broad certified question, and by its statement that:

> It might well be that other associations similar to this one would be associations as defined by the statute.

413 So.2d at 32.

This Court, in Raines, was confronted with the issue of whether an "association" administering a mixed community comprised of condominium and single-family homes was an "association" under Chapter 718, Florida Statutes. This Court declined to reach even that broad issue, and merely decided the status of the Palm Beach Leisureville community. Given this crucial distinction in the composition of the two communities, the controlling facts in the two cases are simply not substantially the same.

Further, in Palm Beach Leisureville, as both this Court and the Fourth District noted, no declaration of condominium was filed to specify the powers of the community association. Here, the Declaration of Covenants, containing all of the Homeowners' Association's powers and duties, is expressly incorporated into the Declaration of Condominium, in Article 21.

Consistent Rules of Law.

No different rule of law has been announced in the instant case, because the Raines decisions did not deal with a community which was exclusively condominium. Put quite simply, the issue in the Raines cases was the status of an association which operated a mixed community, while the issue in the instant case was the status of an association which exists in an exclusively condominium community.

Petitioner Homeowners' Association reads into the Fourth District's opinion in Palm Beach Leisureville a non-existent three-pronged test. To the contrary, after examining all of the relevant facts, including the provisions of the governing documents, the Fourth District's holding was based only on the "constituency" test. After finding that "it would be absurd and patently unfair" to require the single-family home owners to pay attorney's fees under the Condominium Act, "when those owners did not contemplate participation in the condominium way of life", the Fourth District held:

> We therefore hold that the improved lot owners did not take title to their property as 'condominium' unit owners, and thus, the appellant

> Association was not an 'association' within the meaning of Section 718.103(2) and Section 718.303(1).

398 So.2d at 474. This Court merely affirmed that the Palm Beach Leisureville Community Association was not an association within the meaning of §§718.103(2) and 718.303(1), Fla. Stat.

As to the "function" test nonetheless applied by the Third District, its opinion addresses a question not previously dealt with: whether an association which operates condominium property as defined by the statute, which is exclusively for the use of condominium unit owners, is an "association" under Chapter 718. Since neither this Court nor the Fourth District has addressed _this_ issue, no different rule of law has been announced.

Even under the "source of powers" test, no different rule of law has been announced, as the test has not previously been applied. Even if this Court feels it has, Petitioner Homeowners' Association's powers, which derive from the Declaration of Covenants, end up being derived from the Declaration of Condominium, by virtue of the incorporation of the Declaration of Covenants into the Declaration of Condominium. The opinions of this Court and the Fourth District in the _Raines_ cases indicate no such incorporation. Indeed, they indicate a complete lack of intent, as to the single-family homeowners, to subject them to the condominium form of ownership. The non-existent "source of powers" test is, therefore, really the constituency test, without the requisite conflict.

A Little Common Sense.

Petitioner Homeowners' Association urges this Court to take jurisdiction because of a professed sense of confusion.

Petitioner Homeowners' Association will be confused only if it fails to use a little common sense. If a community has been created where different associations operate different, separate, condominium properties, then no confusion or overlap need exist if each association merely deals with, and exercises its statutory powers in connection with, its separate condominium property.

Admittedly, there is one exception to this "separate property" concept: the two associations have overlapping powers with respect to Respondent's condominium, as Petitioner Homeowners' Association has "back-up" power to repair the common elements of the condominiums in the complex. This overlap, however, exists regardless of the decision of the Third District, and would exist regardless of whether or not Petitioner is an "association" under Chapter 718.

Indeed, Petitioner's argument can be turned around to destroy the validity of the Homeowners' Association. Since the "common properties" in the complex are "condominium property", as defined by §718.103(11), Fla. Stat., if there can only be one association, then Homeowners' Association is illegal. In that event, however, the problem would arise as to who would operate the common properties. Does Respondent SIEGEL's condominium association operate them, or does another condominium association operate them? That situation would create confusion and overlap under Petitioner's "only one association" argument. The Third District's opinion leaves matters

as they are, with separate associations responsible for separate condominium property. All the Court has decided is whether Homeowners' Association, in governing its separate property, is governed by Chapter 718, Florida Statutes.

CONCLUSION

Based on the foregoing, this Court lacks jurisdiction as the requisite conflict does not exist, and the Petition for Review should be denied.

Respectfully submitted,

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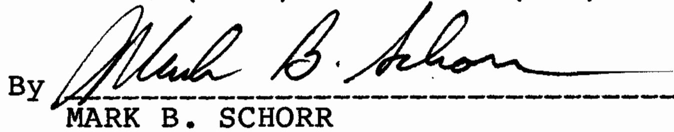

By ______________________________
MARK B. SCHORR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Respondent's Answer Brief on Jurisdiction to The Towers of Quayside Homeowners' Association, Inc. were furnished by mail this 1st day of October, 1984, to: RICHARD L. ALLEN, ESQ., Rubin, Baum, Levin, Constant, Friedman & Bilzin, Attorneys for Petitioner THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., 1201 Brickell Avenue, Suite 314, Miami, FL 33131; and DAVID M. MALONEY, ESQ., Deputy General Counsel, Department of Business Regulation, 725 South Bronough Street, Tallahassee, FL 32301.

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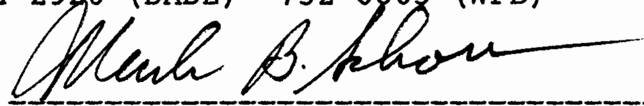

By ______________________
MARK B. SCHORR