IN THE SUPREME COURT OF FLORIDA

PALM POINT PROPERTY OWNERS' ASSOCIATION OF CHARLOTTE COUNTY, INC., Petitioner, v. ROBERT AND LILLIAN PISARSKI, Respondents.	CASE NO. 80,840 DCA-2 NO. 91-03643

PETITION FOR RULE 9.120 REVIEW

OF DECISION ISSUED BY THE

SECOND DISTRICT COURT OF APPEAL

-PETITIONER'S REPLY BRIEF-

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II. SUMMARY OF ARGUMENT

The Petitioner, Palm Point Property Owners' Association, Inc. (hereinafter referred to as PPA), submits that it fairly and adequately represents the best interests and general welfare of the Palm Point Subdivision. PPA asserts that legislative action is not a necessary precursor to the adoption of a court rule of procedure granting standing to homeowners' associations, such as PPA. In support of its position, it contends that Avila, infra, and Lanca, infra, are analogous predecessors. Similar to the condominium association and the mobile homeowners' association, PPA claims the subdivision property owners association has unique features which can only be addressed and resolved by a new court rule of practice and procedure. PPA argues that the existing Florida non-profit corporation law has already empowered it to file suit but the issue of standing to sue on behalf of the subdivision property owners remains to be resolved by this Court. In considering the adoption of such a rule, PPA urges this Court to include the specific provision for enforcement of duly recorded subdivision restrictive covenants.

III. ARGUMENT

In their Answer Brief the Respondents raise a number of points to which the Petitioner, Palm Point Property Owners' Association, Inc. (hereinafter referred to as PPA), wishes to respond. These points can be summarized under the following topics:

A. Is PPA "a stranger" to this subdivision or does it fairly and adequately represent the majority of the property owners in the subdivision.

B. Must PPA be authorized by all the property owners of the subdivision as a pre-condition for standing to enforce subdivision restriction violations.

A. PPA IS NOT "A STRANGER" TO THIS SUBDIVISION AND DOES FAIRLY AND ADEQUATELY REPRESENT THE SUBDIVISION PROPERTY OWNERS.

In its initial brief, PPA developed the factual and legal basis to show how it came to exist as the corporation selected to represent and serve the property owners of this subdivision. Among its many duly assigned functions is enforcement of the restrictive covenants as adopted by the original developer and as later amended several times by the property owners themselves. This is a clear-cut example of subdivision members uniting in a corporate form to carry out the express and implied functions set forth in the amended restrictive covenants.

Yet the Respondents seek to brand this valid Florida non-profit corporation acting within the authorities delegated to it as "a stranger". The Respondents argue their lack of privity with the developer but gloss over the privity all of its members have with that developer by reason of their individual chains of title. Respondents then contend that this corporation is not legislatively validated in some way. According to the Respondents, the Florida Legislature should have enacted specific statutory authority in order for home owner associations to seek judicial relief to enforce subdivision restrictions. This

failing, they assert, should disenfranchise PPA in acting as the representative for this subdivision's property owners.

Respondents analogize to the condominium and mobile home association contexts where the Legislature did attempt to provide statutory relief. Section 723.079(1), Florida Statutes, (1985) and (1987). Respondents do refer to this Court's action in Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1976) and Lanca Homeowners v. Lantana Cascade, 541 So.2d 1121 (Fla. 1988). But they do not acknowledge that the present action also involves the absence of a procedural remedy as was found to exist in Avila and Lanca.

In resolving the dilemma in Avila and Lanca, this Court recognized the need for a rule of procedure and not additional legislatively-fashioned powers. The Rules then adopted provided the missing procedural remedy needed by these Associations. Petitioner submits that legislative action for homeowners' associations, if first requested and obtained, although commendable in supporting such associations in the performance of their avowed purposes, still would not satisfy the constitutional requirement set down in Avila and in Lanca. Only a new rule of procedure will do so. And only this Court can provide such a rule. Surely this Court would not require Petitioner to seek and obtain legislative action as a precondition to the exercise of its rule-making authority. Respondents urge this argument in pointing out the absence of statutory authority for PPA and similarly situated organizations. But it seems inconceivable that the law would require PPA to first obtain legislation which this Court

would then determine to be unconstitutional as defined in Avila and Lanca.

Petitioner argues the home owner subdivision association is not different from the condominium and mobile homeowners' associations. All three face challenges to their authority from without and within; that is, from persons having no vested interest in the association and also from persons who may be included within the field of membership of the association. And then sometimes the parties' respective interests may be difficult to clearly segregate. Lanca involved an action initially filed by a mobile park owner against a non-profit Florida corporation formed by the mobile home residents of that park. The litigation that followed then demonstrated that the interests of both those parties appeared to be heavily interwoven. In recognition of this problem, this Court specifically found that "... the unique features of mobile home residency call for an effective procedural format for resolving disputes between park owners and residents concerning matters of shared interest." Lanca at 1123.

Similarly, Avila involved an action by a condominium association, in its own behalf and on behalf of the association members, against the owners and developers of the tract, building, and appurtenances submitted to condominium ownership. Four individual unit owners were also named as Plaintiffs in their own right and on behalf of all other persons similarly situated. This distinction between substantive rights and judicial practice and procedure was closely examined. This Court concluded that the definition of proper parties in suits litigating substantive

rights clearly has to do with the machinery of the judicial process as opposed to the product thereof. Avila, supra at 608. The standing of a party to sue necessarily concerns the definition of a proper party to a suit and therefor is court practice and procedure.

It is noteworthy also that subsequent to Avila this Court had occasion to revisit the appropriateness of its determination. This occurred in connection with proceedings conducted giving interested persons an opportunity to be heard on this matter. In re Rule 1.220(b), Florida Rules of Civil Procedure, 353 So.2d 95 (Fla. 1977). In rejecting pleas for modification of the newly adopted rule, this Court crystalized the rationale supporting that rule by stating:

> The response of this Court in Avila was to recognize the authority of the legislature to create the capacity in condominium associations to maintain suits, but to reject the attempt of the legislature to design the procedural vehicle for vindication of substantive rights. However, recognizing the virtue of the policy sought to be asserted by the legislature, we adopted Rule 1.220(b).

As to non-profit Florida corporations, Section 617.0302(2), Florida Statutes, specifically grants the power to maintain suits. As thus defined by this Court, the full grant of authority from the Florida Legislature already exists to empower PPA to seek judicial relief. What is missing is the appropriate procedural vehicle.

The issue presented in this action then is simply how to structure the procedural remedy to enable the organization selected by the property owners themselves to perform its assigned

functions. It is clear that the procedural device of class action will not serve to resolve this procedural problem. Nor will an action based upon assignments of chose in action by the individual property owners. Both of these techniques were attempted unsuccessfully in the present suit. Palm Point Property Owners' v. Pisarski, 608 So.2d 537 (Fla. 2d DCA 1992).

So long as the requirement of privity of estate remains as an essential element to enforcement of land covenants, a representative organization, such as PPA, will never be able to enforce subdivision restrictions unless a rule of procedure make this possible. Such a rule can protect the interests of the subdivision owners as a whole by requiring that the organization represent fairly and adequately the majority of those owners. This could be determined by a trial court in part from the organization's organic documents - its corporate charter, Articles of Incorporation, bylaws and minutes. The actions taken by the organization in prior contexts could also give an indication as to whether its motivation is the overall welfare and integrity of the subdivision. The very relief being sought from the trial court would be another gauge of the adequacy and fairness of its representative capacity. Thus the subdivision owners, who do have privity of estate, would be enabled by court procedural rule to enforce their subdivision's restrictive covenants in the representative capacity of their choosing. Such a device would help ameliorate the long-lived antagonism and acrimony which frequently develops when neighbor files suit against his or her neighbor. Certainly subdivision harmony is a worthy objective for

such a court rule to subserve.

B. PPA NEED NOT BE AUTHORIZED BY ALL THE SUBDIVISION PROPERTY OWNERS AS A CONDITION TO ENFORCE SUBDIVISION RESTRICTIVE COVENANTS.

The Respondents contend it is desirable for the Association to represent **all** the property owners. They claim that a subdivision Association simply could not do that and cite the adversarial conflict which arises even in the context of collecting dues and assessments. They argue that somehow this problem in the condominium and mobile home organizations is different than for the homeowners' association. Respondents thus seek to distinguish homeowners from condominium and mobile homeowners. But these different contexts are in name only. For all of these associations require funds to operate for the welfare of the people represented. And there must be some procedural method for obtaining payment. In effect, Respondents are simply reiterating their privity of estate argument in different words. They point to the condomiumim declaration and find the authority to make assessments and then to collect them. But the declaration was the developer's point of beginning, since the condominium does not exist without its declaration. And the declaration is also the vessel from which each unit owner's vested rights flow. The declaration thus becomes the connection for privity between the developer and each unit owner.

Respondents' argument also overlooks the fact that in Lanca the association did not represent **all** the lot owners. That non-profit corporation, organized pursuant to Florida Statutes, Section 723.075, apparently represented 344 mobile homeowners in

a park of 461 mobile home lots. Yet this lack of totality of the membership did not preclude a court rule of procedure. Instead, the uniqueness of mobile home residency determined the need for such a rule. By the provisions of Florida Rules of Civil Procedure, Rule 1.222, the mobile home owners' association in maintaining a suit thereunder in its name does act on behalf of all mobile homeowners. It is apparent that the intent of this Rule was not to require the association to include as members all of the mobile homeowners.

Respondents would attempt to limit the functions available to even condominium associations to those expressly stated in the original document. Such an argument necessarily overlooks the fact that even a condominium's declaration can be amended. Condominium law already validates changes made to the declaration when adopted in accord with prescribed procedural and substantive safeguards. To recognize by statute and case law the ability of a condominium to validly alter its organic structure and to enforce such changes, is to recognize that change may be required to meet the needs of future comdominium unit owners. How is this different for the homeowners living in a developed subdivision? As technology and living conditions change, surely even subdivision homeowners whose development plan needs change should be allowed to do so. To force such homeowners to live in a development without the means to collectively enforce the duly recorded covenants when they wish to do so simply does not accord with the prerogatives already protected for the condominium and mobile homeowners.

Petitioner therefore urges this Court to favorably consider and adopt a new rule of procedure to recognize standing to homeowners' associations who adequately and fairly represent the property owners of a real estate subdivision that is not a direct successor to the interests of the developer and provision for which does not appear in the grantor's original subdivision scheme. It is suggested that such a rule of procedure include the enforcement of duly recorded subdivision restrictive covenants within the ambit of functions for which such an association would have standing to sue.

CONCLUSION

The Petitioner, Palm Point Property Owners' Association, Inc., a non-profit Florida corporation, is certainly not a stranger to this subdivision. In fact, it adequately and fairly represents the best interests and welfare of this subdivision's property owners, particularly in its efforts to maintain and enforce the duly recorded restrictive covenants which bind and govern all of the lots in this subdivision.

There should be no requirement that a homeowners' association be authorized by all the property owners of the subdivision to perform its duly assigned duties. Once duly constituted, such an association should be allowed standing to maintain legal actions, such as suits to enforce subdivision restrictions, pursuant to court rule, if standing to do so is not otherwise available. The adoption of a new rule of civil

procedure to permit this is urged.

Respectfully submitted,
this the 22nd day of February, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished to ROBERT A. DICKINSON, ESQUIRE, 460 S. Indiana Avenue, Englewood, Florida 34223, Attorney for Respondents, by mail, this 22nd day of February, 1993.

Attorney