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IN THE SUPREME COURT OF FLORIDA
CASE NO. **71,909**

ASSOCIATION OF GOLDEN GLADES CONDOMINIUM CLUB, INC., a Florida corporation not for profit,

Appellant

vs.

SECURITY MANAGEMENT CORP., a Maryland corporation,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE THIRD DISTRICT OF FLORIDA

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, Association of Golden Glades Condominium Club, Inc. (which will be referred to as the "Condominium Association" throughout this brief), has filed a petition to invoke the discretionary jurisdiction of this Court. The Third District Court of Appeal affirmed a Trial Court decision enforcing an escalation clause in the Golden Glades long term recreational lease, but certified the following question as a matter of great public importance:

> TO WHAT EXTENT DOES SECTION 718.401(8), FLORIDA STATUTES (1985), APPLY TO RENT ESCALATION CLAUSES ENTERED INTO BEFORE THE EFFECTIVE DATE OF THE STATUTE?

A. APPELLATE HISTORY

Prior to hearing this appeal the Third District had already heard and decided an interlocutory and a final appeal in a separate but related case between the Condominium Association and the Lessor concerning the enforceability of the escalation clause which is the subject of this appeal. In the previous case, the Lessor sought to collect escalated rents from January 1, 1975 to December 31, 1980. The present. dispute involves the same Long Term Lease, but only involves

escalated rents from July 1980 [1] through January 1987.

The first appeal heard by the Third District was an interlocutory appeal. In Golden Glades Club Recreation Corp. v. Association of Golden Glades Condominium Club, Inc., 385 So.2d 103 (Fla. 3d DCA 1980) pet. for rev. denied 392 So.2d 1374 (Fla. 1980) (which will be referred to as Golden Glades I) the Third District held:

> The underlying basis for the declaration of the lessee's rights was that the long term lease incorporated the Condominium Act, Chapter 711, Florida Statutes (1969) by reference as it may be amended from time to time. We affirm on the reasoning and authority of our decision in Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977). See also Century Village, Inc. v. Wellington, Inc., 361 So.2d 128 (Fla. 1978).(Emphasis added.)

In the appeal from the final order concerning the 1975-1980 escalated rental increase, Association of Golden Glades Condominium Club, Inc. v. Golden Glades Club Recreation Corp., 441 So.2d 154 (Fla. 3d DCA 1983), pet. for rev. denied, 455 So.2d 1032 (Fla. 1984) (referred to in this brief as Golden Glades II), however, the Third District issued an enigmatic majority opinion which simply stated:

> Section 718.401(8), Florida Statutes (1981), which prohibits rental escalation clauses in leases for condominium recreational facilities does not apply to prohibit enforcement of such

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[1]. The Complaint actually alleged that the escalated fees were due from January 1980. Plaintiff conceded that the statute of limitations barred the rents from January through June 1980 because the Complaint was not filed until June 1985. (R-338, 423.)

clauses in contracts which antedate the statute. Fleeman v. Case, 342 So.2d 815 (Fla. 1976).

Judge Ferguson wrote a stinging dissent, reminding the majority that their earlier opinion had determined that the lease agreement incorporated by reference the amendments to the Condominium Act. He argued that Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied 466 U.S. 927, 104 S.Ct. 1710, 80 L.Ed. 183 (1984) controlled the outcome of Golden Glades 11.

B. THE PARTIES.

The Joint Pretrial Stipulation and the documents contained in the record reveal that several corporations involved with this condominium project were interlocking directorates. The developer, Golden Glades Building Corporation, (referred to in this brief as the "Declarer"), constructed the condominium development and wrote the condominium documents. (Plaintiff's Exhibit 5.) Golden Glades Club Recreational Corporation (referred to in this brief as "Lessor") constructed the recreational facilities on the site "as part of the condominium development." (R-339.) The officers and directors of the Declarer and the officers and directors of the Lessor were the same. (R-79-106, 107-206, 339-340.) Prior to this action, the Lessor and the Declarer merged into Plaintiff, Security Management Corp. As admitted by Plaintiff, Security Management Corporation, "At all times material up to the merger of [the Declarer]

and [the Lessor], S[ecurity] M[anagement] C[orporation] owned all shares of both corporations." (Bracketed material has been substituted in place of the hieroglyphics of the original, which used acronyms for the names of the Lessor, Declarer, and Plaintiff corporation.)(R-340.) The Articles of Merger, were signed by Steven M. Posner as President of each of the numerous corporations which were merged--including the Lessor and the Declarer of Golden Glades Condominium. Only one corporation is left as a legal entity. Security Management Corporation, the Plaintiff Corporation, is the successor by merger, and the merged corporations--including the Lessor and the Declarer-- have ceased to exist. (See page two, paragraph four of the Articles of Merger in the Appendix, as well as Section 607.231(3)(b) Fla. Stat.)

The pretrial stipulation, signed by both parties to this action, stated that the officers and directors of the Condominium Association were essentially the same as the officers and directors of the Lessor "until the Association was turned over to the unit owners on December 23, 1971." (R-340.) Thus, neither the present unit owners nor their elected representatives negotiated any of the documents involved in this case prior to their execution.

B. THE CONDOMINIUM LEASE, THE DECLARATION OF CONDOMINIUM, AND GOLDEN GLADES I AND II.

On March 14, 1970, when the Lessor entered into the Long Term Lease[2] with the lessee Condominium Association, the officers and directors of the Lessor were one and the same as the officers and directors of the lessee, Condominium Association. (R-340.)

The term of the Long Term Lease stretches until the year 2069, with a base rent of $4,400 per month, subject to a rent adjustment based upon the Cost of Living Index calculated at 5 year intervals commencing January 1, 1975 and continuing each 5 years throughout the term of the lease. (See Lease, paragraphs 11,111, and XXV.)

The Long Term Lease is attached to and made a part of the Declaration of Condominium. (R-340, Lease, paragraph XVIII.) The Long Term Lease specifically and repeatedly references the Declaration of Condominium. (Lease paragraphs XVIII at p.12; XXI.n. at p.15; XXII at p.15; XXIII at pp.15, 17, and 18; XXVI at pp.20-21; XXVII at p.21; XXVIII at p.21; XXIX at p.21; XXX at pp.22,23, and 24; and XXXI at p.24.)

The Long Term Lease directly, expressly, and in no uncertain terms incorporates by reference the "definitions of

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[2] Petitioner has prepared an appendix containing the Long Term Lease, the Declaration of Condominium and the Articles of Merger. Citations to these instruments will be referred to by the document name, page number, and paragraph or article number.

the words, terms, phrases, etc., as provided in Article I of the Declaration of Condominium to which this Long Term Lease is attached as Exhibit No. 4." (Emphasis added.) (Lease paragraph **XXIX** B.)

The Declaration of Condominium contained the following definition of "Condominium Act":

> G. Condominium Act means and refers to The Condominium Act of the State of Florida (F.S. 711 Et. Seq.), as the same may be amended from time to time. (Emphasis added.)

The Declaration of Condominium incorporates by reference the entire Long Term Lease. (Declaration of Condominium paragraph **I,** Definitions R and TT; and paragraph **VII.)** The Long Term Lease also made reference to the Condominium Act "as such statute may be amended." (Lease paragraph **XXIII** at p. 18-19.) Finally, the Long Term Lease incorporated by reference the Declaration of Condominium in the following paragraph:

> **XXVI**
>
> . . . all of the provisions of the Declaration of Condominium to which this Long-Term Lease is attached as Exhibit No.4 relative to this Lease, including, specifically, those provisions relative to the Lessor's approval and consent with regard to voluntary termination of the Condominium and, where required, any Amendment of the Declaration of condominium, are hereby declared to be an integral part of the consideration given by the Lessee to the Lessor for this lease; . . . (Emphasis added.) (See pp. 20-21 of the Lease.)

C. THE TRIAL COURT AND THIRD DISTRICT DECISIONS

The case was tried by bench trial on a Stipulated Statement of the Case and Stipulated Facts. (R-337-341.) No witnesses testified at trial, and the essential issues raised at trial were legal arguments made by the attorneys concerning the affirmative defenses raised by the Condominium Association. The Trial Court entered a lengthy Final Judgment which included the following conclusions of law:

> (c) Neither Plaintiff nor [the Lessor] signed the Declaration of Condominium. [The Lessor] was a party to the Long Term Lease and not the Declaration. Neither Plaintiff nor [the Lessor] ever agreed to be bound by the Declaration or the Condominium Act. The Declaration and the language contained in it cannot bind [the Lessor] or the Plaintiff. See, Cove Club Investors v. Sandalfoot South One, 438 So.2d 354.
>
> (f) The Lessor did not adopt the Condominium Act, now Chapter 718, Florida Statutes, by reference "as it may be amended from time to time" or in any other fashion. (R-399-401.)

The Third District Court of Appeal affirmed the Trial Court ruling but certified an issue of great public importance. The Condominium Association has filed a notice of intention to invoke this Court's jurisdiction to review the decision of the Third District.

ISSUE ON APPEAL

TO WHAT EXTENT DOES SECTION 718.401(8), FLORIDA STATUTES (1985), APPLY TO RENT ESCALATION CLAUSES ENTERED INTO BEFORE THE EFFECTIVE DATE OF THE STATUTE?

SUMMARY OF THE ARGUMENT

The legislature has declared that public policy of the state prohibits the inclusion or enforcement of escalation clauses in long term leases for condominiums. This Court in Angora Enterprises, Inc. v. Cole, **439** So.2d 832 (Fla. 1983), cert.denied, **466** U.S. 927, **104** S.Ct. **1710, 80** L.Ed.2d 183 **(1984),** held that a lessor who agreed to the adoption by reference of "the Condominium Act as it may be amended," may not complain when the statute prohibiting the enforcement of escalation clauses is applied retroactively.

The Long Term Lease in this case is attached to the Declaration of Condominium and incorporated by reference. The Long Term Lease specifically adopts by reference the definition section of the Golden Glades Declaration of Condominium. The Golden Glades Declaration of Condominium defines the Condominium Act as the "Condominium Act of the State of Florida (F.S. 711 Et Seq.) as the same may be amended from time to time."

Moreover, the Plaintiff in this case is both the Lessor and the Declarer pursuant to the law of merger and pursuant to the articles of merger. The separate interlocking entities that originally were the Lessor and the Declarer have now lost their separate existence.

The Condominium Association asks this Court to find that, as in Angora, "to say the Lessor, who in his corporate

capacity [is] both the developer and the [declarer], did not agree to the terms of the declaration is to refuse to see what is plainly written in black and white." The Condominium also asks this Court to hold that when there is any confusion, ambiguity, or contradictions in the meaning of condominium documents, the provisions should be construed against the drafter.

ARGUMENT

Let all the laws be clear, uniform and precise.
Voltaire,
Philosophical Dictionary

It is an essential truth that unless laws--whether created by statute or case law--can be understood, they are bad laws and there will be difficulty, confusion, and inconsistency when common men and their attorneys attempt to interpret them. This case involves another episode of the infamous "escalation clause" in action. The Legislature has certainly given the people of this state the benefit of its thoughts on condominium recreational lease escalation clauses. The Legislature has disapproved and prohibited such clauses. The common man or his lawyer would have no trouble at all in interpreting the legislative language concerning such clauses.

This Court, in performing its function of testing legislatively enacted laws against constitutional guaranties, has interpreted the statutory prohibition of these escalation clauses on a number of occasions. The District Courts, in turn, have used the cases decided by this Court on the subject as a springboard for their own analysis. Unfortunately, the current status of the law concerning such

escalation clauses is horribly confused. No mere attorney--much less a simple condominium buyer--could possibly be certain of the future obligations under that pound of paperwork known as the "condominium document" and "recreational lease," when either of those two documents contain a neatly hidden boilerplate "escalation clause."

Jurisdiction in this Court is based upon the Third District Court of Appeal's certification of the following question:

> TO WHAT EXTENT DOES SECTION 718.401(8) FLORIDA STATUTES (1985), APPLY TO RENT ESCALATION CLAUSES ENTERED INTO BEFORE THE EFFECTIVE DATE OF THE STATUTE.

I. JURISDICTION: AN ISSUE OF GREAT PUBLIC IMPORTANCE

The Golden Glades condominium development alone consists of 166 units. (See Declaration of Condominium at p.3, Section 11, in the Appendix.) Another condominium association has filed a Notice of Intent to invoke this Court's discretionary jurisdiction to review the same issue in Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987). In addition to the many unit holders in the Golden Glades Condominium development, all of the unit owners in the Plaza Towers condominium development have an interest in the answer to the question certified by the Third District Court of appeal. By simply surveying the numbers of other cases

decided in Florida concerning the retroactive application of the amendments to the Condominium Act, and multiplying those cases by the number of condominium unit owners, and estimating all of the condominiums throughout this state which were developed before the enactment of a remedial amendment to the Condominium Act, this Court can take judicial notice of the very large number of condominium unit owners who may be affected by the answer to the question certified by the Third District.[3]

There is now a pending judgment lien against this Condominium Association. Under the voluminous default provisions of the Long Term Lease, the Lessor could retake the recreational facilities. (See the Long Term Lease, page 9 Section XVI.) Moreover, the Lessor has a lien on each condominium unit. (See the Long Term Lease, pp.15-19, paragraph XXIII.) The obvious corollary (also contained as a provision in the Long Term Lease at pp. 15-19, paragraph

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[3] We take the liberty of giving only a partial listing of cases deciding the retroactive application of various sections of the Condominium Act here: Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Century Village, Inc. v. Wellington, E,F,K,L,H,J,M,&G Condominium Association, 361 So.2d 128 (Fla. 1978); Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983); Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983); Condominium Association of Plaza Towers North, Inc., v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987); Halpern v. Retirement Builders, Inc., 507 So.2d 622 (Fla. 4th DCA 1987); Wilderness Country Club Partnership, Ltd. v. Groves, 458 So.2d 769 (Fla. 2d DCA 1984); Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 517; and Coral Isle East Condominium v. Snyder, 395 So.2d 1204 (Fla. 3d DCA 1981).

XXIII) is that the Lessor can foreclose on these units if the unit holders will not or cannot pay.

There is nothing in the record to show that the unit owners are rich or poor, or whether they are on a fixed income, or whether they can afford to pay their share of a judgment that now amounts to almost a half million dollars, once interest and attorneys fees are calculated. But, since this question may affect any condominium owner whose condominium was built before the effective date of any particular remedial amendment to the Condominium Act, it is a given that some of the unit owners will not be rich, and some of the unit owners may be on a fixed income--and there is a chance that some unit owners will not be able to afford the assessments from a judgment of this type. The consequences of this Court's decision in this case will be very serious to the unit owners in the Golden Glades condominium, and probably for unit owners throughout this state.

11. JURISDICTION AND A SYNOPSIS OF THE CURRENT STATUS OF THE CASE LAW

Let all the laws be clear, uniform, and precise; to interpret laws is almost always to corrupt them.
Voltaire,
Philosophical Dictionary

To believe in the judicial system, one should be committed to the first half of Voltaire's equation, and one must be at least somewhat skeptical of the second half of

Voltaire's equation. If Voltaire was looking for a modern day proof of the second part of his equation, however, he could find no better model to justify his theory than the recent case law on escalation clauses. The law concerning escalation clauses has been interpreted into a muddle.

A. Florida Supreme Court Analysis.

In 1975, the Legislature enacted Section 711.231 Fla. Stat (1975) (now renumbered and amended as 718.401(8) Fla. Stat. (1985)) prohibiting escalation clauses in leases for recreational facilities or management contracts in condominiums. That statute was very clear:

> It is declared that the public policy of the state prohibits the inclusion or enforcement of escalation clauses in leases or management contracts for condominiums, and such clauses are hereby declared void for public policy.

This Court ruled on the escalation clause prohibition statute on several occasions. The first occasion was in Fleeman v. Case, 342 So.2d 815 (Fla. 1976). Fleeman held that a retroactive application of this statute was invalid as impairing the obligation of contracts under Article I, Section 10 of both the United States and Florida Constitutions. Although this ruling was decidedly adverse to legislatively stated public policy, it was a fairly simple and direct ruling.

A second case, Century Village, Inc. v. Wellington, E,F,K,L,H,J,M & G, Condominium Association, 361 So.2d 128

(Fla 1978), gave unit owners some relief from this harsh application of the "contracts clause." The Century Village Declaration of Condominium contained the following language:

> . . . [the developer] hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of klorida, F.S. 711 Et. Seq. . . . and the provisions of said Act are hereby incorporated by reference . . . . (Emphasis in the original.)

The Declaration of Condominium in Century Village further defined the "Condominium Act" as follows:

> "Condominium Act" means and refers to the condominium act of the State of Florida (Florida Statute 711, et seq.) as the same may be amended from time to time. (Emphasis added in the original.)

This Court held that the author of the condominium documents and recreational lease agreed to be bound by future amendments to the Condominium Act, and could not complain of a "retroactive application" of the amended Condominium Act.

Next this Court decided Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied **466 U.S.** 927, 104 S.Ct. 1710, 80 L.Ed.2d 183 (1984) . The declaration of condominium in Angora contained language identical to the language quoted above from the declaration of condominium in Century Village. The Declaration of Condominium in Angora also contained specific references to the long term lease which was "attached to this Declaration and made a part thereof." The lease referred back to the declaration. Although the lessor in Angora argued that the lease and the

declaration were separate instruments this Court stated: "to adopt that argument is to ignore the realities of the situation. And to say the lessor, who in his corporate capacity was both the developer and the management firm, did not agree to the terms of the declaration is to refuse to see what is plainly written in black and white." In short, Angora followed the reasoning of Century Village and held that the lessor agreed to be bound by amendments to the Condominium Act, including the amendment that held escalation clauses invalid.

This case factually parallels Angora. First, the provision in the Golden Glades Declaration of Condominium committing the property to condominium ownership, and the definition of the Condominium Act contained in the Golden Glades Declaration, are identical to the provisions of the Century Village and Angora declarations of condominium. As in Angora, the Long Term Lease in this case was incorporated by reference and made a part of the Declaration of Condominium. Virtually the only distinguishing factor between this case and Angora, is that in Angora, the lessor "in his corporate capacity was both the developer and the management firm." Id. at p. **834**. In this case, at the time the Declaration and Long Term Lease were signed, the Declarer and Lessor were separately incorporated but had identical corporate officers and directors. **(R-143-146.)** As of the date of the filing of this lawsuit, however, the Golden

Glades Lessor and Declarer corporations had merged, and now the Plaintiff is both the Lessor and the Declarer. Pursuant to the Articles of Merger, at page 2, paragraph 4 (see Appendix) and pursuant to the law governing the merger of corporations, Section 607.231(3)(b), Fla. Stat., the separate legal existence of the Lessor and Declarer have vanished. Security Management is trying to deny its legal existence as a merged corporation. Security Management is both the Lessor and Declarer. Having made the legal decision to merge the Lessor and Declarer corporations into a single entity, Security Management must accept both the advantages and the disadvantages of the merger.

According to the above analysis of this Court's decisions,, when a condominium owner or his local attorney begins to look at the condominium documents, in order to determine whether the escalation clause is binding, he must make the following analysis:

1. the escalation clause is invalid (statute)--

2. unless the court is interpreting the statute retroactively (Fleeman)--

3. unless the declaration of condominium adopts the Condominium Act as it may be amended, from time to time (Century Village and Angora).

Such reasoning may already be beyond the comprehension of many condominium owners, but hopefully not their attorneys, and hopefully not the trial courts or appellate courts.

The next prong of this analysis, however, presents by far the most difficulty. In Cove Club Investors, Ltd. v. Sandalfoot South One., Inc., 438 So.2d 354 (Fla. 1983), the lessor and the declarer were separate entities, and, this Court found that the lessor did not agree to be bound by the declaration. Therefore, the new formula stands as follows:

1. The escalation clause is invalid (statute)--

2. unless the court is interpreting the statute retroactively (Fleeman)--

3. unless the declaration of condominium adopts the Condominium Act as it may be amended, from time to time (Century Village and Angora)--

4. unless the lessor and the declarer are separate entities and the lessor does not agree to be bound by the Declaration of Condominium (Cove Club).

Is this a complicated formula? Yes. Will the unassisted lay person buying a condominium and looking at the combined paperwork--which includes, but is not limited to, the Declaration of Condominium and Recreational Lease--be able to determine whether he will have to pay escalated rents? Almost certainly not. Will the average lawyer assisting the average condominium buyer be able to accurately advise his client as to whether his client will be held responsible for the rent escalations? It is getting less and less likely. Are the district courts uniformly interpreting this body of case law? No--decidedly not.

B. District Court of Appeal Analysis

Even if the Third District Court of Appeal had not certified to this Court an issue of great public importance, this Court would have conflict jurisdiction because there are dramatic direct and express conflicts in the recent cases analyzing condominium escalation clauses. Not only are there conflicts between districts, the Third District has internal inconsistencies in its case law--a fact expressly stated in dissenting opinions. (See the dissenting opinions in Golden Glades II and in Plaza Towers.) Moreover, the escalation clause in the Golden Glades Condominium Long Term Lease (which is the subject of this Court's present review) has been interpreted on three occasions in a series of interlocutory and final appeals that could not be more internally inconsistent if the Third District had purposely tried to confuse the issue--which it did not.

1. The Third District's Analysis of the Golden Glades Declaration and Long Term Lease.

Just look at the confused judicial interpretation of the condominium document in this case. In Golden Glades I, the Third District affirmed part of a summary judgment in favor of this Condominium Association stating:

> The underlying basis for the declaration of the lessee's rights was that the long term lease incorporated the Condominium Act, Chapter 722, Florida Statutes (1969), by reference as it may

> be amended from time to time. We affirm on the reasoning and authority of our decision in Kaufman v. Shere, 347- So.2d 627 (Fla. 3d DCA 1977). See also Century Village, Inc. v. Wellington, Inc., 361 So.2d 128 (Fla. 1978).(Emphasis Added.)

When the case came up again from a final judgment in Golden Glades 11, the majority wrote an incredibly abrupt opinion--an opinion totally at odds with Golden Glades I:

> Section 718.401(8), Florida Statutes (1981), which prohibits rental escalation clauses in leases for condominium recreational facilities does not apply to prohibit enforcement of such clauses in contracts which antedate the statute.(Citing to Fleeman.)

As the dissent pointed out, the majority in its one sentence opinion, ignored its own "law of the case" established in Golden Glades I, ignored the teachings of this Court in Angora and Century Village, and ignored the holding its own previous opinion in Kaufman v. Schere. If the long term lease incorporated by reference the condominium act "as it may be amended," Angora should have controlled, and the escalation clause should have been held invalid.

2. Conflicts between District Court of Appeal Decisions.

In the wake of Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So 2d 354 (Fla. 1983), the conflicts between district courts in different jurisdictions have been quite dramatic. The district courts have split hairs in determining which of the numerous cross-referenced provisions should

control in declarations of condominium and long term leases. The district courts have labored over subtle distinctions in determining whether a connected relationship between the lessor and the declarer did or did not exist.

Most illustrative of this conflict are (1) Halpern v. Retirement Builders, Inc., 507 So.2d 622 (Fla. 4th DCA 1987); (2) Plaza Towers, 514 So.2d at 381; and (3) the instant case (which was decided on the authority of Plaza Towers). Factually, these three cases are substantially indistinguishable. Halpern involved a management agreement with a cost of living escalation clause similar to the Long Term Lease cost of living escalation clause in this case and in the Plaza Towers case. In Halpern, the management agreement was attached to and made a part of the declaration of condominium--just as the Long Term Lease in both our case and in Plaza Towers were attached to and made a part of the declarations of condominium. One paragraph of the Halpern management agreement stated that the declaration and exhibits attached thereto, together with the management agreement, constituted the entire agreement--a very similar provision is contained in paragraph XXVI of the Long Term Lease in this case. Moreover, in Halpern, several paragraphs of the management agreement tied the management agreement and the declaration together, just as many provisions in the long term leases in Plaza Towers and in our case tie the lease and declaration together. (Lease paragraphs XVIII at p.12; XXI.n.

at p.15; XXII at p.15; XXIII at pp.15, 17, and 18; XXVI at pp.20-21; XXVII at p.21; XXVIII at p.21; XXIX at p.21; XXX at pp.22,23, and 24; and XXXI at p.24.) The Declaration of Condominium which is the subject of review in our case and the declaration of condominium in the Halpern case contained virtually identical definitions of the Condominium Act "as the same may be amended from time to time."

In our case, Golden Glades I held that the Long Term Lease incorporated by reference the amendments to the Condominium Act. Golden Glades I was absolutely correct, since the Golden Glades Long Term Lease most clearly incorporates by reference the definition section of the Declaration of Condominium, and the definition section in the Declaration of Condominium incorporates the Condominium Act "as it may be amended from time to time."

The Halpern Court rejected appellee's argument that Cove Club controlled the outcome of the case, and distinguished Cove Club by stating:

> In Cove Club Investors there was nothing to show that the petitioner, the lessor, who was not the developer of the .condominium, had agreed to be bound by the Declaration of Condominium or the Condominium Act.

Instead, the Halpern Court stated that it was bound by this Court's ruling in Angora, 439 So.2d at 833-834:

> We believe appellants are correct. The facts of this case are very similar to those of Cole. The fact that here the management company is a separate entity from the developer is of no significance when the management agreement by its terms incorporates the condominium declaration.

In our case, Golden Glades I also held that the Long Term Lease incorporated by reference the amendments to the Condominium Act. Golden Glades I was absolutely correct, since the Golden Glades Long Term Lease most clearly incorporates by reference the definition section of the Declaration of Condominium, and the definition section in the Declaration of Condominium defines the Condominium Act "as it may be amended from time to time." Yet despite the holding in Golden Glades I, and despite the clear incorporation by reference provisions in the Long Term Lease, the Third District has completely ignored Angora and has upheld the escalation clauses based upon Fleeman and Cove Club. The interpretation of Angora and Cove Club by the district courts has become quite confused. There is outright conflict which must be resolved.

111. WHERE A DECLARATION OF CONDOMINIUM. LONG TERM LEASE, OR MANAGEMENT CONTRACT CONTAINS CONFUSING, CONTRADICTORY, OR AMBIGUOUS LANGUAGE AS TO WHETHER OR NOT THE CONDOMINIUM ACT "AS IT MAY BE AMENDED" IS INCORPORATED BY REFERENCE INTO THE DOCUMENT. THE BASIC RULE OF CONSTRUCTION OF CONTRACTS SHOULD APPLY:THE LANGUAGE WILL BE CONSTRUED AGAINST THE DRAFTER OF THE DOCUMENT.

Appellant, the Condominium Association respectfully requests this court to answer the Third District Court of Appeal's certified question by reiterating the law in Angora and by adding that when condominium documents are confusing, ambiguous, or contradictory the documents will be interpreted against the drafter.

The basic rule of construction of a contract is that the language of a contract is construed against the drafter. Hurt v. Leatherby Ins. Co., 380 So.2d 432 (Fla. 1980). Let us go back to the formula established by this Court for determining whether an escalation clause is valid or invalid. A prospective Golden Glades condominium unit purchaser (or his attorney) will see that Angora and Century Village hold that an escalation clause will be invalid if (1) the declaration of condominium provides that the Condominium Act is "incorporated by reference", and (2)the definition of the Condominium Act provides that "the Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 Et.Seq.) as the same may be amended from time to time." The prospective buyer (or his attorney) then take a look at the Golden Glades Declaration of Condominium and see that the identical language contained in Angora and in Century Village is also contained in the Golden Glades condominium document. The condominium buyer is feeling fairly confident at this time that the escalation clause is unenforceable.

Now, this condominium buyer has a very astute attorney. This attorney knows about the Cove Club exception. The attorney then looks at the Golden Glades Long Term Lease and sees the following provision:

XXIX.

B. Incorporation of Definitions by Reference: The definitions of the words terms, phrases, etc., as provided in Article ----I of the Declaration of Condominium to which this Long Term Lease is attached as exhibit No. 4, are incorporated by reference and made a part hereof, and unless the

> context otherwise requires, said definitions shall prevail.

The attorney now sees from the clear language of the document that the Lessor has indeed adopted the Condominium Act by reference. If this Court reasserts the clear doctrine announced in Angora, and couples that holding with an affirmation that the basic law of contract construction requires that the language be construed against the drafter, the attorney may advise his client that the clause is unenforceable, and the trial and appellate courts will not have to split hairs or anguish over the "true" meaning of a dozen contradictory clauses.

The Condominium Association urges this Court to remember that the unit holders in this action had no choice about the terms of the Long Term Lease--it was the Lessor which decided to incorporate the Declaration's definitions by reference, and it was the Declarer (not the Condominium Association) which authored the definition of the Condominium Act. The Condominium Association did not choose to merge the Lessor and the Declarer into the Plaintiff corporation or to strip away the legal fiction that the Lessor and the Declarer were separate entities even through they were at all times parented by the Plaintiff corporation. The Condominium Association only asks that Plaintiff, Security Management, having made its own bed, be required to lay in it.

CONCLUSION

The Condominium Association respectfully requests this Court to reverse the decision below, to hold that the escalation clause in the Long Term Lease is unenforceable, and to award costs and attorneys fees to the Condominium Association.

The issue certified by the Third District Court of Appeal should be answered by reaffirming the holding in Angora, and by restating the principle that where this type of contract of adhesion is confusing, ambiguous, and contradictory, the document must be construed against the drafter.

Respectfully submitted,

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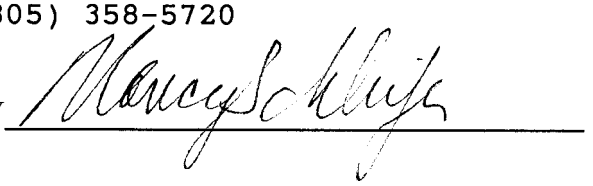
BY 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been served this 14th day of March 1988 on Ira M. Elegant, Esquire, Buchbinder & Elegant, P.A., 46 S.W. 1st Street, Fourth Floor, Miami, Florida 33130 and upon Cypen, Cypen & Dribin, Post Office Box 402099, Miami Beach Florida 33140.

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