IN THE SUPREME COURT
STATE OF FLORIDA

CHARLEY TOPPINO AND SONS, INC., et al.,

Petitioner,

v.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC.,

Respondent.

EPIC METALS CORP., et al.,

Petitioners,

v.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC.,

Respondent.

CASE NO. 80,872

CASE NO. 80,873

(Consolidated Cases)

DUAL PURPOSE REPLY BRIEF OF PETITIONER CHARLEY TOPPINO AND SONS, INC.

On Petition for Discretionary Review of a Certified Question from the Third District Court of Appeal

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Introduction

This reply brief addresses the issues raised in both the answer brief filed by the Association and the amicus brief filed by the Division of Florida Land Sales, Condominiums and Mobile Homes ("the Division").

The critical aspects of the case have been sharpened both by the assertions and the omissions contained in the Association's and the Division's responses. Neither has constructed more than an equitable argument for the Association to prevail, in the form of a strident plea that the interpretation of the unit owner warranty statute as written would bar the Association's pursuit of warranty-based claims which unit owners themselves neglected to pursue. This is mindless, result-oriented advocacy. It does nothing to further a jurisprudential analysis of the certified question in the underlying statutes.

Two simple, but determinative points remain as plain now as before the Association and the Division filed their answers to Toppino's initial brief. First, the legislative history of the warranty provision, unmentioned by either, is precisely what Toppino said it was: a crystal clear demonstration that the legislature intended to provide a warranty remedy *only* in favor of a limited class (unit owners, so far as is relevant to Toppino), and *only* for a limited term. Secondly, the legislative intent of the warranty law matches its plain terms to limit its availability to actions in fact launched within a three-year period (which in this case had expired before the Association's representational suit was filed).

Beyond those two dispositive points, a critical concession is made by the Association in its brief: that a condominium association is no more than an alter ego of

its unit owners. That can only mean that an Association's rights derive from the unit owners themselves, a point the Court recognized in its *Avila* decision over fifteen years ago but which, in this litigation, had been obscured by the Association until now. The corollary to this legal principal, of course, is that an association can have no power to sue when a unit owner does not. Yet that right of independent suit is precisely what the Association seeks here in attempting to bring suit on *expired* unit owner warranties. It seems rather fundamental that a class or derivative action cannot exist when it is premised on a cause of action no longer actionable by members of the class.

There has been a serious misstatement of Toppino's position, made both by the Association and in the Third District's decision, which again needs correcting. The Association asserts that Toppino would not have the tolling provision encompass class action suits by an association on behalf of unit owners, but Toppino has never taken that position. Toppino has never suggested that a *timely* class action suit, as to which members of the class members had the power to sue under the warranty provision, could not have been brought by the Association as class representative. Toppino has only stated that a class action suit by the Association on behalf of unit owners is not cognizable under the tolling provision, or anywhere else under the Condominium Act, when the proposed class members' (unit owners') claims have been extinguished by the passage of time. The Association's distortion of Toppino's position is a strawman argument, designed to avoid addressing the fact that not just unit owners *but the Association itself* permitted timely warranty claims to be extinguished by the passage of time.

A final introductory thought on the Association's and Division's arguments seems warranted. Each approaches the condominium law as a general relief act intended to provide a seamless web of protections to unit owners without any semblance of legislative limits. Undoubtedly the Act was intended to create statutory remedies and rights for unit owners in particular circumstances where the common law had not achieved an appropriate balance (as the legislature viewed matters) between condominium dwellers and a developer and others. Every enactment by the legislature must be respected for balances, however. Here, there is irrefutable evidence that careful balances were built into this complex context, where so many interests intersect.

The Association and the Division would ignore *any* balance in pursuit of their subjective view that unit owners should be accorded whatever protection might not exist in the common law. The plain language of the warranty provision, and its unusually expressive history, ordain the contrary conclusion: namely, that the statutory warranty against suppliers is extended only to unit owners, and as to them the warranty extends to actions only within a limited time period and, most importantly, wholly apart from the timing or fact of developer turnover to a unit owner-controlled association. Neither language nor logic support the position that the unrelated tolling provision for statutes of limitations was ever intended to, or does, reallocate the specified warranty rights created in section 718.203.

Commentary on Statements of the Case and Facts

This appeal derives from a dismissal of the Association's Second Amended Complaint, which alleged breach of a statutory warranty of fitness and merchantability

against Toppino under section 718.203(2), Florida Statutes (1989). Under the circumstances, the facts are framed by the complaint. In its answer brief, however, the Association has gone far afield with assertions not supported in the complaint or otherwise in the record, and (of course) not identified as being record-based. The Court is obliged to disregard these record deviations.

More serious than its improper coloration of the Statement of the Case and Facts with "non-facts" is the Association's non-record, non-factual and completely improper disavowal of its own allegation in the Second Amended Complaint on the issue of "defect discovery."[1/] Toppino strongly objects to the Association's attempt to recast here its own allegation on a key factual issue in the case -- an allegation which the Association in fact made in response to the trial court's directive.

The context of the Association's allegation as to the discovery of alleged defects which ground the Association's lawsuit -- paragraph 21 of the Second Amended Complaint -- is set out in Toppino's Statement of the Case and Facts.[2/] It was there reported that an amended complaint filed by the Association was dismissed by the trial court without prejudice, but with directions that any future complaint specify *when* the alleged defects in Toppino's concrete became manifest. (R. 538). The trial court's order was in response to a motion for dismissal grounded on the Association's failure to allege when *it or the unit owners* had discovered alleged defects in the concrete. (R. 538). The Association responded by adding paragraph 21.[3/]

1/ *See* answer brief at pp. 3-5.

2/ Initial brief at p. 4.

3/ The Association only begrudgingly acknowledges the trial court's directive and its (continued...)

Now the Association suggests that its allegation in paragraph 21 does *not* mean that unit owners or the Association discovered the defects in the time frame identified, but rather that only *the defendants* discovered the alleged defects in that time interval.[4/] The Association has now disavowed the plain language of its own paragraph 21 averment (as is necessary to prop up its thesis of "latency" in the defects and its notion that limitations periods only commence on discovery of the precise cause of a defect), despite the fact that paragraph 21 was written in response to a dismissal for failure to identify when *it and the unit owner*, not the defendants, discovered alleged defects. This back-peddling is supported with a declaration that the Association "did not intend" the inference which its own language connotes.[5/]

Toppino respectfully suggests to the Court that the Association's entire discussion regarding possible meanings for paragraph 21, and as to its (the Association's) "intent" as to the averment *it* made in paragraph 21 of its Second Amended Complaint, is improper

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[3/](...continued)

subsequent compliance with that directive through the addition of paragraph 21 of its Second Amended Complaint. Answer brief at p. 3, notes 6 and 7. The Association devotes footnote 7 to its disagreement with the trial court's requirement for this specificity in its pleading. The trial court's ruling is not an issue before the Court, however, and the Association did not make it an issue before the Third District. The Association could have declined to plead with the required specificity, and appealed the dismissal of its amended complaint. It chose not to. It also chose not to cross-appeal to the district court the trial court's directive about which it is now carping. Having abandoned any legal complaint about the trial court's directive for specificity in its pleading, the Association's dissatisfaction with that ruling provides no basis at this juncture either to disavow the fact that it did comply with the court's directive, or to recharacterize the language it chose to use in framing its responsive allegation on the point.

[4/] Answer brief at pp. 2-3.

[5/] Answer brief at p. 5.

and must be disregarded. Paragraph 21 of the Second Amended Complaint says what it says. It reads:

> The defects and deficiencies . . . became apparent beginning during the one (1) year interval following April 8, 1983 . . . .

Admittedly it does not say "to whom" they became apparent, but it was authored to preserve the lawsuit from dismissal for failure to state when *the Association and unit owners* learned of the defects. No belated gloss or hidden meaning from the pen of its author can now legitimately be asserted as a part of the Association's Statement of the Facts in its answer brief to this Court.[6/] Simply stated, the Association cannot escape its pled admission that *it* was aware of the alleged defects -- latent or patent -- more than four years prior to filing this suit.

Argument

There are two fundamental themes that run through the Association's answer brief, neither of which addresses the issues before the Court. The Association's first theme is that the alleged defects in concrete were "latent" defects for which no cause of action can accrue until the precise nature of the defects are discovered by a litigant with standing to sue. The Association's second theme is that the legislature's concern for developer turnover, which prompted the enactment of section 718.124 in 1977, is both

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6/ The Association's hypothesis as to why unit owners could have had no knowledge of the defects sued upon, as set out on pages 4-5 of the answer brief, is particularly offensive. The inference that unit owners lacked that knowledge, derived from the fact that a lawsuit had been filed by some owners which did *not* assert a concrete defect cause of action, is a wildly speculative supposition of unawareness.

the starting point and ending point for analysis of the certified question pending before the Court.

These two themes prompt the Association to devote the first 38 of its 44-page brief to non-record and non-statutory musings as to why *its* thoughts on the interplay of sections 718.124 (the tolling provision) and 718.203 (the warranty provision) are sensible and should be adopted. Reverting time and again to self-serving analytical reasoning having no foundation other than the Association's advocacy, and lacking any empirical support, the Association suggests what a correct result "should be" from its perspective.

What is notable by its absence from the Association's answer brief is any contradiction of the foundation arguments presented by Toppino as constituting the issues on appeal. The Court will find no analysis or discussion by the Association of multiple key points for a statutory reconciliation between sections 718.124 and 718.203, as the district court's certification requires.

1. Legislative history of section 718.203.

Enactment of the statutory warranty on which the Association has premised its suit -- section 718.203 -- had its genesis and its history in the report of the Florida Condominium Commission. That report unequivocally defines the scope, duration and nature of a warranty which, for the first time in Florida, authorized any suit whatsoever by condominium unit owners against non-privity suppliers of building materials. That report constitutes the legislative history behind section 718.203,[7] and the scope, nature

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[7] The only reference in the Association's entire brief regarding the Commission appears on pages 40-41, where the unbelievable declaration is made that the 1977 (continued...)

and duration of the statutory rights which it led to are necessarily governed by that legislative intent.[8/] The Association neither discusses nor counteracts this critical background which, notably, for interpretative purposes, is consistent with the plain terms of the statute. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984).

2. **Interplay of sections 718.124 and 718.203.**

The interrelated history of various provisions of the Condominium Act, including both sections 718.124 and 718.203, is set out at length in Toppino's initial brief. That history, starting with the impelling common law decision in *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA), *adopted*, 264 So. 2d 418 (Fla. 1972), provides both the explanation for and harmonization of enactments by the legislature in the field of condominium law running from 1972 (when the Florida Condominium Commission was established by the legislature) through enactment of the tolling provision (section 718.124) in 1977.

The Association avoids that entire analysis, other than to suggest grandly that legislative history is unnecessary because the wording of section 718.124 is unambiguous, and to assert cavalierly that the legislative history presented by Toppino was "largely based on surmise and guess."[9/] The Association explains its "surmise" accusation on the ground that "there is virtually no legislative history for section 718.124," and none at all

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[7/](...continued)
enactment of the statute of limitations tolling period (through section 718.124) rendered "obsolete" the report of the Commission which had fostered and shaped the 1976 enactment of the warranty rights created in section 718.203. Unsurprisingly, no case is cited for that preposterous discard of legislative "intent."

[8/] *See City of Plant City v. Mayo*, 337 So. 2d 966, 970 (Fla. 1976); *Lewis v. Judges of the District Court of Appeal, First District*, 322 So. 2d 16, 19 (Fla. 1975).

[9/] Answer brief at p. 39.

the Association could find to remove section 718.203 warranty claims from the operation of 718.124.[10/] The Association's focus here, as it is throughout its answer brief, is *solely* on section 718.124. The Association's analysis is myopic; it suffers from the lack of any consideration or discussion whatsoever of section 718.203. Yet that is the precise provision of the Condominium Act on which the Association brought its lawsuit, and one of the *two* statutory provisions which the district court's certified question has compelled the Court to harmonize.

There is extensive legislative history for section 718.203, and *that* is the provision which by its own terms bars the result which the Association's lawsuit seeks to obtain. The Association is correct in saying that there is no discernible legislative intent for section 718.124 by which to remove section 718.203 from the operation of section 718.124, but here the Association has its analysis backwards. The tolling provision was enacted *after* the warranty provision, so the question is not whether the legislature in 1977 sought to "remove" the warranty claims provision from the tolling provision (the strawman argument raised by the Association), but rather whether that subsequent enactment of the tolling provision was designed to *incorporate* and *embrace* warranty claims defined in the previously-enacted section 718.203.[11/]

[10/] Answer brief at p. 40.

[11/] As Toppino has explained in its initial brief, neither the words of the 1977 statute nor any legislative history (because there is none), suggests that the problem addressed by the tolling provision (a developer turnover concern) was either needed for warranty claims under 718.203 (which already addressed developer turnover concerns) or designed to address them in any fashion.

3. **Plain language of section 718.203.**

The plain language of section 718.203 uses the term "warranty," and it gives those claims life "[f]or a period of three years." The plain language of section 718.124 applies a tolling effect to the "statute of limitations" for condominium and cooperative association lawsuits. A "plain meaning" reading of these two provisions reveals a mismatch. That is, there is no obvious reason from the language in both sections that one would think that section 718.124 in any way concerned itself with the subject matter of section 718.203. Toppino made this "plain language" point in its initial brief. Yet the Association's only response is to mire its argument in section 718.124, and to theorize about the meaning in that section of the phrase "any action."[12/] The issue before the Court requires a harmonization of two provisions; not a half-focus on the wording of only one of the two operative statutes.

4. **Express temporal limitation of warranty actions.**

Section 718.203, by its express terms, defines the starting date for the statutory warranty on which the Association brought this lawsuit. That starting date is the issuance of a certificate of occupancy for the buildings in the Association.[13/] Nowhere in its answer brief does the Association address the fact that, in creating a statutory right of warranty against suppliers, the legislature has spoken precisely to that commencement date for purposes of the "period of three years" for which the warranty runs. Rather, the Association wanders off into its own world of "latent defects" and their commencement

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12/ *See*, for example, answer brief at p. 39.

13/ *See* section 718.203(2)(a) and (3), as set out in the initial brief at p. 6.

under a common law interpretation of limitations periods provided in Chapter 95, Florida Statutes.

Interestingly, the Association's latency thesis includes the notion that the supplier breached this warranty on delivery, by providing defective concrete. The inherent weakness in this argument is that the legislature necessarily would have contemplated a breach of warranty on delivery of concrete, for when else is a supplier of concrete involved in the construction process? Yet the legislature still chose to place a three-year restriction on the warranty dating from issuance of the certificate of occupancy. Obviously, then, that three-year window for warranty enforcement can relate only to the time in which to bring suit, not to the time for a defect to occur. Once again the plain reading of the warranty provision corresponds precisely with its legislative history.

One can well understand why the Association would not want to address the precision of the express language contained in the provision on which they have brought suit, but its failure to do so provides compelling evidence that the Association is asking the Court to adopt the Association's self-perceived policy as to why the legislature *should have* written a very different statute. The Court cannot help but note that the entire foundation for the Association's defense of its lawsuit is not section 718.203 as written, but its theme that *there ought to be* a suit available to unit owners for latent defects which only a condominium association can discover after developer turnover. That theme may be desirable social policy from the point of view of unit owners, but it is not a statutory policy which the Florida Legislature has thus far created. Simply stated, the Association's persistent and only viewpoint is that the Act *should* provide protections for

any given circumstance, regardless of what limited new suit rights the legislature has actually given in the form of statutory warranties.

5. The Association itself let the warranty period lapse.

Both textually and visually, Toppino has called the Court's attention to the fact that the Association itself, independent of unit owners, slept on its right to sue Toppino by allowing a significant period of time to pass even after developer turnover.[14/] On this key point, as well, the Association offers the Court no comment or explanation for its neglect. Indeed, nowhere in the Association's answer brief is there any mention whatsoever of the post-turnover time period during which suit could have been commenced by the Association, or the fact that the unit owners themselves were in no way precluded from bringing timely suits for the statutory warranty claims which the legislature had given them.

Instead, the Association beats a path to suit intervention possibilities for an association in circumstances where a unit owner still possesses a valid claim of some kind.[15/] On the facts of this case, however, that question is wholly hypothetical and only serves to obscure the Association's allegation that it was in fact aware of the alleged defects *after* turnover. All unit owners of course, are bound by the admission of awareness and the knowledge possessed by the Association. *Naranja Lakes Condo. No. Two, Inc. v. Rizzo*, 463 So. 2d 378, 379 (Fla. 3d DCA 1985).

14/ *See* initial brief at pp. 13-16 and appendix 2.

15/ *See* answer brief at 24-25.

6. **Revival of warranty claims.**

Toppino has noted for the Court that the claims brought by the Association can only be pursued by reviving stale claims that the unit owners themselves had allowed to lapse.[16/] The warranty claims created in section 718.203 are granted, by the express language of the statute, only to the developer and to unit owners.[17/] By bringing suit in 1988, the Association was attempting to revive warranties which, based on the allegations of the Association's operative complaint, had expired in 1986. In its answer brief, the Association fails to address how the tolling provision for Association suits (section 718.124) can be construed to *revive* a cause of action which had already expired.

The implicit, unstated rationale for the Association's position is, again, dependent on its latent defect thesis, and an indefinite deferral of the accrual of a cause of action until latent defects are discovered. This interpretation of the effect of the tolling provision utterly disregards the time limits set forth in the warranty provision, ignores the specific legislative history on the genesis and time-limitations in these unit owner warranties and, in this circumstance ignores the Association's admission that the alleged defects had gone from "latent" to "patent" more than 4 years before suit was commenced (causing even the general statute of limitations provision to expire).[18/]

16/ *See* initial brief at p. 19.

17/ *See* section 718.203(2), as set out in the initial brief at p. 6. The Association incorrectly infers the existence of a line of Florida precedents granting associations warranty causes of action. (Answer brief at 13). None of the five cases identified mentioned the statutory, unit-owner warranty provision.

18/ The Association maintains that a built-in limitations period is created by statute only when the time within which suit may be brought is expressly addressed. (Answer brief p. at 35-36). The three cases cited for this proposition say no such (continued...)

7. **Specificity of developer turnover concerns in section 718.203.**

Section 718.203 provides a statutory warranty for developers, and in subsection (1)(e) it specifically addresses the implausibility of those suits going forward until the developer has turned the condominium association over to the unit owners. Nowhere in its answer brief does the Association consider this expressiveness, or attempt to reconcile the recognition of developer turnover found in section 718.203 with the concern over developer turnover which grounded section 718.124. The Association simply ignores the fact that the same concern is evident in the enactment of *both* of these two, disparate provisions.[19] Here too, the Association narrowly concerns itself with section 718.124 as if the statute on which its lawsuit is grounded does not exist.

This point is critical, "since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force." *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 250 (Fla. 1987) (footnote omitted). The Court is obliged to harmonize the warranty and tolling provisions, giving effect to the language of both, unless there is "plain evidence of a contrary legislative intent." *Id.* at 250, n. 3. The Association has conceded absence of any legislative history on the tolling provision, and there is none to suggest it was

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[18](...continued)
thing, and they certainly do not mandate that a magical phrase be part of a statute for it to constitute a limitations period. Those cases just happened to be instances in which a limitations period was defined; they do not purport to classify the only situation when it can occur.

[19] Insofar as the warranties were concerned, a revival period was in fact addressed but by legislative choice was selected only in the time frame provided to sue developers following turnover. *See* section 718.203(1)(e).

intended to revive a prior warranty statute vis-a-vis suppliers when that prior statute expressly gave a revival period to claims against developers alone.

8. Agency interpretation.

In its initial brief, Toppino pointed out that the state agency which bears responsibility for the welfare of condominium unit owners had gone through the rule-making processes of the Administrative Procedure Act and concluded that the interpretation of section 718.203 which Toppino has asserted was correct; that is, that the warranty claims in that section are limited in duration and must be exercised within the three-year period which the legislature prescribed.[20/] After misdescribing this administrative interpretation as "legislative history,"[21/] the Association attempts to counter the *agency's* interpretation with a post-litigation letter from one governmental employee within that state agency (who incidentally is not even the head of the rule-promulgating Division).[22/] Obviously, that employee's willingness to write a letter to the Association for the purpose of this lawsuit cannot contravene an authoritative administrative interpretation of the statute which the agency itself promulgated. *See Erfman v. Department of Professional Regulation*, 577 So. 2d 710 (Fla. 5th DCA 1991); *State Board of Optometry v. Florida Soc. of Ophthalmology*, 538 So. 2d 878 (Fla. 1st DCA 1988).

20/ *See* initial brief at p. 28.

21/ *See* answer brief at p. 41.

22/ *See* answer brief at p. 41.

The Division's amicus brief takes a different tack. It would have the Court disregard the agency's interpretation of section 718.203 as defined in Toppino's initial brief at pp. 28-29. Rather, it focuses on the fact that the Division's construction of section 718.203 by rule was not seeking to implement *the tolling provision of section 718.124.*[23/] That's a very telling point, for it is a dramatic shift in focus. It points out that, prior to this lawsuit, no one in the Division had ever considered that the tolling provision *for associations* would ever operate either to extend or to revive warranty claims given to *unit owners* in section 718.203.

The Division also seeks to deflect its rule with a 1986 declaratory statement that (it asserts) is contradictory to the earlier construction of section 718.203 in its rule. There are two problems with this diversionary attempt. First, the declaratory statement which the Division identifies does not expressly address the *statutory* warranty created by section 718.203, and actually seems by its verbiage and references to exclude those warranty claims. Second, a declaratory statement never trumps a "rule" under the APA and, indeed, is applicable only to the exact fact situations treated in the statement itself. *See* § 120.565, Florida Statutes (1991) ("A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only."). A declaratory statement has no validity as a general proposition, as do rules properly promulgated by a state agency. *See Mental Health Dist. Bd., II B v. Florida*

23/ *See* amicus brief at p. 15.

Dept. of Health & Rehabilitative Services, 425 So. 2d 160 (Fla. 1st DCA 1989) (declaratory statement suggesting general rule of application is improper).

Writing more broadly than to address an attempt to explain away its prior agency interpretation, the Division has filed an amicus brief which tracks the narrow perspective of the Association with respect to the certified question -- that is, section 718.124 should be examined in isolation, and in total disregard of both the language and the legislative history of section 718.203. Like the Association, the Division presents the notion that section 718.124 *must* incorporate warranty claims under section 718.203 because, if it did not, the right of condominium associations to sue on behalf of unit owners would be rendered meaningless in the context of construction defect suits brought against material suppliers.[24/] This ends-justifies-the-means analysis, like the Association's however, avoids any discussion of the key issues in this appeal, namely:

(1) the unchallenged fact that section 718.203 embodies the recommendations of the Florida Condominium Commission, which expressly viewed the exercise of rights in section 718.203 as being confined to a three-year duration;

(2) the fulsome legislative history of the balancing done by the legislature in section 718.203 between creating a new statutory right for the

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[24/] *See* amicus brief at p. viii and p. 12, where the Division suggests that its construction of section 718.124 (notably lacking any integration with section 718.203) is the construction "which makes the most sense . . . ."

first time against persons not in privity with the unit owner and, on the other hand, limiting the duration for that right to be exercised;[25/]

(3) the language of section 718.203 itself, which confers a right (contrary to all of the Division's discussion about representational rights of a condominium association) *only* on developers or unit owners;[26/]

25/ The Florida cases identified by the Division as stating that the time periods set forth in section 718.203 are *not* repose durations all relate only to common law causes of action for breach of warranty. (*See* amicus brief at p. 10). For the reasons Toppino has identified, those decisions under the common law have no bearing whatsoever on the statutory cause of action *created* by section 718.203. The New Hampshire decision identified by the Division is also porous support for its view. In that case, defects became apparent and notice of their presence was asserted all within the one-year warranty period set out by statute for claims against developers.

26/ The Division asserts that only an association can maintain an action, in its own name, after turnover of control. That is a blatantly incorrect statement of law. As noted by the Division in its brief, a district court has just recently upheld a unit owner's right to sue concerning maintenance and repair of the common elements following turnover. *Carlandia Corp. v. Rogers and Ford Construction Corp.*, 605 So. 2d 1014 (Fla. 4th DCA 1992), *review granted and pending, Rogers and Ford Construction Corp. v. Carlandia Corp.*, 618 So. 2d 1369 (Fla., Apr. 16, 1993). In oral argument before this Court on that case, which undersigned counsel have reviewed, the Court's concern was not with the legal conclusion of the district court, but merely with the protections to be provided other unit owners when one chooses to sue and, for one reason or another, the association does not desire to join the action or opposes it.

In this case, the Association ignores the other side of the equation; namely, that unit owners can sue before turnover, have done so in fact, and have been accorded access to the same information that the association obtains from the developer after turnover. (*See* section 718.111(12)). The right of unit owners is key, of course, for section 718.203 gives warranty claims against suppliers *only* to them, and not to their association. The Division conveniently ignores that fact also. (A logical conclusion to be drawn from the Division's position is that condominium associations actually have no right to enforce the statutory warranty created by section 718.203 at all. If the Division's interpretation of section 718.124 and association powers connotes that only associations can sue for unit owners, the only reasonable construction of section 718.203 is that associations

(continued...)

(4) the express recognition in section 718.203 of the problem of developer turnover; and

(5) the fact that the specificity in the warranty provision as to who, when and under what circumstances suit may be brought was enacted *prior to* the enactment of section 718.124.

The Division's comment that Toppino's treatment of the *Regency Wood* decision is "particularly unconvincing" (amicus brief at p. 13, n. 31) is easy to say but hard to show. The fact is that *Regency Wood* did *not* involve expired warranty claims of unit owners which their association was trying to revive.[27] Instead, it was an instance where shoddy repairs had been made under contract, perhaps at the behest and with knowledge of the developer -- a classic circumstance for use of the tolling section to protect the interests of the turnover association.

In sum, it is easy for the Division to reach a conclusion regarding association lawsuits which it would have the Court embrace when it has chosen to turn its back on everything about section 718.203 which is relevant to the lawsuit and which refutes an end-justifies-the-means analysis of the subsequently-enacted tolling provision relating to

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[26](...continued)
were *excluded* from the right to sue by the express language in that section conferring claims exclusively on developers and unit owners.)

[27] *Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc.*, 405 So. 2d 440 (Fla. 1st DCA 1981). The Court has previously expressed concern for the instability created by efforts of a condominium association to "breath[ed] new life" into barred claims. *Penthouse North Ass'n, Inc. v. Lombardi*, 461 So. 2d 1350, 1352 (Fla. 1984).

statutes of limitation.[28] The Division simply joins the Association in presenting a "univision" perspective, premised on a bias favoring association rights against the non-privity suppliers who the legislature allowed *unit owners* to sue a full year before the advent of the tolling provision on which the Division and the Association so narrowly and exclusively rely.[29] Unlike these advocates, the Court cannot put its head in the sand with regard to the history, wording and intended effect of the wholly new range of statutory warranties which were created in section 718.203.[30]

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[28] The Division makes the undocumented declaration that there is no evidence that the legislature intended the five-year period expressed in section 718.203 to operate as a statute of repose. But there is. That evidence is the legislative history of the Florida Condominium Commission which is identified and quoted in Toppino's initial brief, and which, remarkably, the Division completely ignores.

[29] The Division emphasizes the statutory requirement that says the developer must deliver to the association on turnover plans and specifications used in construction of improvements. (*See* amicus brief at p. 5). This point is emphasized to suggest that only the association can uncover or discern defects in the construction of condominium buildings. The Division's point is not well-taken. It has studiously neglected to advise the Court that these same construction documents are available to unit owners *at all times* to pursue the express statutory warranty given them by section 718.203. Section 718.111(12)(a) provides that official records must be maintained by the Association "from the inception of the association," that those records specifically include a copy of the very records that the Division suggests are not available until after turnover (section 718.111(12)(a)1.), and that these records are open to unit owners or their authorized representatives "at all reasonable times." (see section 718.111(12)(c)).

[30] The Division's suggestion that the statute must be construed in light of the financial resources available to the people for whom statutory rights are created (amicus brief at p. 14-15) is farcical. For one thing, some unit owners in this very condominium complex obviously had resources to bring construction defect lawsuits without the association. (*See* initial brief at p. 15). For another, financial disparity may conceivably premise a legislative grant of associational suit rights *parallel* to rights accorded unit owners, as occurred in New Jersey (*see* amicus brief at p. 14), but they have never provided a basis to *substitute* an associational cause of action for one which is given to unit owners expressly, in precise terms, by legislative enactment (such as by section 718.203). In fact, the district court

(continued...)

Conclusion

For the reasons stated, the decision of the Third District should be reversed with directions that the Association's Second Amended Complaint be dismissed with prejudice.

Respectfully submitted,

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recognized in *Carlandia* that the New Jersey decision should not be applied to Florida's differing statutory scheme.

Additionally, the Division's reflections on a supposedly similar Illinois tolling provision (*See* pp. 17-18 of its amicus brief), via a treatise on the subject, are both unpersuasive and unfounded. Illinois has no statutory warranty provision akin to section 718.203, and case law developed there has expressly adopted the *Avila* view that associational standing rests in its representative capacity for unit owners. *See, e.g., Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 118 Ill. App. 3d 163, 454 N.E. 2d 363, 366-67 (Ill. App. Ct. 1983). Thus, in Illinois, there is a complete absence of interplay between a statutory warranty exclusively in favor of unit owners and an association tolling provision. In fact, the Illinois implied warranty of habitability is "limited to latent defects which manifest themselves within a reasonable time after . . . purchase . . . ." *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E. 2d 324, 331 (1982). Apparently, the Illinois tolling provision has not been applied to the implied warranty's duration, which instead is tied to the date of purchase, just as the Florida Condominium Commission envisioned for section 718.203.

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