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IN THE SUPREME COURT IN
AND FOR THE STATE OF FLORIDA

MAISON GRANDE CONDOMINIUM
ASSOCIATION, INC.,

Appellant,

vs. CASE NO. 78,197

DORTEN, INC., and ROBERT
SIEGEL, as Successor
Trustee under the Siegel
Family Trust,

Appellees.

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

The Attorney General, on behalf of the State of Florida, amicus curiae in this Court, adopts the statement of the case and facts set forth in the brief of the Appellant, Maison Grande Condominium Association, Inc. ("Maison Grande").

The facts essential to the issue argued in this brief are these: On November 24, 1971, Maison Grande and Appellees ("Dorten") entered into a 99 year recreational lease. (R-1) The lease provides, among other things, for cost of living adjustments to monthly rentals paid by Maison Grande, such adjustments to be computed with reference to the U.S. Consumer Price Index. (R-2) Maison Grande has paid the monthly rental plus cost of living adjustments under lease from December 1971 through December 1988. (R-2).

Effective October 1, 1988, the Florida Legislature passed § 718.4015 of the Florida Statutes which prohibited further escalation of fees pursuant to the escalation clauses in land leases or other agreements for recreational facilities or other commonly used facilities serving residential condominiums, on or after October 1, 1988. In 1989, the Legislature amended § 718.4015 in Chapter 89-164 Laws of Florida to clarify its 1988 amendment. It provides, in relevant part:

> (2) . . . . and it prohibits any further escalation of rental fees after October 1, 1988, pursuant to escalation clauses in leases relating to condominiums for which the declaration was recorded prior to June 4, 1975.

Because of the enactment of Florida Statute 718.4015 in 1988, Maison Grande has refused to pay any further cost of living adjustments since January 1989. (R-2)

The Appellees brought suit seeking a judgment declaring Florida Statute 718.4015 to be unconstitutional. (R-1-4) By Order dated October 27, 1989 (R-144-145) and by Final Judgment dated February 7, 1990 (R-161-162) the Trial Court granted Summary Judgment as to Count I of the Complaint (R-1-4) and declared § 718.4015, Fla. Stat. (1988) unconstitutional and violative of the contract clauses of the United States and Florida Constitutions, Article 1, §§ 10. The District Court of Appeal, Third District affirmed the decision of the trial court, and certified the following question:

> Is an escalation clause in a condominium recreation lease that was entered into before 1975 enforceable after October 1, 1988, for the entire term of the ninety-nine-year lease, where the lessor has not agreed to be bound by future changes in the condominium act?

SUMMARY OF ARGUMENT

§ 718.4015, Fla. Stat. (1988), specifically prohibited any further escalation of rental fees after October 1, 1988, pursuant to escalation clauses in leases relating to residential condominiums.

The Trial Court ruled that § 718.4015 was unconstitutional based upon the language in Fleeman v. Case, infra, and held that this statute violated the contract clauses of the United States and Florida Constitutions. The Trial Court should have applied the three-prong balancing test as analyzed in the U.S. Fidelity case, infra.

The utilization of the three-prong balancing test clearly demonstrates that the impairment of Appellees windfall profits was minimal compared to the legitimate public purpose of protecting the homes of the elderly from additional escalatory rents. The action of the Legislature is presumed, and must be found, constitutional.

ARGUMENT

THE COURT ERRED IN RULING THAT § 718.4015, FLA. STAT. (1988), WHICH PROHIBITS FURTHER ESCALATION OF RENTAL FEES AFTER OCTOBER 1, 1988, IS UNCONSTITUTIONAL.

The Legislature has clearly and unequivocally announced its intent: No more escalation clauses in residential condominium leases. This public policy of the State was first enunciated in § 711.231, Fla. Stat. (1975), (subsequently renumbered as § 718.401). Thereafter, the Legislature recognized the adverse impact that these escalation clauses have on a large portion of the State's population and acknowledged the evolution of the laws and the limitations imposed by various State and Federal appellate decisions. (App-9-12) Then, the Legislature created § 718.4015, Fla. Stat. (1988), which, among other things, prohibited further escalation of fees pursuant to the escalation clauses, on or after October 1, 1988. As a result of another appellate court decision, the Legislature amended § 718.4015 by Chapter 89-164 Laws of Florida (1989) to clarify its 1988 amendment, and specifically prohibited any further escalation of rental fees after October 1, 1988, pursuant to escalation clauses in leases relating to condominiums for which the declaration was recorded prior to June 4, 1975. (App-17-19)

The District Court, while acknowledging that Maison Grande had presented cogent arguments to the contrary, indicated that the language in Fleeman v. Case, 342 So. 2d

815 (Fla. 1976), was strong and definitive and issued its ruling based upon that decision. In Fleeman this Court held that the statute could not be given retroactive application because there was no showing that such was the intent of the Legislature. This Court added that even if the Legislature intended retroactive application of the statute, it would be invalid as impairing the obligation of contract under Article I, Section 10 of both the United States and Florida Constitutions. However, subsequent appellate decisions have eroded the import of that advisory statement.

Subsequently, in U.S. Fidelity and Guaranty Co. v. Department of Insurance, 453 So. 2d 1355 (Fla. 1984), this Court upheld the retroactive application of the "automobile insurance excess profit law" applying the three-prong balancing test to determine whether a person's interest not to have his contract rights impaired can be outweighed by the legitimate state's interest in the exercise of its police power. The analysis consists of three steps:

> (1) Whether the state law has, in fact, operated as a substantial impairment of a contractual relationship;
>
> (2) If the state regulation constitutes a substantial impairment, whether the state in justification has a significant and legitimate public purpose behind the regulation; and
>
> (3) Once a legitimate public purpose has been identified, whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Id. 1360-1361.

In U.S. Fidelity, this Court upheld the constitutionality of the statute because those members of the insurance industry that had challenged its validity knew that they were operating in a heavily regulated industry. Additionally, the Court held that the State had a legitimate interest in protecting the public from exorbitantly high premiums and any impairment of certain individual contract rights was "outweighed by the State's interest in eliminating unforeseen windfall profits." Id. at 1361.

Applying the three-prong test to the facts of the instant case, the initial inquiry necessarily focuses upon the severity of the impairment of the contractual relationship between the parties. Maison Grande, as lessee, has paid the monthly rental plus the cost of living adjustments under the lease for the first seventeen (17) years of the 99 year lease. (R-2) In addition, pursuant to the terms of the lease, the lessee has been required to pay all real estate taxes, insurance premiums, and maintenance on the demised premises. (R-51-97) Any increase in these rates have been and will be borne in the future by Maison Grande.

However, there is nothing in the terms of the lease that would subject Dorten to any additional expense over and above that which existed on November 24, 1971, the date of the execution of the lease. (R-51-97) The increased rental received by Dorten as a result of the increase in the "Consumer's Price Index, United States Average - All Items

of Food", constitutes nothing more than a windfall profit. Additionally, the abnormal increases in the Consumer Price Index for the years 1977 through 1980 have resulted in staggering rental increases that neither party could have reasonably anticipated. (Aff. of Kenneth W. Clarkson) Therefore, there is a factual issue as to whether, in fact, there has been a substantial impairment of the contractual relationship between the parties.

Assuming arguendo that the impairment is substantial, an additional factor to consider is whether the industry to which Dorten belongs has been regulated in the past. It is almost axiomatic that condominiums in Florida are creatures of statute and, as such, are subject to the control and regulation of the Legislature. Century Village, Inc. v. Wellington, etc., 361 So. 2d 128, 133 (Fla. 1979). Over the years, there have been continued amendments to Chapter 718, Florida Statutes, and the creation of the Division of Land Sales, Condominiums and Mobile Homes, whose statutory mandate includes administrative procedures and broad enforcement powers. The United States Supreme Court long ago observed:

> One whose rights, such as they are, are subject to state restrictions, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.

Hudson Water Co. v. McCarter, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908). Stated another way, one in whose lap the goose has laid the golden egg should not be

heard to complain when the goose decides to retrieve its egg. By participating in the initial development and/or leasing of newly created condominium property, Dorten was on notice that it would be operating in an industry created and heavily regulated by State statutes and should not be heard to complain now that the State has specifically eliminated windfall profits.

Assuming the existence of a substantial impairment, the second inquiry is whether there is a significant and legitimate public purpose behind the State regulation. The elimination of unforeseen windfall profits is, in and of itself, a legitimate State interest. United States Trust Co. of New York v. New Jersey, 431 U.S. 1, at 31 n. 30, 97 S.Ct. at 1505, 1522, n. 30 (1977). In the instant case, the legislative intent behind the statute has been articulated in the preamble to House Bill 45. (App-9-12) The Legislature recognized that the State of Florida has an exceptionally large population of elderly and retired citizens who reside in condominiums and cooperatives and who are living on a fixed income; that inflation has drastically increased the cost of living in Florida which in turn affects all people through erosion of the purchasing power of whatever monetary resources they command; and that escalation clauses in leases for recreational facilities or other commonly used facilities for land serving condominiums are inflationary in nature and lessens the quality of life and particularly impacts on elderly and others on fixed

incomes (App-3-6) Thus, the Florida Legislature has determined that the proposed legislation was necessary to meet a broad and pressing social and economic need. This Court recognized the Legislature's intent in Golden Glades Condo. v. Security Mgmt., 557 So. 2d 1350, 1355 (Fla. 1990) where it said:

> . . . . . the Legislature . . . . . did intend to recognize established case law and establish a statutory prohibition for escalated rents pursuant to those escalation clauses due after October 1, 1988. This interpretation is consistent with the 1989 amendment contained in chapter 89 - 164.

Once a legitimate public purpose has been identified, the third and final inquiry assesses the necessity and reasonableness of the legislation. In Yellow Cab Co., etc. v. Dade County, 412 So. 2d 395 (Fla. 3d DCA 1982), the Court applied the balancing test and upheld the validity of a Dade County Ordinance, which provided for countywide regulation of taxi cabs, but deprived the Yellow Cab Company of its contractual right to provide exclusive taxi cab service at certain hotels. In the instant case, the effect of the statute is to freeze windfall profits derived from escalation clauses at the 1988 level, in order to remedy a social-economic problem, which the Legislature has determined has reached intolerable proportions. In balancing the interests of a large segment of the State's population, which is elderly and on fixed incomes, against those of their landlords, who have already received a disproportionate and unexpected return on their investments,

the reasonableness of § 718.4015, Fla. Stat. (1988), is readily apparent.

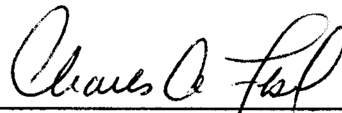
The unconstitutionality of the law must be shown beyond a reasonable doubt, and the burden of making such a showing is on the party challenging the law. State v. Kinner, 398 So. 2d 1360 (Fla. 1981); Knight and Wall Company v. Bryant, 178 So. 2d 5) (Fla. 1965). No such showing has been made in the instant case. This being so, the Appellees are bound by the statutory provision which prohibits any further escalation of rental fees after October 1, 1988, pursuant to the escalation clause in their lease.

CONCLUSION

The decision of the District court affirming the trial court decision that § 718.4015, Fla. Stat. (1988) is unconstitutional should be reversed and the statute should be declared to be a valid exercise of the police power of the State.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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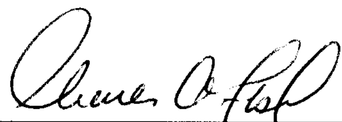
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 30th day of August, 1991, to Joel Perwin, Esq., PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, 800 City National Bank Bldg., 25 West Flagler Street, Miami, Florida 33120, Karl M. Scheuerman, Esq., Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301, Gerald F. Richman, Esq., Scott J. Feder, Esq. and Robert J. Borrello, FLOYD, PEARSON, RICHMAN, GREER, WEIL, BRUMBAUGH & RUSSOMANNO, P.A., 175 N.W. First Avenue, Miami, Florida 33128-1817 and Michael L. Hyman, HYMAN & KAPLAN, P.A., 14th Floor Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130.



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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

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Criminal Appeals
Dept. of Legal Affairs

MAISON GRANDE CONDOMINIUM ASSOCIATION, INC., **

Appellant, **

vs. **

DORTEN, INC., and ROBERT SIEGEL, as successor Trustee under the Siegel Family Trust, **

Appellees. **

CASE NO. 90-529

Opinion filed May 28, 1991.

An Appeal from the Circuit Court for Dade County, Steven D. Robinson, Judge.

Hyman & Kaplan, P.A., and Michael J. Hyman and Edoardo Meloni, for appellant.

Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., and Joel S. Perwin, for appellees.

Karl M. Scheuerman, for Division of Florida Land Sales, Condominiums, and Mobile Homes, as amicus curiae.

Robert A. Butterworth, Attorney General, and Charles A. Finkel, Assistant Attorney General, for the State of Florida as amici curiae.

Floyd Pearson Richman Greer Weil Brumbaugh & Russomanno, P.A., and Gerald F. Richman, Scott J. Feder, and Robert J. Borrello, for Schreiber, Pearl, Gordon, and Gesundheit, in support of position of appellees, as amici curiae.

Before BASKIN, JORGENSON, and COPE, JJ.

JORGENSON, Judge.

Maison Grande Condominium Association, Inc. [Maison Grande], appeals from an order of final summary judgment in an action for declaratory relief and breach of contract. We affirm.

In 1971, Maison Grande and Dorten, Inc., entered into a ninety-nine-year recreational lease for a pool deck. The lease contained an escalation clause that provided that the rental payments would be adjusted annually based upon changes in the consumer price index. When the lease was signed, the consumer price index was 4.34%; the rental payment was $241,920 per year. By 1988, because of enormous increases in the consumer price index, Maison Grande was paying $706,452 per year for rental of the pool deck.

In 1971, when the lease was entered into, escalation clauses in recreational leases were legal. Effective June 4, 1975, the Florida legislature declared that escalation clauses were contrary to public policy and prohibited the inclusion of enforcement of such clauses. § 711.213, Fla. Stat. (1975); ch. 75-61, Laws of Florida; Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., 557 So. 2d 1350, 1352 (Fla. 1990). Effective January 1, 1977, chapter 711 was replaced by chapter 718; section 718.401(8)(a) recodified the prior declaration that escalation clauses were contrary to Florida's

public policy. On July 1, 1988, section 718.401(8) was replaced by the virtually identical section 718.4015(1). Section 718.4015 again prohibited escalation clauses and applied the prohibition to all existing or future contracts.[1]

On January 1, 1989, Maison Grande paid the full amount of the previously escalated rental payment but did not include the adjustment based on the consumer price index for 1989. Dorten sued Maison Grande seeking a declaration that section 718.4015 violated Article I, section 10, of the United States and Florida constitutions and the Fourteenth Amendment to the United States Constitution by impairing the obligation of contracts. Dorten also sued for breach of contract.[2] The trial court granted Dorten's motion for summary judgment on the count for declaratory relief, declaring section 718.4015 unconstitutional. The trial court also awarded Dorten costs, interest, and attorney's fees.[3]

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[1] In all of the statutory revisions, the effective date of the statutory ban on escalation clauses has remained June 4, 1975. Golden Glades Condominium Club, Inc., 557 So. 2d at 1352.

[2] Maison Grande ultimately paid the 1989 cost-of-living adjustment into the registry of the court.

[3] This litigation is the latest chapter in a long-standing dispute between the parties. In 1975, Maison Grande sued in federal court alleging that the escalation clause violated federal antitrust laws. Maison Grande Condominium Ass'n, Inc. v. Maison Grande, No. 75-56-Civ-Eaton, S.D. Fla. The antitrust suit resulted in a verdict against the association which was affirmed by the eleventh circuit, Case No. 81-5685. Also in 1975, Dorten sued Maison Grande in state court for breach of contract after Maison Grande refused to pay the cost-of-living adjustment. Maison Grande counterclaimed, alleging that the escalation clause was unconscionable. The question of unconscionability was tried before a jury which found for Dorten. This court affirmed. Maison Grande v. Dorten, Inc., 358 So. 2d 851 (Fla. 3d DCA 1978).

We agree with Maison Grande that the escalation clause provides Dorten with extraordinary windfall profits and that the Florida legislature has declared such clauses against public policy. Nevertheless, a review of the body of law from the Florida Supreme Court concerning escalation clauses in condominium leases compels the conclusion that application of the statutory ban to leases entered into before 1975 is constitutionally prohibited.

In Fleeman v. Case, 342 So. 2d 815 (Fla. 1976), the Florida Supreme Court held that section 711.231, the earliest incarnation of section 718.4015, prohibiting the enforcement of escalation clauses in condominium leases, could not be applied retroactively. The court gave two alternative reasons for its holding. First, the court reasoned that the statute was not worded in a way that would make it applicable to preexisting contracts. Second, the court concluded that, had the legislature intended retroactive application of the statute, the statute would violate the constitutional ban on impairing contracts. In this appeal, Maison Grande has characterized the second rationale given in Fleeman as mere dicta. However, the court in Fleeman explained its reasoning as follows: "[W]hile we ordinarily do not reach constitutional questions not necessary to the disposition of the case, in this case the principle [sic] contention of the parties and the rulings of the trial courts below are predicated on this constitutional issue. Therefore, we deem it appropriate to resolve the issue in this proceeding." Fleeman, 342 So. 2d at 818. Both the language of Fleeman itself

and the supreme court's later treatment of Fleeman indicate that the second rationale, based on constitutional grounds, was not dicta.

In Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So. 2d 354 (Fla. 1983), the Florida Supreme Court reaffirmed its constitutional holding in Fleeman. The court held that a lessor was not bound by a statement in the declaration of condominium that the declaration was subject to changes in the Condominium Act, as the lessor had not been a party to that agreement. "Furthermore, we concluded [in Fleeman] that even had the legislature intended retroactive application, we would have been compelled to hold it invalid as impairing the obligation of contract absent any agreement to be bound by future amendments to the Act." Cove Club, 438 So. 2d at 356.

The supreme court's most recent pronouncement on the retroactive application of a statutory ban on escalation clauses came in Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., 557 So. 2d 1350 (Fla. 1990). In Golden Glades, the court held that section 718.4015 did not prohibit the enforcement of an escalation clause entered into before June 4, 1975, for rent due from June 4, 1975, to October 1, 1988, the effective date of section 718.4015. In Golden Glades, the court again ratified its constitutional holding in Fleeman. "We have established case law concerning the enforceability of escalation clauses in recreation leases entered into prior to June 4, 1975. . . . [W]e stated: 'Even were we to conclude that the legislature intended retroactive application of

this statute, we would be compelled to hold it invalid as impairing the obligation of contract under Article I, Section 10 of both the United States and Florida Constitutions.'" Golden Glades, 557 So. 2d at 1354, quoting Fleeman.

Golden Glades did not answer the precise question posed by this case--whether section 718.4015 prohibits the collection of escalation payments due after October 1, 1988, under the terms of a lease entered into when escalation clauses were still legal. However, the supreme court's position is clear and unequivocal on the issue of the retroactive application of the statutory ban. According to Fleeman, Cove Club, and Golden Glades, if the statute expressly mandates retroactive application, the statute cannot withstand constitutional muster.[4]

Maison Grande argues on appeal that Fleeman has been modified by Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979), and United States Fidelity & Guaranty Co. v. Dept. of Ins., 453 So. 2d 1355 (Fla. 1984). Maison Grande asserts that in Pomponio and U.S.F. & G., the supreme court receded from its broad holding in Fleeman and adopted a balancing test to determine under what circumstances the legislature may enact statutes that impair the obligation of the contract. We disagree. The criteria for contract clause analysis has not

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[4] The only circumstance under which the ban may be applied retroactively is when the lessor has expressly agreed to be bound by future changes in the Condominium Act. Angora Enters., Inc. v. Cole, 439 So. 2d 832 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S.Ct. 1710, 89 L. Ed. 2d 183 (1984); Century Village, Inc. Condominium v. Wellington, E,F,K,L,H,J,M,& G, Condominium Ass'n, 361 So. 2d 128 (Fla. 1978); Sky Lake Gardens Recreation, Inc. v. Sky Lake Gardens, Nos. 86-2567 and 86-2578 (Fla. 3d DCA Jan. 29, 1991)(on reh'g and motion for clarification).

changed since Fleeman. In 1975, the Florida Supreme Court adopted the balancing test in Yamaha Parts Distributors Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975), and prohibited the retroactive application of a statute that would have modified preexisting franchise-termination provisions of a contract. "Under the circumstances of this case, we hold that the state's interest in policing franchise agreements and other manifestations of the motor vehicle distribution system is not so great as to override the sanctity of contracts." Yamaha, 316 So. 2d at 559. In Fleeman, the supreme court expressly premised its constitutional holding on Yamaha. 342 So. 2d at 818. The balancing test predated Fleeman. When the supreme court decided Pomponio and U.S.F. & G., it did not announce a new approach to testing the constitutionality of a statute that impaired contracts; it merely specified the factors to be weighed in balancing the interests of the state and the parties to the contract. Implicit in Cove Club and Golden Glades, therefore, is the conclusion that, as in Fleeman, the scales tipped to prohibit the impairment of the preexisting contract. Should the supreme court decide to revisit the issue, it may, of course, recede from Fleeman, Cove Club, and Golden Glades. We, of course, are constrained to follow the clear mandate of the state's highest court. However, because the supreme court has not expressly answered the question of whether escalation clauses in leases entered into before 1975 can be enforced after October 1, 1988, for the entire remaining term of the lease, we certify the following question to the Florida Supreme Court as one of great public importance:

> Is an escalation clause in a condominium recreation lease that was entered into before 1975 enforceable after October 1, 1988, for the entire term of the ninety-nine-year lease, where the lessor has not agreed to be bound by future changes in the condominium act?

Absent an unequivocal pronouncement by the supreme court on this issue, we must affirm.[5]

Affirmed; question certified.

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[5] We likewise affirm the order awarding costs, interest, and attorney's fees. By the clear terms of the lease, Maison Grande is obligated to pay the costs and fees. The good faith of the parties and the debatable nature of the legal issues in this case do not override the contractual terms. See Brickell Bay Condominium Ass'n v. Forte, 397 So. 2d 959 (Fla. 3d DCA), rev. denied, 408 So. 2d 1092 (Fla. 1981).