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FILED
SID J. WHITE
JAN 6 1994
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE FLORIDA SUPREME COURT

CASE NO. 82,083

Fourth 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 REPLY BRIEF

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TABLE OF CONTENTS

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TABLE OF CITATIONS

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I. THIS COURT SHOULD ACCEPT JURISDICTION OF THIS APPEAL BECAUSE IT PRESENTS A QUESTION OF GREAT PUBLIC IMPORTANCE WHICH HAS NOT BEEN PREVIOUSLY ANSWERED OR ADDRESSED BY EITHER THIS COURT OR THE FLORIDA LEGISLATURE.

Respondents assert that the certified question presented to this Court has been answered by the 1992 Legislative Amendment to Section 718.303(1), Fla. Stat. (1992). This contention is patently incorrect. That statute has no relevance to the issues on appeal and Respondents' argument serves only to obscure the real legal questions raised.

Section 718.303(1) does not prohibit the levy of a special assessment for the purpose of satisfying judgment liens against a condominium association. Section 718.303(1), Fla. Stat. (1992) provides in pertinent part as follows:

> (1) Each unit owner, each tenant and other invitee, and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and the provisions thereof shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:
>
> (a) The association.
> (b) A unit owner.
> (c) Directors designated by the developer, for actions taken by them prior to the time control of the developer.
> (d) Any director who willfully and knowingly fails to comply with these provisions.
> (e) Any tenant leasing a unit, and any other invitee occupying a unit.
>
> The prevailing party in any such action or in any action in which the purchaser claims a right to voidability based upon contractual provisions as required in s. 718.503(1)(a) is

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> entitled to recover reasonable attorney's fees. 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. This relief does not exclude other remedies provided by law.

(Emphasis added). A plain reading of the statute shows that the Legislature simply intended to provide, as it pertains to this case: (1) a statutory basis for the prevailing party, in action between a unit owner and an association, to recover attorney's fees, and (2) a means to recover amounts which a successful litigant unit owner paid an association in assessments used to fund expenses of litigation in which the unit owner was a party. There is no language in the statute to prevent an association from levying assessments to pay the expenses of litigation or judgments rendered against it from litigation. To the contrary, by providing a means for reimbursement to unit owners of amounts paid in assessments for litigation expenses, the Legislature recognized the rule of law that such an assessment is lawful. Margate Village Condominium Association, Inc. v. Wilfred, 350 So. 2d 16 (Fla. 4th DCA 1977). In other words, if the Legislature did not believe that a condominium association could lawfully assess its members for litigation expenses, it would not have created a basis for recovery of such expenses by a prevailing litigating unit owner.

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Moreover, this statutory provision only applies to the unit owner and the association who are parties in a lawsuit. While a successful litigating unit owner may recover assessments paid as an element of damages, a nonlitigating unit owner remains obligated for the payment of the assessment.

Respondents' argument is also flawed by the fact that Section 718.303(1), Fla. Stat. was amended in 1992 and was retroactively operative only to April 1, 1992. See, Florida Laws, Chapter 92-49 (1992). The judgment special assessment which is the subject of this lawsuit was levied in March, 1985. Consequently, under no circumstances would the statutory amendment be effective or operative for this assessment.

It is important that this Court accept jurisdiction and answer the question certified by the District Court of Appeal. The certified question presents a compelling legal question that merits resolution by this Court. Whether a condominium association can lawfully assess its unit owners to raise the monies needed to satisfy its judgment creditors when an "unauthorized act" occurs is critical to the continued viability of condominium associations. Since more than 3 million Floridians reside in condominiums (16 Nova L. Rev., The Florida Condominium Act (Fall 1991)), it is inevitable that this issue, which affects a large number of citizens, will arise again. Condominium associations are virtually always not-for-profit entities without sources of revenue other than the levy of assessments. Condominium associations are directed by people who

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volunteer their time, who from time to time make mistakes. In this case, the "unauthorized act" was that Ocean Trail's directors relied upon a written legal opinion of its then attorney, that the Association was a homeowner's association and not a condominium association. The attorney further opined that as a result, 100% of the unit owners did not have to consent to purchase from the Developer a vacant parcel of land within the Ocean Trail complex. The resolution of the certified question will have a critical bearing on the operation, financial management, and asset ownership of condominium associations throughout the State of Florida.

II. THE DISTRICT COURT OF APPEAL'S MISUNDERSTANDING OF THE UNDISPUTED FACTS DETERMINED BY THE TRIAL COURT AND BY STIPULATION OF THE PARTIES, RESULTED IN AN ERRONEOUS FACTUAL BASIS FOR THAT COURT'S OPINION AND CONSTITUTES REVERSIBLE ERROR.

Petitioner's Initial Brief detailed the relevant instances of the District Court of Appeal's departure from the undisputed facts which were established in the trial court proceedings. The following is a brief summary of the most significant portions of the District Court of Appeal's Opinion which are in conflict with the findings of fact of the trial court:

(1) The District Court of Appeal's determination that the $500.00 judgment special assessment was used to reimburse some unpaid unit owners for the payment of the purchase special assessment and other costs and expenses directly related to the unauthorized purchase (B-73) is contrary to the trial court's finding that this assessment was made exclusively to pay the attorney's fee and cost judgment rendered in favor of the attorney representing 150 of the unit owners, with the remaining funds being utilized to pay judgments entered against OCEAN TRAIL. (R. 555, 556)

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(2) The manner of disbursement of the insurance settlement proceeds after the payment of attorney's fees, was incorrectly stated by the District Court of Appeal. The Appellate Court determined that $100,000.00 of insurance proceeds remaining after payment of the attorney's fee and cost judgment, was used to reimburse some, but not all, of the unit owners who had sued OCEAN TRAIL and who had obtained judgments. To the contrary, the proceeds were disbursed pro-rata to all similarly situated non-judgment creditors, including unit owner creditors, even though the amount distributed was insufficient at that time to satisfy the entire amount of OCEAN TRAIL's debt.

The Respondents even acknowledge, in their Answer Brief at page 8, that the District Court of Appeal erred with respect to its version of the facts. While Respondents tried to minimize this by stating that "[a]ny misunderstanding by the District Court of Appeal with regard to the Petitioner's use of that $100,000 is immaterial ...", clearly the District Court's misunderstanding of the undisputed facts is critical to this case because its Opinion is based on those facts.

III. THE JUDGMENT SPECIAL ASSESSMENT WAS A PROPER COMMON EXPENSE OF THE ASSOCIATION LEVIED FOR THE LAWFUL PURPOSE OF SATISFYING JUDGMENT LIENS.

Under traditional principles of agency law, it is firmly established that the Board of Directors of OCEAN TRAIL had, at least the apparent authority, to enter into the purchase transaction for the acquisition of the Campeau property. Prezioso v. Cameron, 559 So. 2d 423 (Fla. 4th DCA 1990); Symons Corp. v. Tartan Lavers Delray Beach, Inc., 456 So. 2d 1254 (Fla.

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4th DCA 1984).[1] Respondents contend that even if there was apparent authority, OCEAN TRAIL only acquired legal title on a resulting trust basis for those unit owners who provided the funds for the purchase. Continuing with their argument, Respondents suggest that the unit owners who did not pay the assessment lacked any equitable interest in the Campeau property, so the non-paying 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." (Respondents' Answer Brief, page 11). In so arguing, Respondents have confused the two separate assessments which were levied by OCEAN TRAIL, and the different legal issues involved with each.

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[1]Respondents contend that the issue of apparent authority is inappropriately raised by Petitioner. This argument is without merit. The District Court of Appeal specifically addressed the issue of authority in its Opinion. The District Court emphasized that the actions taken by the Board of Directors were "unauthorized" and held that the Association could not impose assessments to pay for the consequences of an "unauthorized act". Petitioner's argument simply address the error committed by the District Court of Appeal, by providing legal support and analysis for the imposition of the assessment using principles of agency law that impose liability upon a principal for the unauthorized acts of its agent. This issue first arose from the Opinion of the District Court. Moreover, the issue of authority was previously addressed in the related action of Ocean Trail Unit Owners Association, Inc. v. Levy, 489 So. 2d 103 (Fla. 4th DCA 1986) and OCEAN TRAIL's rescission Crossclaim in that case. The trial court in the rescission action recognized the issue of apparent authority when it stated:

> 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)

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The propriety of the initial purchase special assessment is not an issue in this case, and the propriety of the judgment special assessment has nothing to do with any theory of equitable ownership in the Campeau property.

Under the holding of Towerhouse Condominium v. Millman, 475 So. 2d 674 (Fla. 1985), unit owners who do not provide funds for the purchase of property, acquire no equitable interest in the property. Therefore, the unit owners in this case, who failed to pay the purchase assessment for the Campeau property, did not acquire any equitable interest in the Campeau property. Nevertheless, these owners, along with the remaining owners who did pay the purchase assessment, continued to be unit owners and members in Ocean Trail, which owns the common properties and facilities. It was this ownership interest in the common properties which OCEAN TRAIL sought to protect when it levied the judgment special assessment, not any equitable interest in the Campeau property which may have been acquired by some of the unit owners. The expenses incurred by OCEAN TRAIL which rendered the judgment special assessment necessary were expenses of all, not some, of the unit owners. It is inconsequential that some of the monies derived from the judgment special assessment and the insurance proceeds were paid to some, but not all, of the unit owners, because the unit owners who received payments did so solely due to their status as creditors of the Association.

Contrary to Respondents' assertion, the application of the monies derived from the judgment special assessment, and the

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insurance proceeds, is in compliance with Section 718.116(9)(a), Fla. Stat. (1992), which provides that "a unit owner may not be excused from the payment of the share of the common expenses of a condominium unless all unit owners are likewise proportionally excused from payment". Respondents mistakenly construe OCEAN TRAIL's payment of monies to unit owners, who were also creditors, as an unlawful and disproportionate refund of common surplus to select unit owners. The critical distinction is that the pro-rata payment of these funds by OCEAN TRAIL was a satisfaction of debt, and not a disbursement of excess or common surplus. Respondents' mischaracterization of these payments and their convoluted attempt to suggest a statutory violation unnecessarily complicates the issue.

Despite Respondents' attempts to mask the real issue in this case, the fundamental question as framed by the District Court of Appeal, is the lawfulness of the special assessment to pay judgment liens. That question should be answered in the affirmative for several basic reasons:

(1) The Board of Directors of OCEAN TRAIL had apparent authority to purchase the Campeau property. As found by the trial court, OCEAN TRAIL acted conscientiously, in good faith, with due diligence and reliance upon advice of counsel prior to making the offer to purchase. (AA - 38)

(2) As a result of this purchase, extensive litigation was commenced which ultimately resulted in judgments against OCEAN TRAIL. A majority of the judgment creditors were also unit owners of OCEAN TRAIL at the time the judgments were paid.

(3) The judgment creditors of OCEAN TRAIL could levy upon the assets of OCEAN TRAIL which were equitably owned by all unit owners collectively, and which consist of the

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common elements and facilities (e.g., the tennis courts, swimming pool, clubhouse, etc.)

(4) OCEAN TRAIL has the power to levy special assessment to pay judgments rendered against it, regardless of who the judgment creditors are, or the reason for the entry of the judgment. The power and authority to levy such assessments is expressly provided in the Condominium Act and in the OCEAN TRAIL condominium documents. See Section 718.111(1)(a), Fla. Stat. (1989); Section 718.103(1), Fla. Stat. (1989); Section 718.103(7), Fla. Stat. (1989); Section 718.115(1)(a), Fla. Stat. (1991); Declaration of Condominium Section 6.5; and, Articles of Incorporation of Ocean Trail, Article III, Section 3.2(a).

Furthermore, there is no legal precedent which negates OCEAN TRAIL's authority to levy an assessment to pay judgments rendered against it. Reliance by the District Court of Appeal and Respondent on Scudder v. Greenbriar Condominium Association, Inc., 566 So. 2d 359 (Fla. 4th DCA 1990), and Rothenberg v. Plymouth #5 Condominium Association, Inc., 511 So. 2d 651 (Fla. 4th DCA 1987) rev. den. 518 So. 2d 359 (Fla. 1987), is misplaced. A correct reading of these two cases demonstrate a glaring critical distinction: Scudder and Rothenberg involved assessments for improper and unauthorized purposes (the purchase of transportation services, in which the court relieved unit owners from paying these assessments to their association). The present case is based upon an assessment made to pay judgment creditors of the Association, which is a proper and authorized purpose (satisfaction of judgment liens against the association in favor of third-parties). This distinction is fundamental, and must have legal significance or condominium associations cannot survive and fulfill their statutory purpose. Otherwise, who is

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going to pay the judgments? If not by special assessment, then the judgment creditors will continue to levy and execute on the regular maintenance assessments as they are collected by the Association, or they will execute and levy on Ocean Trail's common properties. The result is the same--the unit owners will end up paying the judgments either way.

IV. THE DISTRIBUTION OF THE INSURANCE SETTLEMENT PROCEEDS TO UNIT OWNER CREDITORS OF OCEAN TRAIL WAS A PROPER PAYMENT OF A LAWFUL COMMON EXPENSE AND THE DISTRICT COURT OF APPEAL'S DISAPPROVAL OF THE SETTLEMENT WAS ERRONEOUS BECAUSE IT WAS BASED UPON AN INCORRECT INTERPRETATION OF THE FACTS.

Respondents' Initial Brief filed with the District Court of Appeal stated that, "there was no factual dispute about the use to which the insurance proceeds were put nor over the fact that the insurance proceeds were an asset of the Association." (R-17). Respondents contended in the District Court of Appeal, and once again in their Answer Brief filed with this Court, that the distribution of these funds was an improper payment of expenses which were not common expenses. However, the Opinion of the District Court of Appeal indicates that the Court did not accept Respondents' argument in this regard, but disapproved the settlement on other grounds, holding that there was "no possible justification for the preferential selectivity" in reimbursing some unit owners, but not all, from the insurance proceeds. The District Court of Appeal was concerned that **all** unit owners be reimbursed for the amounts which they paid for the special purchase assessment, and indicated that had **all** owners been paid

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pro-rata, then the disbursement would have been proper. The District Court of Appeal's error lies in its belief that the reimbursement was "selective". It was not. To illustrate this point, a break down of the three types of unit owners at OCEAN TRAIL is helpful:

(1) unit owners who paid the purchase special assessment, litigated against OCEAN TRAIL and obtained judgments (judgment creditors);

(2) unit owners who paid the purchase special assessment and did not litigate against OCEAN TRAIL (general creditors); and

(3) unit owners who did not pay the purchase special assessment and who had no claims against OCEAN TRAIL for reimbursement of assessment monies paid.

Of the foregoing three classes of unit owners, the first two, as creditors of OCEAN TRAIL, were fully reimbursed the amounts that they paid under the purchase special assessment. The first group consisted of judgment creditors whose judgments were satisfied from the judgment special assessment. The second group of unit owners were all reimbursed on a pro-rata basis from the insurance proceeds. Although the insurance proceeds only satisfied 27% of the amount due this second group of unit owners, OCEAN TRAIL subsequently, in October 1989, paid the remaining 73% due from the monies collected from Campeau in the rescission action. After that payment, <u>all</u> of the unit owners who had paid all or part of the purchase special assessment were paid in full, whether or not they had received a judgment. Although, the District Court of Appeal was correct in recognizing that the disbursement of the insurance proceeds was proper as a common

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expense, its disapproval of the distribution was erroneous because of the Court's misunderstanding these facts.

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CONCLUSION

The key issue in this case is the propriety of the judgment special assessment levied by OCEAN TRAIL. The peripheral issues raised by the Respondents are not material to the certified question and confuse the central issue. OCEAN TRAIL has the power and authority under the Condominium Act and its documents to impose the assessment for the purpose of satisfying judgment liens and to pay losses of the Association. The lawful purpose of the assessment was to satisfy OCEAN TRAIL's judgment creditors and thereby protect OCEAN TRAIL's common properties, bank accounts, collection of future assessments, etc. It is inconsequential that payments were made from the judgment special assessment to judgment creditors who also happened to be unit owners. Moreover, the fact that the "unauthorized acts" of OCEAN TRAIL gave rise to a series of events eventually resulting in these judgment liens is also inconsequential. OCEAN TRAIL had no reasonable alternative but to exercise the only prudent option available, to impose a special assessment to protect its common properties and other assets from levy and execution by the judgment creditors. To deny OCEAN TRAIL the ability to levy assessments to satisfy judgment liens will effectively mean that OCEAN TRAIL, and other condominium associations in this State, can never pay liabilities such as liens and judgments, which they incur arising out of tortious, wrongful or simply mistaken acts of the Association. Such a result is both legally and practically unreasonable, and would defeat the very propose of a

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condominium association, which is an entity that perpetually manages and operates the property of the unit owners and the association. Therefore, it is respectfully submitted that this Court should quash the Opinion of the District Court of Appeal, and affirm the trial court's rulings.

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 5 day of January, 1994 to David L. Gorman, Esquire, 618 U.S. Highway One, North Palm Beach, Florida 33408.

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