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SUPREME COURT OF FLORIDA

CHARLEY TOPPINO AND SONS, INC., ET AL.,

Petitioner,

CASE NO. 80,872

vs.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC.,

Respondent.

_____/

EPIC METALS CORP., ET AL.,

Petitioner,

CASE NO. 80,873

vs.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC.

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND THE FACTS

After turnover of control of the association by the Developer[1] of the Seawatch condominium to the unit owners in August 1985, Seawatch discovered that the concrete used to build the buildings contained high amounts of salt, which was causing the buildings to deteriorate.[2] Seawatch also discovered that the structural steel reinforcing system had been improperly designed and constructed so that it provided inadequate structural support and improper fire protection.[3] These defects are quintessentially "latent", requiring intensive inspection by professional engineers and sophisticated laboratory testing to ascertain their existence.

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[1] We use the following designations in this brief: "Seawatch" refers to the respondent, Seawatch at Marathon Condominium Association, Inc.; "Developer" refers to the petitioner Turtle Kraals, Ltd., the developer of Seawatch; "Toppino" refers to petitioner, Charley Toppino and Sons, Inc., the manufacturer and supplier of the concrete used in the construction of the Seawatch condominium; and "Epic" refers to Epic Metals Corporation, the designer, manufacturer and supplier of the structural steel reinforcing system used in the construction of Seawatch. The general contractor that built Seawatch, Monroe Construction Corp., which has not joined in the present petition, is referred to as "Monroe".

Emphasis, shown by underlining, is by the author, unless otherwise indicated.

[2] The nature of the problem caused by salt-laden concrete is discussed in the Petitioners' Brief on the Merits (at pages 2-6) in a related case styled Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 588 So. 2d 631 (Fla. 3d DCA 1991), jurisdiction accepted, 602 So. 2d 533 (Fla. 1992), now pending before this Court under Case No. 79,127.

[3] The defects alleged in Epic's structural reinforcing system, which relate both to improper structural design and construction as well as improper fire protection, are set forth in Exhibit A to the Second Amended Complaint. (R. 514-536)

Seawatch sued the Developer, the general contractor (Monroe) and the suppliers of the concrete (Toppino) and of the structural steel reinforcing system (Epic) for the resulting damages. The Second Amended Complaint alleged that although the defects were present in the structures at the time of construction they were latent to the unit owners. (R. 516-517, 520). It further alleged that the consequences of the defects in the form of cracks and rust began to become apparent before turnover, when the Developer still controlled the condominium and was responsible for its maintenance and repair.[4]

The Second Amended Complaint did not allege that the defective concrete or the inadequately protected reinforcing system had become apparent or known to any unit owners -- as opposed to the Developer, Monroe, Toppino or Epic.[5] Nor did it allege the various dates when each of the unit owners at Seawatch had purchased their

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[4] The early signs of deterioration such as cracking and leaking rusty water referred to in the Second Amended Complaint (R. 520) were consistent with the later diagnosis of excessive chlorides made after turnover, when Seawatch retained engineers to conduct testing. Those same signs, however, were also consistent with more common, less serious problems, like settlement cracks and water intrusion, which typify buildings of this kind and which require only routine maintenance to correct. That may explain why the Developer did not itself discover the problems with Toppino's concrete during the time it maintained the buildings.

[5] The defective nature of the concrete and the structural system was, or should have been, apparent to Toppino and Metals, the manufacturer/designer/suppliers. Toppino used aggregate (rock) laden with sea salt to prepare the concrete, and must have been aware of that defect. Likewise, the failure of Epic's structural system to meet the fire resistivity requirements of the Southern Building Code must have been apparent to Epic at the design stage of the project.

condominium units and therefore could conceivably have discovered any of the defects.

The petitioners seize on the allegation of apparentness[6] as being an admission by Seawatch that its unit owners had knowledge of the defects.[7] But they misread the allegation, which does not state to whom the defects became apparent. Nor, significantly, does it state that the defects became apparent to the unit owners. What it does say is that the defects became apparent during the time that the developer was in control of the condominium. Moreover, the allegation of latency to the unit owners was clear:

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[6] The allegation was that:

> The defects and deficiencies were present in the Structures at the time of construction, but became apparent beginning during the one (1) year interval following April 8, 1983, and well within the three (3) year interval following the completion of each of the respective structures. Thereafter, the defects and deficiencies became more evident as time passed. . . .

(R. 520).

[7] That allegation of apparentness in paragraph 21 was first made in the Second Amended Complaint only after the trial court improperly had directed Seawatch to plead dates "when the alleged defects became manifest." See Order on Defendants Toppino, Epic Metals and Monroe's Motions to Dismiss Plaintiff's Amended Complaint and Plaintiff's Motion to Amend Complaint, R. 537-539, which states, in part:

> 2. Count I of Plaintiff's amended complaint is dismissed without prejudice as to Defendant Toppino, and Plaintiff shall have twenty days from December 1, 1989 to amend said count to allege the date(s) certificates of occupancy were issued, when the alleged defects became manifest, and the specific building code(s) plaintiff contends were violated.

R. 538. That order was entered as a result of the Appellees' argument that no cause of action could arise for breach of the statutory implied warranties, § 718.203, Fla. Stat., unless the defect was apparent within the warranty period (an argument which Seawatch, of course, has consistently opposed).

> The existence or causes of the defects and deficiencies are not readily recognizable by persons who lack special knowledge or training, or they are hidden by components, or finishes and thus are latent defects which the Unit Owners and the Association, in the exercise of reasonable diligence, did not discover the existence of or cause of until after their purchase and occupancy of the Condominium units, and/or were led to believe by the DEVELOPERS that all said defects and deficiencies would be or had been corrected.

(R. 516-517).

That the unit owners did not have knowledge of the defects sued upon in the present case is demonstrated by an earlier lawsuit brought before turnover in which four unit owners had sued the Developer for other defects in the Seawatch condominium. Callihan v. Turtle Kraals, Ltd., 523 So. 2d 800 (Fla. 3d DCA 1988). Callihan was not brought as a class action and none of the other unit owners joined or benefitted by the suit. The defects sued upon in Callihan included damage from leaks and cracking but did not target Toppino's defective, salt-laden concrete or Epic's defective structural reinforcing system which are the basis of the present action. Nor were Toppino, Epic or Monroe named as defendants in Callihan.

As Callihan indicates, the unit owner plaintiffs then had the benefit of a construction and design expert who, notwithstanding the early signs of deterioration, did not link those signs to the defective concrete or recognize the inadequacy of the structural system. It is a reasonable conclusion that the few individual unit owners in Callihan would have included the present defects in their earlier suit if they had known about them. It is also reasonable

to conclude that, if the expert did not discover the present defects at that time, the unit owners, who had clearly acted with due diligence by hiring an expert, could not themselves have discovered them.

Seawatch therefore disagrees with the factual premise pervading the briefs of all petitioners that the unit owners "discovered" the defects alleged in the present action prior to turnover of control by the Developer. The Second Amended Complaint does not make that allegation, nor did it intend such an inference to be drawn from the facts alleged. "Discovery" of the defects for purposes of the applicable statute of limitations for construction defect claims[8] constitutes a factual issue that would have to be resolved by a jury only if this Court were not to answer the certified question of the Third District affirmatively.

The petitioners' statements of the case also need to be supplemented, because they do not completely address the proceedings before the trial court that resulted in the improper dismissal of Seawatch's several claims for breach of common law implied warranty, breach of statutory implied warranty under Section 718.203, Florida Statutes, and violation of the building code under Section 553.84, Florida Statutes. Those proceedings were held by telephone hearing without the benefit of a court reporter, with the result that the precise basis for the trial court's rulings was unclear. We summarize the trial court

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[8] Section 95.11(3)(c), Florida Statutes.

proceedings below in connection with our discussion of the petitioners' principal arguments. See n. 12, 13 infra.

SUMMARY OF THE ARGUMENT

The developer until the time of turnover is in a position to discover and enforce breaches of Section 718.203 warranties that run in its favor, while condominium purchasers, having no control of the association, are not. The passage of Section 718.124 had the remedial effect of preserving all unit owner rights of action until turnover, when the unit owners could effectively act to enforce their rights through the vehicle of the association as their representative.

A condominium association is nothing more than an alter ego for the collective interests of its unit owner members -- it has no substantive rights or interests of its own that are separate from those of its members. Logically, Section 718.124 must affect all actions of the association including class actions and actions for breach of the Section 718.203 implied construction warranties. Nothing in the wording of Section 718.124 suggests that class actions were not included under the broad definition of "any action" by the association. To impose that limitation upon the reach of Section 718.124 would render that provision useless for all practical purposes, because the only actions which need to be tolled are those to enforce unit owners' rights against developers. Section 718.124 was enacted to avoid leaving the rights of

condominium purchasers at the mercy of developers who have no incentive to sue themselves and every reason to allow unit owner claims to become stale before turnover of control of condominium associations.

Section 718.203, Florida Statutes, creates substantive warranty rights. The association is a proper party to bring an action for breach where warranties relate to the common elements of the condominium. The time periods in the statute define the time during which the warranties can be breached, not the time when suit must be brought. If a statute that creates a substantive right also limits the time to bring an action to enforce the right, it must do so with express language stating that "actions" are being limited. No such language appears in Section 718.203.

Although the Section 718.203 warranties were breached at the moment construction was completed, the time to bring the action for breach was tolled both by Section 718.124 and by the tolling provision of the statute of limitations generally governing construction defect actions, Section 95.11(3)(c), Florida Statutes. If that were not the case, the unit owners' warranty claims would have been foreclosed before the owners were even aware that their rights had been invaded and possibly even before they purchased their units. The Legislature did not intend in Section 718.203 to grant condominium purchasers wholly illusory warranties.

ARGUMENT

Section 718.124, Florida Statutes (1991), sets forth in "terse and unambiguous" language[9] an unqualified tolling of all statutes of limitations affecting actions brought by condominium associations. The reach of Section 718.124 is broad and all-encompassing and must be construed to include actions brought by condominium associations in any capacity on any theory of recovery, including actions arising out of the Condominium Act:[10]

> The statute of limitations for any actions in law or equity which a condominium association or cooperative association may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration.[11]

The petitioners raise two principal arguments to avoid operation of this statute in the present circumstances. The first argument asserts that Section 718.124 doesn't apply to actions brought by condominium associations as class representatives of unit owners.[12] The second contends that the warranty periods in

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[9] Seawatch at Marathon Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 610 So. 2d 470, 473 (Fla. 3d DCA 1993).

[10] Chapter 718, Florida Statutes.

[11] § 718.124, Fla. Stat.

[12] That argument was raised in the trial court as a ground for dismissal with respect to all counts of the Second Amended Complaint. The argument must have been the basis for the trial court's improperly dismissing the following counts: Count V against the Developer (breach of common law implied warranty); and Count VIII against the Developer and Monroe (violation of the building code pursuant to Section 553.84, Florida Statutes). That argument may also have been the basis for the trial court's improperly dismissing Counts I through IV against the Developer, Monroe, (continued...)

Section 718.203, Florida Statutes (1991), are not really warranty periods at all. Rather, say the petitioners, they are periods limiting the time for filing suit for their own breach -- that is, they are curiously their own statutes of limitations or repose.[13]

As we will show, neither argument has merit in light of the plain language of Sections 718.124 and 718.203, the overall scheme for turnover of control of condominium associations embodied in the Condominium Act, and the intent evident in the Act of providing condominium purchasers remedies that cannot be rendered worthless by the acts of developers before turnover of control.

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[12](...continued)
Toppino and Epic, respectively (breach of the statutory implied condominium warranties pursuant to Section 718.203, Florida Statutes). The record is not clear, however; the other basis for dismissal of the Section 718.203 counts may have been that raised in petitioners's second main argument. See the following footnote infra.

[13] This argument may have been the basis for the trial court's dismissal of the counts brought for breach of the Section 718.203 warranties. The several motions to dismiss resulting in the orders reversed by the Third District were argued in a telephone hearing, without benefit of a court reporter. In neither its oral rulings nor in the written orders of dismissal (R. 1119-1131) did the trial court articulate the basis for dismissing the Section 718.203 implied warranty counts. During the telephone hearing, counsel for Toppino raised both of the arguments of timeliness now raised by the petitioners. The trial court granted Toppino's motion without articulating which argument it had accepted. Immediately after the trial court granted Toppino's motion all of the other defendants moved for dismissal by adopting Toppino's arguments. The trial court then dismissed all counts against the remaining defendants, apparently on the same grounds as its dismissal of the claim against Toppino. Thus, one of the two arguments concerning timeliness (inapplicability of Section 718.124 to class actions and inapplicability of Section 718.124 to Section 718.203 warranty actions) must have been accepted by the trial court in its decision to dismiss the Section 718.203 counts, although nowhere in the record are the grounds stated.

I. SECTION 718.124 APPLIES TO ANY ACTION OF CONDOMINIUM ASSOCIATIONS -- INCLUDING CLASS ACTIONS

The Condominium Act invests a condominium association with the capacity to sue with respect to the exercise of its statutory powers to maintain, manage and operate the condominium. § 718.111(3), Fla. Stat.[14] After turnover an association may sue in its own name on behalf of its unit owners concerning matters of common interest. Id. The petitioners' argument that Section 718.124 does not apply to class actions is bottomed on the shaky premise that an association "has" an action when it sues in the exercise of its powers but does not "have" an action when it sues on behalf of its members. Nothing in the wording of Section 718.124 gives support for distinguishing between actions brought in different circumstances by an association. Rather, the broad language of the statute discourages the making of any distinctions whatsoever. "Any" action means just that - any action

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[14] Section 718.111(3), Florida Statutes (1991) (formerly numbered 718.111(2)) empowers associations to bring actions both on their own behalf and as class representative of the unit owners, as follows:

> (3) 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....

brought by an association in any situation.

A Condominium Association Can Act Only On Behalf of Its Unit Owners

The distinction advanced by the petitioners makes no practical sense either. An association is always acting on behalf of its members -- it can never do otherwise. Although technically a distinct legal entity, a condominium association has no purpose for existence other than to serve as a vehicle to provide the unit owners with an efficient means of acting collectively for the advancement and protection of their common interests in the condominium. Only unit owners can be members of the association, § 718.111(1)(a), Fla. Stat., and, in fact, "membership in the association is a required condition of unit ownership." § 718.103(2), Fla. Stat.

In effect the association is no more than the alter ego of its members. At its creation a condominium association owns no property in its name. Rather, the unit owners collectively own all common property in their names as appurtenances to their individual units. § 718.103(11), Fla. Stat. An association can later acquire property, but only "for the use and benefit of its members." §§ 718.103(3), 718.111(7), Fla. Stat. An association can enter into agreements and acquire leaseholds, but only "to provide enjoyment, recreation, or other use or benefit to the unit owners." § 718.114, Fla. Stat. Although a "unit owner does not have any authority to act for the association by reason of being a unit owner," § 718.111(1)(c), Fla. Stat., an association may

nevertheless contractually bind unit owners individually. Thus, when an association enters into agreements to improve condominium property, it is the individual unit owners who bear the ultimate obligation to pay. No lien can attach to the condominium property as a whole; rather, liens "may arise or be created only against individual condominium parcels," § 718.121, Fla. Stat. That is because the association does not own the common elements of the condominium -- the unit owners do. § 718.108, Fla. Stat. The association's power to contract for improvements derives solely from its duty to maintain, manage and operate condominium property on behalf of its members. § 718.111(3), Fla. Stat.

A condominium association's power to sue similarly derives from its duty to maintain, manage and operate the condominium. Id. That power is limited, however, to claims that affect the rights of the unit owners. The association does not have interests that are not identical to those of its members. Thus, a unit owner may bring any claim that an association may bring on behalf of its members, and where an association fails to bring an action any affected unit owner may initiate suit. § 718.111(3), Fla. Stat.[15]

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[15] The converse is not true, however. An association does not have the ability as an entity to bring each and every claim that unit owners may bring. See, e.g., Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599 (Fla. 1977) (condominium association does not have standing to bring class action for fraud); Bonavista Condominium Ass'n v. Bystrom, 520 So. 2d 84 (Fla. 3d DCA 1988) (taxpayers/unit owners indispensable parties to suit protesting ad valorem taxes); cf. Brazilian Court Hotel Condominium Owners Ass'n, Inc. v. Walker, 584 So. 2d 609 (Fla. 4th DCA 1991) (Bonavista legislatively overruled by amendment giving standing to (continued...)

Both the Association and the Unit Owners May Sue for Breach of Warranties

Not surprisingly in view of the unique and inextricable relationship between associations and unit owners, Florida courts have consistently recognized that both unit owners individually and associations on behalf of their members have the capacity to sue builders for defective construction on a variety of theories, including breach of warranty. See, e.g., Juno by the Sea Condominium Apartments, Inc. v. Juno by the Sea North Condominium Ass'n (The Tower), Inc., 418 So. 2d 1190 (Fla. 4th DCA 1982) (association "proper party" in action for breach of implied and express warranties and negligence in construction); Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So. 2d 463 (Fla. 4th DCA 1975), cert. denied, 327 So. 2d 31 (1976) (association has capacity as individual entity to bring suit for breach of contract, breach of warranty and negligence); Schmeck v. Sea Oats Condominium Ass'n, Inc. 441 So. 2d 1092 (Fla. 5th DCA 1983) (warranties run in favor of both association and unit owners); Bay Park Towers Condominium Ass'n, Inc. v. H.J. Ross & Assoc., 503 So. 2d 1333 (Fla. 3d DCA 1987) (association allowed to intervene as real party in interest in warranty action); Carlandia Corp. v. Rogers and Ford Constr. Corp., 605 So. 2d 1014 (Fla. 4th DCA 1992), rev. granted, ___ So. 2d ___, Table No. 80,788 (Fla. April 16, 1993) (individual

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[15](...continued)
condominium associations in ad valorem tax suits, but right of affected unit owners to opt out preserved).

as real party in interest has standing to sue for construction defects in common elements).

These cases reflect that condominium warranties relating to construction of the common elements run to the unit owners individually and collectively, and that where construction defects affect the common elements the association, through its power to maintain the condominium on behalf of the unit owners collectively, is a proper party to sue for breach.[16] Nothing in the wording of Section 718.203 suggests that the statutory warranties created therein were intended to be enforced any differently than the common law warranties recognized in Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA 1972), adopted and approved, 264 So. 2d 418 (1972).

In view of the shared right of both associations and unit owners to sue as real parties in interest for construction defects, the petitioners' contention that Section 718.124 was intended to toll only actions brought by an association in its own name approaches metaphysical nit-picking. Nor is it reasonable in light of the plain purpose of Section 718.124 to prevent despoliation of unit owner rights by the developer prior to turnover of control of the association to the unit owners.

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[16] While unit owners own their units (apartments) individually, each owns an undivided share in the common elements, § 718.106(2), Fla. Stat., which the condominium association is responsible for maintaining and, if necessary, bringing suit to carry out its responsibilities. § 718.111(3), Fla. Stat.

Section 718.124 Makes Sense Only In Actions Against Developers and Their Agents

The Condominium Act contemplates that the developer will create the condominium association and then control it, acting on behalf of unit purchasers in all matters of common interest until sufficient units have been sold to trigger turnover of control of the association to the unit owners. § 718.301, Fla. Stat. Prior to turnover, however, a developer has little incentive to place unit owners' interests above its own. Accordingly, Section 718.124 was enacted:

> to give condominium associations, as representatives of individual unit owners in matters concerning common elements, the right to sue after taking control, where the developer for reasons of self-interest or oversight, failed to pursue a cause of action for breach of contract or negligent construction.

Seawatch at Marathon Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 610 So. 2d 470, 472.

Section 718.124 as a bulwark against abuse by developers makes sense only when considered in connection with claims arising out of dealings between unit owners and developers and their contractors, suppliers or other agents prior to turnover. The most obvious of those claims are those for construction defects, where the Condominium Act specifically empowers associations to act on behalf of the unit owners and designates the class action as the most efficient vehicle to bring what would otherwise be a multiplicity of separate but virtually identical actions if brought by unit

owners individually. § 718.111(3), Fla. Stat.

Although individual owners may have the right to sue for construction defects, Carlandia Corp. v. Rogers and Ford Constr. Corp., 605 So. 2d 1014, the vesting in associations of the dual right to sue is designed to avoid separate actions by individual unit owners and to encourage legal action en masse. § 718.111(3), Fla. Stat. Without the vehicle of the association to act on behalf of unit owners collectively and to sue on their behalf as class representative, the coordination of their collective interests would be unmanageable. For example, third parties dealing with condominiums would require contracts to be signed by every unit owner. Lawsuits filed for or against the condominium would require the joining of all unit owners individually as parties. And, in the event individual unit owners sought to exercise their own right to sue as a class representative concerning a matter of common interest with other owners, they would have to follow the cumbersome procedural requirements of a class action that were eliminated by the enactment of Section 718.111(3) and the adoption by this Court of Rule 1.221, Florida Rules of Civil Procedure.[17] See The Florida Bar. In Re Rule 1.220(b) Florida Rules of Civil Procedure, 353 So. 2d 95 (Fla. 1977) (condominium association, without more, represents its members as a matter of law); Imperial Towers Condominium, Inc. v. Brown, 338 So. 2d 1081 (Fla. 4th DCA 1976), rev. dismissed, 354 So. 2d 978 (1977) (condominium

[17] Rule 1.221 was originally numbered Rule 1.220(b).

association may represent subclasses of unit owners); and Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So. 2d 515 (Fla. 4th DCA 1981), rev. denied, 417 So. 2d 328 (1982) (condominium association may recover full damages for construction defects in common elements notwithstanding fewer than all unit owners entitled to sue).

Upon turnover unit owners have for the first time the ability collectively to assess the state of the condominium's books and records, to review contracts binding the association, and, importantly, to conduct a comprehensive inspection of the physical structures which they must now maintain. § 718.301(4), Fla. Stat.

The turnover provisions of the Condominium Act virtually compel the unit owners to wait until after turnover before bringing claims for construction defects. Only upon turnover are unit owners entitled to receive the financial records reflecting expenditures by the developer-controlled association for building maintenance and repairs. § 718.301(4)(c), Fla. Stat. Only then may the unit owners receive the "as-built" plans for the building, § 718.301(4)(f); the names of the contractors, subcontractors, and suppliers used to build the condominium, § 718.301(4)(g), Fla. Stat.; and the written warranties, if any, from contractors, subcontractors and suppliers. § 718.301(4)(k), Fla. Stat. In other words, only after turnover does the Condominium Act provide unit owners collectively with the information necessary for them to conduct their inspection of the building and to determine whether

defects in the common elements exist and whether litigation is called for against any of the parties responsible for building the condominium.

Moreover, new purchasers of condominiums, acting alone, may be ill-equipped to recognize or deal with problems in the construction of their buildings. Condominium buildings are often complex, high-rise structures. The construction defects likely to reside within the buildings are apt to be far more sophisticated than those to which many unit owners may have been accustomed in their previous homes. Moreover, many of the defects, as in the present case, may be latent to lay persons, requiring the investigation of knowledgeable professionals before they can be discovered and diagnosed. The costs of such sophisticated investigation may be prohibitive to a single owner acting alone but affordable to all owners acting collectively. Accordingly, it is common practice for the association upon turnover to hire professional engineers to inspect the condominium structures and to report upon the presence of hidden problems. See, e.g., Alan Becker & Robert Manne, Construction Litigation, in Florida Condominium Law & Practice § 15.1, at 713-714 (The Florida Bar CLE 1987).

Because developers, through their contractors, build and then control and maintain the condominium buildings until turnover, developers have unique knowledge of the manner of construction and the ability to discover and repair defects, especially latent defects requiring expert knowledge to apprehend. As recognized by

the Third District, however, "the developer for reasons of self-interest or oversight [might fail] to pursue a cause of action for breach of contract or negligent construction," Seawatch Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc. 610 So. 2d at 472. In short, the developer is highly unlikely to sue itself. Thus the legislature passed Section 718.124 to assure that the condominium association's power to bring class actions not be rendered ineffectual by the dilatory actions of an unscrupulous or merely careless developer during its control of the association.

> [T]he obvious purpose of § 718.124 was to lengthen the limitations period for particular causes of action. Section 718.124 was intended to prevent a developer from retaining control of an association long enough to bar a potential cause of action which the unit owners might otherwise have been able and willing to pursue. To this end, the statute provides that an association's cause of action does not accrue until the unit owners have acquired control over the association.

Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc., 405 So. 2d 440, 443 (Fla. 1st DCA 1981).

Regency Wood is Directly On Point

Regency Wood, which construed Section 718.124 no differently than by the Third District below, was a condominium construction defects case similar in almost every way to this case. The petitioners go to great lengths to distinguish Regency Wood, but their efforts only place them in an anomalous, self-contradictory position. Regency Wood, say the petitioners, was not a class action but rather an action brought by the condominium association

as "real party in interest",[18] "in its own right",[19] and "not as a class representative".[20] Therefore, argue the petitioners, Regency Wood does not stand for the proposition that Section 718.124 serves to toll class actions as well as actions in which the condominium association sues as real party in interest.

But the petitioners misread Regency Wood, which was plainly brought as a class action. That is clear from the Regency Wood decision itself, which rejected defendants' argument that the association had not adequately pled a class action:

> Most of the grounds for dismissal raised by the appellees do not, in our opinion require lengthy discussion. Dismissal was not warranted for failure to attach the contracts, failure to state a cause of action for negligence, or failure to properly allege a class action under Florida Rule of Civil Procedure, Rule 1.221.

405 So. 2d at 441.[21] There is no factual difference between the posture of the association ("Regency Wood") in Regency Wood and

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[18] Toppino Brf. at 34.

[19] Epic Metals Brf. at 11-12.

[20] Turtle Kraals Brf. at 34.

[21] It is also clear from the Record on Appeal in Regency Wood (which is fully incorporated in the present Record on Appeal at R. 963-1075), where one of the defendant/appellees raised the identical argument that Section 718.124 did not toll the statute of limitations of the association, because suit was brought as a class action. See defendant, Houdaille Industries, Inc., motion to dismiss (R. 1004-1007) and Houdaille's memorandum in support of its motion to dismiss (R. 1038-1054), which argued that Section 718.124 did not operate to toll the statute of limitations, because the association brought filed the claims as a class action. The appellate court in Regency Wood did not even bother to address that argument in its decision, and it simply held that the Section 718.124 tolling provision applied to the class action before it.

that of Seawatch in the present case. Unquestionably, Regency Wood brought its action as class representative, as did Seawatch here. As we have shown, a condominium association can act only on behalf of its members. It has no right of action that is not one and the same as that of its members.

The Inconsistency in Petitioners' Argument

Although the petitioners insist that Regency Wood was suing for construction defects as the real party in interest, the next minute they take the contrary position that a condominium association cannot be the real party in interest in a construction defect suit, because only individual unit owners own the condominium. But that contradicts the well-established principle that both condominium associations on behalf of all unit owners and unit owners individually may sue for construction defects. Juno by the Sea Condominium Apartments, Inc. v. Juno by the Sea North Condominium Ass'n (The Tower), Inc., 418 So. 2d 1190; Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So. 2d 463; Schmeck v. Sea Oats Condominium Ass'n, Inc. 441 So. 2d 1092 (Fla. 5th DCA 1983); Bay Park Towers Condominium Ass'n, Inc. v. H.J. Ross & Assoc., 503 So. 2d 1333. Regency Wood obviously had no more ownership interest in the common elements than does Seawatch or any other condominium association. The nature of the action was plainly one for construction defects:

> Regency Wood . . . brought suit against the condominium developer and various entities allegedly responsible for the design, construction, maintenance or repair of a part of the common elements . . . for which Regency Wood has

a duty of care under the declaration of condominium. 405 So. 2d at 440. As we have said, a condominium association does not own the common elements, only the unit owners do. If Regency Wood was not acting as class representative it could have had no interest in the lawsuit and could not have been a proper party.

Nor can it be said that Regency Wood had a particular interest, different from Seawatch's, based upon its duty to maintain the condominium. Regency Wood had no lesser or greater obligation to maintain and repair the common elements than Seawatch or any other Florida condominium association. That duty is statutory, arising out of Section 718.111(3), Florida Statutes, and uniformly applies to all condominium associations.

The petitioners construe Regency Wood as being an action arising only out of the association's duty to maintain, brought solely in its own right as real party in interest, rather than as class representative. That characterization is inaccurate in view of the obvious reference to the propriety of the class allegations quoted above and the nature of the claims brought. Nonetheless, the Regency Wood court would have been wholly correct in viewing the case as having been brought by the association both in its own name as class representative and pursuant to its power to operate the condominium, for there is no difference between them. There is still nothing to distinguish Regency Wood from this case, because Seawatch shares the identical duty to maintain, has incurred the same kind of damage and has also brought its action as class

representative.[22]

One Hundred Statutes of Limitation, All Running From Different Dates

Assuming but not conceding petitioners' dubious point that Section 718.124 applies only to actions that an association has "in its own right", and that warranty rights run only to unit owners individually rather than collectively, that would mean that a separate and distinct limitation period must run with respect to each unit owner. Logically, under that interpretation, in the case of construction claims the statute of limitations for each unit owner claim could not begin to run any earlier than the date the unit owner purchased his unit.[23] In cases involving latent construction defects, such as here, the limitation period for each unit owner would be further extended so as not to begin running until the date the unit owner discovered or should have discovered the defect "with the exercise of due diligence." § 95.11(3)(c), Fla. Stat. Thus a condominium construction case would have not one, but potentially dozens or even hundreds of limitation periods governing defect claims, each running from the date of discovery by

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[22] As alleged in its Second Amended Complaint: (1) Seawatch "is the entity responsible for the operation and maintenance of the Condominium"' [R. 515]; (2) it "brings the action ... in its own right and as lawful representative of the class of owners...." [R. 517]; and (3) it "has been damaged" by the various breaches of the defendants and will be required "to make substantial expenditures" to repair and replace the structures. [e.g. R. 521, 524]

[23] A unit owner's rights could not possibly be violated any earlier than that, nor, or course, could a unit owner possibly be on notice of any invasion of rights. See Kelley v. School Bd. of Seminole County, 435 So. 2d 804 (Fla. 1983).

the various unit owners.

But after turnover the condominium association, as the agent of the unit owners, can by its knowledge and failure to act allow its members' individual rights to be extinguished collectively under the general statute of limitations. Naranja Lakes Condominium No. Two, Inc. v. Rizzo, 463 So. 2d 378 (Fla. 3d DCA 1985).[24] The statute of limitations that governs construction defect claims thus depends upon discovery by the association, not by the individual unit owner. Logically, then, if the condominium association has the ability to extinguish the rights of individual unit owners to sue for construction defects collectively, the association must also have the right to enforce those rights on behalf of the unit owners collectively. Such agency could not exist to bar claims prior to turnover because of the fundamental conflict of interest between a developer-controlled association and the unit owners that Section 718.124 is designed to remedy.

As agent of the owners, a condominium association after turnover is empowered to bring actions for the entire class of unit owners, or for any subclass. Imperial Towers Condominium, Inc. v. Brown, 338 So. 2d 1081; Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So. 2d 515; see also The Florida Bar. In Re

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[24] Under the rule of Naranja Lakes an individual unit owner who himself doesn't learn of a defect until after discovery by the association, cannot escape being bound by the association's knowledge.

Rule 1.220(b), Florida Rules of Civil Procedure, 353 So. 2d 95. Accordingly, the association may bring an action for construction defects and recover the full amount necessary to repair the common elements, even where only one unit owner is entitled to bring the claim, regardless of the fact that other unit owners not entitled to bring the action may benefit.[25] Moreover, where one unit owner has timely filed an action on his or her own behalf for defects in the common elements, the association has the right to intervene, notwithstanding that the statute of limitations might otherwise have expired. Bay Park Towers Condominium Association, Inc. v. H.J. Ross & Associates, 503 So. 2d 1333. Therefore if, under petitioners' reasoning, some unit owners were barred by their own knowledge from bringing suit, the association could nevertheless still sue on behalf of those remaining unit owners whose claims

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[25] This rule developed out of the claim by a condominium association on behalf of the original purchasers of condominium parcels, against the developer for defects in the common elements, notwithstanding that this would benefit subsequent purchasers, who were not in privity with the developer and therefore did not have a cause of action in contract:

> We hold that as to common elements, the appellees [unit owner plaintiff class members] may recover the entire damages on either theory [implied warranty and negligence] albeit the subsequent or remote purchasers will benefit thereby. To conclude otherwise and apportion the damages would penalize the original purchasers. In order for appellees to receive the benefit of their bargain and be made whole, the amount of damages awarded must equal the sum necessary to correct the condition.

Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So. 2d at 519-520.

were not barred and could recover fully for all defects.[26]

While the association is the agent for the unit owners, a unit owner is not, conversely, an agent for the association or for other unit owners individually.[27] "A unit owner does not have any authority to act for the association by reason of being a unit owner." § 718.111(1)(c), Fla. Stat. Therefore, discovery of a latent defect by an individual unit owner is not attributable to the association or to any other unit owner. Otherwise, an individual unit owner -- including ironically a developer with unsold units -- who discovers a defect but fails to report it to the association could unwittingly foreclose the rights of all other unit owners.[28] Yet that repugnant and illogical result necessarily

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[26] In the present case nothing in the pleadings suggests that among the unit owners in Seawatch there is not at least one remaining who has a viable claim for the defects in the condominium.

[27] Condominium associations are organized as corporations, making ownership of a condominium unit analogous to ownership of stock in corporation. § 718.111(1)(a), Fla. Stat. Under well-settled corporation law, a shareholder has no power to represent, bind, or otherwise act as the agent of a corporation, unless such power is specifically delegated to him. Charron v. Coachmen Industries, Inc., 417 So.2d 1145 (Fla. 5th DCA 1982); Michael Constr. Co. v. Smith, 244 So.2d 563 (Fla. 3d DCA 1971), cert. denied, 247 So. 2d 438 (1971); Mease v. Warm Mineral Springs, Inc., 128 So.2d 174 (Fla. 2d DCA 1961), cert. denied, 132 So. 2d 291 (1961). Nor is one unit owner the agent for the other individual unit owners, because membership in a condominium association is not characterized by the mutual agency relationship that typifies a partnership. See, e.g., § 620.60, Fla. Stat. ("Partner agent of partnership").

[28] Thus, assuming but not conceding that the few unit owners who sued for construction defects in the earlier action, Callihan v. Turtle Kraals, Ltd., 523 So. 2d 800, "should" have discovered (continued...)

follows from petitioners' reasoning.

Discovery By the Association Can Occur Only After Turnover

"Discovery" of latent defects by the association can logically occur only after turnover of control from the developer to the unit owners, not before. A condominium association is not empowered to bring an action on behalf of its members concerning matters of common interest such as defects in the common elements until after turnover has occurred. § 718.111(3), Fla. Stat. If knowledge by the developer of the existence of defects were imputed to the association during the period of developer control, and the developer-controlled association were deemed to be the agent of the unit owners for "discovery" purposes, Naranja Lakes Condominium No. Two, Inc. v. Rizzo, 463 So. 2d 378, then the rights of the unit owners would be in the hands of the party least likely to enforce them. A developer-controlled association cannot be expected to use its knowledge prior to turnover to act adversely to the interests of the developer.

Because a developer will not sue itself, the Legislature enacted Section 718.124, which assures that the fox is not left to guard the hen house. Section 718.124 prevents "a developer from retaining control over an association long enough to bar a

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[28](...continued)
the defects involved in the present case, § 95.11(3)(c), Fla. Stat., that knowledge cannot be attributed to other unit owners who did not have the same knowledge from which the duty to discover might be inferred.

potential cause of action which the unit owners might otherwise have been able to pursue." Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc., 405 So. 2d at 443.

When Section 718.124 Is Not Needed

There is one more reason why the petitioners' construction of Section 718.124 does not hold water. Other than construction defect actions there are no situations that exist where an association might sue a developer and need the benefit of the tolling provision of Section 718.124. As we have shown an association does not have an action "in its own right" that is not at the same time an action on behalf of its members, that its members can also bring as individuals.

Assuming arguendo that an association could have such an independent right of action, as the petitioners contend, none would require tolling by Section 718.124. For example, often a developer-controlled association enters into a contract before turnover, a situation presumably, according to the petitioners, where the association "has" an action "in its own right." But if the contract is entered at arm's length between the association and a third party -- i.e. is not a "sweetheart" contract in which the

developer has an interest -- it is unlikely that the developer would not sue in the event of breach.

That is because until the last unit is sold the developer of a condominium is also a "unit owner" and shares with its purchasing unit owners an interest in the financial well-being of the condominium as a whole. The Condominium Act requires either that the developer pay assessments on its unsold units or that it guarantee the condominium budget at a stated amount and obligate itself to pay any amount in excess of the stated amount. See § 718.116(9)(a), Fla. Stat. Thus, if the breach of a contract causes damage to the association, the developer would have no less interest in suing to recover damages than would the unit owners. Accordingly, the developer would have little incentive to allow the limitations period for bringing a breach of contract action to expire. Because the interests of the developer and the unit owners are in that circumstance congruent, there is little need for the tolling provision of Section 718.124 to protect the rights of the unit owners.

On the other hand, in the event that the developer-controlled association has entered into a contract with a third party that upon turnover the unit owners determine is disadvantageous to the association -- such as a "sweetheart" contract -- the Condominium Act provides to the unit owners an absolute right upon the vote of the unit owners to cancel the contract without need for litigation. See § 718.302, Fla. Stat. Thus it is equally unlikely that Section

718.124 would come into play there as well.

Again based upon the petitioners' inaccurate assumption of an independent right of action by an association, an association could be argued to have an action "in its own right" for failure of the developer to meet its turnover obligations under Section 718.301 of the Act. By definition, however, those obligations can not come into being until turnover, again making the tolling feature of Section 718.124 superfluous.

Another possibility might arguably be an action in fraud for the improper management of the association's affairs by the developer prior to turnover. § 718.303, Fla. Stat. But the statute of limitations for fraud does not begin to run until discovery, § 95.031, Fla. Stat., and the unit owner-controlled association is not likely to discover fraud in its records until after turnover, once again making Section 718.124 useless for practical purposes.[29]

In sum, the only kind of action by an association likely to need the benefit of tolling under Section 718.124 is an action against a developer and its agents for defects in the construction of the condominium, which include most importantly actions for breach of the statutory warranties of Section 718.203, Florida Statutes. But as we have shown, all of this is based upon the inaccurate premise of the petitioners that an association can have

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[29] A class action by the association for fraud by the developer upon individual unit owners is, of course, generally prohibited for lack of commonality. Avila South Condominium Assoc. v. Kappa Corp., 347 So. 2d 599.

a right of action distinct from that of the unit owners. There is no action that an association has only "in its own right." An association can act only on behalf of its members, and if the association fails to act, unit owners can always bring actions individually on the same claims. § 718.111(3), Fla. Stat.

II SECTION 718.124 APPLIES TO ACTIONS BROUGHT TO ENFORCE SECTION 718.203 WARRANTIES

Petitioners argue that, although Section 718.124 applies to "any action," it nevertheless does not apply to actions brought to enforce the statutory warranties created by Section 718.203 of the Condominium Act. This theory hinges on the premise that warranty periods set forth in Section 718.203 are not warranty periods at all, but rather statutes of limitations. The existence of these limitation periods, goes the reasoning, preempts operation of the tolling provision of Section 718.124 or the general statute of limitation which governs construction defect claims, Section 95.11(3)(c), Florida Statutes.[30] Neither a literal reading of

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[30] The applicable statute of limitations for construction defect claims is set forth in Section 95.11(3)(c), Florida Statutes:

> Actions other than for recovery of real property shall be commenced as follows:
>
> * * *
>
> (3) WITHIN FOUR YEARS. --
>
> * * *
>
> (c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed

(continued...)

Section 718.203 nor the policy underlying the Condominium Act permits this interpretation.

Section 718.203 Warranties

Prior to the creation of the implied condominium warranties in Section 718.203, Florida recognized the existence of a common law warranty running from condominium developers to purchasers of new condominium units. Gable v. Silver, 258 So. 2d 11.[31] By passing Section 718.203 the Florida Legislature broadened the warranty rights of condominium purchasers by eliminating the privity requirement inherent in common law implied warranties.[32] In all

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[30](...continued)
contractor and his employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest.

[31] In this case Seawatch sued the Developer for breach of both the common law implied warranty and the statutory warranty. Both claims (among others) were improperly dismissed by the trial court on timeliness grounds. Under the Third District's ruling, the dismissal of both the common law and statutory warranty counts was improper because the applicable statute of limitations was tolled by Section 718.124, Florida Statutes. The question certified by the Third District relates only to the statutory implied warranty count under Section 718.203, Florida Statutes.

[32] Thus, for example, a supplier like Toppino is liable for breach of warranty to the unit owners, notwithstanding that Toppino may have sold the concrete to the Developers or its general contractors. Furthermore, in § 718.203(5) the warranties are stated to "inure to the benefit of each owner and his successor (continued...)

other respects the statutory warranty must be construed in conformity with general warranty law.[33] As we have shown, condominium warranties run to the unit owners collectively insofar as they relate to the common elements, which the unit owners own by undivided share. § 718.106(2), Fla. Stat. Thus where construction defects occur in the common elements the warranties are properly enforced on their behalf by the association pursuant to its power to maintain the common property of the condominium. § 718.111(3), Fla. Stat.

A "warranty is an undertaking that a certain fact regarding the subject of the contract is what it has been represented to be . . . ." Vilord v. Jenkins, 226 So. 2d 245, 247 (Fla. 2d DCA 1969). Where, as in Section 718.203, a warranty is limited by a time period, that time period defines the time within which a breach must occur in order for the breach to be actionable.[34] Because warranties are substantive rights to be distinguished from statutes

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[32](...continued)
owners ....", thus overcoming the limitations of the common law warranty held to exist in Parliament Towers Condominium v. Parliament House Realty, Inc., 377 So. 2d 976 (Fla. 4th DCA 1979) (no implied warranty extended to remote purchasers).

[33] Statutes must be "construed with reference to appropriate principles of the common law, and . . . to make them harmonize with existing law and not conflict with long settled principles." Vanner v. Goldshein, 216 So. 2d 759 (Fla. 3d DCA 1968).

[34] In this case, the breach of the implied warranties of fitness and merchantability occurred immediately upon the completion of construction, because the defective concrete and the inadequately protected structural reinforcing system were present, albeit latently, when the buildings were designed and built.

of limitation, which are procedural,[35] the substantive warranty period is separate from the limitation period for bringing suit in the event of breach.

Only upon breach of a warranty can the cause of action for breach arise and the limitation period begin to run.[36] The warranty period and the limitation period must run consecutively, because a breach of warranty can occur at any time during the warranty period, and only after a breach has occurred can a cause of action begin to accrue. Kelley v. School Bd. of Seminole County, 435 So. 2d 804. Thus in Dubin v. Dow Corning Corp., 478 So. 2d 71 (Fla. 2d DCA 1985), the court described the consecutive operation of the two periods in connection with an express roof warranty[37] first given in 1977 and observed:

> Theoretically, if the roof had first leaked right before the end of the five-year warranty period in 1983, appellant would have had until 1987 to file suit.

Id. at 73.[38]

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[35] See Allie v. Ionata, 503 So. 2d 1237 (Fla. 1987).

[36] The running of the statute may of course be tolled during the time between occurrence of the breach and turnover, § 718.124, Fla. Stat., and again, if the defect is latent, during the time between turnover and discovery of the defect. § 95.11(3)(c), Fla. Stat.

[37] Dubin did not involve a condominium or a warranty claim under § 718.203, although the Dubin court was applying the statute of limitations for construction defects, §95.11(3)(c), Fla.Stat., the same statute that governs the case at bar.

[38] If the warranty and limitation period did not run consecutively, as the Dubin court recognized, the result could be impractical and absurd. For example, if a roof leak did not occur (continued...)

Section 718.203 is not a Statute of Limitation

The petitioners arbitrarily declare that various time periods set forth in Section 718.203 are periods of limitation upon the time to bring suit rather than warranty periods. Their conclusion rests upon the mere presence of time periods in the statute and nothing else, for there is no mention in Section 718.203 of the time or manner in which actions for breach of the warranties must be brought. Time periods alone are not enough to convert Section 718.203 from a statute creating substantive rights into a statute procedurally regulating the enforcement of those rights.

Where a statute creates a right it may also limit the time to enforce that right by legal action, provided the language of limitation is expressly contained in the statute. See Bowery v. Babbit, 128 So. 801 (Fla. 1930). In Bowery a statute was deemed to have created the right to a lien and also to have prescribed the time period was the time within which suit to enforce the lien had to be brought because it expressly referred to the time to bring "suit". The statute under consideration in Bowery[39] provided:

> When there has been no record of a notice of lien, suit to enforce lien . . . must be brought within twelve months from the performance of the work or the furnishing of the materials, and if there has been such record, the suit must be brought within twelve months from the time of such record.

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[38](...continued)
until the 365th day of the fifth year, the owner would have only one day to hire an engineer to investigate the problem, to retain a lawyer, and to have the lawyer investigate the problem, research the law and file a lawsuit on the claim.

[39] Former Comp. Gen. Laws 1927, § 5393.

Id. at 805.[40] See also La Floridienne v. Seaboard Air Line Ry., 52 So. 298, 303 (Fla. 1910) ("all suits under this chapter [relating to conduct of railroads] shall be brought within twelve months after the commission of the alleged wrong or injury."); and Fowler v. Matheny, 184 So. 2d 676, 677 (Fla. 4th DCA 1966) ("no action shall be brought for the recovery of the purchase price after two years from the date of such sale [of securities]"); and compare, e.g., Chap. 681, Fla. Stat. (Motor Vehicle Warranty Enforcement Act).[41]

Section 718.203, by contrast, makes no express reference to when suit might be brought for breach of its warranties. In the absence of such language the presumption must be that the statute of limitations for construction defects governs the time for filing

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[40] The present version of the construction lien law, Chapter 713, Florida Statutes, similarly creates substantive lien rights and expressly declares a specific time limit for the filing of an action to enforce those rights. § 713.22(1), Fla. Stat.

[41] The Motor Vehicle Warranty Enforcement Act, Chapter 681, Florida Statutes, creates "Lemon Law" rights for purchasers of new motor vehicles. It expressly defines the substantive "Lemon Law rights period", which is limited in time, § 681.102(7), Fla. Stat., and then expressly limits the time for filing suit:

> (1) A consumer may file an action to recover damages caused by a violation of this chapter. The court shall award a consumer who prevails in such action the amount of any pecuniary loss, litigation costs, reasonable attorney's fees, and appropriate equitable relief.
> (2) An action brought under this chapter must be commenced within 1 year after expiration of the Lemon Law rights period, or, if a consumer resorts to an informal dispute settlement procedure or submits a dispute to the division or board, within 1 year after the final action of the procedure, division, or board.

§ 681.112, Fla. Stat.

suit, Section 95.11(3)(c), Florida Statutes. Cf. Dubin v. Dow Corning Corp., 478 So. 2d 71.

Nor is Section 718.203 a Statute of Repose

The petitioners' further argument that the warranty period from developers to purchasers is a statute of repose suffers from the same fatal defect as the argument regarding the statute of limitations.[33] Statutes of repose and statutes of limitations are procedural cousins, both limiting the time in which suit may be filed. They differ only in the method of establishing the cutoff date for bringing an action.[34] But in either case the statute must contain language expressly limiting the time for bringing an action. Thus, all of the cases relied upon by the petitioners concern statutes in which the language expressly limits the bringing of "actions".[35] Again, absent the necessary language,

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[33] Actually, Toppino describes the five year warranty in Section 718.203(1)(e) as "repose-like", Brf. of Pet. Toppino at 28, which is less inaccurate than the Developer's flat assertion that it is a statute of repose. At best, the language "but in no event more than 5 years" echoes wording contained in real statutes of repose, but without an express limitation on the time to file suit the similarity ends there.

[34] As this Court stated in University of Miami v. Bogorff, 583 So. 2d 1000, 1003 (Fla. 1991):

> In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued.

[35] All of the "repose" cases cited by the petitioners concern sections in Chapter 95, Florida Statutes, each of which (continued...)

Section 718.203 is no more a statute of repose than it is a general statute of limitation.

Section 718.203 Must Be Construed to Avoid an Absurd Result

Under the petitioners' view that Section 718.203 is its own statute of limitation, the time to bring suit on a latent defect could expire before unit owners even become aware of the existence of the breach or purchase their units. That violates the basic principle that a cause of action does not accrue until the aggrieved party has been placed on notice of an invasion of its legal rights. Kelley v. School Bd. of Seminole County, 435 So. 2d 804. In construing a statute it must be presumed that the Legislature did not intend to create an absurd or pointless result.[36] Surely the Legislature did not intend by the passage of Section 718.203 to grant condominium purchasers wholly illusory warranties with the remedy of suing for breach foreclosed before

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[35](...continued)
contains explicit language limiting when an "action" may be brought: Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992) (§ 95.11(4)(b), Fla. Stat.); Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401 (Fla. 1978) (§§ 95.031, 95.11(3)(c), Fla. Stat.); Melendez v. Dreis and Krump Mfg. Co., 515 So. 2d 735 (Fla. 1987) (§ 95.031(2), Fla. Stat.); University of Miami v. Bogorff, 583 So. 2d 1000 (§ 95.11(4)(b), Fla. Stat.); Purk v. Federal Press Co., 387 So. 2d y354 (Fla. 1980) (§ 95.031(2), Fla. Stat.); Cates v. Graham, 451 So. 2d 475 (Fla. 1984) (§ 95.11(4)(b), Fla. Stat.).

[36] Neu v. Miami Herald Publishing Co., 462 So. 2d 821, 825 (Fla. 1985); City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950).

they could be in the position to act.[37]

It is also unreasonable to conclude that Section 718.203 was intended to apply only to patent construction defects, especially where the Legislature has recognized elsewhere that latent defects are so pervasive as to require a special tolling of the general statute of limitation for actions involving latent defects. § 95.11(3)(c), Fla. Stat. Nor, in light of the 15 year statute of repose embedded in that general statute of limitation for construction defects, Id., is it reasonable that the Legislature intended the 5 year warranty in Section 718.203 to constitute a shorter statute of repose for the same kind of action.

Legislative History, While Scant And Inconclusive, Is Also Unnecessary

The petitioners' elaborate reconstruction of the legislative history underlying the relationship between Section 718.203 and Section 718.124 is largely based on surmise and guess, and in this context is unnecessary. It is unnecessary because the language of Section 718.124 is unambiguous ("any action") and its intent to

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[37] Section 718.124 was enacted by the Legislature after Section 718.203 for the remedial purpose of preventing just such an absurd result. The statutory warranties now contained in Section 718.203 (formerly numbered Section 711.65) were first enacted in 1976. The warranties thus established ran both to the developer and to members of the association, creating separate causes of action with respect to each. The next year the Legislature enacted Section 718.124, tolling statutes of limitations for associations but not those of developers, notwithstanding the developers' warranty rights under Section 718.203. The exclusion of developers from Section 718.124 suggests that the Legislature recognized that developers had the unhampered ability to enforce their Section 718.203 warranties in a timely fashion.

preserve the rights of unit owners is clear. Therefore there is no need to go beyond the plain language of the statute by resorting to legislative history. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983).

It is based upon surmise because there is virtually no legislative history for Section 718.124 and none we could find that expressed a legislative intent to remove Section 718.203 warranty claims from the operation of Section 718.124.[38] Much of petitioners' interpretive construct consists of filling large voids with wishful thinking about what must have been in the minds of the Legislature. Moreover, the petitioners ignore the fact that Section 718.124 was enacted after Section 718.203, rendering obsolete the Florida Condominium Commission report upon which the

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[38] The tiny swatch of floor debate from the Florida House of Representatives, which the Developer quotes, Brf. of Pet. Turtle Kraals at 25-26, hardly provides the support for the narrow meaning it reads into § 718.124. Not only is it unclear exactly what the representatives meant by the terms "warranties" and "contracts", but the statements of an individual legislator as to his individual opinion is "of doubtful worth" in showing the intent of a statute. 49 Fla.Jur 2d Statutes § 167; see McLellan v. State Farm Mut. Auto Ins. Co., 366 So.2d 811 (Fla. 4th DCA 1979) (affidavit of legislator regarding intention of statute inadmissible.) Moreover, whatever the proposed wording of the bill before the House at the time of the quoted debate (which is not furnished in Appellees' briefs), the final language of the statute was obviously much broader than the legislator's comment suggests. Section 718.124, as passed, did not end up tolling the limitations only on actions in contract, but on "any actions in law or equity". Clearly the bit of dialogue lends nothing to proper construction of the statute.

petitioners so heavily rely to limit the scope of the warranties.[39] The tolling provision of Section 718.124 is obviously remedial in nature, and one need only ask what the statute was intended to remedy if not the burying of unit owners' warranty rights by the developer prior to turnover.

Finally, the petitioners' legislative history is inaccurate insofar as it relies, surprisingly, on what it incorrectly presumes to be the interpretation of the Division of Florida Land Sales, Condominiums & Mobil Homes of the Department of Business Regulation.[40] When asked its interpretation during the proceedings below the Division expressly disagreed with the petitioners' position:

> [P]lease be advised that the Division of Florida Land Sales,Condominiums and Mobile Homes does not take the position that the warranty periods provided by Section 718.203, Florida Statutes, constitute the relevant statute of limitations pertaining to causes of action accruing under that section, notwithstanding the language which you pointed out in the condominium association manual which may be construed as indicating a position to the contrary.[41]

Sections 718.203, 718.124 and 95.11(3)(c) Should be Harmonized with Each Other

The only sensible construction is to read the three applicable

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[39] The statutory warranties now contained in Section 718.203 (formerly Section 711.65) were first enacted in 1976. The following year the Legislature enacted Section 718.124. See n.37 supra.

[40] See Br. of Pet. Toppino at 28-29.

[41] Letter of Alex Knight, Chief, Bureau of Condominiums, April 6, 1990. (R. 914)

statutes, Sections 718.203, 95.11(3)(c), and 718.124, in harmony with each other, as the law requires, and consonant with the clear purpose of providing condominium purchasers with meaningful remedies for defective construction.[42] Accordingly, the times specified in Section 718.203 define only the periods within which the warranties may be breached, while the limitation period for filing suit for breach is governed by the applicable statutes of limitations, Sections 95.11(3)(c) and 718.124.

In summary, a cause of action for breach of warranty cannot accrue until the breach occurs and a claimant is put on notice of the breach. Kelley v. School Bd. of Seminole County, 435 So. 2d 804. The warranty period and the limitation period for suing on the breach can run only consecutively, not concurrently. Dubin v. Dow Corning Corp., 478 So. 2d 71. Assuming breach of the Section 718.203 warranty has occurred before turnover, the limitation period for an association to file suit on a defect in the common elements cannot begin to run until turnover. § 718.124, Fla. Stat. Finally, assuming a latent defect is undiscovered as of

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[42] As stated in Mann v. Goodyear Tire and Rubber Co., 300 So.2d 666, 668 (Fla. 1974):

> [It is a] well-settled rule that, where two statutes operate on the same subject without positive inconsistency or repugnancy, courts must construe them so as to preserve the force of both without destroying their evident intent, if possible. It is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statute were not enacted at the same time.

turnover, the earliest it can begin to run is when the association actually discovers or in the exercise of due diligence should discover the defect. § 95.11(3)(c), Fla. Stat.

CONCLUSION

The certified question should be answered in the affirmative and the decision of the Third District should be affirmed to the extent that it reverses the dismissal of the Second Amended Complaint on timeliness grounds.[43]18

In the event that the certified question is answered in the negative, with the Court holding that Section 718.124 does not extend the time for the condominium associations to bring actions for breach of the Section 718.203 warranties, this Court should nevertheless affirm the Third District's ruling that Section 718.124 tolls statutes of limitations for all other actions brought by condominium associations, including class actions. Accordingly, the dismissal by the trial court of the remaining, non-Section 718.203 counts of the Second Amended Complaint on grounds of timeliness (Count V against the Developer for breach of common law implied warranty and Count VIII against the Developer and Monroe pursuant to Section 553.84, Florida Statutes) should be reversed,

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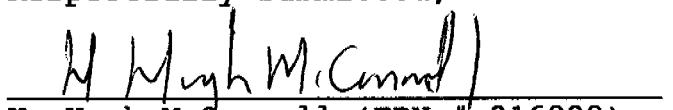
[43] The Third District's affirmance of the dismissal of Seawatch's tort claims and claims against Toppino and Epic for violation of the building code pursuant to its holdings in Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 588 So. 2d 631 (Fla. 3d DCA 1991), jurisdiction accepted, 602 So. 2d 533 (Fla. 1992), should not be affirmed, pending the decision of this Court in Casa Clara. See the following footnote infra.

consistent with the decision of the Third District.[44]

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Arthur J. England, Jr., Esq. and Charles M. Auslander, Esq., Greenberg, Traurig, Hoffman, Kipoff, Rosen & Quentel, P.A.1221 Brickell Avenue, Miami, Florida 33131; Lynn E. Wagner, Esq. and Richard A. Solomon, Esq., Cabaniss, Burke

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[44] The dismissal with prejudice of other counts against the defendants below on grounds not related to the statute of limitations is not within the scope of the certified question now before this Court. Those counts include claims sounding in tort against the Developer, Monroe, Toppino and Epic, which were dismissed as being barred by the economic loss rule and claims against Toppino and Epic for violation of the building code pursuant to Section 553.84, Florida Statutes, which were dismissed on the ground that Toppino and Epic were material suppliers and not liable under Section 553.84. The Third District affirmed the trial court's dismissal of those counts based upon its holding in the related case Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 588 So. 2d 631. In the event that this Court reverses the decision of the Third District in Casa Clara, then those claims should also be held by this Court to be governed by the tolling provision of Section 718.124, Florida Statutes and thus to have been timely brought by Seawatch as well.

& Wagner, P.A., 500 North Magnolia Avenue, P.O. Box 2513, Orlando, Florida 32802; Karl Beckmeyer, Esq. and Nicholas Mulick, Esq., Beckmeyer & Mulick, 88539 Overseas Highway, Tavernier, Florida 33020; James E. Tribble, Esq., Blackwell & Walker, P.A., 2400 Amerifirst Building, 1 S.E. 3rd Avenue, Miami, Florida 33131; Betsy E. Gallagher, Esq., Kubicki, Draper, Gallagher & McGrane, P.A., City National Bank Building, Penthouse, 25 West Flagler Street, Miami, Florida 33130-1712; and Richard A. Sherman, Esq., 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33316 on this 14th day of June, 1993.

M. Hugh McConnell