SUPREME COURT OF FLORIDA

ROGERS & FORD CONSTRUCTION CORP., and FLAGLER PROPERTIES, INC.,

Petitioners,

vs.

CARLANDIA CORPORATION,

Respondent.

_____/

CASE NO.: 80,788

District Court of Appeal
4th District - No. 91-2142

ANSWER BRIEF OF RESPONDENT, CARLANDIA CORPORATION

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PREFACE

This is a review of a final order dismissing a complaint with prejudice which was reversed by the Fourth District Court of Appeal who certified a question to this Court as being of great public importance. This Court has postponed determination on jurisdiction pending briefing by the parties. Respondent files this consolidated Answer Brief in response to both Petitioners' Initial Briefs.

Plaintiff/Appellant/Respondent, Carlandia Corporation, shall be referred to throughout this brief as "Carlandia" or "Plaintiff". Defendants/Appellees/Petitioners, Flagler Properties, Inc. and Rogers & Ford Construction Corp., shall be referred to as "Flagler" and "Rogers & Ford" respectively or "Defendants" collectively. References to the record on appeal shall be denoted by "R. ____.", while references to the parties' prior briefs shall be by designations such as "Plaintiff's Reply Brief at ____.". References to the Fourth District's opinion will be by "Opinion at ____.". In the interest of brevity, Plaintiff has not reargued in toto its arguments below but would incorporate them by reference.

STATEMENT OF THE CASE AND FACTS

Carlandia accepts Defendants' statements of the case and facts to the extent they are not argumentative with the following additions.

On rehearing, counsel for Carlandia sought clarification of the trial court's ruling as to whether Carlandia had failed to join an indispensable party or whether the trial court held it was solely the association that could maintain the action. (R. 30-31). The trial court confirmed its ruling was the latter and that the joinder of other parties would not alter its ruling. This is made clear from the following colloquy:

> THE COURT: All right. I'll make a ruling. I'll grant the motion for rehearing which I have already done, and after having heard the motion decide that is -- it does not apply thereby reaffirming the original motion.
>
> MR. YOUNG: [Counsel for Carlandia]: I need to ask for one point of clarification.
>
> The argument -- I was not here at the last hearing, but the argument that counsel made today runs a little afoul of my understanding of your order -- of the reading of your order.
>
> I came to the conclusion that it was not an indispensable party problem you were concerned about such as argued here today, but you decided an individual could not maintain an action for damage or defect to the common elements period.
>
> THE COURT: I decided in this case your individual could not maintain an action.
>
> MR. YOUNG: That is not for failure to [join] an indispensable party then?
>
> THE COURT: No. I have an independent recollection that was my decision.

MR. DAIELLO: [Counsel for Rogers & Ford Construction Corp.]: We argued a number of factors. That is one of the things we argued, Judge.

MR. YOUNG: If it was an indispensable [sic] party problem, I would argue a need to amend and the party could not maintain the action whether it be separately in the form of a class or individually on his own account that the indispensable party problem does not bother you. If that is the case, I don't need --

THE COURT: Despite [sic] the fact that you were not here, you assessed my opinion correctly.

MR. YOUNG: Thank you, Judge.

(R. 30-31; emphasis added).

Defendants argued the association had the exclusive right to sue. The Fourth District disagreed and reversed, holding that the trial court had erred "under the circumstances sub judice." Opinion at 2.

SUMMARY OF ARGUMENT

The trial court dismissed Plaintiff's Amended Complaint on the ground that an individual unit owner could not, under any circumstances, maintain an action for defects to common elements. In fact, when asked whether the court was concerned about an "indispensable party" problem, and whether Plaintiff should seek leave to amend to join the association or other unit owners as a class, the trial court replied the issue of an indispensable party was not the basis for his ruling. The trial court held essentially that under §718.111(3) the association had the exclusive right to maintain such actions and that individual unit owners, no matter in what capacity or joinder, have no standing. The trial court's ruling was clearly error.

At common law, individual unit owners were required to maintain suits in their own names because associations were not recognized legal entities. Courts soon recognized associations, but still required individual unit owners to maintain class action suits, requiring compliance with the procedural prerequisites of a class action. The legislature then enacted the predecessor statute to §718.111(3), which granted associations the capacity to sue, dispensing with the procedural need for the unit owners to prove class action status. The legislature did this for procedural ease and not with the intent to usurp the common law rights of the individual unit owners as clearly reflected in the very language of the statute.

As they did before the Fourth District, the Defendants fail to

recognize the issue on appeal. While both acknowledge Plaintiff could maintain the action by joining other unit owners or by joining the association, they fail to recognize that the trial court precluded such a joinder. Defendants' arguments regarding public policy and multiplicity of suits are premature; they fail to recognize the basic distinction between the substantive issue of standing as opposed to the equitable considerations of avoiding multiple suits. At some point in the future, Plaintiff may well join the association as an involuntary party, but at this point in the litigation the issue for review is whether the court's holding, essentially barring Plaintiff from such joinder, was error. The statute, case law and common sense clearly suggest it was.

The Fourth District was correct in its reversal of the trial court in this case. The facts of this case are unique and do not present the issues represented by the Defendants as being of great public importance. This Court should refuse jurisdiction or, in the alternative, affirm the correct conclusion of the Fourth District Court of Appeal.

ARGUMENT

THE TRIAL COURT ERRED BY DISMISSING WITH PREJUDICE PLAINTIFF'S AMENDED COMPLAINT BASED UPON THE COURT'S DETERMINATION THAT AN INDIVIDUAL UNIT OWNER COULD NEVER MAINTAIN SUIT, IN ANY FASHION, FOR DAMAGES TO THE CONDOMINIUM'S COMMON ELEMENTS.

The trial court erred in its dismissal with prejudice of Plaintiff's Amended Complaint seeking damages for defects and deficiencies in the condominium's common elements.[1] The trial court held that an individual unit owner could not, under any circumstances, maintain such an action given it was the association that had to bring suit pursuant to §718.111(3), Fla. Stat. (1987). The operative language of the statute and case law reveal that the trial court was wrong. Unit owners may maintain such suits individually and as members of a class. The trial court precluded this by its ruling and its clear expression that joinder of indispensable parties (such as the association or other unit owners as a class action) made no difference to its ruling.

Section 718.111(3) is permissive, not mandatory, and reflects the legislature's intent to confer the capacity to sue upon condominium associations for procedural ease rather than a substantive change of established common law. The trial court's ruling, in essence that the association is the sole party to maintain such suits, is clearly error. The Fourth District

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[1] As is obvious from the style and status of this case the condominium association has not joined in this action.

recognized this and properly reversed the lower court's decision.

A. The Instant Case Does Not Present a Question of Great Public Importance.

This is a unique case which turns on specific facts. The question certified was not essential to the proper determination of the case. This Court should exercise its discretion to either refuse to exercise jurisdiction or refuse to render a written opinion.

As stated previously, while Defendants argue that the trial court was correct because indispensable parties were not joined, the trial court itself ruled that this was not a consideration. The trial court ruled, incorrectly, that an individual unit owner could not maintain an action for damages to common elements under any circumstances; neither by joining the association nor by joining all other owners as a class.[2] This was clearly error.

The Fourth District recognized this and recognized that the trial court had ruled essentially that condominium associations had the exclusive right to sue under §718.111(3). Opinion at 2. The Fourth District held that, under the facts of this case, the trial court was wrong and that the Plaintiff does have standing. Opinion at 2 (". . . we disagree that [individual condominium unit owners] have no standing to sue under the circumstances sub judice")(emphasis added). While the District Court acknowledged that certain practical difficulties may exist by its ruling, it recognized that such potential difficulties could not deprive an

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[2] The effect of the ruling was, in essence, to preclude a class action, expressly recognized under Fla.R.Civ.P. 1.220, in deference to an action maintained by an association.

owner of standing.

While the certified question herein confers jurisdiction on this Court, it does not mandate the Court exercise that jurisdiction. As stated in Zirin v. Charles Pfizer & Co., 128 So.2d 594, 597 (Fla. 1961):

> For the purpose of emphasis we repeat that the proposition of whether a decision of a district court decides a question of great public importance is one solely for the district court to determine only insofar as vesting complete jurisdiction in this Court to entertain the cause is concerned. After jurisdiction attaches, the Constitution then brings into play the power of this Court to exercise its discretion and then to determine whether in that case an opinion is justified or required. For instance, to cite just one example, a decision may be certified to this Court that does decide a question of great public importance but, on examination by this Court, we may conclude that the question answered was not essential to a determination of the case and is of such nature that no useful purpose would be served by rendering a decision. [Footnote omitted].

In the instant case, the certified question is not essential to the proper and correct determination of this case and a written opinion would serve no useful purpose.

B. The Trial Court Ruled That The Action Must Be Maintained By The Association Under §718.111(3).

If this Court decides to accept and exercise jurisdiction, however, it must affirm the Fourth District's opinion. An individual unit owner has standing to maintain an action for damages to common elements.

Defendants, again, misconstrue the issue on review. Defendants' acknowledge individual unit owners may maintain construction defect suits, but argue Plaintiff does not have standing because

indispensable parties exist. It must be understood that if this were true, the trial court would have afforded Plaintiff the opportunity to amend to join such indispensable parties. See Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So.2d 463, 466 (Fla. 4th DCA 1975), cert. denied, 327 So. 2d 31 (Fla. 1976); see also Fla.R.Civ.P. 1.190 and 1.210(a). Instead, the trial court stated that the failure to join an indispensable party was not the basis for his ruling. It was clear that the trial court would not entertain a motion for leave to amend to join other parties. Such a motion would have been fruitless in light of the court's expressed ruling. The trial judge held that the only vehicle by which to bring such a suit is by and through the association as the sole party plaintiff under §718.111(3).

C. Individual Unit Owners Have An Actionable Interest in the Condominium Common Elements.

It is clear in Florida that individual unit owners have an actionable interest in their condominium's common elements. See generally, Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1976); Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So.2d 463 (Fla. 4th DCA 1975), cert. den., 327 So.2d 31 (Fla. 1976). Condominium unit owners own an undivided proportionate share of the common elements, making them owners of the common elements. Significantly, prior to the enactment of the predecessor statute to §718.111(3), individual unit owners were deemed to be the only proper parties in interest in suits affecting common elements. See generally, Commodore

Plaza, at Century 21 Condominium Association, Inc. v. Saul J. Morgan Enterprises, Inc., 301 So.2d 783 (Fla. 3d DCA 1974), dismissed, 308 So.2d 538 (Fla. 1975); Hendler v. Rogers House Condominium, Inc., 234 So.2d 128 (Fla. 4th DCA 1970). Individual unit owners were required at that time to bring suit in their individual capacity and as a representative of a class of unit owners. This remains an acceptable procedure. See Fla.R.Civ.P. 1.220. This was overlooked by the trial court when it determined the only way to maintain a suit for defects to a condominium's common elements was by and through the condominium association.

While it may be true that condominium owners must by necessity expect to relinquish certain rights and accept certain responsibilities as a result of condominium living, this does not include the relinquishment of an owner's right to seek redress in Florida courts. There is no question that owners of the common elements have an actionable interest in preserving their common elements. Ownership is clearly a "sufficient stake" to confer standing upon unit owners. See generally, Jamlynn Investments Corp. v. San Mario Residences, 427 So.2d 815 (Fla. 5th DCA 1983). The Fourth District has previously noted that individual unit owners have standing to maintain suits regarding common elements. In Wittington, supra, an action for damages relating to defects to common elements, the Fourth District noted that an owner, Victor Matthews, had standing in his individual capacity stating:

> As to the status of Victor Matthews, individually, we are satisfied that the allegations contained in the complaint (in particular the allegation that he is a condominium unit owner) are

> sufficient to demonstrate his interest and standing; and coupled with the other allegations pertaining to the multiple claims for relief are sufficient to withstand a motion for judgment on the pleadings.

Wittington, 313 So.2d at 468 (emphasis added).

In Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1976), the Supreme Court recognized that individual unit owners had standing to attack the legality of their condominium's common element recreational lease. While the unit owners were not parties to the lease, they nonetheless had standing by virtue of their ownership interests in the common elements. See also S & T Anchorage, Inc. v. Lewis, 575 So.2d 696 (Fla.3d DCA 1991)(district court reversed summary judgment on ground that factual issues existed as to individual's rights, apart from the association's, to sue to protect common elements). Individual unit owners have always had standing in actions involving common elements.

The trial court erred in concluding that an individual unit owner has no standing to initiate suit regarding common elements.

D. Section 718.111(3), Fla. Stat., Does Not Confer the Sole Exclusive Authority to Sue Upon Condominium Associations.

Since individual unit owners are recognized as having an actionable interest in their condominium common elements, the only other basis upon which the trial court could dismiss this cause is based upon its determination that §718.111(3) conveys upon condominium associations the sole and exclusive right to maintain such actions. This interpretation is contrary to the plain

language of the statute and the clear legislative intent.

Section 718.111(3) provides, in its entirety:

> POWER TO MANAGE CONDOMINIUM PROPERTY AND TO CONTRACT, SUE, AND BE SUED. The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property. After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities and on units; and may defend actions in eminent domain or bring inverse condemnation actions. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action which may otherwise be available. [e.s.]

To determine the meaning of a statute the touchstone is to ascertain the legislative intent and purpose behind the statute. See generally, Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); Devin v. Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976). This may be accomplished by following the general rules of statutory construction such as by giving the language of the statute its plain ordinary meaning, by reviewing the legislative history of the statute, and by reviewing judicial interpretation of the statute. Pursuant to these general rules, it is clear that §718.111(3) was intended to confer the "capacity" to sue upon condominium associations as a

procedural convenience rather than to create any substantive change in the law which would usurp the common law rights of the individual unit owners.

The plain language of the statute clearly suggests the legislature's intent was to create a permissive capacity in, rather than a mandatory obligation upon, condominium associations. The pertinent statutory language itself is couched in the permissive term "may"; as in the association "may contract, sue, or be sued . . ."; "may institute, maintain, settle, or appeal actions or hearings in its name . . ."; and "may be joined in an action as representative of that class . . ." §718.111(3), Fla. Stat. (1987). The plain meaning of the statute is clearly permissive suggesting that actions maintained by associations are optional rather than mandatory. See generally, Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. 1st DCA 1963) (the word "may" is to be taken to mean permissive rather than mandatory); see also Pedersen v. Green, 105 So.2d 1 (Fla. 1958) (language of statute to be given plain ordinary meaning).

In addition, the final sentence of subsection (3) makes it abundantly clear that any rights, powers, or duties conferred upon a condominium association are limited so as not to infringe upon the rights of the individual unit owners. As stated:

> Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action which may otherwise be available.

§718.111(3), Fla. Stat. (1987). It is clear from the plain unambiguous language of the statute that the legislative intent

was not to confer the exclusive right to sue upon condominium associations. The statute in no way affects the substantive rights of the individual unit owners to maintain any and all legal actions relating to the common elements. This particular "retention of rights" sentence of the statute was subsequently amended to make the legislative intent even more clear. In 1990, the legislature amended the final sentence of the pertinent section so as now to read:

> Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action without participation by the association which may otherwise be available.

§718.111(3), Fla. Stat. (1990) (Ch. 90-151, Laws of Fla.), (effective date October 1, 1990) (emphasis reflects added portion). By this amendment, the legislature recognized the danger evidenced by the Defendants' arguments sub judice and the trial court's misinterpretation of the statute to affect the substantive rights of the unit owners. The amendment reflects the legislative intent that associations are not the sole and exclusive party to bring suit. Further, it clarifies the question as to whether the association must always be joined as a party in suits involving a common interest among unit owners. Associations need not be joined in such actions and recent case law supports this conclusion given that in actions involving issues of "common interest" neither the association nor individual unit owners are considered indispensable parties in suits maintained by the other. See generally, Brazilian Court Hotel v. Walker, 584 So.2d 609

(Fla. 4th DCA 1991); Kesl, Inc. v. Racket Club of Deer Creek, 574 So.2d 251 (Fla. 4th DCA 1991).

The express retention of rights provision in the Florida statute is significant because it clearly and completely distinguishes this case from that relied upon almost exclusively by Defendants. In Siller v. Hartz Mountain Associates, 93 N.J. 370, 461 A.2d 568, cert. den., 464 U.S. 961, 104 S.Ct. 395, 78 L.Ed.2d 337 (1983), the New Jersey Supreme Court recognized that a condominium association had standing to bring suit for alleged defects to common elements based upon New Jersey's Condominium Act. That Court expressly determined, however, that the legislative intent behind the Act was to confer the sole and exclusive right to sue upon associations. A review of the pertinent sections of the Act reveals, however, that the New Jersey Condominium Act does not contain a reservation of rights provision, distinguishing it from the Florida Act. The New Jersey counterpart to §718.111(3) is §46:8B-15(a) (1991), which provides:

> Powers of the Association.
>
> Subject to the provisions of the master deed, the by-laws and the provisions of this act, the association shall have the following powers:
>
> (a) Whether or not incorporated, the association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued. If the association is not incorporated, it may be deemed to be an entity existing pursuant to this act and a majority of the members of the governing board or of the association, as the case may be, shall constitute a quorum for the transaction of business. Process may be served upon the association by serving any officer of the association or by serving agent designated for service of process.

> Service of process upon the association shall not constitute service of process upon any individual unit owner.

(Emphasis added). Without a similar reservation of rights provision in the New Jersey statute, it is more susceptible to judicial interpretation and, as such, is inapposite to the instant case. It is interesting to note that while holding that the association had the sole and exclusive right to sue, the Court in Siller still recognized that individual unit owners have an actionable interest in common element defect suits. The Siller Court expressly held that an individual unit owner could "act on a common element claim upon the association's failure to do so." Siller, 461 A.2d at 574. The court went on to state that "the association must be named as a party." Id. Defendants fail to recognize that despite the clearly distinguishable statutory language, the Siller Court still acknowledged an individual unit owner's right to maintain suit. In the instant case, the proposed joinder of the association as an indispensable party, as suggested in Siller, was expressly rejected by the trial court!

The Siller Court also analogized the statutory law governing corporations in assessing the legislative intent. This logic is reiterated in Defendants' briefs. The Siller Court did not have the same explicit reservation of rights provision for guidance and so the corporate comparisons were well founded and justified. In the instant case, however, where the clear intent of the legislature is found in the plain language of the statute, such a comparison is unnecessary and improper. As stated by the Florida Supreme

Court in Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G, Condominium Association, 361 So.2d 128, 133-134 (Fla. 1978), the Legislature:

> . . . has broad discretion to fashion such remedies as it deems necessary to protect the interests of the parties involved.

The Florida Legislature has wisely chosen not to usurp any of the individual condominium unit owners' rights. The intent of this reservation of rights was to protect the interests of the unit owners involved.

Section 718.111(3) does not confer the sole and exclusive right to sue upon condominium associations.

E. The Equitable Concern of Multiplicity of Suits Does Not Deprive Plaintiff of Standing.

Defendants confuse the substantive principle of standing with the equitable principle of avoiding multiple suits. They argue that the potential for multiple suits denies Plaintiff standing, despite Plaintiff's acknowledged ownership interest in the common elements. Defendants are incorrect and are placing the proverbial "cart before the horse."

Standing is the substantive requirement that a person have an interest in the litigation sufficient to justify seeking redress. See generally, Jamlynn Investments Corp. v. San Mario Residences, 544 So.2d 1080 (Fla. 2d DCA 1989); Gieger v. Sun First National Bank of Orlando, 427 So.2d 815 (Fla. 5th DCA 1983). As stated by the Second District in Jamlynn:

> The concept of standing has been defined in a broad sense as having a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that

> controversy. Standing is not determined by first finding whether privity exists. Rather, a party has standing when it has such a legitimate interest in a matter as to warrant asking a court to entertain it. Thus, one has standing where there is a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation.

Jamlynn, 544 So.2d at 1082 (citations omitted).[3]

There is no question that Plaintiff has standing to maintain this action. Plaintiff not only has an "interest at stake", it has an ownership interest at stake. While Defendants do not appear to contest this, they argue that the potential for multiple suits divests Plaintiff of its standing. A review of the relevant law quickly reveals this is simply incorrect.

Multiplicity of suits is an equitable consideration which provides a court with discretion to entertain matters over which it may otherwise not have jurisdiction. See generally Lambert v. Lambert, 403 So.2d 484 (Fla. 1st DCA 1981); Morris and Esher, Inc. v. Olympia Enterprises, Inc., 200 So.2d 579 (Fla. 3d DCA 1967). Equity allows a court to take jurisdiction and consolidate matters to prevent repeated litigation of the same issue. See generally 30A C.J.S. Equity, §38; see also Crane Company v. Bradford Builders, Inc., 116 So.2d 794 (Fla. 3d DCA 1960). The principle is not mandatory, but discretionary, to be left to the determination of courts on a case by case basis. Lambert, supra. As applied, the principle is one of inclusion rather than exclusion, designed to join rather than exclude parties from suit. The equitable

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[3]In Jamlynn, a lessee was found to have standing in an action involving condominium common elements based upon its lease which afforded it only rights of use and possession, not ownership.

principle does not function to divest one of standing simply on the ground of inconvenience. While the Fourth District recognized that the current style of the instant case presents certain inherent difficulties, it also recognized that those difficulties could not be held to divest Plaintiff of its substantive rights.

A trial court may exercise its discretion and order that other, additional, parties be joined so to ensure against the multiplicity of suits. However, this has no effect on whether a party has standing to be one of those proper parties. A court may not divest a proper party of standing under the auspices of protecting against multiple suits.

The issue of multiplicity of suits is not presently before this court. At some point in the future there may be a need to join other parties in the interest of finally resolving all claims in one action. That has not yet occurred. In fact, the trial court expressed its opinion that the joinder of parties would not affect its ruling. It is clear that parties may be joined at any time during a litigation, see Fla.R.Civ.P. 1.250(c), and that the misjoinder of parties is not a valid ground for dismissal of an action. See Fla.R.Civ.P. 1.250(a); Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So.2d 463 (Fla. 4th DCA 1975), cert. den., 327 So.2d 31 (Fla. 1976).

Florida Rule of Civil Procedure 1.210 provides that "[e]very action may be prosecuted in the name of the real party in interest . . . ." A "real party in interest" may be defined as a "person in whom rests, by substantive law, the claim sought to be enforced."

See Kumar Corp. v. Nopal Lines, Ltd., 462 So.2d 1178 (Fla. 3d DCA), rev. denied, 476 So.2d 675 (Fla. 1985)(quoting Author's Comment to Fla.R.Civ.P. 1.210, 30 Fla. Stat. Ann. 304, 306-07 (1967)). It is clear that an owner of realty is a party who, by substantive law, holds the entitlement to bring a claim involving that realty. It has been held that there can exist more than one real party in interest to an action. See Prevor - Mayorsohn Caribbean v. Puerto Rico Marine, 620 F.2d 1, 4 (1st Cir. 1980). Further, it is significant that the real party in interest rule is permissive rather than mandatory so that actions may be maintained by persons other than a real party in interest. See generally, City of Lakeland v. Select Tenures, Inc., 129 Fla. 338, 176 So. 274 (Fla. 1937); Holyoke Mutual Insurance Co. v. Concrete Equipment, Inc., 394 So.2d 193 (Fla. 3d DCA), pet. denied, 402 So.2d 609 (Fla. 1981); see also Durrant v. Dayton, 396 So.2d 1225, 1226 (Fla. 4th DCA 1981)(nominal party may bring an action in own name "without joining the real party in interest.")(citations omitted); cf. Metro Dade County v. Floyd, Pearson, 559 So.2d 614 (Fla. 3d DCA), rev. denied, 576 So.2d 289 (Fla. 1990)(party other than real party in interest may maintain suit to advance concerns of the real party in interest).

Contrary to Defendants' assertions, Florida's real party in interest rule does not divest Plaintiff of standing to maintain the instant action. The trial court essentially held the only real party in interest was the association. Even when asked whether Plaintiff should join other parties, the trial court

clearly held that that would not dissuade his decision.

The trial court erred in holding that, as a matter of law, an individual unit owner could not, under any circumstances, maintain the instant action. The Defendants' arguments, based upon the equitable concern of avoiding multiplicity of suits, are premature and inapposite to the issue on review.

CONCLUSION

The trial court erred and the Fourth District was correct: individual unit owners have standing in actions involving common elements and §718.111(3) does not confer upon condominium associations the sole and exclusive right to sue for matters involving common elements. This case does not present a question of great public importance which mandates action on the part of the Supreme Court.

This Court should refuse to exercise jurisdiction and not render an opinion in this case. In the alternative, if this Court chooses to exercise jurisdiction, it must affirm the opinion of the Fourth District Court of Appeal. If the latter, Respondent would respectfully request oral argument on all issues presented by these appellate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this 19th day of January, 1993, to THOMAS D. DAIELLO, ESQ., Marchbanks, Daiello & Leider, P.A., Counsel for Rogers & Ford Construction Corp., Sanctuary Centre Tower E, 4800 North Federal Highway, Suite 101E, Boca Raton, Florida 33431 and to ROY E. FITZGERALD, ESQ., GUNSTER, YOAKLEY & STEWART, P.A., 777 South Flagler Drive, Phillips Point - Suite #500E, West Palm Beach, Florida 33401, Counsel for Flagler Properties, Inc.

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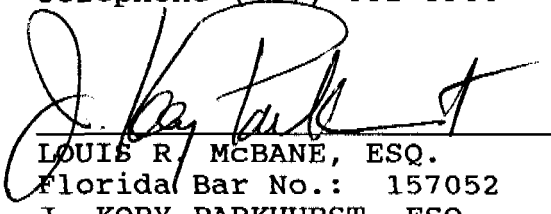

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