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IN THE SUPREME COURT
STATE OF FLORIDA

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

Petitioner,

v.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC.,

Respondent.

CASE NO. 80,872

ORIGINAL

EPIC METALS CORP., et al.,

Petitioners,

v.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC.,

Respondent.

CASE NO. 80,873

(Consolidated Cases)

ON PETITION FOR DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER CHARLEY TOPPINO AND SONS, INC.

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Introduction

This appeal involves the narrow question of what the legislature intended in a 1977 statute which tolled the statute of limitations for causes of action available to condominium associations until after developer control has passed to unit owners. As it pertains to this case, the Third District Court of Appeal has certified for the Court's consideration whether that 1977 tolling statute extends a three-year warranty which the 1974 Legislature gave to developers and to condominium unit owners with respect to the common elements of a condominium. The certified question framed by the district court reads as follows:

> Does section 718.124, Florida Statutes (1991) [the tolling provision], grant a condominium association an extended period of time in which it may assert a cause of action for damage to common elements in condominium buildings, beyond the time granted [to unit owners and developers for a warranty] in section 718.203, Florida Statutes (1991), after unit owners have elected a majority of the members of the board of administration?

Seawatch at Marathon Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 610 So. 2d 470 (Fla. 3d DCA 1992) ("*Seawatch*") (App. 1).

The district court has held that the 1977 statute -- which tolls the "statute of limitations" for associations -- should be read to extend the three-year "warranties" on common elements which the legislature wrote into law for unit owners and developers. The court's decision allows the Seawatch at Marathon Condominium Association, Inc. (the "Association"), as an entity, to pursue a cause of action beyond the warranty term expressed in the statute on behalf of unit owners who themselves failed to initiate their suit within the prescribed three-year warranty term.

The narrow issue in this proceeding, then, is whether a time-barred cause of action possessed by unit owners under the warranty section of the so-called Condominium Act[1/] (the "Act") can be resurrected and exercised out of time by the association which the unit owners control. This brief will demonstrate that all legal and equitable principles augur against this Lazarus-like use of section 718.124 to revive expired rights which were unclaimed by the unit owners themselves, based on three elemental propositions.

(1) The warranties provided in section 718.203 -- granted expressly only *to unit owners* -- are a species within the family of rights concerning the common elements of condominiums which are possessed exclusively by unit owners.

(2) The only right a condominium association has ever possessed with respect to the common elements, limited in particular by legislative direction with respect to the statutory warranties created in section 718.203, is to pursue a claim as the "representative" of the unit owners.

(3) Since the unit owners of Seawatch allowed their warranty claims under section 718.203 to lapse prior to the time suit was filed on their behalf by their association, the Association could not have pursued a legitimate cause of action when it belatedly filed this suit.

1/ Section 718.101, Fla. Stat. (1987).

Statement of the Case and Facts

Seawatch at Marathon Condominium Association, Inc. (the "Association") filed its original complaint against Charley Toppino and Sons, Inc. ("Toppino"), as well as other defendants,[2] on May 13, 1988. (R. 1-7). The complaint alleged that Toppino had manufactured and supplied concrete for the construction of the Seawatch condominium buildings which contained excessive levels of chloride. The chlorides were alleged to have caused corrosion of imbedded steel reinforcements within the concrete which, in turn, allegedly caused spalling and cracking of the structural concrete, cracking of ceramic tiles and seepage of rust-stained water onto vehicles parked beneath the structures. *Id.*

An Amended Complaint was subsequently filed which re-alleged all pertinent counts against Toppino, including a breach of the statutory implied warranty of fitness and merchantability under section 718.203(2), among other things.[3] The Amended Complaint (and a subsequently filed Second Amended Complaint) asserted that suit was brought by the Association, in its own right and as the class representative of unit owners

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[2] Those other defendants were the developer, engineer, architect, contractor and subcontractor of the three Seawatch buildings. (R. 1-3).

[3] Allegations of alleged breach of *common law* implied warranties of fitness and merchantability, negligence, strict liability, and violation of the Florida Building Codes Act were dismissed with prejudice. (R. 537-39, 500-04, 507-13, 617-43). In ruling on these counts, the trial court was consistent with decisions which were later affirmed by the Third District Court of Appeal in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 588 So. 2d 631 (Fla. 3d DCA 1991), *jurisdiction accepted*, 602 So. 2d 533 (Fla. 1992) and *Chapin v. Charley Toppino & Sons, Inc.*, 588 So. 2d 634 (Fla. 3d DCA 1991), *jurisdiction accepted*, 602 So. 2d 533 (Fla. 1992). The Court held oral argument on the consolidated *Casa Clara* and *Chapin* decisions on January 8 of this year.

under the authority of section 718.111(2), Florida Statutes, and Rule 1.221, Fla. R. Civ. P. (R. 47, 514).

The trial court dismissed the statutory warranty count of the Amended Complaint without prejudice, on two grounds: first, that the Association had failed to allege when it or individual unit owners had discovered the alleged defects in the concrete which were complained of; and, secondly, that the Association had not identified the dates that certificates of occupancy had issued for each of the three buildings. (R. 538). The trial court specifically instructed the Association to include in any future pleading "when the alleged defects became manifest." (R. 538).

In its Second Amended Complaint, the Association complied with the trial court's directives by stating that the unit owners had discovered the alleged defects in the concrete "during the one year interval following April 8, 1983," (R. 520), and that certificates of occupancy for the three buildings comprising Seawatch were issued, respectively, on February 19, 1982, April 12, 1982 and April 8, 1983. (R. 519). The Association also alleged that control of the Association was obtained by the Seawatch unit owners on August 10, 1985. (R. 517).

Toppino filed a motion to dismiss the Second Amended Complaint based alternately on the term for exercise contained in the statutory warranty itself and on the statute of limitation for product defects. (R. 687-727). In response, the trial court dismissed the statutory warranty count with prejudice. (R. 1119-20). The trial did not specify the basis for its dismissal.

The Third District reversed the dismissal of the statutory warranty claim and posed the certified question previously quoted regarding that claim. That court affirmed

the trial court's dismissal of all counts of the complaint other than the statutory warranty count, based on its decision in *Casa Clara*. 610 So. 2d at 420.

A timely notice to invoke the Court's discretionary jurisdiction was filed by Toppino, as well as by other defendants. The Court's jurisdiction was abated while the Third District considered, and ultimately denied the Association's request for rehearing. Since then the Court has established a briefing schedule and consolidated this proceeding with Case No. 80,873, a separate case number given to one of the other timely requests for review.

The Association has not invoked review by the Court, despite the rulings by the Third District which rejected its claims of breaches of implied common law warranties, negligence, strict liability and violations of the Florida Building Codes Act. A resolution of those various issues will be made by the Court in the pending *Casa Clara* case, argued on January 8.[4/]

Statutes Directly Applicable to Toppino's Appeal

Section 718.124, Florida Statutes (1987), provides:

> The statute of limitations for any actions in law or equity which a condominium association or a 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.

4/ *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 588 So. 2d 631 (Fla. 3d DCA 1991), *jurisdiction accepted*, 602 So. 2d 533 (Fla. 1992) and *Chapin v. Charley Toppino & Sons, Inc.*, 588 So. 2d 634 (Fla. 3d DCA 1991), *jurisdiction accepted*, 602 So. 2d 533 (Fla. 1992).

Section 718.203, Florida Statutes (1987), provides in relevant part:

> (2) The contractor and all subcontractors and suppliers grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows:
>
> > (a) For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement . . . .
>
> (3) "Completion of a building or improvement" means issuance of a certificate of occupancy for the entire building or improvement . . . .
>
> (5) The warranties provided by this section shall inure to the benefit of each owner and his successor owners and to the benefit of the developer.

Section 95.11(3)(c), Florida Statutes (1987), provides in relevant part:

> 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, [or] the date of the issuance of a certificate of occupancy . . . 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.

Section 718.111, Florida Statutes (1987), entitled "The Association," provides in relevant part:

> (2) POWER AND DUTIES. The powers and duties of the association include those set forth in this section and those set forth in the declaration and bylaws and chapters 607 and 617, as applicable, if not inconsistent with this chapter.

Summary of Argument

The Association's lawsuit was not brought in a timely fashion. The tolling provision for claims which a post-turnover association may have does not operate to revitalize potential warranty claims possessed strictly by unit owners which were long since extinguished by the passage of time.

The tolling provision on association claims has no operative effect on the warranty provision established for unit owners. The rights of unit owners and associations as defined by the condominium law are neither interchangeable, nor identical. Since the Association could serve only as a class representative of unit owner claims under the warranty provision, the expiration of unit owner power to sue necessarily extinguished the mere derivative right of the association to sue.

In this case, the three-year warranty governing the manufacturer's supplying of concrete for construction had expired well before this action was instituted. Even were a four-year statute of limitations for product defects to apply to this action, the Association's filing was still too late based on the acknowledged date of discovery of the alleged defects.

Time-barred warranty claims once possessed by unit owners could not be re-established either in the name of the Association or in its derivative capacity after their expiration. The tolling provision on association-based actions found in section 718.124 provides no extension period for warranty claims of unit owners under section 718.203. The certified question proposed by the district court should be answered in the negative, its decision reversed in part and the case remanded with instructions to reinstate dismissal of the statutory warranty claim.

Argument

1. Background to enactment of the tolling provision.

The statutory warranties for unit owners which are involved in this suit were first created by the legislature in 1974 as part of the enactment of the Condominium Act. Ch. 74-104, § 16, Laws of Fla., creating § 711.65, Fla. Stat. (1975). The "tolling statute" which is the heart of this case -- section 718.124 -- was not enacted until 1977. Ch. 77-222, § 9, Laws of Fla. The evolution of these statutes makes sense only in the context in which they were formulated.

It is unusual in Florida to find explicit legislative history for a statutory enactment. This case, however, provides a rare instance in which a lawyer need not glory in the possession of analytic tools allowing for subtle penetration into the mists of legislative intention. Pedantry of any sort is unnecessary because legislative history on the warranty provision at issue is abundant, clear and specific.

The addition of statutory warranties for units owners, as a component of the condominium law, was impelled by the decision in *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA), *adopted*, 264 So. 2d 418 (Fla. 1972). In that case, the Court determined that an implied warranty of fitness and merchantability should be extended in connection with the purchase of new condominium units acquired from builders to those in privity -- a warranty arising not from the Uniform Commercial Code but as a product of the common law. *Gable* -- the first Florida decision to recognize an implied warranty of fitness and merchantability for purchasers of newly constructed condominiums -- marked the potential for open-ended liability of condominium developers and builders,

uncircumscribed in duration, and potentially for other participants in the construction process.

In 1972, the legislature had established the Florida Condominium Commission (the "Commission"), which subsequently issued a report recommending the inclusion of time-bound warranties in the Act. (R. 852-53). That report contemplated proposed warranties akin to those a consumer might obtain for a car, tires, toaster, or most other products. Departing from the *Gable* decision, the report recommended removing the requirement of contractual privity from the warranty being proposed for enactment by the legislature, thus broadening its proposed reach to non-privity unit owners for the first time.

> A recent court decision [*Gable*] has found that there is an implied warranty of fitness and merchantability that attaches to new condominiums that are sold by the builders. Even though this decision finds the implied warranty, *it does not place any limits upon the time or the remoteness*, and neither does it state the persons liable upon the warranty.
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> * * * *
>
> The Commission is of the opinion that the implied warranty of fitness and merchantability *should be stated with definiteness as to the persons liable and as to the period for which they are liable*. Without some statutory limitation of these aspects of the warranty, there is difficulty in applying the warranty to units in a building that are completed and delivered to purchasers at different times, to units in different buildings of a condominium or cooperative that are completed at different times, and to different condominiums or cooperatives in a project that are completed at different times.

(R. 852-53) (emphasis added).

The Commission proposed that warranties should operate in like fashion to repose periods, and it recommended an enforcement period for unit owners which "expires" at the end of the identified warranty period. (R. 852).

> This section provides that the implied warranty of fitness and merchantability attaches to each condominium or cooperative parcel . . . . *Each owner* of this property is *given the right to enforce* the implied warranty *until the warranty expires.*

(R. 852) (emphasis added).

In 1974, the legislature enacted the warranty legislation at issue here, which adopted the Commission's proposals both as to time limitations and the elimination of privity. Ch. 74-104, § 16, Law of Fla. Virtually all of the Commission's proposals were included in the original text of the warranty provision. The Commission had carefully assessed (1) the catalyst for the warranty section, (2) the need for temporal certitude, (3) the owner's sole right to the warranty, and (4) the need for some accommodation related to the transfer of the condominium association from the developer. The trail of reasoning is thoroughly documented.

> The warranty as to the roof and structural parts of the building *runs for a period of three years* from the completion of the construction or installation in the case of a contractor, subcontractors and suppliers. In the case of a developer, the period of the warranty begins with the date of the first occupancy or use of the building by a unit owner and runs for at least three years, and will be extended until six months after unit owners other than the developer acquire control of the association but for no longer than five years.
>
> * * * *
>
> The developer is held liable under the warranty for a longer period than the contractor, subcontractors and suppliers because the developer will be in a position of controlling the enforcement of the warranty against the developer so long as the developer is in control of the association. Hence, *the association is given six months after the unit owners acquire control of the association within which to enforce the warranty against the developer, but the warranty will run in no event longer than five years.* The *five year limitation* is indicated by present Section 711.24(3)(d) that limits a unit owner's cause

of action against a developer because of violation of the disclosure provisions.

(*See* R. 852-53) (emphasis added).

The history and reasoning behind enactment of what is now section 718.203 reflects a clear intention that any warranties be finitely limited in nature, scope and term. The Commission's proposals, as adopted by the legislature *en masse* in 1974, have not since been substantially modified.

In 1974, the legislature also substantially amended the powers of condominium associations vis-a-vis suits on behalf of unit owners. In that legislation, the post developer-turnover association was authorized to maintain a class action "on behalf of unit owners" with reference to matters involving the common elements and structural components of buildings, among other things. *See* Ch. 74-104, § 7, Laws of Fla.[5/]

In 1976, the legislature again subjected the Condominium Act to significant overhaul. Some changes in terminology were made to the warranty provision, but none were viewed by the legislature as modifications to the substance of the section. *See* Ch. 76-222, Laws of Fla. and (R. 855, 864). By that time, court decisions were emerging as to the authority of condominium associations to sue for infringements to the common elements of a condominium. Three of these decisions are of especial importance here.

In the first decision, the Third District firmly concluded that a condominium association may only institute suit regarding the common elements "in its capacity as a

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5/ The assignment of rights to common elements exclusively to unit owners continues. Section 718.106(2), Fla. Stat. (1987), first enacted in 1976, for example, provides that: "There shall pass with a unit, as appurtenances thereto . . . (a) An undivided share in the common elements and common surplus."

representative of the individual condominium unit owners or in the alternative as a class action." *Reibel v. Rolling Green Condominium A, Inc.*, 311 So. 2d 156, 158 (Fla. 3d DCA 1975). The court held that a condominium association has no standing as a real party in interest to bring suit concerning the common elements of a condominium. 311 So. 2d at 158.

In a second decision, this Court applied the same analysis to hold that the legislature exceeded its constitutional authority in purporting to establish class action procedures for suits brought by an association on behalf of unit owners concerning matters of common interest. *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977) (construing the 1975 and 1976 versions of present section 718.111(3) of the Act). The Court held that the legislature had acted, improperly, in the constitutional role of the judiciary to set procedures governing class actions and other forms for suit, in that the Act had only granted derivative powers of suit to an association in matters concerning the common elements.[6/] The Court declared unconstitutional, as being a matter of procedure and not substance, the language of the Act which authorized an association to institute actions "in its name on behalf of all unit owners concerning matters of common interest, including . . . the common elements [and] the roof and structural components of a building." 347 So. 2d at 608.

6/ The procedural vehicle for class actions now appears in Rule 1.221, Fla. R. Civ. P. (created in *Avila*), governing representation of unit owners by associations. The Association's Second Amended Complaint grounds its suit in part on this Rule. (R. 514). This Rule creates only a derivative representational interest for associations in actions concerning commonality of interests of unit owners, of course. The essence of *Avila*, which turned on the separation of powers principle and shifted class action representation to Rule 1.221, is that the legislature had not created *substantive* capacity for an association to sue in its own interest, regardless of those of unit owners.

In a third decision, the Court reinforced this theme by rejecting in no uncertain terms "the argument . . . that under the new class action rule adopted in *Avila South*, an association is identical to and standing in the place of the unit owner." *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G, Condominium Ass'n*, 361 So. 2d 128, 133 (Fla. 1978).

Against this backdrop of legislative initiatives and judicial construction, the 1977 legislature enacted what is now section 718.124 to extend statutes of limitations past turnover from the developer for causes of action which "a condominium association or a cooperative association may have." The Association has urged, and the Third District has now held that this tolling provision for limitations on condominium association actions can be read to grant a direct, independent and extended cause of action for a breach of the warranties given unit owners under section 718.203. The pellucid history of the distinction between rights given to an association in its own capacity and any derivative rights it may have on behalf of unit owners, however, cannot be harmonized with the Association's position. It is contrary to the language, the history, and the purpose of the Act.

2. Factual untimeliness of the Association's lawsuit.

It will be helpful to the Court's understanding at this juncture to see exactly how the proposed, extended warranty would operate under the Association's position. A textual explanation of the interplay of times and timeliness follows. For additional assistance, Toppino has prepared as an appendix to this brief a visual display of the relevant time frames relating to the warranty term and the limitations period. (App. 2).

Subsection 718.203(2)(a) grants a three-year warranty as to structural components in a condominium from "the date of completion of construction," which in subsection 718.203(3) is defined to mean the issuance of a certificate of occupancy. Toppino accepts, for analytical purposes here, that the date of issuance of the third and last certificate of occupancy for the Seawatch buildings commenced the applicable warranty term for Toppino's concrete.[7/] That certificate was issued on April 8, 1983. Based on the express language of the statute, the warranty term for unit owners ran to April 8, 1986. The Association's suit on their behalf was not filed until more than 2 years more had passed, on May 13, 1988.

The Association's suit was not timely, as well, under the general statute of limitations governing causes of action for product defects. The Association has pled that the alleged defects in Toppino's concrete were discovered not later than April 8, 1984, one year after issuance of the last certificate of occupancy. Assuming that the general four-year statute of limitations of section 95.11(3)(c) applies to this cause of action -- the "worst case" assumption for Toppino and the "best case" assumption for the Association -- discovery of the alleged defects by unit owners gave them a limitations period for any action against Toppino running all the way to April 8, 1988. That date, too, came and went *before* suit was brought by the Association on the unit owners' behalf.

Toppino suggests that a third time factor, evident from the time lines that govern this case, puts a third nail in the Association's timeliness coffin. The Court will recall that the Association pled that developer turnover occurred on August 10, 1985. This

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7/ Plainly, the three-year warranty ended at earlier dates for the two buildings for which certificates of occupancy were issued before April 8, 1983.

date fell well before the expiration of both the three-year warranty term (April 8, 1986) and the four-year limitations period (April 8, 1988). Thus, not just the unit owners themselves, but even the Association itself let lapse any right to bring suit. (See App. 2). Any notion of "needing" an extension of the warranty term or the limitations period is nonexistent. When control of the condominium association passed from the developer to unit owners, a full eight months remained on the three-year statutory warranty provided in section 718.203, and a full two years and eight months remained on the four-year limitations period from "defect discovery" under section 95.11(3)(c).[8/] It seems clear that it was the unexplained and unwarranted delay attributable to the Association, even *after* developer turnover, that prompted its search in the tolling provision for some statutory hypothesis to extend the unit owners' cause of action beyond the 36-month term of warranty itself.

Of equal if not greater importance than the Association's idleness prior to the expiration of the unit owners' warranty term and the limitations period on discovered defects, is the fact that there is nothing in the 19-page Second Amended Complaint, or in this record, to suggest that the unit owners were themselves inhibited in any way from filing an action on their statutory warranties before or after turnover of the Association from the developer. Indeed, the contrary is evident from the facts pled by the

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8/ It is noteworthy that the Association was fully aware during this time period that it may have had a claim against Toppino for breach of a statutory warranty, because a Mr. Callihan and two other unit owners were at that time embroiled in litigation against the developer for construction defects in the common elements at Seawatch. *Callihan v. Turtle Kraals, Ltd.*, 523 So. 2d 800 (Fla. 3d DCA 1988). One of the firms representing the Association in this suit also represented Mr. Callihan and his co-owners. The present suit was filed a mere two weeks after the issuance of the decision of the Third District which upheld Mr. Callihan's award of damages.

Association. Based on the date it acknowledges having discovered the alleged concrete defects -- April 8, 1984 -- unit owners had 16 months prior to turnover to the Association, and 8 more months after, in which to bring suit for alleged construction defects.

3. Section 718.124 has no effect on unit owner warranties conferred in section 718.203.

Section 718.124 is a provision which, by its terms, tolls the "statute of limitations" on any actions which a condominium association "may have." A plain reading of the statute refutes any notion that it *creates* an independent, substantive right in condominium associations to originate lawsuits as a real party in interest. Moreover, by its terms section 718.124 does not extend time-fixed warranties; it extends only "limitations." The legislature's words match its intent.

The authority and powers of a condominium association are addressed in the Act in sections 718.111 (creation of association and general statement of its powers), 718.113 (maintenance of the common elements) and 718.114 (power to enter into contracts, etc.). Each of these provisions was revised as part of the overhaul of the Act forged in 1976 by Chapter 76-222. The warranties created by section 718.203 were modified in that law, but without any intention that changes of a substantive nature were being made.[9/]

The following year, 1977, the limitations tolling provision for association actions was enacted by Chapter 77-222. That enactment did not include any modifications to the substantive powers granted to an association in sections 718.111-.114. Obviously, the

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9/ See (R. 855, 864).

tolling limitations conferred in section 718.124 could only have been intended to operate on previously-enumerated powers of condominium associations. As noted, the tolling statute did not in terms or in substance add to existing association powers.

The tolling provision for associations was added to the Act not only without fanfare, but without any legislative history to support the notion that a new cause of action for associations was being created to alter the previously-decreed demarcation between unit owner rights and association powers. Neither the Association or the Third District has identified any words or legislative history suggesting that section 718.124 means anything more than it says. Indeed, the position presented by the Association and approved by the district court is contrary to everything contemporaneous with the circumstances then prevailing.

By the time of the tolling provision's enactment in 1977, the courts had determined that no legislative grant to a condominium association had established a direct interest in the common elements or conferred authority for associations to sue as a real party in interest concerning common elements.[10/] That separation has always proceeded from the basic premise that unit owners are uniquely the real parties in interest as to claims regarding harm allegedly befalling the common elements of a condominium complex. *See Avila*, 347 So. 2d 599 (Fla. 1976); *Reibel*, 311 So. 2d 156 (Fla. 3d DCA 1975). *And see* section 718.106(2)(a), Fla. Stat. (1987). In *Reibel*, the Third District expounded on precisely this point:

10/ The association had been granted the right and responsibility to maintain the common elements in § 718.113(1), Fla. Stat. (1987), but this provision has never been construed to grant the association a direct interest in the common elements other than for this limited purpose.

> It is now established that the common elements of a condominium are owned by the condominium unit owners as an undivided share appurtenant to the condominium and, therefore, the plaintiff condominium associations have no standing as the real parties in interest to bring a suit to quiet title to the common elements of a condominium complex . . . a condominium association may institute an action concerning the common elements only in its capacity as a representative of the individual condominium unit owners or in the alternative as a class action.

311 So. 2d at 158.

Section 718.124 could never have been meant to obscure a demarcation so clearly emblazoned in condominium law. Had this rash change been intended by the legislature, it would certainly have been pronounced overtly and explicitly, or at a minimum alluded to in some manner. It is untenable to suggest that a change of this magnitude -- a negation of the common law -- was ushered in the back door, utterly unpronounced, by virtue of an enactment dealing only with an extension of limitations for association causes of action beyond developer turnover. *See State ex rel. Housing Authority of Plant City v. Kirk*, 231 So. 2d 522, 524 (Fla. 1970).

The Association's position is an unrealistic interpretation of what section 718.124 was intended to do. By its terms, its context and its purpose, the tolling authority of section 718.124 was applied only to the numerous causes of action which associations could themselves maintain as real parties in interest, based on their own substantive rights.[11/] *See, e.g., Palma del Mar Condominium Association #5 of St. Petersburg, Inc. v.*

11/ As one co-appellant has noted, the tolling provision operates on claims which an Association "may have," not upon claims it "may bring." There is nothing artificial about this method of parsing the plain terms of section 718.124. It is the Association's interpretation of the tolling provision which introduces artificiality into the plain language of the warranty section in order to grant associations a direct interest in bringing suit, at a time when the unit owners themselves would not have standing to bring the same action.

Commercial Laundries of West Florida, Inc., 586 So. 2d 315 (Fla. 1991); *Avila South*, 347 So. 2d at 603; *Fairways Royale*, 419 So. 2d at 668; *Hur v. Saul J. Morgan Enterprises, Inc.*, 325 So. 2d 446 (Fla. 3d DCA 1976). For example, associations have the power to enter into contracts, acquire title to property, purchase and sell condominium units, acquire leaseholds and acquire memberships and other possessory or use interests in lands and recreational facilities. *See, e.g.*, §§ 718.103(2), 718.111(1), (2); 718.114.

Nor was section 718.124 construed to rewrite the warranty provision to freshen stale claims by unit owners against suppliers of structural components of condominiums. As will be developed below, the Association's interpretation of section 718.124 both supersedes and nullifies the language of section 718.203(1)(e), a method of interpretation contradictory to all the known maxims of statutory construction. *See Woodgate Dev. Corp. v. Hamilton Investment Trust*, 351 So. 2d 14, 16 (Fla. 1977) (legislature would not "effect so important a measure as the repeal of a law without expressing an intention to do so . . . duty of the courts [is] to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act"); *Gretz v. Florida Unemployment Appeals Comm'n*, 572 So. 2d 1384, 1386 (Fla. 1991) ("Statutes should be construed to give each word effect."); *Johnson v. Feder*, 485 So. 2d 409, 411 (Fla. 1986) (statutory interpretation rendering provisions superfluous is disfavored).

The design of section 718.124 was to preserve the legal rights of associations as real parties in interest, until after the unit owners were in control and in a position to enforce them. There was no need for a tolling provision on causes of action belonging to unit owners, as a developer could never preclude a unit owner from filing suit on his own claims within either an applicable statute of limitations or warranty term. In the

case of the Seawatch condominiums, the ubiquitous Mr. Callihan satisfactorily proves that point. *See, e.g., Breslerman v. Dorten, Inc.*, 362 So. 2d 37, 38 (Fla. 3d DCA 1978).

Unit owners, whether as individuals or as a class, were always free to sue developers and those in the construction chain to enforce their individual warranty rights under section 718.203, regardless of whether the developer would allow the captive association to join or bring such a suit. *See, e.g., Carlandia Corp. v. Rogers and Ford Construction Corp.*, 605 So. 2d 1014 (Fla. 4th DCA 1992) (unit owners have standing to bring suit for construction defects in common elements or common areas of condominium); *Imperial Towers Condominium, Inc. v. Brown*, 338 So. 2d 1081 (Fla. 4th DCA 1976), *appeal dismissed*, 354 So. 2d 978 (Fla. 1977) (unit owner and association class action claim timely).

In sum, the tolling on limitations in section 718.124 delayed the expiration of causes of action possessed by associations in their own right, until such time as the association was no longer a captive of the developer. That tolling enactment did not create new rights for association entities or could not have imbued associations with "real party in interest" status concerning the common elements.

4. Section 718.203 provides warranties only to unit owners, and not associations.

The plain language of section 718.203 lends further credence (were any necessary) to the conclusions that (1) it creates statutory warranties running only to unit owners and to the original developer, not to any association, (2) for a fixed and limited term. The beneficiaries of the legislature's non-privity, previously-unavailable warranty are given a "warranty," good for three years from issuance of the certificate of occupancy, within

which to sue. *See* § 718.203(2)(a) and § 718.203(3). Those persons are precisely defined in subsection (5) of section 718.203:

> The warranties provided by this section shall inure to the benefit of each owner and his successor owners and to the benefit of the developer.

This plain language perfectly reflects the common law then in effect, that unit owners alone are the real parties in interest vis-a-vis the common elements. There is no mention here of a warranty given to any condominium association, and no suggestion that any association has warranty rights based on powers granted elsewhere in the Act. The legislature's limitation on who may pursue warranty claims is inescapable. *See Aetna Casualty & Surety Co. v. Huntington National Bank*, 609 So. 2d 1315 (Fla. 1992) (unambiguous statute must be accorded plain and ordinary meaning); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (statute must be given its plain and obvious meaning); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071 (Fla. 1982) (best evidence of legislative intent is generally the plain meaning of text of statute).

The rationale for extending the warranties of section 718.203 to unit owners, but not to condominium associations, stems from the legal premise that the common elements of a condominium are owned by the unit owners, not by their associations. *See, e.g., Avila*, 347 So. 2d at 608, in which the court recognized the need for a "procedural vehicle" through which associations may initiate claims as the representative of unit owners on matters of common interest such as common structural elements of a condominium complex. *See also Reibel, supra*, to the effect that "condominium associations have no standing as the real parties in interest to bring a suit to quiet title to the common elements of a condominium complex . . . ." 311 So. 2d at 158.

A four-step deduction flows from this premise: (1) by its express terms, section 718.203 extends statutory warranties concerning the common elements only to unit owners; (2) this dovetails with the common law doctrine that a direct interest in the common elements belongs only to the unit owners; (3) therefore, whatever rights are possessed by the Association in matters involving the common elements, section 718.203 warranties are exercisable solely in a procedural and representational capacity for the unit owners; and (4) the Association's ability to represent unit owners must depend on whether the unit owners themselves possessed valid causes of action against Toppino on the date the original complaint was filed. This conclusion is supported by the case law. *See Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G, Condominium Association*, 361 So. 2d 128 (Fla. 1978); *In re Rule 1.220(b)*, 353 So. 2d 95 (Fla. 1977); *Avila, supra; Fairways Royale Association, Inc. v. Hasam Realty Corp.*, 419 So. 2d 667 (Fla. 4th DCA 1982); *City of Deerfield Beach v. Ocean Harbor Association*, 348 So. 2d 1192 (Fla. 4th DCA 1977); *Reibel, supra.*

In *Century Village*, for example, the Court was asked to determine whether an association, which was suing on behalf of its unit owners, could avail itself of the deposit provision of the Act which, by its terms, applied only when a unit owner initiated an action or interposed a defense. The Court held that the express terms of the deposit provision statute meant what they said, and that accrued rent must still be paid where the association had brought suit in its own capacity. The Court's rationale was instructive for present purposes:

> we reject the argument . . . that under the . . . class action rule . . . an association is identical to and standing in the place of the unit owner. [While we previously] extended a class action to an association [we] in no

> way attempted to equate an association with a unit owner for all purposes . . . . The terms "association" and "unit owner" are not interchangeable . . . .

361 So. 2d at 133.

The legislature, of course, is presumed to be aware of judicial declarations construing sections of the condominium law.[12/] *See Ford v. Wainwright*, 451 So. 2d 471 (Fla. 1984). These include court decisions prior to the enactment of section 718.124 in 1977 which had resolutely held that unit owners possess the direct interests in the common elements. *See, e.g., Avila, supra* (decided in 1976), as later re-affirmed in *Century Village, supra* (decided in 1978). Under the circumstances, it is impossible to attribute to the enactment of the tolling law in 1977 the unexpressed creation of an inherent interest in unit owner common elements, or a capacity beyond unit owner representation alone for condominium associations to pursue warranty claims.

An analysis of other precise terms crafted into the warranty statute also provides corroboration for the impropriety of using the limitations tolling provision to extend statutory warranty terms. Subsection (1)(e) of section 718.203 contains a built-in resurrection and extension of time for suit, based on the same circumstance of developer-maintained control that drives the Association's assertions regarding the tolling of limitations in section 718.124. Subsection 718.203(1)(e) extends a warranty for structural components *against the developer* for a period of three years after the

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12/ The history of the cost deposit provision demonstrates how closely the legislature reads statutory-interpretive case law. Following *Century Village*, the legislature amended the Act to include associations within the protections of the cost deposit provision. *See Cenvill Investors, Inc. v. Condominium Owners Organization of Century Village East, Inc.*, 556 So. 2d 1197, 1199 (Fla. 4th DCA 1990).

completion of construction (meaning certificate of occupancy), "or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years."

This delineation of extended rights demonstrates, Toppino suggests, that the legislature was aware of the need for a preservation of certain warranty claims against *developers* until after turnover to the association, and consciously saw no reason to extend the right of suit against others. The legislature could have effectuated the same pattern with respect to claims against suppliers such as Toppino, but it affirmatively wrote the warranty law not to do so. The logic for postponing warranty claims against the developer until he or it relinquishes control is obvious. Not only is the same logic absent as to others, but the doctrine of *expressio unius est exclusio alterius* has particular force in this situation to establish that the legislature did not intend a wholesale preservation of unit owner claims from a point in time marked by a turnover of the association. *Thayer v. State*, 335 So. 2d 815 (Fla. 1976).

In short, the legislature must be credited with having meant not only what it said but what it did not say. When it saw fit to itemize the preservation of one right in the statute, other rights which could have itemized were unquestionably considered and rejected. *Thayer*, 335 So. 2d at 817; *see also Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674, 676 (Fla. 1985). Unless the result is arbitrary, capricious, or otherwise violates secured constitutional interests, which no one has suggested in this case, the line drawn by the legislature cannot be re-drawn by the judiciary. *North Ridge General Hospital, Inc. v. City of Oakland Park*, 374 So. 2d 461, 464-465 (Fla. 1979).

The fact of having excluded from supplier suits what was conferred for developer suits -- a post-turnover moratorium -- is driven home by the history of the enactment of these sections. In 1976, when the legislature massively revised the condominium law, it modified both the warranty section and those sections from which association rights and powers emanate. *See* Ch. 76-222, Laws of Florida. The statutory warranties involved here had been on the books since 1974. The legislature had the opportunity to grant associations the same warranties conferred to unit owners, or to extend the time of suit against suppliers beyond developer turnover as it had done for suits against developers. It did neither. Its choosing not to do so cannot be ignored as meaningless, especially where the law on condominiums was completely reviewed and re-tooled in one, all-encompassing revision. *See, generally, Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978).

By comparison, the 1977 amendment which added the tolling provision was part of a minor revision of the Act which *did* amend the warranty provision, but by *narrowing* its effect. The 1977 law *exempted* from the statutory provision condominiums covered by "an insured warranty . . . for no less than 10 years duration [including] . . . all the structural components of a building." *See*, Ch. 77-222, § 6, Laws of Fla. The legislature unquestionably considered the relationship of the limitations tolling provision and the warranty term in its passage of Chapter 77-222. By its silence and omission, it rejected any expansion of the warranty provision either to include associations in section 718.203, or to extend the warranty terms in that section through the tolling of limitations in section 718.124.

Yet another aspect of the history of the legislative development of the warranty and tolling sections is indicative of the intention of the legislature *not* to expand statutory

warranties to associations in their entity capacity. When the warranty provision was modified as part of Chapter 76-222, the legislature took out the provision, now in subsection 718.203(5), reciting that warranties were granted only to unit owners and to the developer. That omission was corrected in 1979, when the legislature again amended the warranty provision to reincorporate this element. *See* Ch. 79-314, § 9, Laws of Fla., codifying § 718.203(5), Fla. Stat. (1987).[13/] This reinsertion to the warranty section came *after* the tolling provision was enacted in 1977. It seems to Toppino that this is further proof that the Association's 1988 lawsuit cannot benefit from a tolling of warranty rights through an unstated and magically implied creation of a substantive associational right.

The foregoing discussion of the dual developments of the warranty and tolling statutes demonstrates consistency pointing to an absence of direct warranty interest for associations under sections 718.124 and 718.203. It follows that an association can pursue a claim under section 718.203 only from its derivative, representational capacity of the unit owners. The foregoing leads to the conclusion that associations can only act representationally when unit owners *have* a pursuable claim, and not when their potential claim is barred by lack of diligence. Associational standing in cases involving interests in the common elements is limited to a representational capacity of unit owners, or to contractual interests it may directly possess (such as those for the maintenance and repair of the common elements). In the former feature, of course, the Association's representational qualifications on behalf of unit owners differs not in the least from any

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13/ The tolling provision was also modified in 1979 by a Reviser's Bill to correct a misspelling. Ch. 79-400, § 263, Laws of Fla.

derivative, representational, or class action right, according to previous decisions of the Court. *See Avila*, 347 So. 2d at 608; *Century Village*, 361 So. 2d at 133; *In re Rule 1.220(b)*, 353 So. 2d 95 (Fla. 1977). If the underlying individuals represented (here the unit owners) have no independent right to bring a cause of action, their representative surely has no right to bring that claim in their stead. *See Warth v. Seldin*, 422 U. S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (standing rights of property owners' association no greater than rights of individual members comprising that group).

The three-year warranty given to unit owners by the legislature had expired when the Association finally decided to file suit. So had the lengthiest statute of limitations available for construction defects. The necessary consequence of these time bars was that any right of the Association to sue as the class representative or agent on behalf of the unit owners had also expired.

Returning to the underlying rationale for these condominium statutes, it is necessary again to put them in the context of the times. The seminal *Gable* decision, as well as the warranty section of the Act, were major expansions of previously nonexistent rights for condominium unit owners to sue for alleged breaches in the construction process. *Gable* limited the range of potential defendants to those in privity, but its newly-created cause of action for the purchaser of a new unit seemed to be of unlimited duration for all practical purposes. By statute, the legislature broadened *Gable* to permit the cause of action to be pursued by successive owners and against those not in privity, but it simultaneously limited the life of any warranty to the terms identified in the statute. Those terms must be respected as part of a balanced framework which created the warranty right itself.

The legislature made it unmistakably clear that unit owners would only be permitted to sue construction participants to enforce the newly-created warranties within a set time frame after completion of their buildings. Only for developers did the legislature extend the repose period to a time one year after the owners gained control of the condominium association, and even in this circumstance a suit could be brought "in no event more than 5 years" after completion of construction. *See* § 718.203(1)(e), Fla. Stat. (1987). The intention and plain language of the statute as to warranty terms cannot be ignored or by-passed, as the association proposes, by reference to another, unrelated provision. The built-in, repose-like period extends any potential action for breach of warranty by unit owners against the developer, but nothing extends suits against other construction defendants. Suppliers may only be sued for breach of the warranty granted by section 718.203(2) during the period of three years from the issuance of occupancy certificates on each condominium building.

Not surprisingly, the administrative agency responsible for condominiums has interpreted the warranty provision in a manner completely consistent with the legislative history noted in this brief. Administrative rules provide that

> The purchaser of each unit . . . *may direct* to the contractor, subcontractors, and suppliers *any claim* regarding implied warranties of fitness as to the work performed by them as follows:
>
> (a) For a *period of three years* from the date of completion of construction of a building or improvement as to the roof and structural components . . . .

Rule 7D-20.002, Fla. Admin. Code (emphasis added). This rule, first promulgated in 1979, neither makes any mention of a tolling provision for "association" claims nor implies that anything beyond the three-year term is available. Had there conceivably

been any relationship between the warranty and tolling provisions, one would certainly have anticipated that the agency charged with protecting unit owners would have found a way to mention it. Succinctly, however, since 1979, the rule has conveyed the conclusion that claims must be brought within the warranty period, or otherwise be lost.

Even beyond the rule, the Condominium Association Manual prepared by the Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, for distribution to all condominium associations in Florida to inform them of association and unit owner rights and responsibilities under the Act, provides in relation to warranties that

> Transfer of control does not relieve the developer of warranty obligations. However, the association should be aware of the warranty periods so that if claims are necessary, *they can be made before the warranty periods expire.*

(R. 722-25) (emphasis added). This written administrative interpretation of the warranty statute clearly expresses an understanding that the time-limited warranties are equivalent to statutes of repose, capping the time in which a warranty action can be pursued by unit owners.

The decision of the Third District is contrary to the plain language and intention of the warranty statute, and administrative interpretation. When the Third District ascribed to section 718.124 some inherent power for associations to pursue causes of action which were explicitly foreclosed by the warranty terms in sections 718.203(1) and (2), it rewrote the legislation in breach of the separation of governmental powers. That was impermissible. *Capeletti Brothers, Inc. v. Department of Transportation*, 499 So. 2d 855, 857 (Fla. 1st DCA 1986), *rev. denied*, 509 So. 2d 1117 (Fla. 1987).

It is significant in regard to the warranty statute what the legislature selected as the triggering event for the warranty terms. The warranties commence on issuance of the certificate of occupancy. § 718.203(3), Fla. Stat. (1987). The warranty term expires after a period of years commencing from that issuance of occupancy certificates. In neither the warranty term nor the added repose periods relating to developer claims is "notice" or "discovery" of a cause of action pertinent, as it is when a limitations period is involved. The warranty term, operating exactly like a repose period, commences at a defined moment (such as delivery of a product or good) and ending at a time certain typically defined to run from the defined commencement event. *See e.g., Kush v. Lloyd*, 17 Fla. L.Weekly S730 (Fla. Dec. 3, 1992).

The legislature's enactment can be traced to its own Commission's recommendation that it would be unnecessary, inappropriate and undesirable to toll the repose periods of section 718.203(2) for claims against suppliers, general contractors and subcontractors until after the unit owners had gained control of the association. (R. 852-53). The rationale is sound and irrefutable. Unit owners themselves at all times remain free to sue these construction participants regardless of whether their association was developer-controlled. The very fact that section 718.203(1)(e) granted a lone tolling period after turnover of the association -- for suits against developers -- is ample proof that associations were given no wide-ranging opportunity to toll the other warranty repose terms, post-turnover, by virtue of the "limitations" tolling contained in section 718.124.

5. **The Association's theories of harshness and common law analogy.**

At various times in this litigation, the Association has argued that interpretation of the warranty terms as repose periods is unduly harsh to unit owners, and that consideration should be given to the fact that limitations on a cause of action for *common law* warranties do not commence to run until discovery of the defect. Neither of these assertions by the Association has any pertinence in this circumstance.

There is nothing in section 718.203, *and certainly nothing in this record*, to suggest that unit owners could not themselves have instituted an action against Toppino or others within the allotted warranty terms. After all, Mr. Callihan and some other unit owners did! Moreover, when the developer turned over the association on August 10, 1985, there remained plenty of time even for the Association to institute a "representative" suit on behalf of the unit owners for these alleged breaches of the statutory warranties. Under the warranty term, 8 months remained for an association representational suit. Under the limitations period of section 95.11(3)(c), the unit owner-controlled Association had until April 8, 1988, to institute a timely action (based on the last day of the one-year period the Association admitted that the allegedly "latent" defects were discovered). Thus, by the Association's own pleading admission, it possessed approximately 32 months (August 10, 1985 to April 8, 1988) from the date of turnover to bring a timely suit on behalf of the unit owners. This period of inactivity by the Association negates any notion of harshness towards unit owners.

The Association's expansive claim for a warranty cause of action should be measured against what it replaced; literally nothing. To put it simply, there was no viable claim by unit owners -- original or successor -- against a supplier such as Toppino

prior to creation of the statutory warranty. *Casa Clara, supra*; *GAF Corp., supra.* A time-limited warranty can hardly be conceived of as harsh, when it extended a remedy not previously available for unit owners. Moreover, the Association's tolling theory of the warranties, when taken to its natural end, would have the effect of delaying a claim for an indeterminate number of years, based on the unpredictable future date when turnover of the association from the developer takes place. Such a result would be antithetical to the plain terms and legislative history of the warranty provisions.

In any event, the Court well knows that the expiration of *any* repose period before a claim is brought is by definition "harsh." It is a result embedded in the laws and public policy of the state, however. *See Kush v. Lloyd, supra*; *University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991). Repose periods are integral to and intertwined with the many rights afforded by statutory law. This is reflected in these recent precedents of the Court which have denied recovery for serious personal and property injuries, tragic in nature, based on expiration of statutory repose periods before the aggrieved party was even aware that a claim had accrued, *Kush, supra*, and even where fraud in concealing the existence of a claim was alleged. *Bogorff, supra.*

The common law warranty analogy made by the Association, too, is completely bereft of substance. Statutory warranties contained in section 718.203 cannot be construed to be similar to implied warranties found in the common law. For one thing, the intent and plain language of the statute evince a legislative determination to reject the unlimited time frame for the implied warranty of fitness created in the *Gable* decision. For another, the statutory warranties in section 718.203 reflect a carefully crafted, policy-based tradeoff. The statutory warranty given for suits against suppliers

does not require privity of contract. The common law allowed suits only against developers and builders, not suppliers such as Toppino.[14/] By allowing original and remote purchasers of units to sue parties in the construction chain for the first time in Florida, the legislature broadened (and simultaneously constrained temporally) the rights previously found at common law.

Thus, while the legislature expanded warranty rights for condominium unit owners by eliminating the privity requirement, a conscious trade-off was made by placing limitations on the time within which these warranties could be invoked. While it appears that under *Gable* an original unit owner could sue for breach of a common law implied warranty unless barred by a four-year statute of limitations or the fifteen-year statute of repose, the legislative determination was made to establish a shortened repose period under section 718.203 -- five years for actions against developers, and three years for actions against material suppliers. *See* §§ 718.203(1)(e); 718.203(2)(a). There is nothing unduly harsh about this legislatively-developed public policy initiative. The judiciary, in any event, lacks the authority to question the wisdom of the legislation in making these tradeoffs. *Century Village*, 361 So. 2d at 134.

It follows that any cause of action available to the unit owners against Toppino survived only for a period of three years from the certificates of occupancy. Paragraph nineteen of the Association's Second Amended Complaint alleges that the last certificate

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14/ In other types of actions, common law implied warranties have been held applicable only to the original purchasers of condominium units. *See Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So. 2d 976 (Fla. 4th DCA 1979). In another instance, privity of contract was required before any action for breach of implied warranty could be brought. *See, e.g., GAF Corp. v. Zack Co.*, 445 So. 2d 350 (Fla. 3d DCA), *rev. denied*, 453 So. 2d 45 (Fla. 1984).

was issued on April 8, 1983. (R. 519). April 8, 1986 became the final date for any cause of action under the warranty statute. The original complaint was not filed until May 13, 1988.

6. The *Regency Wood* decision is inapposite to the revival of expired warranty claims.

At the Association's urging, the Third District has stated that section 718.124 was enacted to prevent an unscrupulous developer "from retaining control over an association long enough to bar [by expiration of the statute of limitations] a potential cause of action" which the unit owners may wish to pursue, but cannot be pursued because the developer controlling the association has refused or failed to enforce the association's legal rights. The court cited to *Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruchman, Inc.*, 405 So. 2d 440, 443 (Fla. 1st DCA 1981).

The district court, however, has taken *Regency Wood's* narrow holding well out of its proper context, and in so doing extended that decision to the warranty situation for which it is ill-suited. *Regency Wood* did not involve an action by an association related to the implied warranties of fitness defined in section 718.203. There was no issue and no debate by the court concerning the status of an association vis-a-vis unit owner warranties, or the effect, if any, of the tolling provision on those warranties. *Regency Wood* did not revive any expired causes of action.

Regency Wood was the classic situation where an association was proclaiming a right as the "real party in interest," to enforce maintenance and repair contracts between the developer and several companies. It is actually the Florida case most demonstrative of the intended effect of the tolling provision. *Regency Wood* was the typical

circumstance in which the developer-controlled association itself possessed a cause of action prior to turnover which, without the tolling effect of section 718.124, would likely not have been exercised.

Most importantly, *Regency Wood* did not involve the revival of any claim, let alone extinguished warranty claims such as were possessed by the Seawatch unit owners. When section 718.124 became law, "the [Regency Wood] association's cause of action was still viable." 405 So. 2d at 443. Thus, section 718.124 was not employed as the Association proposes here, to revive a stale cause of action or to establish a new cause of action for associations which was originally possessed by the unit owners individually and exclusively. It truly "tolled" the post-turnover association's limitations period for an action in which the association was the real party in interest, not a derivative stakeholder.

Regency Wood by no means negated the distinction between association and unit owners' causes of action. It confirmed and hewed specifically to the distinction made previously in *Avila* and *Century Village*. Nothing in the decision or its underlying facts connote an effort on the First District's part to opine that the unit owners' own accrued but expired claims were either effected or implicated by section 718.124's tolling properties.

7. Statutes of limitations run from discovery of a defect, and not from discovery of the defect's "cause."

Section 95.11(3)(c), Florida Statutes (1987), provides a four year period from the date a unit owner discovers an alleged defect in a condominium structure in which to commence suit against a manufacturer for breach of the statutory warranties allotted in

section 718.203(2). *See Almand Construction Co. v. Evans*, 547 So. 2d 626 (Fla. 1989); *Naranja Lakes Condominium No. Two, Inc. v. Rizzo*, 463 So. 2d 378 (Fla. 3d DCA 1985). The Association has admitted in its operative pleading that the unit owners discovered the alleged defects in Toppino's concrete not later than April 8, 1984. (R. 520, 523). The four year statute of limitations expired on April 8, 1988. The association's original complaint was not filed until May 13 of that year. Obviously, the action is time barred under section 95.11(3)(c).[15/]

The Third District did not reach this statute of limitations issue, basing its decision instead on a hypothesized direct and non-representational authority of the association to sue under section 718.124. Before the circuit and district courts, however, the Association had argued alternatively that there was no bar by this statute of limitations since the original complaint was filed within four years after the unit owners had discovered that *the cause* of the alleged defects in the concrete was its excessive chloride content. (R. 751, 754, 958).

The Association's argument on that point is untenable. No statute of limitations is tolled until the exact reason for alleged defects is revealed. Were that approach utilized, the statute of limitations would logically have to be tolled until such time as discovery for trial were concluded, or even until the case was over and a jury or judge made the determination that a particular cause underlay the alleged injury to the product!

15/ This argument assumes the worst case for Toppino -- that this limitation period applies and that the Association somehow escaped the more restrictive 3-year repose period of the warranty statute.

It is settled law that the discovery of an alleged defect -- not the cause of the defect -- suffices to place unit owners on reasonable notice of a possible cause of action. In *Almand*, the Court explained that

> the plaintiff . . . could not rely on a lack of knowledge of the specific cause of a defect to protect it from the running of section 95.11(3)(c) . . . [Plaintiffs'] knowledge of the settling of the house and resulting structural damage . . . was sufficient to put them on notice that they had, or might have had, a cause of action. This knowledge meets the discovery component of section 95.11(3)(c).

Almand, 547 So. 2d at 628. In *Naranja Lakes*, the same reasoning was applied to an association's suit to recover maintenance and repair expenses. 463 So. 2d at 379. Since, by their own admission the unit owners were on notice of alleged defects in the concrete more than four years prior to filing of the Association's original complaint, their cause of action is barred by section 95.11(3)(c).[16/]

16/ At various time in the trial and appellate proceedings, the Association has posed what it terms an "*ab initio*" theory of warranty breach, based on the allegation that the concrete was defective when supplied and, therefore, excused it from compliance either with the three-year warranty for claims or the more elongated limitations period running four years from the date of discovery of the alleged defects. This theory is not supported by any of the cases identified from time to time by the Association as supportive of it. *See, e.g., Creviston v. General Motors Corp.*, 225 So. 2d 331 (Fla. 1969) (general purpose of limitations period in personal injury actions is to prevent assertion of stale claims after aggrieved party is placed on notice of invasion of his legal rights). The Association's theory for excusing its failure to meet applicable repose and limitations periods would seem to be barred by its own pleading concession that it was on notice of the defects more than four years prior to filing suit. This attempt at contriving to avoid the expiration of its action would also render meaningless the term limitations identified in the warranty provision, by treating them as if they are simply not there.

Conclusion

It is anomalous that the Association's interpretation of section 718.124, which was accepted by the Third District, would revive dead claims of unit owners in the hands of their association, when nothing in the law allows unit owners to revive those same dead claims in their own names. The Association's interpretation effectively rewrites section 718.124 (or 718.203) to create substantive warranty rights in the common elements in favor of condominium associations, despite an absence of any language or legislative history to that effect. The Court can only preserve the balance of rights and obligations established by the legislature by limiting the warranty and tolling provisions to their plain language.

The court is respectfully requested to quash the decision of the Third District, and to direct reinstatement of the trial court's order dismissing the Association's Second Amended Complaint with prejudice.

Respectfully submitted,

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Appendices

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC., a Florida corporation, Appellant,

v.

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

No. 90–1890.

District Court of Appeal of Florida, Third District.

Nov. 3, 1992.

Rehearing Denied Jan. 29, 1993.

Condominium association brought class action suit as representative of unit owners against numerous defendants including developer, general contractor, concrete manufacturer and manufacturer of structural reinforcing system. The Circuit Court, Monroe County, J. Jefferson Overby, J., dismissed claims with prejudice. Defendant appealed. The District Court of Appeal, Ferguson, J., held that statute tolling period for condominium association to bring action until control of association was turned over from developer to unit owners extended period in which association might bring claims for breach of implied statutory warranties.

Reversed and remanded; question certified.

Limitation of Actions ⇐49(7), 70(1)

Statute tolling period for condominium association to bring action until control of association was turned over from developer to unit owners extended period in which association might assert claims for breach of statutory implied warranties as representative of unit owners against developer and others for damage to common elements in condominium buildings; tolling provision made no distinction between actions brought by association on its own behalf and those brought on behalf of unit owners. West's F.S.A. § 718.124.

Siegfried, Kipnis, Rivera, Lerner, De La Torre & Mocarski and H. Hugh McConnell, Coral Gables, for appellant.

Blackwell & Walker and Angela C. Flowers, Kubicki, Draper, Gallagher & McGrane, Miami, Beckmeyer & Mulick and Nicholas Mulick, Tavernier, Cabaniss, Burke & Wagner and Richard A. Solomon and Lynn Wagner, Orlando, for appellees.

Before HUBBART, NESBITT and FERGUSON, JJ.

FERGUSON, Judge.

Recognizing that this case presents a question of great public importance throughout the state, we certify the following question to the Supreme Court of Florida:

> Does section 718.124, Florida Statutes (1991), grant a condominium association an extended period of time in which it may assert a cause of action for damage to common elements in condominium buildings, beyond the time granted in section 718.203, Florida Statutes (1991), after unit owners have elected a majority of the members of the board of administration?

Seawatch at Marathon Condominium Association brought this class action as the representative of unit owners against numerous defendants including Turtle Kraals, Ltd., the developer, Monroe Construction Corp., the general contractor, Charley Toppino and Sons, Inc., the concrete manufacturer, and Epic Metals Corp., the manufacturer of the structural reinforcing system, seeking damages arising out of the construction of Seawatch Condominium. Seawatch alleged that the condominium is in a state of deterioration caused by the use of defective concrete and a defective metal decking system in the construction of the buildings. The defect allegedly manifested itself by the cracking of the concrete surfaces, cracking of ceramic tiles and the seepage of rust-stained water. In its claim for damages, the condominium association alleged substantial loss of structural integrity requiring vast repair work.[1]

Seawatch appeals the dismissal of all its claims, with prejudice, against each defendant. Three rulings of the trial court are raised as error by Seawatch: (1) the damage to the condominium buildings does not give rise to an action in tort; (2) neither Toppino nor Epic are subject to liability for violation of the building code; and (3) the claims for breach of statutory implied warranties under section 718.203, Florida Statutes (1991), are time-barred.

We affirm the court's rulings as to the tort claims and violation of building code based on our holding in the related case of *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons,* 588 So.2d 631 (Fla. 3d DCA 1991), *jurisdiction accepted,* 602 So.2d 533 (Fla.1992). We reverse the court's dismissal of the statutory implied warranty claims on statute of limitations grounds. The facts pertinent to the statute of limitations ruling are as follows.

Seawatch Condominium consists of three five-story buildings that were constructed between 1981 and 1983. Certificates of occupancy were issued for the three buildings on February 19, 1982, April 12, 1982, and April 8, 1983. Although the defects in the structure became apparent during the one-year interval following April 8, 1983, control of the condominium association remained in the hands of the developer until August 10, 1985, when control was turned over to the unit owners. On May 13, 1988, Seawatch at Marathon Condominium Association commenced this action on behalf of the unit owners. An amended complaint asserted claims for negligence, strict liability, breach of common-law and statutory warranties, and violation of the Florida Building Code, section 553.84, Florida Statutes (1991). After the trial court entered an order dismissing with prejudice all claims against Toppino, Monroe, and Epic, except the claims for breach of statutory

1. For the purpose of this appeal we must accept the well-pleaded allegations of the complaint of substantial defects in the entire condominium building which includes the individual units and the common elements. *N.E. at West Palm Beach, Inc. v. Horowitz,* 471 So.2d 570 (Fla. 3d DCA 1985).

implied warranties under section 718.203, Seawatch filed a second amended complaint repleading the section 718.203 claims and restating the claims against Turtle Kraals.

In moving for dismissal of the second amended complaint, the defendants raised, alternatively, two statute of limitations defenses: (1) the original complaint was filed more than four years after the unit owners discovered the alleged defects and was thus barred by the expiration of the four-year statute of limitations period in section 95.11(3)(c), Florida Statutes (1991); [2] or (2) that the original complaint was not filed within three years from the completion of construction of the condominium buildings and suit was, therefore, time barred under section 718.203(2)(a), Florida Statutes (1991).[3] The trial court dismissed with prejudice all remaining counts against Turtle Kraals, Monroe, Toppino, and Epic. The breach of statutory implied warranty claims against all defendants were dismissed on grounds of timeliness.[4]

In this appeal the condominium association challenges the dismissal of the section 718.203 claims on statute of limitations grounds. The court's ruling, according to Seawatch, disregarded section 718.124 of the Florida Condominium Act, chapter 718, Florida Statutes (1991), which provides a tolling period for actions brought by condominium associations. The statute defers the running of the limitations periods until control of the association is turned over from the developer to the unit owners. Section 718.124 provides:

> The statute of limitations for any actions in law or equity which a condominium association or a 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.

It is undisputed that the complaint of May 13, 1988, was filed less than three years after the unit owners assumed control of the condominium association. It would appear that the filing was within the limitations period of sections 95.11(3)(c) and 718.203(2)(a). Appellees argue, however, that the tolling provision of section 718.124 does not apply to actions brought by condominium associations in their capacity as class representatives of the unit owners, but instead applies only to those actions brought by condominium associations in their own right. We disagree with that restrictive interpretation of the statute.

Clearly, it was the intent of the legislature 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. From that indisputable intent, a reasonable construction of section 718.124 will not support the conclusion that the legislature intended to limit the period in which condominium associations could sue for construction defects to the same

2. Section 95.11(3)(c) provides in pertinent part:
(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 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.

3. Section 718.203(2)(a) provides:
(2) The contractor, and all subcontractors, suppliers, design professionals, architects, and engineers grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows:
(a) For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit.

4. The trial court did not specify in its order which of the two statute of limitations grounds the dismissal was based.

period in which the developer could have brought suit.

Originally, only the condominium developer had a cause of action, on a contract theory, against contractors for defective design and construction of a building. Experience taught that the developer's interest—in building, selling, and getting out—was not always the same as the longer-term interests of those who bought individual units in the condominium building. Section 718.124 was enacted, obviously, in response to that realization. In many instances, expiration of the period for bringing an action, as provided by both section 95.11(3)(c) and section 718.203(2), would have preceded the turnover from the developer to unit owners. In those cases, on the appellee's interpretation, section 718.124 is a nullity. We agree with the first district's different view:

> [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 over 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.

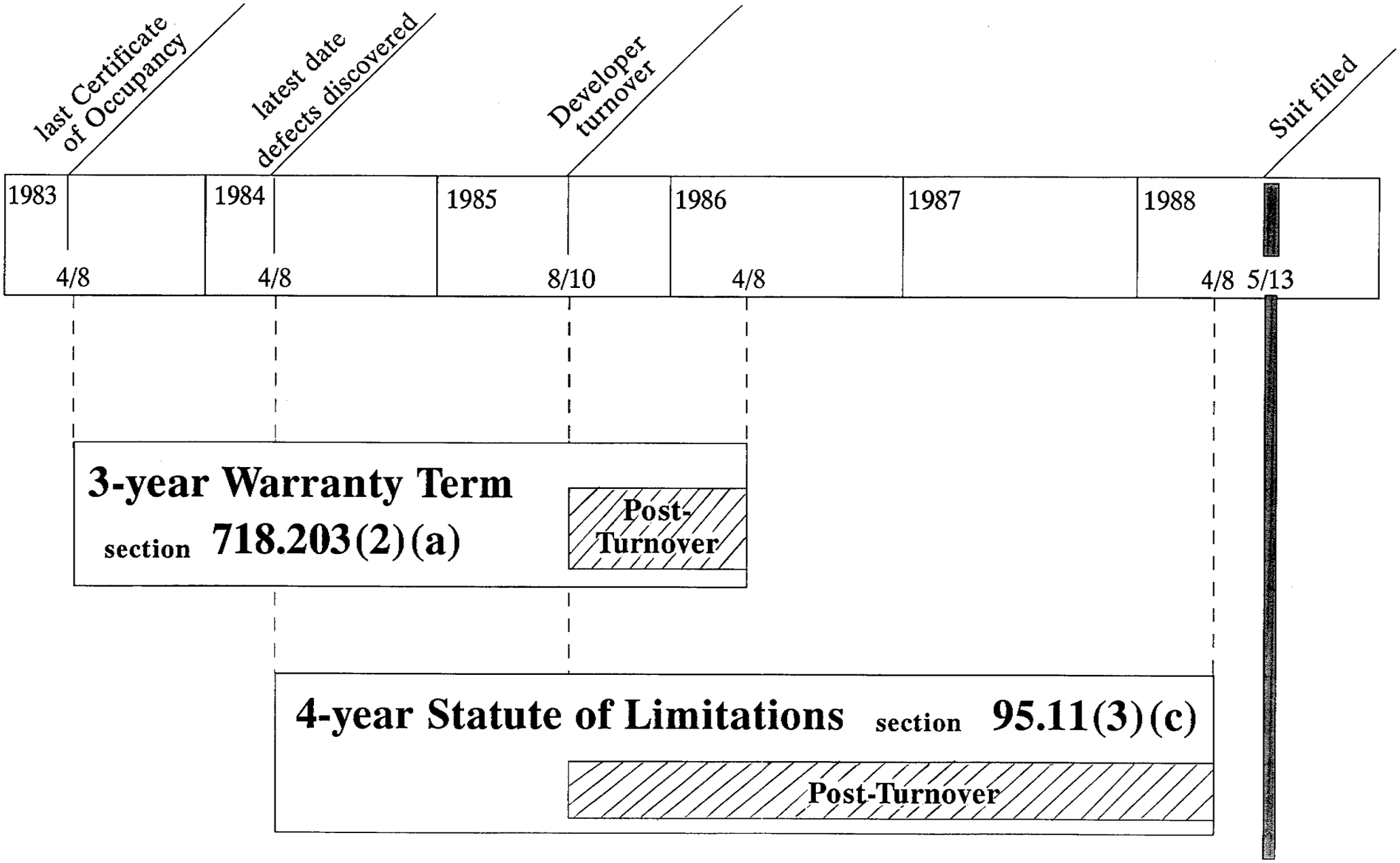
Regency Wood Condo., Inc. v. Bessent Hammack & Ruckman, Inc., 405 So.2d 440, 443 (Fla. 1st DCA 1981).

Reibel v. Rolling Green Condo. A, Inc., 311 So.2d 156 (Fla. 3d DCA 1975), relied on by appellees, does not hold that the condominium association is without standing to represent the interests of unit owners. Neither does this case turn on the absence of substantive contract rights in the condominium association. Section 718.124 gives a statutory right to a condominium association, as a successor to the condominium developer and as representative of unit owners, to proceed against contractors and engineers in its own name.

Section 718.124, which is terse and unambiguous, makes no distinction between actions brought by the association on its own behalf and those brought on behalf of the unit owners. Florida Rule of Civil Procedure 1.221 expressly provides for class action suits by condominium associations for matters of common interest "including, but not limited to, the common elements; the roof and structural components of the building or other improvements." *See Avila South Condo. Ass'n, Inc. v. Kappa Corp.*, 347 So.2d 599 (Fla. 1976). Moreover, the common interest provision of the rule has been interpreted to permit a class action by the association for a construction defect located physically within a unit, rather than in the common elements, if the defect is prevalent throughout the building. Alan Becker & Robert Manne, *Construction Litigation*, in Florida Condominium Law & Practice § 15.3, at 715–716 (The Florida Bar CLE 1987).

The condominium association's statutory right to bring this action, even though the developer's action would have been time-barred, is not at all remarkable. And because a four-year limiting period still applies after unit owners have been elected to a majority of the board, the time for initiating the action is not open-ended.

Reversed and remanded for further consistent proceedings.


last Certificate of Occupancy
latest date defects discovered
Developer turnover
Suit filed
1983
1984
1985
1986
1987
1988
4/8
4/8
8/10
4/8
4/8
5/13
3-year Warranty Term
section 718.203(2)(a)
Post-Turnover
4-year Statute of Limitations section 95.11(3)(c)
Post-Turnover