IN THE FLORIDA SUPREME COURT

CASE NO. 82,083

4th District Court of Appeal -
Case No. 91-00350

OCEAN TRAIL UNIT OWNERS ASSOCIATION, INC.,

Petitioner,

vs.

STATES MEAD and WILLIAM BRISTER, etc.,

Respondents.

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

PETITIONER'S INITIAL BRIEF

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II.

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S RULING THAT OCEAN TRAIL DID NOT BREACH A FIDUCIARY DUTY TO THE UNIT OWNERS BY ENTERING INTO THE INSURANCE SETTLEMENT BECAUSE THIS POINT WAS NOT RAISED ON APPEAL NOR BRIEFED OR ARGUED BY THE PARTIES. THE DISTRICT COURT OF APPEAL ALSO ERRED BY NOT AFFIRMING THE TRIAL COURT'S RULING BECAUSE RESPONDENTS' FAILED TO FURNISH A COPY OF THE TRIAL TRANSCRIPT

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TABLE OF CITATIONS

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STATUTES

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PRELIMINARY STATEMENT

This case comes to this Court to answer the following question certified to be of great public importance by the Fourth District Court of Appeal:

> **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IN WHICH THE ASSOCIATION'S PURCHASE OF REAL PROPERTY WAS INVALIDATED AS AN UNAUTHORIZED ACT AND SUBSEQUENTLY RESCINDED**

The original Opinion of the Fourth District Court of Appeal is States Mead, et. al. vs. Ocean Trail Unit Owners Association, Inc., ____ So. 2d _____, 18 F.L.W. D464 (Fla. 4th DCA 1993). The Opinion on Rehearing of the Fourth District Court of Appeal, in which the question is certified to this Court, is States Mead, et. al. vs. Ocean Trail Unit Owners Association, Inc., ____ So 2d _____, 18 F.L.W. D1432 (Fla. 4th DCA 1993). Both Opinions are contained in OCEAN TRAIL'S Appendix to this Brief.

Throughout this Brief, Petitioner will be referred to as "OCEAN TRAIL". Respondents will be referred to as "Respondents". The following symbols are adopted for reference herein:

A Appendix to Respondents' Initial Brief filed with Fourth District Court of Appeal.

AA Appendix to OCEAN TRAIL's Answer Brief filed with Fourth District Court of Appeal.

B Appendix to OCEAN TRAIL's Brief filed with the Florida Supreme Court.

R Record on Appeal.

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Respondents were the Appellants in the Fourth District Court of Appeal. OCEAN TRAIL was the Appellee in the Fourth District Court of Appeal.

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STATEMENT OF THE CASE AND FACTS

OCEAN TRAIL is a condominium association responsible for operating and maintaining the extensive common properties and facilities (tennis courts, swimming pool, clubhouse, roads, etc.) within the OCEAN TRAIL condominium development located in Jupiter, Florida (AA-3, 6, 10, 13, 17, and 35). OCEAN TRAIL owns the common properties and facilities in its own name and maintains and operates them for the benefit of all 602 unit owners (AA-3, 6, 10, 13, 17 and 35).

In March, 1985, the Board of Directors of OCEAN TRAIL began discussions with Campeau Corporation Florida, the developer of the OCEAN TRAIL complex, for the purchase by OCEAN TRAIL of an unimproved parcel of property within the complex that Campeau had decided not to build upon. OCEAN TRAIL consulted its attorney, Jay Steven Levine, Esquire, for legal advice concerning the legal ability and authority of OCEAN TRAIL to purchase the property. Mr. Levine advised OCEAN TRAIL orally and in writing that because it was a homeowner's association and not a condominium association, it had the authority to purchase the property without a unit owner vote, and that a levy of a special assessment (hereafter referred to as the "purchase special assessment") by the Board of Directors without a unit owner vote to fund the purchase was authorized by OCEAN TRAIL'S documents (AA - 34, 38). Relying upon this advice, OCEAN TRAIL entered into and consummated an agreement with Campeau for the purchase of the property (hereafter referred to as the "Campeau purchase")

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and the purchase special assessment of $1,518.44 per unit was levied by OCEAN TRAIL against all units with OCEAN TRAIL. (R 532-554) After this occurred, approximately one hundred fifty (150) unit owners who did not pay the purchase special assessment, including Respondents, MEAD and BRISTER the class representatives in this case, joined together as plaintiffs and filed a Complaint for Declaratory Relief in the Circuit Court of Palm Beach County, Florida, to have the purchase and the purchase special assessment declared invalid. (R 532-554) (A-24). The attorney for the unit owners was John Avery, Jr. The case was styled Levy v. Ocean Trail Unit Owners Association, Inc.

OCEAN TRAIL filed two crossclaims in this litigation. The first crossclaim was filed in November, 1985, and was an action by OCEAN TRAIL against Campeau for rescission of the purchase transaction, including return of the land purchase monies (R 532-554). The rescission crossclaim was pursued in the name of OCEAN TRAIL, and thus, on behalf of all of the unit owners in OCEAN TRAIL[1]. This crossclaim eventually resulted in a rescission judgment. The second claim was filed in February, 1987, and was an action for declaratory relief against OCEAN TRAIL's insurance carrier, Standard Fire, who had denied coverage under OCEAN TRAIL's insurance policy for the losses that had occurred and

[1]A separate rescission action was also instituted by the unit owner group when they filed suit. However, this action was later dismissed by the unit owners after OCEAN TRAIL initiated and pursued its own claim for rescission (AA-3, 6, 10, 13, 17 and 35).

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were anticipated to occur in the future from the purchase. This crossclaim settled prior to trial.

In August, 1985, the Circuit Court entered summary judgment against OCEAN TRAIL on the unit owners' claim, finding that OCEAN TRAIL was a condominium association, not a homeowner's association, and as such, lacked the authority under the Condominium Act to purchase the property without the consent of all 602 unit owners, and that the assessment to fund the purchase was similarly invalid (R 532-554). In April, 1986, the trial court's order was affirmed by the Fourth District Court of Appeal in Ocean Trail Unit Owners Association v. Levy, 489 So.2d 103 (Fla. 4th DCA 1986) (R 532-554). Thereafter, commencing in May, 1986, many of the owners who paid all or part of the purchase special assessment began to file separate, individual lawsuits for return of their monies plus interest, attorneys fees and costs. All of these law suits resulted in judgments against OCEAN TRAIL, and were continuing to be filed on an on-going basis (R 532-554).

As a result of the judgments in these law suits and the executions and levies that had taken place against OCEAN TRAIL's property, by March, 1988, the financial condition of OCEAN TRAIL had become critical (R 556). OCEAN TRAIL reasonably believed that a special assessment was necessary to pay the judgments that were being imposed and which were anticipated to be rendered against it in the pending unit owner law suits to protect its common properties and facilities from execution and levy (R 556).

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The most significant of these judgments was the attorney's fee and cost judgment that the trial court was ready to assess against OCEAN TRAIL in favor of the unit owner plaintiffs in the Levy lawsuit, for their expenses in the trial court and on appeal. At this time, an attorney's fee and cost hearing had already been held, in which Attorney John Avery had requested judgment in excess of $200,000.00 for attorney's fees and costs. OCEAN TRAIL, at this time, was awaiting the trial court's ruling on this motion. Under the reasonable and good faith belief that a special assessment would be necessary to pay the judgments entered and to be entered against it, OCEAN TRAIL, in March, 1988, levied a $500.00 per unit special assessment (hereafter referred to as "judgment special assessment") for the sole and exclusive purpose of paying the substantial attorney's fee and cost judgment about to be awarded to Attorney Avery, and to pay the other unit owner judgments that were entered and anticipated to be entered against OCEAN TRAIL by the individual unit owners in the pending and future lawsuits (A-2) (R 556). The judgment special assessment was intended to protect the tennis courts, swimming pool, clubhouse and other property titled in OCEAN TRAIL'S name from execution and levy by the judgment creditors (A-2) (R 556).

On April 19, 1988, an attorney's fee and cost judgment in the amount of $194,079.37 was rendered in favor of the unit owners and their attorney, John Avery, Jr., against OCEAN TRAIL (R 532-554). That judgment was recorded and re-recorded in the

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Public Records of Palm Beach County and became a lien against the property of OCEAN TRAIL (AA-26). In May, 1988, the attorney's fee and cost judgment was paid entirely from monies collected from the judgment special assessment (R 555). The various judgments obtained by the individual unit owners who sued to recover the purchase special assessment were also recorded and were paid from time to time after they were entered. (R 532-534, 555-556).

In July, 1988, OCEAN TRAIL entered into a settlement agreement with Standard Fire on its crossclaim in the Levy litigation (A-3) (R 532-554). In exchange for payment of $275,000.00 for disputed coverage, OCEAN TRAIL released Standard Fire from all liability it may have had under its policy of insurance for OCEAN TRAIL in connection with any claim arising in any way out of the Campeau purchase (R 532-554). From these monies, $175,000.00 was used to pay OCEAN TRAIL's past due attorney's fees incurred in the rescission and other lawsuits, with the balance of the monies distributed on a pro rata basis, to all unit owners who had paid all or a part of the purchase special assessments but who had not already obtained a judgment against OCEAN TRAIL. (R 555-563, 734-735, 743-744) (AAA-4) All of these owners received twenty-seven percent (27%) of the amount of their payment toward the purchase special assessment from the $100,000.00 disbursement. (A-4) (R. 734-735, 743-744). No other monies were available to complete the reimbursement at that time

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because OCEAN TRAIL had not yet settled the rescission claim against Campeau and its financial situation was critical. (A-4)

The rescission crossclaim filed by OCEAN TRAIL in the Levy case was concluded in September, 1989, when the trial court entered a Final Judgment in favor of OCEAN TRAIL, granting rescission and requiring the return of the property to Campeau upon payment of the sum of $630,000.00, which included recovery of OCEAN TRAIL's attorneys fees and costs. (AA 32-51, R 532-554). The trial court in that case determined that the Board of Directors of OCEAN TRAIL had acted in good faith and had relied upon its attorney's advice in entering into the purchase agreement and in levying the purchase special assessment. The Court also found that the Board of Directors and Campeau had made a mutual mistake of fact pertaining to OCEAN TRAIL's authority in entering into the purchase and sale. OCEAN TRAIL completed the rescission and collected $630,000.00 from Campeau in October, 1989. OCEAN TRAIL paid from these monies the remaining 73% due (100% less the 27% previously paid) plus interest, to those unit owners who had paid all or part of the original purchase special assessment but who did not receive a judgment. At this time all of the unit owners who paid all or part of the purchase special assessment were now paid in full whether they received a judgment or not. (R 532-554).

The lawsuit giving rise to the case at bar was commenced on June 15, 1988, when Respondents filed a Complaint for Declaratory Relief against OCEAN TRAIL seeking a determination that the

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judgment special assessment of $500.00 per unit was improper. (R 1-20) The case was certified as a class action and Respondents were confirmed as class representatives. (R 39-41) OCEAN TRAIL filed a Counterclaim in the action to foreclose claims of lien filed against the class members as a result of their non-payment of the judgment special assessment. (R 51-161) The case was tried before the trial court on October 31, 1990. The issues for determination by the trial court as stipulated by the parties were:

A. Whether the $500.00 judgment special assessment levied on March 28, 1988 was proper;

B. Whether the Board of Directors breached its fiduciary duty in entering into settlement of OCEAN TRAIL's claim against its insurance carrier for $275,000.00;

C. Whether the uses for which the insurance settlement funds were distributed were proper.

(R 537).

The trial court, after hearing extensive testimony and considering numerous exhibits, determined that the judgment special assessment was valid, that the Board of Directors had not breached their fiduciary duty, and that the settlement funds were properly disbursed and utilized (R 555). The Court entered an Order titled "Final Judgment" on December 6, 1990, in favor of OCEAN TRAIL on all three issues (R 555-563). Actually, this

Order was an Order determining liability only, because further judicial efforts were needed to conclude the case.[2]

On February 2, 1991, Respondents filed their Notice of Appeal to the District Court of Appeal, seeking reversal of the Order of the trial court (R 827-828). Respondents specifically did not appeal the issue of whether OCEAN TRAIL breached its fiduciary duty by entering into the insurance settlement. Respondents, on page 2 of their Initial Brief, stated that:

> In this appeal, the Appellants do not question the trial court's resolution of the second issue presented for trial, i.e., whether the Association breached its fiduciary duties by entering into the insurance settlement. Although the Appellants disagree with the trial court's ruling, they can see that he made his ruling based upon disputed facts which would mandate affirmance....

(B 2). (Emphasis added). Respondents did not furnish a transcript of the trial proceedings to the District Court of appeal.

The District Court of Appeal filed its Opinion on February 10, 1993 (B 72). The Court reversed all of the trial court's rulings, including the ruling that OCEAN TRAIL did not breach its fiduciary duty by entering into the insurance settlement. That

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[2]Thereafter, the trial court determined the amount of costs and attorney's fees due OCEAN TRAIL for the trial court litigation. On May 9, 1991, a Final Judgment of Foreclosure was rendered which ordered foreclosure of the claims of lien securing the unpaid assessments, interest, costs and attorney's fees against each of the condominium units comprising the class. That Order was appealed separately to the District Court of Appeal and has been stayed until this case is decided.

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issue was never briefed or argued by the parties because it was not raised on appeal.

On February 24, 1993, OCEAN TRAIL filed a Motion for Rehearing En Banc and a Motion for Rehearing, Clarification and Certification (B 78-85, 88-110). On June 16, 1993, the District Court of Appeal entered its Opinion on Rehearing which denied OCEAN TRAIL's Motions for Rehearing, but granted OCEAN TRAIL's Motion for Certification (B 118). 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.

Petitioner filed its Notice to Invoke Discretionary Jurisdiction with the District Court of Appeal on July 6, 1993 (B 120).

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SUMMARY OF ARGUMENT

The District Court of Appeal certified the following question 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

The certified question should be answered in the affirmative under existing statutory and Florida case law, and to facilitate the just, equitable and practical discharge of judgments rendered against condominium and other not-for-profit associations when a mistake is made.

The Board of Directors of OCEAN TRAIL, acting in good faith, upon the advice of counsel and with apparent authority, mistakenly incurred a liability which resulted in judgments against OCEAN TRAIL. In order to discharge this liability and protect OCEAN TRAIL's common properties and facilities from sheriff's levy from judgment creditors, OCEAN TRAIL levied a $500.00 per unit special assessment to raise sufficient funds to satisfy the judgments. OCEAN TRAIL had the specific authority under its Condominium Documents and under the Florida Condominium Act to levy a special assessment for the purpose of paying judgment liens or paying losses of OCEAN TRAIL. This special assessment was lawfully imposed for a legitimate and authorized purpose. The fact that the judgments were entered against OCEAN TRAIL as a result of the original "unauthorized act" is

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irrelevant to whether this subsequent remedial action taken by OCEAN TRAIL to discharge these debts and protect its property is lawful. The District Court of Appeal erred in determining that OCEAN TRAIL lacked the power and authority to levy the special assessment to pay these judgments which was needed to protect OCEAN TRAIL's property and to continue the operations of OCEAN TRAIL for the benefit of its unit owners, including Respondents.

The District Court of Appeal also committed reversible error by changing material undisputed facts which were determined by the trial court and established by stipulation of the parties. This was done without so much as a trial transcript, which Respondents failed to furnish to the District Court of Appeal as part of its appellate review.

The District Court of Appeal's review of the issue of OCEAN TRAIL's alleged breach of fiduciary duty by entering into the insurance settlement, which Respondent specifically acknowledged in their Brief, was not an issue on appeal, is improper because the parties did not have the opportunity to brief or argue the issue. Moreover, OCEAN TRAIL's decision to settle the insurance claim was authorized by statute governing the authority of directors of a not-for-profit corporation and was within the Board of Directors' sound business judgment. The District Court of Appeal disturbed these findings by the trial court and improperly interferred with the corporate management decisions of OCEAN TRAIL.

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The District Court of Appeal mistakenly concluded that the disbursement of the proceeds from the insurance settlement constituted "preferential selectivity" on the basis that reimbursement of some but not all unit owners was improper. This ruling directly contradicts the findings of fact of the trial court and the trial court's determination that the payment of monies to OCEAN TRAIL's judgment creditors was not an unauthorized distribution of common surplus, but rather the proper payment of a common expense of OCEAN TRAIL. The trial court's decision was correctly based upon the undisputed facts that after payment of OCEAN TRAIL's attorneys fees, the remaining portion of the settlement monies were distributed to all owners who had not obtained judgments as a debt of OCEAN TRAIL.

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I.

THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL AS A QUESTION OF GREAT PUBLIC IMPORTANCE SHOULD BE ANSWERED IN THE AFFIRMATIVE BECAUSE:

A CONDOMINIUM ASSOCIATION HAS THE LEGAL AUTHORITY TO LEVY AND 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. THE DISTRICT COURT OF APPEAL ERRED BY CHANGING MATERIAL FACTS THAT WERE FOUND BY THE TRIAL COURT AND ESTABLISHED BY STIPULATION OF THE PARTIES.

In the case at bar, Respondents did not furnish a transcript of the trial proceedings to the District Court of Appeal. While many facts were either undisputed or stipulated by the parties, there were some critical material facts that were expressly or impliedly found by the trial court and stipulated by the parties that were changed by the District Court of Appeal. These erroneous facts constitute the foundation by which the District Court of Appeal reversed the trial court's rulings.

The most notable example of this is the following statement by the District Court of Appeal in the second paragraph of page 2 of its Opinion:

> Instead of first making all of the unit owners whole from the proceeds of the rescission and insurance claim settlement, the directors fully paid their own lawyers a fee of $175,000.00 for the rescission action, as well as some other costs. The association

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> then had the sum of $100,000.00 left to reimburse all unit owners for their initial purchase assessment,but the sum remaining was sufficient apparently to pay only those unit owners who had sued the association and obtained judgments. The effect of this priority in payment was that some unit owners were reimbursed, while some were not. The $500 assessment at issue here was then made to pay some of these unpaid unit owners, as well as some other costs and expenses directly related to the unauthorized purchase.

(B 73).

Taking the last sentence first, the District Court of Appeal incorrectly determined that the $500 special assessment was imposed to pay some of the unpaid unit owners, as well as other costs and expenses directly related to the unauthorized purchase. The stipulated facts submitted to the trial court show that the $500 judgment special assessment was made exclusively to pay the attorney's fee and cost judgment rendered in favor of Attorney John Avery, Jr., the attorney who brought suit on behalf of the group of approximately 150 unit owners, with the remainder to pay judgments entered and to be entered against OCEAN TRAIL in favor of individual unit owners recovering payment for the original purchase special assessment. Indeed, this was the express finding of the trial court as stated in the Order of December 6, 1990 based upon the stipulation of the parties. (R 555, 556).

The remaining statements of the District Court of Appeal are also contrary to the stipulated facts and the express findings of the trial court. OCEAN TRAIL's attorneys were paid monies for past due attorney's fees in the amount of $175,000.00 from the

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insurance settlement proceeds in October, 1988. The remaining proceeds of $100,000.00 were disbursed pro-rata to all unit owners who had paid the original purchase special assessment but who did not obtain judgments against OCEAN TRAIL. At the time of this disbursement, all of these owners received twenty seven percent (27%) of the amount of their respective payments. No other monies were available to return to the owners at that time because the rescission crossclaim against Campeau was still pending.

The District Court of Appeal also erroneously concluded that the problem with the disbursement of the insurance proceeds was that the reimbursement was not made to all of the unit owners. In fact, the pro-rata disbursement was to pay OCEAN TRAIL's debts, and was not a disbursement of excess or common surplus. Disbursement was made to all owners who had not already recovered a judgment against OCEAN TRAIL, because those who had judgments were being paid from the special assessment. Simply stated, the District Court of Appeal improperly changed the undisputed and stipulated facts and the findings made by the trial court, and these erroneous findings formed the basis of the Court's Opinion.

B. OCEAN TRAIL IS AUTHORIZED BY THE CONDOMINIUM ACT AND THE CONDOMINIUM DOCUMENTS TO LEVY A SPECIAL ASSESSMENT TO PAY JUDGMENT LIENS EVEN IF THE JUDGMENT ARISES FROM "UNAUTHORIZED ACTS" OF ITS DIRECTORS IN OPERATING THE ASSOCIATION

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C. OCEAN TRAIL AND ITS UNIT OWNERS ARE BOUND BY "UNAUTHORIZED ACTIONS" OF ITS BOARD OF DIRECTORS UNDER THE DOCTRINE OF AN APPARENT AGENCY

The District Court of Appeal's decision that OCEAN TRIAL's special assessment is improper because it was made to pay debt resulting from "unauthorized acts" of its Board of Directors is contrary to traditional principles of agency law and OCEAN TRAIL's own Condominium Documents. See generally 8 Fla. Jur. 2d, Business Relationships; Section 311-318 (1978). The District Court of Appeal, in its fixation on the "unauthorized actions" of the Board of Directors, totally disregarded the fact that corporations can and frequently are held liable for the unauthorized actions of their directors; and that in a condominium association, which is a not-for-profit corporation, the unit owners are responsible to pay common expenses which, as in this case, include judgment liens obtained by third parties against the corporation. In apparently overlooking the concept of principal and agent, the District Court of Appeal reasoned that, because the initial actions of the OCEAN TRAIL directors were "unauthorized", all subsequent actions which arose from the initial "unauthorized acts" were tainted and thus invalid. The critical problem with this analysis is the District Court's failure to recognize that although the Board of Directors' initial actions may not have been "authorized", OCEAN TRAIL was nevertheless bound by them under the theory of apparent authority. See, Prezioso v. Cameron, 559 So.2d 423 (Fla. 4th DCA

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1990); Symons Corp. v. Tartan Lavers Delray Beach, Inc., 456 So.2d 1254 (Fla. 4th DCA 1984); Rety v. Green, 546 So.2d 410 (Fla. 3rd DCA 1989).

All corporations, by virtue of their structure, must necessarily act through officers, agents and directors in carrying out their powers and functions. Section 617.026, Fla. Stat. (1992 Supp.) provides in pertinent part:

> All corporate powers shall be exercised by or under the authority of and the affairs of the corporation shall be managed under the direction of a board of directors, managers, or trustees...Each director, manager or trustee of such board shall have the rights and duties of a director under the provisions of this Chapter...

As a not-for-profit corporation, OCEAN TRAIL has all of the powers contained in the Florida Not-For-Profit Corporation Act (Chapter 617, Fla. Stat.), The Florida Condominium Act (Chapter 718, Fla. Stat.) and OCEAN TRAIL's Articles of Incorporation and By-Laws, together with all implied powers which are necessary to the performance of its purpose. See, Section 718.112(2) Fla. Stat. (1985).

The power of OCEAN TRAIL to acquire title to real property is expressly provided for by statute. See, Section 718.111(7) Fla. Stat. (1989) and Section 617.021 (9), Fla. Stat. (1985). This power to acquire title to real property must necessarily be exercised through OCEAN TRAIL's Board of Directors. Corporate directors are deemed to have plenary authority to transact all of the ordinary business of the corporation within the scope of their charter. Prezioso v. Cameron, 599 So.2d 423 (Fla. 4th DCA

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1990) With respect to conveyances by corporations, the Florida Legislature has created a specific statutory provisions validating conveyances by corporate officers on behalf of the corporation. Sections 692.02, Fla. Stat. (1991) provides that any corporation may execute instruments affecting any interest in its lands, in the name of its president or any vice president or chief executive officer, and that any instrument so executed shall be valid whether or not the officer signing for the corporation was authorized to do so by the board of directors, absent any fraud. See also, Snead v. U.S. Trucking Corporation, 380 So.2d 1075 (Fla 1st DCA 1980). Although Section 718.110(4) Fla. Stat. (1985) required the unanimous consent of all unit owners before OCEAN TRAIL could properly purchase the land, the trial court in Levy who adjudicated the rescission crossclaim found that both OCEAN TRAIL and Campeau were operating under the mutual mistake that OCEAN TRAIL was a homeowners association and therefore had the authority to purchase the property and levy the purchase special assessment without the consent of the unit owners[4]. While OCEAN TRAIL's Board of Directors lacked actual

[4]The precise issue of the authority of OCEAN TRAIL to purchase the Campeau property was addressed the Fourth District Court of Appeal in Ocean Trail Unit Owners Association, Inc. v. Levy, 489 So.2d 103 (Fla. 4th DCA 1986) and OCEAN TRAIL'S rescission crossclaim in the Levy case. The District Court of Appeal determined that the OCEAN TRAIL condominium documents and Section 718.110(4), Fla. Stat. required the unanimous consent of the unit owners before the Campeau property could be purchased. However, in addressing this matter, the District Court of Appeal's Opinion focused on the very narrow issue of OCEAN TRAIL's actual authority to enter into the purchase agreement without a unanimous vote of the owners. Although the District Court of Appeal in Levy, supra., determined that the purchase of

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authority to make the purchase, the Board did have the apparent authority to contract for the purchase. At that time, both OCEAN TRAIL and Campeau believed that OCEAN TRAIL had the power, ability and authority to purchase the property without a unit owner vote. The trial court in the rescission case expressly found that both parties believed that OCEAN TRAIL had the authority to purchase the property and levy special assessments to pay for the purchase. Campeau, who was the seller of the property, had drafted the OCEAN TRAIL documents and with special knowledge of the restrictions in them, believed that OCEAN TRAIL's Board had the authority to make the purchase. Furthermore, OCEAN TRAIL, acting through its Board of Directors, relied in good faith on the advice of their attorney, who had counseled OCEAN TRAIL that the unanimous vote of the unit owners was not required for the purchase or for the purchase special assessment.

Section 617.0830 Fla. Stat. (1991) specifically authorizes directors to rely on opinions of legal counsel in discharging their duties as a director. Significantly, the trial court in the rescission action found that:

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the Campeau property was not authorized, the issue of apparent authority of the Board of Directors acting on behalf of OCEAN TRAIL was not addressed. The finding that the actions taken were not authorized does not preclude corporate liability to third parties on the part of OCEAN TRAIL and thus its unit owners, who are subject to payment for common expenses, for these "unauthorized acts". Although the equitable remedy of rescission was granted by the trial court, the court specifically held that no illegal act was committed by the Board of Directors and that the Board of Directors and Campeau relied upon a mistake of fact when they agreed to purchase and sell the Campeau property.

> If there was a question concerning the Association's (OCEAN TRAIL's) authority, ability and power to purchase the property, Campeau who caused the condominium documents to be drafted and who actually controlled the Association until almost the very time of contracting would have been in the best position to know of any limitation or information concerning the Association's ability to purchase the property.

(AA 38). Parenthetical supplied.

This is a clear case of apparent authority. The factual findings made by the trial court regarding the purchase support the contention that even if the purchase was "unauthorized" for lack of the requisite unit owner vote, OCEAN TRAIL was still legally bound by the purchase, including rescinding the purchase.

It is also significant that the actions of OCEAN TRAIL's directors with respect to the Campeau purchase did not constitute misconduct or egregious behavior. The directors of OCEAN TRAIL were acting in good faith. The trial court stated in the Final Judgment rescinding the Campeau purchase that:

> The Association (OCEAN TRAIL) acted conscientiously and in good faith with due diligence by consulting its attorney prior to making the offer to purchase....

(AA 38). Parenthetical supplied.

Because the directors' actions were within the statutory standard of conduct, the individual directors could not be held personally liable[5]. See, Section 617.0830, Fla. Stat. (1991). If the

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[5]officers and directors of non-profit corporations are not personally liable for actions taken or not taken in their representative capacity unless the officer or director breached or failed to perform his duties and such breach or failure constitutes either (i) a violation of criminal law, or (ii) a transaction in which the officer or director derived an improper personal benefit, or (iii)) recklessness or an act or omission

individual directors are shielded from liability under the protection of the statute, the corporation must bear the liability and resulting monetary burdens. Clearly, neither the legislature nor the judiciary intended to absolve both the corporation and the individual directors from liability, at the expense of innocent and aggrieved third-parties transacting business with the corporation through its directors.

In the present case, OCEAN TRAIL's Board of Directors had apparent authority to negotiate a contract for the purchase of the Campeau property. Such a transaction was clearly within the scope of the agency of the Board of Directors acting on behalf of OCEAN TRAIL. As a result, OCEAN TRAIL had to bear the liability arising from the actions of its directors and was forced to take appropriate measures to discharge the liability. OCEAN TRAIL reasonably determined that the imposition of a special assessment was, under the statutory scheme and condominium documents, an appropriate method for generating funds to satisfy the judgments entered against it in favor of the unit owners and their attorney resulting from the "unauthorized acts". The trial court agreed. The propriety of this special assessment is directly addressed hereafter.

Not only is the District Court of Appeal's Opinion fundamentally flawed in failing to acknowledge and recognize

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committed in bad faith with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property. Section 617.0831 Fla. Stat. (1991).

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OCEAN TRAIL's liability to third-parties for the "unauthorized acts" of its directors, the Court also erred in limiting the ability of OCEAN TRAIL, a not-for-profit corporation, from satisfying judgments entered against it. The District Court of Appeal asserted that the $500.00 judgment special assessment was a direct product of the first "unauthorized act" of OCEAN TRAIL's Directors, and concluded that the Directors' subsequent authorized actions taken to remedy the consequence of the initial actions were invalid (B 1-2).

The District Court of Appeal's ruling inevitably produces a result which is not only absurd, but inequitable: Under the Opinion of the District Court of Appeal, if a condominium board of directors makes a mistake and enters into an "unauthorized" transaction which results in liability to the corporation, the association is precluded from taking subsequent lawful and authorized actions to satisfy the liability. As a direct result of the association's inability to act, the assets of the association are placed at risk of execution and levy by judgment creditors, with the association having no means to otherwise pay the judgments to prevent this.

In this case, the assets are the common properties and facilities which the unit owners use for recreational purposes and which were and are an integral part of their purchases, both from a use and value perspective. In the wake of the District Court's Opinion, a condominium association cannot satisfy a judgment against it resulting from an "unauthorized act". Stated

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differently, what is the reasonable alternative of a condominium association to using assessment monies to satisfy a judgment lien? The District Court of Appeal implies that the solution is to forego payment of the judgment lien and invite loss, including execution and levy by the judgment creditors on all of the common properties and facilities owned by OCEAN TRAIL, which are utilized by its owners. Such a result would significantly impair the value of the condominium units in OCEAN TRAIL and essentially destroy the community. As absurd as it sounds, the District Court's ruling leaves OCEAN TRAIL with no method to pay the judgment to avoid such a harsh result.

If OCEAN TRAIL cannot levy a special assessment to pay judgments from "unauthorized acts", surely under the District Court's Opinion it cannot use general maintenance funds to do so, because the same reasoning applies: The unit owners would be assessed to replenish the monies used to pay the judgments thereby indirectly paying the judgments.

Furthermore, the same result would necessarily follow for the attorneys fee and cost judgment that Respondents will obtain for their trial and appellate efforts in this case if this Court does not quash the Opinion of the District Court of Appeal. Similarly, OCEAN TRAIL will be precluded from assessing and using assessment monies to pay the very substantial judgment that will be rendered in favor of Respondents for return of their portion of the monies that they paid to satisfy the Final Judgment of Foreclosure that was entered by the trial court. OCEAN TRAIL

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will be unable to obtain the monies that will be needed to pay the judgments and will be forced into bankruptcy. After all, OCEAN TRAIL, as a condominium association, has no source of income other than assessments. The result will be that OCEAN TRAIL will no longer be viable and will be unable to perform its functions as a condominium association. If this occurs, no one will write a mortgage in OCEAN TRAIL because the condominium association will not be functioning. Under the District Court's Opinion, this problem can occur whenever a Board of Directors makes a mistake and undertakes an "unauthorized act". Had the District Court of Appeal properly construed and applied the pertinent statutory and contractual provisions, a more equitable and practical outcome would have been achieved.

The District Court of Appeal failed to recognize that OCEAN TRAIL has the power to levy special assessments to pay judgments regardless of the reason for the entry of the judgment. The power and authority to levy special assessments is specifically provided in Chapter 718, Fla. Stat. (Florida Condominium Act), and in the OCEAN TRAIL condominium documents:

1. The corporate entity responsible for the operation of the condominium has the power to make and collect assessments. Section 718.111 (1)(a), Fla. Stat. (1989)

2. **Assessments** mean "a share of the funds which are required for the payment of **common expenses...**" Section 718.103(1), Fla. Stat. (1989) (emphasis added)

3. **Common Expenses** are "all expenses and assessments which are properly incurred by the Association for the condominium". Section 718.103(7) Fla. Stat. (1989) (emphasis added).

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4. **Common expenses** include the expenses of the operation, maintenance, repair, replacement **or protection of the common elements and association property,** costs of carrying out the powers and duties of the association, **and any other expense, whether or not included in the foregoing, designated as common expense by this chapter, the declaration, the documents creating the association, or the bylaws.** Section 718.115(1)(a) Fla. Stat. (1991) (emphasis added). **Protection of the common elements against levy and execution by a judgment creditor is well within the parameter of the statutory definition of "common expenses".**

5. The OCEAN TRAIL condominium documents expand upon the statutory definition of **common expenses** to include liens as common expenses and specifically require that OCEAN TRAIL must pay all **liens of any nature** as a common expense. See, Declaration of Condominium-Section 6.5. (emphasis added) **A judgment is a lien on property.** See Steinbrecher v. Cannon, 501 So.2d 659 (Fla. 1st DCA 1987).

6. OCEAN TRAIL's condominium documents specifically provide a grant of power to make and collect assessments to defray the cost, expense **and losses** of OCEAN TRAIL (See Articles of Incorporation of OCEAN TRAIL, Article III, Section 3.2(a) (emphasis added).

Based upon the foregoing, it is evident that OCEAN TRAIL, as a condominium association governed by the Florida Condominium Act, and as a not-for-profit corporation governed by its own Articles of Incorporation and By-laws, has the power to levy a special assessment for the purpose of paying common expenses. The applicable statutes and the Articles of Incorporation demonstrate that the payment of a lien, which includes judgments, is a valid common expense for which assessments may be imposed. This is especially true if the assessment is to protect OCEAN TRAIL'S property from execution and levy.

The authorization in OCEAN TRAIL's documents to levy a special assessment for the purpose of paying a judgment lien

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renders them proper expenses. There is no limitation or condition that the lien or judgment lien must arise from an "authorized act". To the contrary, a lien or judgment against a property or individual clearly includes wrongdoing or unauthorized conduct on the part of the judgment debtor or party who is liened. Any limitation on an association's ability to impose special assessments to pay only those expenses which result from "authorized acts" contravenes the purpose and intent of the condominium documents in specifically authorizing the payment of liens as common expenses. The purpose for which the assessment was made - to pay judgment liens - is a legitimate common expense. The assessment, notwithstanding the prior "unauthorized acts" of the Board of Directors, is valid under the documents.

The District Court of Appeal expressed concern about the liability of individual unit owners for the excesses of condominium directors. However, adequate protection against liability for the wrongful or "unauthorized acts" of an association's directors already exists for unit owners. The association can purchase extensive directors and officers liability policies of insurance to provide protection for "unauthorized acts" in the operation of the association. Further, if the association is exposed to liability in excess of insurance coverage for matters which are not included as common expenses, the unit owners have the right to receive notice from the association and to intervene and defend the legal action; and

their liability is limited to the value of their individual units. See, Section 718.119(3) Fla. Stat. (1991). Also, if the director's conduct is so culpable as to render him personally liable for monetary damages, the individual unit owners have a cause of action against the director. See, Section 617.0834 Fla. Stat. (1991). Moreover, because the officers and directors of the association are fiduciaries, the unit owners have rights arising out of breach of the fiduciary relationship. Breach of fiduciary duty can also expose the directors to liability to the unit owners. See, Sections 718.111(1). Finally, dissatisfied unit owners always have the power to recall directors with or without cause at any time, and to amend the association documents to restrict the realm of authority of the directors. See, Sections 718.112(2)(g) Fla. Stat. (1991) and Section 718.110, Fla. Stat. (1991).

The District Court Appeal stated that it was unable to distinguish the case at bar from Scudder v. Greenbriar Condominium Association, Inc., 566 So.2d 359 (Fla. 4th DCA 1990) and Rothenburg v. Plymouth #5 Condominium Association, Inc., 511 So.2d 651 (4th DCA 1987), rev. den. 518 So.2d 359 (Fla. 1987). Those two cases differ significantly from this case, so it is difficult to understand why the District Court of Appeal felt compelled to analogize them.

Both Scudder and Rothenburg, involve the imposition of special assessments for a purpose which was not authorized by the condominium documents (the purchase of transportation services).

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The District Court of Appeal held that because the purpose of the special assessment was not authorized by the documents, the special assessment to pay for the "unauthorized" service was improper. That result was proper because between the association and its unit owners, a special assessment cannot be levied for an "unauthorized" purpose. However, the obvious difference in the case at bar is that unlike Scudder and Rothenburg, this case concerns the liability of OCEAN TRAIL to third parties who relied upon the validity of the "unauthorized acts" in making payments to OCEAN TRAIL and who obtained judgments on those liabilities. This case is analogous to the Association in Scudder and Rothenburg levying a special assessment to pay a judgment obtained by the bus company who rendered unpaid services in reliance upon the apparent authority of the Association's Board of Directors. No one would legitimately suggest that the bus company could not recover its judgment, or that the owners could not be assessed to pay the judgment that was rendered in order to avoid execution and levy on the Association's property or otherwise. Indeed, as in this case, who is going to pay the judgment if the unit owners don't?

In the case at bar, the purpose for which the special assessment was imposed by OCEAN TRAIL was expressly authorized by the Condominium Documents and was proper. Every unit owner who purchased at OCEAN TRAIL was on notice from the Condominium Documents that they could be assessed for judgments rendered

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against OCEAN TRAIL and the losses of OCEAN TRAIL, irrespective of why the judgments were entered.

In relying on Scudder and Rothenburg, the District Court of Appeal confused the different issues of the "unauthorized act" of the Board in contracting to purchase the property, with the authorized act of the Board imposing a special assessment to pay judgments which arose from the "unauthorized" purchase. The trial court correctly understood and grasped this important distinction when it stated:

> 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 a failure to act by a condominium association or relied by a breach of 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. Section 718.116(1)(a) Fla. Stat. (1987). See Abbey Park Homeowner's Association v. Bowen, 508 So.2d 554 (Fla. 4th DCA 1987).

(R 559).

The critical issue in reviewing the propriety of the judgment special assessment should be whether OCEAN TRAIL had the power and authority to impose an assessment for the purpose for which it was levied. The events giving rise to the common expense necessitating the special assessment are not material if OCEAN TRAIL has the ability to discharge the liability by use of assessment monies for payment of a judgment lien. The District Court's Opinion that the special assessment was invalid is erroneous and should be quashed.

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II.

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S RULING THAT OCEAN TRAIL DID NOT BREACH A FIDUCIARY DUTY TO THE UNIT OWNERS BY ENTERING INTO THE INSURANCE SETTLEMENT BECAUSE THIS POINT WAS NOT RAISED ON APPEAL NOR BRIEFED OR ARGUED BY THE PARTIES. THE DISTRICT COURT OF APPEAL ALSO ERRED BY NOT AFFIRMING THE TRIAL COURT'S RULING BECAUSE RESPONDENTS' FAILED TO FURNISH A COPY OF THE TRIAL TRANSCRIPT

Although this case is before the Florida Supreme Court to address the certified question, the Court's review is not limited to the certified question. Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961). Certification extends the scope of review to allow this Court to determine whether the opinions and judgment of the District Court are correct[6]. Gibler v. City of Coral Gables, 149 So.2d 561 (Fla. 1963). Thus, this Court can dispose of other questions raised on appeal. Stadnik v. Shell's City, Inc., 140 So.2d 871 (Fla. 1962). The Court's jurisdiction extends to the entire case and the Court's scope of review extends to all questions raised in the appeal and any error in the record. A. Lawrence v. Florida East Coast Railway, 346 So.2d 1012 (Fla. 1977). The District Court of Appeal disapproved the settlement, but failed to state any grounds for disapproval, other than to express dissatisfaction with the insufficiency of the amount of money available to reimburse all unit owners for

[6]It is the decision that passes upon the question of great public importance, not the question itself, that the Supreme Court should be concerned with. Zirin, supra, at 596.

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the purchase special assessments. The Court merely stated that there was no basis on which the trial court should have approved the settlement.

In rendering an opinion on the propriety of the settlement, the District Court of Appeal went well beyond the permissible scope of review of the trial court's order because the ruling was not appealed. Respondents specifically stated in their Initial Brief filed in the District Court of Appeal that:

> In this appeal the Appellants do not question the trial court's resolution of the second issue present for trial, i.e., whether the association breached its fiduciary duties by entering into the insurance settlement. Although the Appellants disagree with the trial court's ruling, they can see that he made his ruling based upon disputed facts which would mandate affirmance...

(B 6) Emphasis supplied.

None of the parties briefed or argued this issue because it had not been raised. Therefore, the District Court of Appeal should not have reviewed and rendered an opinion in the matter. See, Norris v. Peck, 381 So.2d 353 (Fla. 5th DCA 1980).

As the trial court found in the Order of December 6, 1990 (R 557, 558), the decision to settle the claim with OCEAN TRAIL's insurance carrier was a proper exercise of the "business judgment" of the Board of Directors, based upon the advice of counsel. Section 617.0830(2)(b) Fla. Stat. (1989). The business judgment rule, as set forth in Section 617.0830(1)(a)-(c) Fla. Stat. (1989), vests management of a corporation with wide discretion in the performance of its duties. As a result of this

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broad discretion, courts will not disturb corporate management decisions which are made in the exercise of business judgment. Schein v. Caesar's World, Inc., 491 F.2d 17 (5th Cir. 1974), cert. denied 419 U.S. 838, 95 Sct 67, 42 L. Ed 2d 65 (1975); International Insurance Co. v. Johns, 874 F.2d 1447 (11th Cir. 1989).

It is clear that 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 (Fla. 2d DCA 1965). The trial court found no evidence of fraud, illegal conduct or receipt of improper benefit on the part of any Director to warrant any contrary conclusion. Consequently, the settlement fell within the sound business judgment of the Board, and the trial court's ruling should not have been disturbed by the District Court of Appeal.

Moreover, this issue should have been summarily affirmed by the District Court of Appeal under the authority of Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979), because Respondents failed to provide the District Court of Appeal a record of the trial testimony, which was significant for this point and for which there were disputed factual issues. Without a proper and adequate record of the factual issues determined at trial, the appellate court is not in a position to reasonably conclude that the trial judge committed reversible error. Id. at 1152. Therefore, a decision of a trial court must be affirmed if the appellant fails to furnish a transcript of the trial

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proceedings because the record is insufficient to demonstrate reversible error. Id. at 1152; See also, Beyer v. Carey, 61 So.2d 373 (Fla. 1952); Hauer v. Thum, 75 So.2d 205 (Fla. 1954).

III

OCEAN TRAIL'S USE OF THE MONIES RECEIVED FROM THE INSURANCE SETTLEMENT TO PAY ATTORNEYS FEES AND OTHER DEBTS OF THE ASSOCIATION WAS NOT AN IMPROPER DISTRIBUTION OF COMMON SURPLUS. THE DISTRICT COURT OF APPEAL ERRED BY NOT AFFIRMING THE TRIAL COURT'S RULING BECAUSE RESPONDENTS' FAILED TO FURNISH A COPY OF THE TRIAL TRANSCRIPT

The disbursement of the proceeds from the insurance settlement to pay debt of OCEAN TRAIL consisting of past-due attorney's fees and the reimbursement on a pro-rata basis of the purchase special assessment to individual unit owners who had not reduced their claim to judgment was entirely proper, and the District Court erred in ruling otherwise.

The District Court of Appeal reversed the disbursement on the grounds of "preferential selectivity", stating that the reimbursement to some unit owners but not all, and the payment of attorney's fees in full, was unjustifiable.

As previously discussed on pages 15 and 16, supra., the District Court of Appeal impermissibly changed the stipulated facts and the facts found by the trial court to arrive at this conclusion. OCEAN TRAIL did not use the remaining $100,000 to pay only those unit owners who had sued OCEAN TRAIL and obtained judgments - the reverse is true: OCEAN TRAIL used the $100,000 to pay all owners who had not obtained judgments twenty seven

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percent (27%) of the monies that they paid to OCEAN TRAIL for the invalid purchase special assessment. The remaining sums, plus interest, were paid to these unit owners from the proceeds of the rescission judgment, resulting in full payment to all owners who were owed this debt.

As the trial court found, the monies owed to the unit owners who had paid all or part of the purchase assessment was a debt of OCEAN TRAIL. (R 558). The trial court correctly found that the payment of monies to creditors of the condominium association is not an "unauthorized" distribution of common surplus, and that payment of attorneys fees is a proper common expense of a condominium association under the authorities cited in the trial court's order. (R 558). The trial court also correctly found that the evidence on this point was undisputed, and showed that the insurance policy was one which belonged to OCEAN TRAIL and which had been purchased with OCEAN TRAIL funds for the protection of OCEAN TRAIL. (R 558)

If anything, the record demonstrates that there was no selectivity since all of the unit owners who did not sue OCEAN TRAIL were paid twenty-seven percent (27%) pro-rata on their payment to OCEAN TRAIL. The unit owners who had sued OCEAN TRAIL and obtained judgments were paid from the $500.00 judgment special assessment which had already been levied. Since provisions had already been made by the Board via the imposition of the judgment special assessment to fully compensate the unit owners which were judgment creditors, it was unnecessary to pay

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these owners out of the settlement proceeds. The bottom line was that all of the unit owners were going to be reimbursed, and were reimbursed, albeit from different sources of funds because no one source was sufficient for all of the payments.

Moreover, since the reimbursement to the unit owners of the purchase special assessment constituted a debt of OCEAN TRAIL, the law that common surplus is owned by unit owners in the same shares as their ownership interest in the common elements does not apply to the distribution of the insurance proceeds. See, Section 718.115(3) Fla. Stat. (1991). The insurance proceeds cannot be construed as common surplus under the statutory definition of that term. Common surplus is "the excess of all receipts of the association collected on behalf of the condominium...over the common expenses." Section 718.103(8) Fla. Stat. (1991). The judgments and reimbursement of the special purchase assessment were clearly expenses of the association. There could be surplus only after these expenses were satisfied. Consequently, it cannot rationally be argued that the insurance proceeds constituted common surplus when there were substantial outstanding expenses of OCEAN TRAIL which had to be satisfied and which would necessarily exceed the available insurance proceeds.

As the trial court determined, reliance on Century 21 Commodore Plaza, Inc. v. Commodore Plaza at Century 21 Condominium Association, Inc., 340 So.2d 945 (Fla. 3rd DCA 1976) is misplaced, because that case involved an operating assessment that had become common surplus thereby requiring pro-rata

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redistribution. Unlike Century 21, the case at bar does not involve the distribution of common surplus but rather the payment of common expenses. Clearly, the payment of OCEAN TRAIL attorney's fees is a proper common expense of the association. Margate Village Condominium Association, Inc. v. Wilfred, Inc. (350 So.2d 16 (Fla. 4th DCA 1977); Brickell Biscayne Corp. v. The Palace Condominium Association, 526 So.2d 982 (Fla. 3rd DCA 1988).

Moreover, this issue should have been summarily affirmed by the District Court of Appeal under the authority of Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979), because Respondents failed to provide the District Court of Appeal a record of the trial testimony, which was significant for this point and for which there were disputed factual issues. Without a proper and adequate record of the factual issues determined at trial, the appellate court is not in a position to reasonably conclude that the trial judge committed reversible error. Id. at 1152 Therefore, a decision of a trial court must be affirmed if the appellant fails to furnish a transcript of the trial proceedings because the record is insufficient to demonstrate reversible error. Id. at 1152. See also, Beyer v. Carey, 61 So.2d 373 (Fla. 1952); Hauer v. Thum, 75 So.2d 205 (Fla. 1954).

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CONCLUSION

The question certified by the Fourth District Court of Appeal as one of great public importance should be answered in the affirmative. OCEAN TRAIL should be allowed to levy and enforce a special assessment to satisfy judgments rendered against it in favor of third-parties resulting from an "unauthorized act". If the condominium association is found liable for the wrongful acts or omissions of its officers, agents and directors, it has the right to satisfy that liability through the imposition of a special assessment, where as here, the authority to do so is granted to OCEAN TRAIL by statute and in its documents.

The decision of the District Court of Appeal on the issue of the propriety of the insurance settlement is also erroneous and should be quashed. The District Court of Appeal should not have ruled on an issue that was neither raised by the parties nor briefed or argued. The ruling of the District Court of Appeal also conflicts with the findings of fact of the trial court, which are supported by competent, substantial evidence. There was no trial transcript furnished by Respondents for what they acknowledge was disputed issues of material fact, which in and of itself required the District Court of Appeal to affirm.

The District Court of Appeal's ruling on the issue of the disbursement of the settlement proceeds is equally erroneous. It is based upon erroneous facts and is legally incorrect.

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It is respectfully submitted that this Court should reinstate the trial court's Order of December 6, 1990, quash the Opinion of the District Court of Appeal and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 14 day of September, 1993 to David L. Gorman, Esquire, 618 U.S. Highway One, North Palm Beach, Florida 33408.

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