SUPREME COURT OF THE STATE OF FLORIDA
500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927

OCEAN TRAIL UNIT OWNERS ASSOCIATION, INC.

Petitioners,

v.

STATES MEAD AND WILLIAM BRISTER, as representatives of a class of owners at the Ocean Trail Condominiums,

Respondents.
_____/

CASE NO. 82,083
4TH DCA CASE NO. 91-0350

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT--CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

RESPONDENTS' ANSWER BRIEF

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PREFACE

This case comes to this Court on certification by the Fourth District Court of Appeal of Florida to resolve a question certified to be of great public importance. The Petitioner, Ocean Trail Unit Owners Association, Inc. was the Defendant/Counterplaintiff at trial and the Appellee before the Fourth District Court of Appeals. Ocean Trail Unit Owners Association, Inc. will be referred to herein as the **Petitioner, Association** or **Ocean Trail**. Respondents, States Mead and William Brister, were the Plaintiffs/Counterdefendants before the trial court and representatives of a certified class of unit owners. Mead and Brister were the Appellants before the Fourth District Court of Appeal and will be referred to herein as **Mead**. The trial court entered a final judgment on a complaint for declaratory relief relative to a special assessment levied by a condominium association's use of funds to pay expenses which **Mead** asserted were not common expenses. The trial court, the Honorable Matthew W. Stevenson, Circuit Judge, presiding, entered final judgment on December 6, 1990 in favor of **Ocean Trail** and against **Mead**.

The Fourth District Court of Appeal reversed and certified the following question to this Court as a matter of great public importance:

> **WHETHER A CONDOMINIUM ASSOCIATION CAN ENFORCE A SPECIAL ASSESSMENT IMPOSED TO PAY JUDGMENTS, ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH A LAWSUIT BROUGHT BY UNIT OWNERS AGAINST THE ASSOCIATION IN WHICH THE ASSOCIATION'S PURCHASE OF REAL PROPERTY WAS INVALIDATED AS AN UNAUTHORIZED ACT AND SUBSEQUENTLY RESCINDED.**

In this brief, the following symbols will be used:

IB - Initial Brief of Ocean Trail in Supreme Court

A - Appendix to Respondents' Brief

AB -Petitioner's Answer Brief before the Fourth DCA

R - Record on Appeal

STATEMENT OF THE FACTS AND OF THE CASE

Mead is generally in agreement with the statement of the case and facts provided by Petitioner in its initial brief. In fact counsel for both sides stipulated to a majority of the facts at trial and accordingly, the 1-day non-jury trial contained substantial legal argument by the parties.

This action was brought by States Mead and William Brister as class representatives **(hereinafter Mead)** under an amended complaint for a declaratory judgment to determine the enforceability of the $500.00 assessment and the propriety of a settlement made by the Board of Directors with Ocean Trail's insurance company. (R-195-226,238). In addition, **Mead** asked the Court to address the Association's use of the $275,000.00 insurance settlement fund. Id. The Petitioner filed a class action counterclaim seeking damages and foreclosure of liens against the members of the class based upon their failure to pay the $500.00 special assessment. (R-51-161).

Before this action began, **Ocean Trail** had entered into a contract to purchase a parcel of vacant land lying adjacent to the Ocean Trail property ("the Campeau property"). (R-533). The attempted purchase of the Campeau property by the condominium Association was not unanimously approved by the unit owners. Accordingly, some unit owners brought suit to declare the purchase assessment of $1,500.00 invalid and to rescind the purchase agreement. Id. That case concluded with the Circuit Court entering a final judgment determining the purchase of the Campeau property to be unauthorized under the Condominium Act, the Ocean Trail Declaration of Condominium, and its bylaws, and ordering rescission of the contract with Campeau. Id. This judgment was affirmed on appeal. Ocean Trail Unit Owners Association, Inc. v. Levy, 489 So.2d 103 (Fla. 4th DCA 1986).

Subsequently, an attorney fee judgment in favor of John Avery, the attorney

who represented the unit owners who challenged the purchase special assessment, was entered for $194,079.37. (R-534). In addition, unit owners who originally paid the purchase special assessment began suing and obtaining judgments for recovery of the purchase special assessment which had been levied to fund the purchase. Id.

In order to pay the attorney fee judgment in favor of John Avery and the judgments being rendered from time to time in favor of unit owners for recovery of the purchase special assessment, Ocean Trail assessed each of its unit owners $500.00. (R-534-5,555-6). That assessment was the subject of this lawsuit.

In addition, Ocean Trail made a claim on an errors and omissions insurance policy. (R-535,557-8). Although the limits of insurance were $1 million the claim was settled by payment from the insurance company to Ocean Trail in the amount of $275,000.00. Id. The proceeds of the insurance settlement were used first to pay Becker, Poliakoff & Streitfield, P.A., the law firm representing Ocean Trail, attorney's fees of $175,000.00 which were incurred to pursue the rescission action on behalf of the unit owners who had paid the original special assessment. (R-558). The remaining $100,000.00 was disbursed to unit owners who had paid the original purchase assessment, themselves. Id.

The case proceeded to trial before the court sitting without a jury on October 31, 1990. The issues presented for determination by the Court were stipulated to be the following:

1. Whether the special assessment of $500.00 per unit to pay judgments which had been, and were anticipated to be, rendered against Ocean Trail and which arose from the previous purchase of the Campeau property [were] valid.

2. Whether Ocean Trail breached a fiduciary duty to its members by entering into the settlement agreement with Standard Fire Insurance Company.

3. Whether Ocean Trail's disbursement of the funds received from the insurance settlement was an

improper distribution of common surplus.

(R-537).

Following the one day non-jury trial the trial judge entered a final judgment ruling against the Respondents on all three issues (R-555) and upon the denial of the Respondents' motion for rehearing an appeal was perfected to the Fourth District Court of Appeal. As the Petitioner notes, **Mead** did not challenge the trial court's ruling with regard to the second issue presented at trial. **Mead** did, however, ask the District Court of Appeal to review the trial court's decision with regard to the first and third issues presented to the trial court, i.e. whether the special assessment was valid and whether the use of the insurance settlement funds was proper.

Upon full review the Fourth District Court of Appeal reversed the trial court and held that the $500.00 special assessment was unenforceable and that the Association's use of the $275,000.00 insurance fund was an improper disbursement of common surplus. (Opinion pg. 1-6, A-12-17). Contrary to the Petitioner's claims, the Fourth District Court of Appeal did not address the second issue which had not been appealed, i.e., the court did not consider whether Ocean Trail breached its fiduciary duty to the members by entering into the settlement agreement with Standard Fire Insurance Company. The District Court of Appeal noted that it found no basis upon which the trial court could have approved the settlement but the case was not remanded for further proceedings on that issue.

On subsequent motion by the Petitioner the District Court of Appeal certified the following question to this Court as one of great public importance:

> **Whether a condominium association can enforce a special assessment imposed to pay judgments, attorney's fees and costs incurred in connection with a lawsuit brought by unit owners against the association in which the association's purchase of real property was invalidated as an unauthorized act and subsequently rescinded.**

(A-10-11).

By order dated July 21, 1993 this Court postponed its decision on the question of jurisdiction and directed the parties to brief the issues.

SUMMARY OF THE ARGUMENT

The question certified to this Court by the Fourth District Court of Appeal as a matter of great public importance was resolved by the legislature in 1992 when it amended §718.303(1), Fla. Stat., to provide that a condominium association may not fund its unsuccessful litigation against unit owners by assessing those unit owners to pay a share of the costs and attorney's fees incurred. The opinion of the District Court of Appeal is in harmony with the statute and no interdistrict conflict exists. Accordingly, this Court should decline to accept jurisdiction.

The Fourth District Court of Appeal correctly determined that a condominium association may not impose a special assessment to pay the consequences of an unauthorized act by the board of directors. A special assessment must be levied for a proper purpose and for the benefit of the condominium. The underlying assessment was not made for a proper purpose as it was intended to pay for the unauthorized acts of the board of directors. In addition, the assessment at issue was not levied to pay for the obligations of the association qua a condominium association. Rather, the assessment challenged by **Mead** was levied to pay expenses properly owed by the association in its capacity as the trustee of a resulting trust. As such, the expenses did not benefit the condominium and could not be paid by the use of condominium funds.

Similarly the proceeds of an insurance policy purchased by and belonging to the association cannot be appropriated for payment of costs, expenses, or debts that did not benefit the condominium. Accordingly, the use of the insurance proceeds to benefit a select group of unit owners who were beneficiaries under the resulting trust was improper. **Mead**, therefore, requests that this Court affirm the opinion

of the Fourth District Court of Appeal if jurisdiction is accepted.

ARGUMENT

POINT I

THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL AS A QUESTION OF GREAT PUBLIC IMPORTANCE SHOULD BE ANSWERED IN THE NEGATIVE BECAUSE THE DISTRICT COURT CORRECTLY DETERMINED THAT A CONDOMINIUM ASSOCIATION CANNOT COMPEL UNIT OWNERS TO PAY FOR UNAUTHORIZED ACTIONS OF THE DIRECTORS WHICH BENEFIT ONLY A SELECT GROUP OF UNIT OWNERS BY SPECIAL ASSESSMENT.

This appeal involves the liability of condominium unit owners for the unauthorized excesses of a board of directors. More specifically this Court is asked to determine if a condominium association may fund unsuccessful litigation against unit owners by assessing the prevailing unit owners. The Fourth District Court of Appeal answered the question in the negative but certified to this Court as a matter of great public importance the following question:

> Whether a condominium association can enforce a special assessment imposed to pay judgments, attorney's fees and costs incurred in connection with a lawsuit brought by unit owners against the association in which the association's purchase of real property was invalidated as an unauthorized act and subsequently rescinded.

(A-10-11).

A. THIS COURT SHOULD DENY CERTIORARI ON THE QUESTION PRESENTED BECAUSE THE LEGISLATURE HAS RESOLVED THE ISSUE.

By order dated July 21, 1993 this Court postponed its decision on jurisdiction in this case. Section 718.303(1), Fla. Stat., should be dispositive on the issue of whether this Court should accept jurisdiction on the question certified by the District Court of Appeal to be of great public importance. That section provides:

> "[a] unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his reasonable

> attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his share of assessments levied by the association to fund its expenses of the litigation."

§718.303(1), Fla. Stat.

This, legislature has already resolved the issue which the Fourth District Court of Appeal has certified to this Court as one of great public importance. The legislature has determined that condominium associations may not fund their unsuccessful battles with unit owners from the pockets of the prevailing unit owners. Because the legislature has answered the question which the Fourth District Court of Appeal certified to be of great public importance, and since the opinion of the District Court of Appeal is in harmony with the legislature and no interdistrict conflict exists, jurisdiction should be denied.

B. THE DISTRICT COURT OF APPEAL PROPERLY APPLIED THE LAW TO THE FACTS FOUND BY THE TRIAL COURT AND STIPULATED TO BY THE PARTIES.

The trial court entered final judgment against Respondents determining that the special assessment levied against the objecting unit owners to pay for judgments arising out of the unauthorized actions of the board of directors was enforceable stating:

> The reason why the judgments were entered is not determinative in this case. . . A unit owners duty to pay assessments, including special assessments, is conditioned solely on the basis of holding title to a condominium unit. Florida Statutes, Section 718.116(1)(2)(1987). See, Abbey Park Homeowners Association v. Bowen, 508 So.2d 554 (Fla. 4th DCA 1987).

(R-557,A-3).

Upon review the Fourth District Court of Appeal reversed the trial court's final judgment stating:

> We reject the idea that a board of directors of a condominium association may properly force unit owners to bear the direct costs of an

> unauthorized act by the directors of the association, simply because the declaration and corporate articles and bylaws generally empower the association to make assessments to pay the common expenses. In so doing we affirm the principle that assessments to pay expenses are proper only when the expenses themselves are incurred in carrying out the authorized powers of the association.

(Opinion pg. 1, A-12).

At the outset the Petitioner argues that the District Court of Appeal altered the material facts of the case as determined by the trial court and by stipulation of the parties. (IB-15-17). Petitioner further claims that the District Court of Appeal based its decision on the "altered" facts. (IB-15). These arguments are without merit. For instance, Petitioner argues that the District Court of Appeal misunderstood the purpose of the $500.00 assessment. (IB-15-16). The District Court of Appeal stated that the $500.00 assessment was made to pay some unpaid unit owners who contributed to the original purchase and other costs. (Opinion pg. 2, A-13). The trial court found that the $500.00 special assessment was used to repay the unpaid unit owners who contributed to the purchase and to pay the attorney's fee judgment rendered in favor of attorney John Avery, Jr., the attorney who originally brought suit on behalf of the unit owners to contest the purchase assessment. (R-555-6). The District Court of Appeal characterized the attorney fee judgment as a cost or expense "directly related to the unauthorized purchase." (Opinion pg. 2, A-13). This fact was stipulated by the parties and no error can be found in such a statement. Id.

The Petitioner also complains that the District Court of Appeal's treatment of the $100,000.00 remaining from the insurance settlement was contrary to the findings by the trial court. (IB-16-17). Any misunderstanding by the District Court of Appeal with regard to the Petitioners use of that $100,000.00 is immaterial; and, even if material was invited by Petitioner. In its answer brief before the District

Court of Appeal Petitioner stated, "the trial court also found that the settlement monies were used to pay debts of the Association, including a partial payment of 20% of the debt owed to each person, to everyone who had paid all or part of the purchase assessment." (AB-9). Now to argue before this Court that Petitioner was unfairly treated by the District Court of Appeal is disingenuous. The District Court's treatment of the $100,000.00 was consistent with the Petitioner's Statement of the Facts and Case before that court as presented by the Petitioner, itself. See, State Farm Mutual Automobile Insurance Co. v. Gage, 603 So.2d 669 (Fla. 4th DCA 1992) and Whitney v. Brown, 588 So.2d 681 (Fla. 3d DCA 1991).

The undisputed material facts before the trial court to which Petitioner stipulated and upon which the District Court of Appeal relied are as follows:

1. **Ocean Trail Unit Owner's Association, Inc. (Ocean Trail)** engaged in an unauthorized act when it attempted to purchase the Campeau Property.

2. As a result of that unauthorized act **Ocean Trail** obtained a settlement with its insurance company for $275,000.00.

3. **Ocean Trail** used the $275,000.00 insurance settlement to pay $175,000.00 to its attorneys, Becker & Poliakoff, in order to pursue an action to rescind the land purchase for the benefit of a select number of unit owners.

4. The remaining $100,000.00 of **Ocean Trail's** settlement fund was used to refund money to selected individual unit owners rather than being distributed to all unit owners or made part of common funds of the Association.

5. The $500.00 special assessment which was the subject of this lawsuit was the direct result of the illegal Campeau purchase.

The Petitioner has conceded that the $500.00 assessment was levied to pay costs directly related to the improper and unauthorized attempt to purchase the Campeau property. (IB-6). The $500.00 assessment was used to pay an attorney fee

judgment entered against the Association in favor of the attorney who successfully challenged the original assessment for the purchase and to refund money to people who paid the original purchase assessment. Id. The District Court of Appeal correctly "viewed this $500.00 assessment as a direct product of the first unauthorized act of the Association's directors." (Opinion page 3, A-14).

C. THE ASSOCIATION HAS NO POWER TO ASSESS ITS MEMBERS TO PAY THE EXPENSES INCURRED IN UNDERTAKING UNAUTHORIZED ACTS.

The District Court of Appeal correctly held that the Association cannot compel its members to pay for unauthorized acts by the board of directors by special assessment. This holding is correct because, as the District Court of Appeal stated, "[d]irectors cannot at once be unauthorized to do some act and at the same time authorized to impose assessments to pay for the consequences of the unauthorized act." (Opinion page 3, A-14). The District Court of Appeal opinion is in accord with §718.303(1), Fla. Stat. which provides that condominium associations may not fund litigation against unit owners by assessing the prevailing unit owners.

Petitioner argues that it is legally bound by the unauthorized actions of its board of directors to third parties under traditional principles of agency law. (IB-18). Therefore, Petitioner claims it is entitled to specially assess its members to raise the funds necessary to discharge the liability arising out of the unauthorized act. Never before in these proceedings, at the either trial or appellate levels, has Ocean Trail argued that agency law would support the special assessment. Ocean Trail cannot raise such issues for the first time in this Court. Dober v. Worrell, 401 So.2d 1322, 1323-4 (Fla. 1981), U.S. Fidelity & Guaranty Co. v. Sellers, 197 So.2d 832, 833 (Fla. 1st DCA 1967) reh'g. den., cert. den., 204 So.2d 211 (Fla. 1967), see also, Grabek v. Worldwide Specialty Merchandise, Inc., 611 So.2d 590 (Fla. 4th DCA 1993) and Estovir Construction Corp. v. La Pradera, Inc., 598 So.2d 265 (Fla. 3rd

DCA 1992). Petitioner's liability to third parties was not an issue in this case. This case involved the liability of unit owners to the Association to pay for the consequences of the board's unauthorized acts.

Even if Petitioner had timely argued apparent agency as a basis for enforcing the special assessment, its reasoning is fundamentally flawed. The purchase of the Campeau property was not unanimously approved by the unit owners and Ocean Trail was, therefore, unauthorized to complete the purchase on behalf of the Association as a matter of law.[1] When a condominium association exceeds its authority in purchasing real property, the association acquires only the bare legal title under a resulting trust for the benefit of the unit owners who contributed to the purchase. Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674 (Fla. 1985). Accordingly, under the holding of Towerhouse, Ocean Trail acquired only the bare legal title to the Campeau property with the equitable title vesting in the unit owners who actually paid the special assessment levied for the purchase of the property. The objecting unit owners never obtained an interest in the property and could not be held liable for the costs incurred in purchasing or protecting the property or in suing to rescind the contract to purchase the property. The objecting unit owners cannot be compelled to pay any assessment which will be used to benefit only the class of unit owners who hold an equitable interest in the Campeau property.

The liability of the Association to third parties resulting from the unauthorized act, must be satisfied by the class of unit owners who were benefitted by the purchase and cannot be apportioned to the objecting unit owners who have acquired no interest in the property. Towerhouse v. Millman, supra. Petitioner's reasoning would indirectly compel the objecting unit owners to pay expenses for the purchase

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[1] This is precisely the holding of the trial court as affirmed by the Fourth District Court of Appeal in the prior case of Ocean Trail Unit Owners Association, Inc. v. Levy, 489 So.2d 103 (Fla. 4th DCA 1986).

and preservation of the property for which they could not be held directly responsible. In other words, the monies obtained by assessing the objecting unit owners would be used to benefit a smaller class of unit owners by protecting rights in real property equitably owned only by the contributing individuals. Id. Therefore, even if the Association may have had apparent authority to enter into the agreement with Campeau, it did not have the authority to assess objecting unit owners to pay the purchase price or the costs of preserving the property or rescinding the contract. Those expenses must be borne solely by the equitable owners of the property.

The issue of Ocean Trail's liability to third parties based upon apparent authority need not be reached in this case because the rights of the third party (Campeau) were never an issue in this case and, in fact, already have been addressed by the court. Ocean Trail Unit Owners Association, Inc. v. Levy, 489 So.2d 103 (Fla. 4th DCA 1986). Campeau was not a party in this action and Ocean Trail is without standing to raise Campeau's rights herein. See, Higdon v. Metropolitan Dade County, 446 So.2d 203 (Fla. 3d DCA 1984). Further, this case did not involve the Association's power to acquire real property. **Mead** concedes the Association has such power. The limits on the power have already been defined and were never an issue in this case. See, Ocean Trail Unit Owners Association, Inc. v. Levy, supra.

The District Court of Appeal determined that the Association may not assess the entire membership to pay expenses legally owed by less than all of the members. This proposition is neither absurd nor inequitable as argued by Petitioner; to the contrary, the result the Association urges, which would allow some unit owners to profit at the expense of their neighbors, is, itself, repugnant to equitable notions.

The unit owners who objected to the purchase of the Campeau property cannot

be held liable for repayment to those who contributed nor can they be forced through the power of special assessment to pay the costs of the purchase or protection of the Campeau property.[2] Furthermore, the Association cannot use the proceeds of an insurance policy purchased by the Association for the benefit of all of the unit owners to pay the debts and obligations of the owners who purchased the Campeau property. Such a preferential use of common property violates the dictates of §718.116(9)(a), Fla. Stat., (1991), which, as the District Court of Appeal noted, "provides that no unit owner may be excused from paying his share of common expenses unless all unit owners are likewise proportionately excused from payment." A refund of common property to some but not all unit owners is a clear violation of this statute. (Opinion, page 5, A-16). In addition, the District Court of Appeal noted that the "selectivity in reimbursement bears the added mischief of effectively making all owners bear an expense for some." (Opinion, page 5, Footnote 1, A-16).

The District Court of Appeal correctly declined to distinguish this case from Rothenberg v. Plymouth No. 5 Condominium Association, 511 So.2d 651 (Fla. 4th DCA 1987) reh'g. den., rev. den., 518 So.2d 1277(Fla. 1987) and Scudder v. Greenbrier C Condominium Association, Inc., 566 So.2d 359 (Fla. 4th DCA 1990). The association in Rothenberg, contracted with a third party to provide bus transportation service for unit owners to areas outside condominium property. Rothenberg v. Plymouth, supra at 651. The court held that the association did not have the authority to enter into the transportation contract and accordingly, could not assess the unit owners for those services. Id. at 652. In other words an assessment against the unit owners for an unauthorized purpose is not valid.

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[2] As noted above, the legislature amended §718.303(1) to provide that a unit owner who prevails against the Association in an action for damages or injunction may recover as damages, any assessments paid to fund the litigation against that unit owner.

Scudder also addressed an assessment for transportation service. Scudder v. Greenbrier, supra at 360. In Scudder, however, the Condominium Act had been amended to allow for the assessment for transportation services as a common expense provided the service had been available from the date the developer transferred control of the association. Id. If the service were not continuous the act did not provide for assessment as a common expense. Id at 361. A factual issue existed as to whether the transportation service was provided continuously since the association was turned over by the developer and accordingly, the case was reversed and remanded for further proceedings. Id. The court determined that, consistent with Rothenberg an assessment for an unauthorized purpose is unenforceable. Id.

These cases are analogous to the case sub judice because the $500.00 assessment was intended to pay expenses incurred by the Association in pursuing unauthorized acts, i.e., the rescission action and reimbursement of unit owners who contributed to the purchase assessment. Neither of these obligations were common expenses of the Association but were instead, obligations owed by the Association as trustee of the resulting trust which arose upon the unauthorized purchase of the Campeau property. Towerhouse v. Millman, supra. Because these expenses were not common expenses Rothenberg and Scudder controlled and mandated a reversal of the trial court.

In determining that the assessment was enforceable the trial court had relied upon Abbey Park Homeowners Association v. Bowen, 508 So.2d 554 (Fla. 4th DCA 1987). Abbey Park, however, is factually distinguishable from this case. The assessments in Abbey Park were regular monthly maintenance assessments; they were not special assessments. The unit owner, Bowen, did not assert that the purpose for which the assessments were levied was improper, but instead claimed that the association's failure to maintain the common elements properly relieved her

of any duty to pay the assessments. The court did not hold that a unit owner is obliged to pay an illegal assessment or one levied for an improper purpose, but merely that some breach of duty by the association does not relieve a unit owner of the duty to pay otherwise proper assessments. That is an unexceptionable proposition, but more importantly, it has nothing to do with the issues presented by this case.

At the time of the assessment by Ocean Trail the Condominium Act provided that "condominium expenses include the expenses of the operation, maintenance, repair or replacement of the common elements, costs carrying out the powers and duties of the association, and any other expense designated as a common expense by this chapter, the declaration, the documents creating the condominium or the bylaws." §718.115(1), Fla. Stat. It did not provide, as the trial court implicitly found, that an association may assess unit owners to pay any "debt" of the association. Indeed, neither the Rothenberg nor Scudder decisions contain any suggestion that the contracts for bus services did not create debts of the association and that was clearly not the basis of the ruling denying enforcement of the assessments. Although the bus service contracts may have created debts due to the bus service companies, they were not debts which the unit owners could be forced to pay by assessments levied for that purpose. Similarly, while judgments in favor of the unit owners who had paid the purchase assessment of $1,500.00 may have constituted debts of the Association they were not debts which the Association could lawfully compel its unit owners to satisfy. To rule otherwise would result in a legal reductio ad absurdum.

In 1985, the trial court in Levy ruled that the plaintiffs could not be compelled to pay the purchase assessment which was levied to pay for the acquisition of the Campeau property. In 1986, the District Court of Appeal affirmed that ruling.

Nevertheless, the trial court in this case ruled that **Mead** could be required to pay money to reimburse unit owners who paid the original illegal assessment. The effect, of course, is to require **Mead** to share in the selfsame assessment which the Fourth District Court of Appeal had already agreed he need not pay. The District Court of Appeal in this case, therefore, correctly ruled that the $500.00 special assessment was unenforceable because the purpose for which the association levied the assessment was improper.

The Petitioner makes the same arguments that failed to impress the District Court of Appeal, i.e., because the liability has been reduced to judgment the Association may now properly assess all unit owners. This argument was rejected by the District Court of Appeal because the result would invite fraud and overreaching by the directors and officers of condominium associations.

For instance, a determined board could legitimize an otherwise unauthorized act simply by permitting judgment to be entered against the association. The rule of law proposed by the Petitioner would bar inquiry into the reason why the judgment was entered and would require all unit owners to contribute by assessment to discharge the liability. Petitioner argues that the documents authorize assessment for judgments and accordingly, each unit owner was on notice of his potential liability therefor. Ocean Trail disregards the requirement that each assessment must be for a proper purpose and the use to which the assessment proceeds are applied must be an authorized use under the Condominium Act.

POINT II

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE ASSOCIATION'S USE OF THE $275,000.00 INSURANCE SETTLEMENT FUND CONSTITUTED AN IMPROPER DISBURSEMENT OF ASSOCIATION PROPERTY WHICH BENEFITTED SOME UNIT OWNERS AT THE EXPENSE OF OTHERS BECAUSE THE INSURANCE PROCEEDS BELONGED TO OCEAN TRAIL IN ITS CAPACITY AS A CONDOMINIUM ASSOCIATION AND NOT

IN ITS CAPACITY AS A TRUSTEE.

Petitioner argues that this Court may address issues not encompassed within the certified questions addressed to this Court by the District Court of Appeal. **Mead** does not quarrel with this general proposition. The extent to which this Court may review issues and questions, however, is limited to the extent that the issues were presented or the questions raised in the proceedings below. Dober v. Worrell, supra, U.S. Fidelity & Guaranty v. Sellers, supra, Grabek v. Worldwide Specialty Merchandise, Inc., supra and Estovir Construction Corp. v. La Pradera, Inc., supra. Based upon this established maxim of appellate review, this Court should affirm the opinion of the Fourth District Court of Appeal.

Petitioner argues that the District Court of Appeal wrongfully disapproved the $275,000.00 settlement with the insurance company since **Mead** stated in his initial brief that the trial court's determination with regard to the propriety of that settlement was not an issue for appeal. **Mead** did, however, appeal the trial court's ruling that the use of the $275,000.00 insurance settlement fund was proper. The District Court of Appeal did not determine that the settlement with the insurance company was improper. Rather, the District Court disapproved of the trial court's ruling that the manner of disbursement was proper. Petitioner has shown no reversible error in the District Court of Appeal's ruling. The District Court of Appeal did not purport to reverse the trial court on an issue not raised, and the District Court's certification of a separate issue should not provide Petitioner with an opportunity to boot strap its way into a re-litigation of the second point raised by **Mead** in his appeal to the Fourth District Court of Appeal.

POINT III

THE DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE USE OF THE $275,000.00 INSURANCE SETTLEMENT CONSTITUTED AN IMPROPER DISBURSEMENT OF COMMON PROPERTY.

As the Petitioner correctly notes the insurance policy belonged to the Association and was purchased with Association funds for the protection of the Association. (IB-36). This finding is especially important in this instance, because the Petitioner wore two hats and owed different duties to separate and distinct classes of individuals.

First, Petitioner represented all condominium unit owners pursuant to the Condominium Act, declaration of condominium and bylaws. In addition, Petitioner was trustee under the resulting trust which arose at the time of the unauthorized purchase of the Campeau property. Towerhouse v. Millman, supra. In this capacity Ocean Trail owed a duty to the contributing unit owners in whom the equitable title to the property vested as a matter of law. The individuals who contributed to the purchase of the Campeau property constituted a separate and distinct group from the group constituting the membership of the condominium association. The Association owed different duties to the different and distinct groups that it represented.

For instance, as trustee, Ocean Trail was required to protect and preserve the trust property and was presumably empowered to assess the equitable owners, if necessary, for payment of taxes and like expenses. Ocean Trail, as trustee, did expend money in protecting the property and incurred additional sums in suing on behalf of the trust beneficiaries to rescind the purchase agreement. On the other hand, Ocean Trail, as a condominium association owed a duty to its unit owners to protect and maintain condominium property and to account for the use of common property and special assessment funds. In this capacity Ocean Trail, as a condominium association, could not appropriate condominium property to the

exclusive use and benefit of the resulting trust. This, however, is precisely what the Petitioner did and precisely what the Fourth District Court of Appeal determined was wrongful. This breach of duty and commingling or misappropriation of assets is improper under the holding of the District Court of Appeal and under the Condominium Act.

The proceeds from the insurance policy settlement were condominium property owned by all unit owners and should not have been appropriated to pay attorney's fees incurred by the resulting trust to rescind the contract for purchase. If the purchasers of the Campeau property desired to rescind their contract they were obligated to fund that action with their own money. In addition, the $100,000.00 remaining from the insurance settlement after paying Becker, Poliakoff & Streitfield, P.A. $175,000.00 in attorney's fees to rescind the contract, constituted common property which could not only be disbursed to unit owners proportionally. See, §718.115(3), Fla. Stat.

The Condominium Act defines an assessment as a "share of the funds which are required for the payment of common expenses which from time to time is assessed against the unit owner." §718.103(1), Fla. Stat. A special assessment is "any assessment levied against unit owners other than the assessment required by a budget adopted annually." §718.103(21), Fla. Stat. Accordingly, a "special assessment" is still an "assessment" and the board of directors is still subject to the restrictions placed upon an association in levying an assessment, i.e. it can only be made to pay for common expenses. The Act further defines the term common expenses to mean "all expenses and assessments which are properly incurred by the association for the condominium." (emphasis added) §718.103(8), Fla. Stat. Accordingly, any assessment must be levied to pay a properly incurred common expense for the benefit of the condominium. §718.115(1), Fla. Stat. provides that

"[c]ommon expenses include the expenses of operation, maintenance, repair or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this chapter, the declaration, the documents creating the condominium, or the bylaws." Id.

An analysis of the definitions of the terms assessment, common expenses, and special assessment, under the Condominium Act compels the conclusion that an assessment is only enforceable if it is incurred for a proper purpose. This is precisely what the District Court of Appeal held in reversing the trial court. Furthermore, in order to be proper the expense must be incurred in carrying out some function of the association which is authorized by the Condominium Act, the declaration of condominium or the bylaws. Nothing in the Condominium Act, the declaration or the bylaws provides a vehicle for assessment for improperly incurred expenses. Accordingly, the District Court of Appeal correctly held that the expenses incurred in undertaking the assessment for purchase of the Campeau property and for rectifying the problems created thereby were not common expenses nor were they properly incurred.

The expenses incurred in the rescission action were not common expenses for the same reason. That is, they were not properly incurred by the Association for the condominium. Instead, these expenses were incurred on behalf of the resulting trust. The Association's desire to repay the wrongful assessment levied for the purchase of the Campeau property is also not a common expense. The repayment to the contributing unit owners is not a proper expense by the Association for the condominium; rather, it constituted an unlawful disposition of common surplus.

Common surplus is defined by the Condominium Act as "the excess of all receipts of the association collected on behalf of a condominium (including, but not

limited to, assessments, rents, profits, and revenues on account of the common elements) over the common expenses. §718.103(8), Fla. Stat. Clearly, the proceeds of the Association owned insurance policy constituted a receipt of the Association collected on behalf of the condominium and accordingly, any excess became common surplus which could only be returned to the unit owners on a pro rata basis. See, §718.115(3), Fla. Stat. The use of the insurance proceeds to pay expenses incurred by the trust for rescission of its contract to purchase the Campeau property and to repay contributing unit owners in the purchase assessment were illegal under the Condominium Act.

The Association wrongfully used the $100,000.00 to repay unit owners who contributed to the purchase of the Campeau property. Any damages which these unit owners sustained by virtue of their contribution to the purchase assessment must be paid from trust property which consisted of the Campeau property and any funds which the trust generated by assessing the beneficiaries. To use the condominium association funds for this purpose is to indirectly compel the objecting unit owners to contribute indirectly to the purchase to which they had objected and for which they could not directly be made to pay.

CONCLUSION

As the foregoing argument demonstrates, the question certified by the District Court of Appeal to be of great public importance has been resolved by the legislature through the amendment to §718.303(1), Fla. Stat., and, therefore, the question no longer even exists. With no question to form a proper basis for this Court's exercise of certiorari jurisdiction, the Respondents respectfully request this Court to deny the Petition by refusing to accept jurisdiction.

If this Court accepts jurisdiction, the decision of the Fourth District Court of Appeal must nevertheless be affirmed because the $500.00 special assessment under

consideration was unauthorized and improper since the purpose for which the funds were raised was not a common expense of the Association. For the same reason it was improper to use the insurance settlement funds belonging to the Association for the payment of expenses which were not common expenses. Accordingly, the Fourth District Court of Appeals opinion should be affirmed and the case remanded to the trial court with instructions to conduct such further proceedings as are consistent with the decision of the Fourth District Court of Appeal as may be appropriate.

Respectfully submitted,

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By: _____
David L. Gorman
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and

By: _____
Peter S. Van Keuren
Fla. Bar No.:816401

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Daniel S. Rosenbaum, Esquire, Becker & Poliakoff, P.A., Reflections Building, 7th Floor, 450 Australian Avenue South, West Palm Beach, FL 33401, this 12th day of November, 1993.

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By: David L. Gorman
David L. Gorman
Fla. Bar No.:222453

SUPREME COURT OF THE STATE OF FLORIDA
500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927

OCEAN TRAIL UNIT OWNERS ASSOCIATION, INC.

Petitioners,

v.

STATES MEAD AND WILLIAM BRISTER, as representatives of a class of owners at the Ocean Trail Condominiums,

Respondents.
_____/

CASE NO. 82,083
4TH DCA CASE NO. 91-0350

APPENDIX TO RESPONDENTS' ANSWER BRIEF ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT--CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

SUBMITTED BY:

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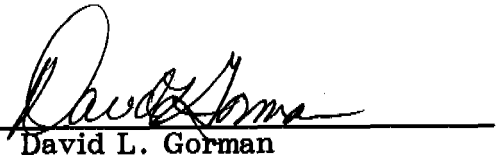
By: 
David L. Gorman
Fla. Bar No. 222453

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. CL 88-5502 AH

STATES MEAD and WILLIAM BRISTER, as representatives of a class of unit owners at the Ocean Trail Condominiums,

Plaintiffs,

v.

OCEAN TRAIL UNIT OWNERS ASSOCIATION, INC.,

Defendant.
_____/

FINAL JUDGMENT

THIS MATTER came on for trial before the Court, sitting without a jury, on October 31, 1990. Both sides were present, represented by their respective counsel, and presented evidence and legal arguments to the Court. Based upon the evidence received and the arguments of counsel, the Court makes the following findings:

The first issue presented by this case is whether the $500.00 special assessment which was levied on March 28, 1988, by the Board of Directors was proper. The Plaintiffs contend that it was not because the uses to which the funds were to be put were not for the payment of "common expenses". The Defendants, on the other hand, contend that it constituted a valid exercise of the powers granted to the Board of Directors pursuant to the Declaration of Condominium, the Articles of Incorporation of the Ocean Trail Unit Owners Association, and its By-Laws. All sides agree that the $500.00 special assessment was the direct result of a prior Board's decision to proceed with the Campeau purchase and that the funds were used exclusively to pay the attorney's fees judgment which was rendered in favor of attorney John Avery for successfully opposing that purchase and in order to pay judgments which were

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rendered in favor of unit owners who had sued to recover the original assessment of approximately $1,500.00 which they had paid. The Association urges that the assessment was proper because the judgments represent "debts" of the Association and because the Board of Directors is charged with the obligation to satisfy the Association's debts. The Plaintiffs counter, however, that the issue is not whether the judgments constituted debts of the Association but rather whether they constituted debts which the individual unit owners could be forced to pay.

At the time the $500.00 special assessment was levied Ocean Trail was pursuing a claim for rescission against Campeau Corporation to return the property to Campeau and to recover all amounts paid to Campeau for the purchase. The monies recovered from Campeau were intended to be, and were, returned to the persons who had paid the purchase assessment. Ocean Trail's financial situation in March, 1988 was critical, and it reasonably believed that a special assessment was necessary to pay the judgments and protect its common properties and facilities from execution and levy.

The Declarations of Condominium for Ocean Trail Condominiums I, II, III, IV and V and Ocean Trail's Articles of Incorporation and By-Laws authorize the levy of an assessment to pay judgments, as well as other debts of the corporation. Pursuant thereto the payment of judgments is a proper "common expense". See also, Section 718.115, Florida Statutes. Section 6.5 of the Declarations of Condominium provides for the authority to pay liens against Association property. A judgment is a lien on property. See, Steinbrecher v. Cannon, 501 So.2d 659 (Fla. 1st DCA 1987) and Dade Federal Savings and Loan Association v. Miami Title and Abstract Division of American Title Insurance Company, 217 So.2d 873 (Fla. 3d DCA 1969).

The Articles of Incorporation for Ocean Trail, Article III, Section 3.2(a), provides that the powers of Ocean Trail shall include the power to "... make and collect assessments

against members as unit owners to defray the cost expenses and losses of the Association...." Article VI, Section 4(a) of Ocean Trail By-Laws provides that "common expenses" of Ocean Trail shall include "... any other expenses designed as common expenses from time to time by the Board of Directors of the Association...."

The reason why the judgments were entered is not determinative in this case. A unit owner's duty to pay an assessment is not conditioned on the actions of or failure to act by a condominium association, or relieved by a breach by the condominium association. The duty to pay assessments is not a dependent covenant. A unit owner's duty to pay assessments, including special assessments, is conditioned solely on the basis of holding title to a condominium unit. Florida Statutes, Section 718.116(1)(a) (1987). See, Abbey Park Homeowners Association v. Bowen, 508 So.2d 554 (Fla. 4th DCA 1987).

The second issue presented by the Amended Complaint is whether or not the Board of Directors breached its fiduciary duties in making a settlement of the Association's claim against its insurance carier for $275,000.00. The Plaintiffs' evidence showed that the policy limits were $1,000,000.00. The Defendant, on the other hand, urges that the settlement was a proper exercise of the "business judgment" of the Board of Directors, based upon the advice of counsel, and is, therefore, protected pursuant to Florida Statutes, Section 607.0830(2)(b).

The business judgment rule, as set forth in Florida Statutes, Section 607.0830 (1)(a)-(c), as amended, governs here. Pursuant thereto, management of corporate business is vested in the directors of the corporation, who have wide discretion in the performance of their duties. Thus, a court will not attempt to pass upon questions of mere business expediency or mere exercise of business judgment, which is vested by law in the governing body of the corporation. Schein v. Caesar's World, Inc., 491 F.2d 17 (5th Cir. 1974), cert. denied, 419 U.S. 838, 95 S.Ct. 67, 42 L.Ed.2d 65 (1975); and

International Insurance Co. v. Johns, 874 F.2d 1447 (11th Cir. 1989). The decision to settle or compromise a claim is within the sound discretion of the board members. Citizens National Bank of St. Petersburg v. Peters, 175 So.2d 54; and Caesar's World, supra. Absent evidence of fraud, illegal conduct or receipt of improper benefit, which was not shown in this case, the settlement does not constitute a breach of fiduciary duty.

The final issue presented by the Amended Complaint is whether the use to which the insurance settlement funds were put was proper. The evidence on this point was also undisputed and showed that the insurance policy in question was one which belonged to the Association and which had been purchased with Association funds for the protection of the Association. The evidence showed that approximately $100,000.00 of the funds were used to make payments to individuals who had paid the original illegal special assessment while the remaining $175,000.00 were paid to the law firm of Becker, Poliakoff & Streitfeld, P.A. as attorney's fees pursue to the Campeau rescission case. Therefore, Plaintiff argues that the Association used general funds for purposes other than the payment of common expenses and for the use and benefit of a select group of unit owners. As such, Plaintiff argues that use of the funds was improper regardless of whether or not the amount for which the Board settled was reasonable.

"Common surplus", simply stated, is the monies left over after payment of all expenses. See Section 718.103(8), Florida Statutes. The monies owed to persons who had paid all or part of the purchase assessment (some of whom were no longer unit owners at Ocean Trail) was a debt of Ocean Trail. The payment of monies to creditors of a condominium association is not an unauthorized distribution of common surplus. Also, payment of attorney's fees is a proper common expense of a condominium association. Margate Village Condominium Association, Inc. v. Wilfred, Inc., 350 So.2d 16 (Fla. 4th DCA 1977); and Brickell

Biscayne Corp. v. The Palace Condominium Association, 526 So.2d 982 (Fla. 3d DCA 1988).

Accordingly, it is,

ORDERED AND ADJUDGED as follows:

1. Judgment on the Amended Complaint and the counterclaim is hereby rendered in favor of Ocean Trail.

2. The $500.00 special assessment is valid. The class members are liable for the amounts due set forth on the Exhibit attached hereto, plus pre-judgment interest, and their equal pro-rata share of the attorneys fees and costs incurred in this litigation.

3. The Court reserves jurisdiction to enter a final judgment on all claims and to determine the amount of attorney's fees and costs for inclusion therein.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach, County, Florida this 6th day of December, 1990.

W. MATTHEW STEVENSON
Circuit Judge

copies furnished:

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