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FILED
SID J. WHITE
OCT 14 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ler:91-527

IN THE SUPREME COURT OF FLORIDA

CASE NO: 78,197

3d DCA Case No. 90-529

FLA. BAR NO: MLH - 111830
EM - 836842

MAISON GRANDE CONDOMINIUM ASSOCIATION, INC.

Petitioner,

vs.

DORTEN, INC., etc., et al.,

Respondents.

_____/

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

REPLY BRIEF OF PETITIONER

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I. REPLY TO ARGUMENT THAT THE ESCALATION CLAUSE IS ENFORCEABLE FOR THE ENTIRE TERM OF THE LEASE

The thrust of the first argument advanced by Dorten consists of reducing the issue before the Court to one simple proposition: the Court must either overrule **Fleeman v. Case**, 342 So.2d 815 (Fla. 1976), or reject entirely Maison Grande's position. Such, however, is not the posture which the instant case must of necessity assume.

Initially, it should be pointed out that neither in these proceedings nor in the proceedings below has Maison Grande maintained that "**Fleeman** was wrongly decided" (answer brief at 4) or that "**Fleeman** was wrongly decided, because it failed to apply the three-part contract-clause balancing test which the Court has recognized both before and after **Fleeman**" (answer brief at 6). Dorten attributes these assertions to its opponent, without citations to the pages of the briefs submitted by Maison Grande to the District Court (appendices "A" and "B"), or to the initial brief filed with this Court. The reason for the lack of such citations is simply that Maison Grande has never formulated the issue in the terms which Dorten ascribes to it.

Instead, Maison Grande has consistently argued that **Fleeman** could not have applied the three-part test for the very obvious reason that the current method of contract clause analysis was devised well after **Fleeman** was decided. In fact, it was adopted by the Court in **Pomponio v. Claridge of Pompano**

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Condominium, Inc., 378 So.2d 774 (Fla. 1979) and in **United States Fidelity & Guaranty Co. v. Department of Insurance**, 453 So.2d 1355 (Fla. 1984) (appendix "A" at 8; initial brief at 18-19). For this reason, Dorten's statement that Maison Grande belatedly conceded that "the three-part balancing test existed both before and after **Fleeman**" (anwer brief at 19), a statement which does not advise the Court as to where the alleged "belated concession" was made, is clearly not supported by the arguments Maison Grande has developed before the Court of Appeal and in the course of this proceeding.

Similarly, Maison Grande did not contend below, and is not contending now, that "the three-prong balancing test existed well before **Fleeman**, but that **Fleeman** failed to apply it" (answer brief at 17). Indeed, apart from the fact that it would have been materially impossible for the **Fleeman** Court to apply the three-prong balancing test adopted by the Court years after it decided **Fleeman**, as noted above, it should also be noted that **Fleeman** was decided following the lower courts' summary dispositions of three consolidated cases and that the Court did not have available for its consideration factual, evidentiary findings that would have enabled it to apply the three-prong balancing test to the unique circumstances surrounding each of the three consolidated cases.

As Maison Grande respectfully pointed out (initial brief at 15, 17-18), interpreting **Fleeman** as Dorten does would necessarily and indefinitely require any legislative enactment intended to have a retrospective application to be prospectively

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declared unconstitutional on its face, regardless of whether it would only minimally impair the obligation of contract, whether the legislative purpose is to remedy a broad and general social or economic problem such as the elimination of unforeseen windfall profits, and whether the rights and responsibilities of the parties have been adjusted upon reasonable conditions appropriate to the public purpose that the enactment sought to achieve, in accordance with the current constitutional standard.

If Dorten's interpretation is correct the result would necessarily be that in Florida the legislature does not have the power to enact statutes that may have a backward reach, perhaps not even in an emergency, no matter how compelling the state interest or how minimal the impairment may be. Such, however, cannot be the correct interpretation of **Fleeman** because this Court has stated after **Fleeman**, in **Pomponio** and **U.S.F.& G.**, that in impairment of contract cases, factual issues, must be considered and properly weighed before a pronouncement on the constitutional validity of a statute may be made.

Maison Grande acknowledges that, as Dorten points out (answer brief at 9), the rule of stare decisis serves the purpose of maintaining stability in the law. However, as the Court explained in **Forman v. Florida Land Holding Corporation**, 102 So.2d 596, 598 (Fla. 1958),

> [t]he rule of stare decisis is merely the embodiment of a legal maxim to the effect that a principle or rule of law which has been established by the decision of a court of controlling jurisdiction will be followed in other cases involving similar situations. Stare decisis relates only to the determination of questions of law. It has no

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> relation whatever to the binding effect of determinations of fact. [...] In actuality the rule of stare decisis is merely the rule followed by the courts in order to maintain stability in the law and although its application is not obligatory in any particular case, it is considered appropriate in most instances in order to produce consistency in the application of legal principles unless for some compelling reason it becomes appropriate to recede therefrom.

Maison Grande pointed out (initial brief at 6-15), using examples derived principally from opinions of the United States Supreme Court, that in the area of contract clause analysis the judgments of this country's highest Court have undergone a certain, constant evolution, even if this resulted in receding from, or modifying, the Court's prior opinions. Thus, for example, while in **Home Building and Loan Association v. Blaisdell**, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934), the Court had sustained retroactive application of legislation, in part because it was addressed to an emergency situation, in **City of El Paso v. Simmons**, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965) and in subsequent decisions, the Court eliminated from its contract clause analysis the requirement that legislation be enacted to address emergency matters. Similarly, while in **Allied Structural Steel Company v. Spannaus**, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), the Court had required that legislative enactment severely impairing the obligation of contract be necessary to meet important general social problems, with **Energy Reserves Group, Inc. v. Kansas Power & Light Company**, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), that requirement was relaxed to the level of a

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"significant and legitimate public purpose".

In **Gates v. Foley**, 247 So.2d 40 (Fla. 1971), a case in which the Court discussed a common law principle adopted by the Florida legislature in the area of tort law, it was stated:

> [t]he law is not static. It must keep pace with changes in our society for the doctrine of stare decisis is not an iron mold which can never be changed.

Certainly this Court was well familiar with the principle of stare decisis when it decided **Pomponio** and **U.S.F.&G.** In those two cases, at a minimum, the Court necessarily departed from the **Fleeman** approach to impairment of contract analysis and prescribed a precise methodology to be applied to the facts of each individual case.

Dorten concedes that "the criteria for contract clause analysis are not absolute, but are applied on a case by case basis" (answer brief at 17), but nevetheless maintains that "[n]ot only did **Fleeman** apply the three-part test, but it applied that test properly" (answer brief at 6). Thus, assuming arguendo that the three-prong test was applied in **Fleeman**, this would only mean that the test was applied to the particular facts of the three consolidated cases the Court had before it at that time. However, assuming that Dorten is correct in its interpretation of **Fleeman**, if the three-prong balancing test was applied to the particular circumstances surrounding each of the cases before the Court, then Maison Grande must again ask with renewed vigor why the three-prong balancing test is not being applied to the unique circumstances surrounding this particular case.

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Dorten's characterizations to the contrary notwithstanding, Maison Grande is not asking the Court that it overrule its own precedent. Maison Grande is merely requesting that the statute be tested against the current constitutional standard mandated by this Court in contract clause cases such as this.

In support of the proposition that the rent escalation clause is valid and enforceable, Dorten asserts that "the bargained-for cost-of-living increases in the instant contract were "certainly 'reasonably to be expected'" (answer brief at 30). Apart from the fact that such "certainty" was not at all apparent to the District Court, as it specifically determined that the rent escalation clause provides Dorten with "extraordinary windfall profits" (opinion at 4), the issue of whether Dorten's gains were "bargained for" and "reasonably to be expected" is ultimately a question of fact to be determined in the appropriate forum, after the introduction of all relevant evidence.

Nonetheless, it should be pointed out that Dorten's economic analysis (answer brief at 22-36) in incorrect for two major reasons. First, it is crucial to note that the subject lease (R. 61-88) is a net-net-net lease which renders the lessee responsible for taxes, insurance, and maintenance and repair expenses. In practical terms this means that following the initial construction of the recreational facilities, the lessor is not obligated to expend any monies over the life of the lease in order to give the lessee the use of the premises. Under

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normal circumstances landlords are responsible for the payment of property taxes, liability and hazard insurance, and for the maintenance and repair of the property. Clearly, under those circumstances, rental increases are necessary, even if pegged to the Consumer Price Index, because the landlord's cost of bringing the property to his tenants necessarily increases over the years. This lease, however, imposes no such responsibility upon the landlord, and it is therefore respectively submitted that Dorten's "stay even" argument (answer brief at 27, 38) is ill-conceived.

Second, Paragraph IV.b of the lease agreement provides:

> b. Cost of living adjustment to rental. The monthly rentals herein provided for shall be adjusted from time to time, as herein set forth, to compensate for any increase in the cost of living as computed by reference to the "index number" as of December 1, 1970, provided, however, in no event shall the monthly rentals herein provided for ever be decreased, and once increased, pursuant to the provisions of this section, rentals shall not thereafter be decreased.

Thus, assuming that the CPI were to have a negative value in a deflationary period, that from a base of 100 it were to rise to 105 and then after a number of years decrease to 95, the tenant would still be obligated to pay rent based on the 105 Index, even if the Index were to remain at 95 indefinitely. Therein lies the basic unfairness of escalation clauses recognized by the legislature, and Dorten's assertion that "[b]y definition, the landlord can never be ahead" (answer brief at 27, 38) is not supported by the economic realities and the actual effect that escalation clauses of this nature may have on a tenant over a

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99-year period.

II. REPLY TO ARGUMENT THAT APPLICATION OF SECTION 718.4015, FLORIDA STATUTES WOULD VIOLATE THE DUE PROCESS (TAKINGS) CLAUSE OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

Dorten contends that the application of Section 718.4015, Florida Statutes, to the facts of the instant case amounts an unlawful exercise of the state's power of eminent domain, as it deprives the lessor of a vested property right without just compensation (answer brief at 38-44). The issue thus becomes, according to Dorten, "whether the retroactive application of this statute sufficiently deprived the plaintiffs of a property right as to condition the constitutional exercise of such a power upon the payment of just compensation" (answer brief at 40-41).

We do not take issue with the authorities (answer brief at 41) Dorten cites in support of the proposition that, in general, contracts are a form of property which in the state's exercise of eminent domain may require compensation. A substantial and fundamental difference exists, however, between a "contract" as contemplated in the cases cited by Dorten, and a lease.

In **De Vore v. Lee**, 30 So.2d 924 (Fla. 1947), the Court had the opportunity to explain the difference between an "obligation to pay money" and a lease. **De Vore** involved the construction of Section 201.08, Florida Statutes (1931), which dealt with taxation on notes and obligations to pay money, and

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assignments of compensations. Having initially noted the "faint similarity" between an "obligation" and a covenant to pay money contained in a lease, the Court explained:

> An outright obligation to pay money, as contemplated in the statute, Section 201.08, and an obligation which flows from a lease are easily distinguishable. The latter is contingent, and the undertaking to pay rent periodically ripens into a debt only as the times for payments of rent arrive. [...] 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 that the lessor would eventually receive from the lessee for the occupancy of the property for the entire time mentioned in the lease would not be established merely upon the execution of the instrument, for "rent does not accrue to the lessor as a debt or a 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 the actual debt or liability." [citations omitted, emphasis supplied]

Id. at 926. See also, **Penthouse North Association, Inc. v. Lombardi**, 461 So.2d 1350 (Fla. 1984) (the obligation to pay rent is a contingent one which becomes an enforceable debt only as the rent is earned through the lessee's use of the property). Thus, it should be clear that Dorten's so called "vested property right" is "essentially inchoate" (answer brief at 26; see, initial brief at 22, 23), at best a mere non-vested expectation. Moreover, for purposes of eminent domain, the landlord's and tenant's respective interests have been defined

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as follows:

> A lessee's interest in a leasehold estate is thus stated: During the life of the lease, the lessee holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership. The estate of the lessor during such time is limited to his revisionary interests which ripens into perfect title at the expiration of the lease. [emphasis supplied]

William v. Jones, 326 So.2d 425, 433 (Fla. 1975), quoting from **State Road Department v. White**, 148 So.2d 32 (Fla. 2d DCA 1962), cert. discharged. If the lessor's title is thus so "inchoate" that it would only ripen into a perfect title only on the expiration of the 99-year term, the state cannot be depriving it of a vested right. Please also note that because "in the case of leases for an initial term of 99 years or more, the lessee may be considered to be the owner 'in fee simple'", **Williams**, 326 So.2d at 436, Dorten's "takings" argument must necessarily fail.

III. REPLY TO ARGUMENT THAT THE DISTRICT COURT PROPERLY AFFIRMED THE AWARD OF ATTORNEYS' FEES AND THE PROPERLY AWARDED APPELLANT FEES.

It must be noted initially that the instant case is not before the Court "on discretionary review" (answer brief, cover sheet), and in addition to the fact that the District Court certified a question to the Court, review in this case is mandatory pursuant to Article V, Section 3(b)(1), of the Florida Constitution (1980), because the lower court expressly declared

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a state statute unconstitutional. In such cases, the Court has reviewed not only the constitutional question but also other issues directly related thereto. For example, in **Rupp v. Bryant**, 417 So.2d 658 (Fla. 1982), the Court reviewed a decision of the District Court of Appeal declaring unconstitutional the amended version of Florida's sovereign immunity statute and the lower court's finding that causes of action for negligent conduct and for willful negligence had been stated against the defendants. Clearly, in **Rupp**, those two issues were closely related.

Similarly, in the instant case, the award of trial-level and appellate fees is directly related to the question of whether Maison Grande could have breached the contract, when it complied with the directives of Section 718.4015, Florida Statutes, a statute which was valid until declared unconstitutional by the trial court. It is therefore respectfully requested that because the constitutional question and the possibility that Maison Grande "breached" the lease agreement are so closely interrelated, the Court take this issue under consideration.

To answer Dorten's question (answer brief at 46), Maison Grande has not, and does not, contend that it relied in "good faith" on an "unconstitutional" statute. Please note that the trial court awarded attorneys' fees (R. 161) pursuant to Count II of the Complaint which stated a cause of action for breach of contract (R. 1), and after its determination that Maison Grande had breached the agreement.

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Dorten concedes that a valid statute is a "dispositive defense" to an action for breach of contract (answer brief at 46). It seems to contend, however, that Maison Grande should have known that this statute was unconstitutional, in spite of the fact that the Florida's legislative body specifically prohibited the payment of the escalated increment, beginning January 1, 1989. Well-established principles of Florida law should put it beyond question that a party cannot be charged with knowledge that a statute found on the statute books may be unconstitutional. It is not until a judicial determination as to its unconstitutionality is made that the statute ceases to have any validity. **City of Sebring v. Wolf**, 141 So. 736, 737 (Fla. 1932); **Evans v. Hillsborough County**, 186 So. 193, 196 (Fla. 1938). By the time the trial judge made the judicial determination that the statute was unconstitutional, Maison Grande was making fully escalated rental payments.

Dorten asked the district court to award it appellate fees pursuant to paragraph XXIV of the lease agreement, executed in 1971 (R. 61-88). As Maison Grande pointed out (initial brief at 45-46), paragraph XXIV is completely silent on the subject of appellate fees. Absent and express provision which would allow the prevailing party to recover appellate fees, no legal basis exists for the award of attorneys fees on appeal. **Lake Killarney Apartments, Inc. v. Estate of Thompson**, 283 So.2d 102 (Fla. 1973); **Ohio Realty Investment Corp. v. Southern Bank of West Palm Beach**, 300 So.2d 679 (Fla. 1974). It is therefore respectfully submitted that the awards of trial level and

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appellate fees were erroneous and should, accordingly be reversed.

CONCLUSION

Approval of the decision below would create a glaring inconsistency in Florida jurisprudence, as the District Court's opinion in effect sanctioned windfall profits as being constitutionally protected. For the reasons set forth herein, it is respectfully requested that the Court declare F.S. 718.4015 not to be facially unconstitutional and that the statute be tested against the current constitutional standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11TH day of October, 1991 to:

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