IN THE SUPREME COURT OF FLORIDA

SUSAN COHN,

Appellant,

vs.

THE GRAND CONDOMINIUM ASSOCIATION, INC., PH HOTEL, INC., & PH RETAIL, INC.

Appellees.

CASE NO.: SC10-430

L.T. NO.: 3D08-3051

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ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

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THE GRAND CONDOMINIUM ASSOCIATION, INC.'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Susan Cohn, was a defendant, and The Grand Condominium Association, Inc., was the plaintiff in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. In this brief, the appellant will be referred to as "Cohn" and appellee, The Grand Condominium Association, Inc., will be referred to as "The Grand." The two other defendants, appellees in this Court, PH Hotel, Inc. and PH Retail, Inc., are referred to as "PH Hotel" and "PH Retail."

The following symbols will be used:

IB = Initial Brief of Appellant

IB App. = Appendix to Initial Brief

IB DCA = Initial Brief before the Third District Court of Appeal

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

"The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute." Sabawi v. Carpenter, 767 So. 2d 585, 586 (Fla. 5th DCA 2000). The statement of the case and facts in the Initial Brief "is unduly argumentative and contains matters immaterial and impertinent to the controversy between the parties." Williams v. Winn-Dixie Stores, Inc., 548 So. 2d 829, 830 (Fla. 1st DCA 1989). Because the statement of the case and facts in the Initial Brief is argumentative, incomplete, and violates the Florida Rules of Appellate Procedure, The Grand submits the following statement of the case and facts:

The Grand was created in 1986 when its Declaration of Condominium ("the Declaration"), Articles of Incorporation and By-Laws (collectively "the Governing Documents") were filed in the Public Records of Dade County, Florida. (R. 464-465). The Grand is a mixed-use condominium containing 810 residential units (owned individually), 141 retail units (owned by PH Retail, Inc.), and 259 commercial units (owned by PH Hotel, Inc.). Cohn v. Grand Condominium Ass'n, Inc., 26 So. 3d 8, 9 (Fla. 3d DCA 2009). All of The Grand's commercial units are operated collectively as a DoubleTree hotel, and the retail shops are on the first

two floors of the condominium. Id. Appellant is a residential unit owner at the Grand. Id. When The Grand was created in 1986, "there was no specific statute regulating mixed-use condominiums." Id.

Article VI of The Grand's Articles of Incorporation provides that The Grand's "affairs shall be managed by a Board of Directors. . ." (R. 451). In order to ensure that each group of unit owners (residential, retail, and commercial/hotel) would have an equal say in how The Grand is managed, Article VI established the following method of voting for the seven (7) members of the Board of Directors:

(1) Residential unit owners vote for and elect two directors;

(2) Retail unit owners vote for and elect two directors;

(3) Commercial/hotel unit owners vote for and elect two directors; and

(4) The entire membership votes for and elect one "at large" director.

(R. 451-452). Under the Governing Documents, the residential unit owners, the retail unit owners, and the commercial/hotel unit owners equally hold 29% of the voting interests. (R. 504). In addition, all residential unit owners, the retail unit owners, and the commercial/hotel unit owners share a 13% interest in voting for the "at large" director. Id. The voting procedures set forth in The Grand's Declaration and Governing Documents have been followed at every annual meeting since The Grand was turned over from the developer in 1993. (R. 452, 464-465).

In 1995, the Florida Legislature enacted section 718.404, which stated that "where the number of residential units in the condominium equals or exceeds 50 percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration." Because the 1995 version of section 718.404(2) did not provide for the retroactive application of the statute, The Grand continued to elect its Board of Directors in accordance with its Declaration and Governing Documents.

In 2007, the Florida Legislature amended section 718.404(2) to provide for the retroactive application of the statute. The Florida Legislature's Staff Analysis of the amendment states that the retroactive application "could have the effect of re-writing previously recorded declarations, and therefore may be an unconstitutional impairment of obligation of contract." Fla. S. Comm. on Judiciary, CS for SB 902 (2007), Staff Analysis 18 (Apr. 18, 2007). The amendment to section 718.404(2) became effective on July 1, 2007. The amended version of section 718.404(2) does not specifically state how the modification of the residential and non-residential unit owners' vested interests in their full voting rights, which constitute an appurtenance to each condominium unit, would occur. § 718.404(2), Fla. Stat.

On December 14, 2007, The Grand filed a Complaint for Declaratory Relief. (R. 4-13). The Grand sought a declaration that, among other things, section

718.404 violates Article I, Section 10 of the Florida Constitution because it constituted an unreasonable impairment of the contract between The Grand and the owners of its retail and commercial/hotel units. (R. 11-12). Both The Grand and Cohn filed motions for summary judgment. (R. 412-425, 447-457).

The trial court conducted a hearing on the summary judgment motions and, after a thorough analysis of the pertinent issues, concluded that the retroactive application of section 718.404(2) was unconstitutional as applied in this case. (R. 505). Final summary judgment was subsequently entered in favor of The Grand. (R. 506-507). Cohn appealed the final judgment to the Third District Court of Appeal, which held that retroactive application of section 718.404(2) was unconstitutional as applied to The Grand. Cohn, 26 So. 3d at 11. This appeal followed.

SUMMARY OF THE ARGUMENT

Article I, section 10 of the Florida Constitution prohibits the Florida Legislature from passing ex post facto laws or laws impairing the obligation of contracts. The Grand's Declaration and Governing Documents are contracts. Every unit owner at The Grand entered into a contractual arrangement and agreed to be bound by the terms set forth in the Declaration and the Governing Documents. These contracts expressly set forth a system for electing The Grand's Board of Directors, which manages The Grand's affairs.

There have always been three types of units at The Grand since it was formed in 1986: residential, retail, and commercial/hotel. In order to ensure that each group of unit owners would have an equal say in how The Grand is managed, the Articles of Incorporation established an equitable method of voting for the Board of Directors. Every unit owner at The Grand has a legally vested right to their full voting rights set forth in The Grand's Articles of Incorporation because those rights constitute an appurtenance to the unit and cannot be modified without the consent of all unit owners and lienors. The 2007 amendment to section 718.404(2) of the Florida Statutes ostensibly altered the voting rights of all of The Grand's unit owners. Retroactive application of section 718.404(2) in this case, however, would unconstitutionally violate the terms of The Grand's Declaration and Governing Documents, would infringe upon the contractual arrangement established by the Declaration and the Governing Documents, and would deprive The Grand's unit owners of their legally vested, full voting rights.

In order to address whether the retroactive application of section 718.404(2) to The Grand violated Article I, Section 10 of the Florida Constitution, the Third District Court of Appeal properly applied the test set forth by this Court in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1984). After a thorough analysis, the Third District held that the "2007 retroactivity amendment must be invalidated as an impairment of the obligation of

contract." Cohn, 26 So. 3d at 11. Because retroactive application of section 718.404(2) to The Grand would unconstitutionally impair the contractual rights of The Grand's unit owners, the Court should affirm the Third District's well-reasoned opinion in Cohn.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT SECTION 718.404(2) OF THE FLORIDA STATUTES WAS UNCONSTITUTIONAL AS APPLIED TO THE GRAND IN THIS CASE

Standard of Review

"This Court reviews de novo a lower court's ruling on the constitutionality of a statute," and legislative acts are afforded a presumption of constitutionality. Lawnwood Med. Ctr. v. Seeger, 990 So. 2d 503, 508 (Fla. 2008). Nevertheless, "[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." State Farm Mut. Automobile Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995).

Section 718.404(2) of the Florida Statutes is Unconstitutional as Applied to The Grand under this Court's Decision in Pomponio

Cohn argues that the Third District Court of Appeal erred by applying this Court's decision in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1984) because it is distinguishable and inapplicable to this case. (IB.

37). According to Cohn, the Court should not apply Pomponio because the unconstitutional statute at issue in that case infringed upon the contract between a condominium association and its landlord. The instant case, in contrast, involves an unconstitutional statute that impairs the contractual relationship between The Grand and its unit owners. Cohn does not cite any authority to support the assertion that the constitutional analysis created by this Court in Pomponio does not apply to statutes that infringe upon the contractual relationship between a condominium and its unit owners.

Nothing in the Pomponio decision limits the test set forth therein to statutes affecting "the contractual rights of a third party landlord that entered into an agreement with a condominium association." (IB. 41). Rather, the Court in Pomponio set forth a general test to be utilized when analyzing whether a statute violates Article I, Section 10 of the Florida Constitution. Pomponio, at 378 So. 2d 780-782. The fact that Florida courts have applied the Pomponio test in a variety of different cases for more than three decades undermines Cohn's attempt to limit the holding in Pomponio to the facts of that case. See Coral Lakes Cmty. Ass'n, Inc. v. Busey Bank, N.A., 30 So. 3d 579 (Fla. 2d DCA 2010); Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236 (Fla. 4th DCA 2009); Brevard County v. Florida Power & Light, 693 So. 2d 77 (Fla. 5th DCA 1997); Yellow Cab Co. v. Dade County, 412 So. 2d 395 (Fla. 3d DCA 1982). Accordingly, Cohn's assertion

that Pomponio is "inapplicable" and "clearly distinguishable from the instant action" must fail.

Alternatively, Cohn argues that section 718.404(2) passes constitutional muster under Pomponio. (IB. 42-47). Cohn's alternative argument must fail because the Third District correctly held "that the Pomponio test is not satisfied" in this case. Cohn, 26 So. 2d at 11. The first inquiry of the constitutional analysis under Pomponio must be "whether the state law has, in fact, operated a substantial impairment of a contractual relationship." Id. at 10. "'The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.'" Pomponio, 378 So. 2d at 779.

The Third District properly concluded "that the voting arrangements in a condominium are of great importance, and the change imposed by subsection 718.404(2) operates a substantial impairment of the existing contractual relationship." Cohn, 26 So. 3d at 10. Cohn argues the Third District's conclusion was erroneous because "the law has absolutely not operated as a substantial impairment of The Grand's or the Controlling Entities' contractual relationship." (IB. 43). Cohn claims that any impairment caused by the retroactive application of

section 718.404(2) is minimal, at best, because (1) PH Hotel and PH Retail "would still be guaranteed representation on the association's board of directors," and (2) "even a residential unit owner controlled board of directors will still owe the Controlling Entities a fiduciary duty pursuant to § 718.111 Fla. Stat., and all of their rights, as provided in the governing documents would remain undisturbed." (IB. 43). Such an argument should be rejected for two reasons: First, it was not raised below and second, it is wrong.

The law is clear that a party cannot raise an argument for the first time on appeal. Metropolitan Dade County v. Chase Fed. Housing Corp., 737 So. 2d 494, 499 n.7 (Fla. 1999)(refusing to address party's argument that was not raised before the trial court, or the Third District); M.W. v. Davis, 756 So. 2d 90, 97 n.17 (Fla. 2000)(juvenile defendant's "constitutional right to privacy" argument was not preserved for this Court's review because it was not raised before the District Court of Appeal). Cohn never argued before the Third District that the impairment caused by the retroactive application of section 718.404(2) would be minimal because PH Hotel and PH Retail would still have representation on the Board of Directors, albeit much less than their legally vested full voting rights under section 718.106(2)(d) of the Florida Statutes. Furthermore, Cohn never claimed that the impairment of PH Hotel's and PH Retail's contractual rights would be minimized by the "fiduciary duty" the Board of Directors would owe to those entities. In fact,

Cohn conceded before the Third District that "the statute absolutely effects [sic] the rights of the Controlling Entities." (IB. DCA 32). Even if Cohn had raised such an argument below, it would be without merit because the right to vote for The Grand's Board of Directors constitutes an appurtenance to the unit and is a vested property right under Florida law by statute. § 718.106(2)(d), Fla. Stat.; Mahood v. Bessemer Prop., 18 So. 2d 775, 779 (Fla. 1944)("When a lawful contract is in existence regulating property rights and property rights have been acquired and vested by authority of law, subsequent legislation cannot divest the rights."). The fact that the Board Members owe a fiduciary duty to the unit owners is true irrespective of the manner in which the different types of owners vote for the Board of Directors. The "fiduciary duty" argument is beside the point. Therefore, Cohn's argument that any impairment caused by the retroactive application of section 718.404(2) is minimal, at best, should be rejected.

Since the retroactive application of section 718.404(2) would cause a substantial impairment of the existing contractual relationships of The Grand and its unit owners, the balancing test set forth by this Court in Pomponio is applicable. Under the Pomponio balancing test, the Court must analyze the following factors:

> (a) Was the law enacted to deal with a broad, generalized economic or social problem?
>
> (b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to

regulation by the state?

> (c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

Pomponio, 378 So. 2d at 779 (footnotes omitted). The Third District addressed the first question in the Pomponio balancing test and noted that the record on appeal "is devoid of any explanation of the problem which led to the enactment of the retroactivity provision." Cohn, 26 So. 3d at 10.

The 2007 Legislature's Staff Analysis was part of the record on appeal in this case, but nothing therein offered any explanation of the problem which led to the adoption of the retroactivity clause in section 718.404(2). Id. at 11. In fact, the Legislature's Staff Analysis acknowledged that the amendment to section 718.404(2) "could have the effect of re-writing previously recorded declarations, and therefore may be an unconstitutional impairment of obligation of contract." Fla. S. Comm. on Judiciary, CS for SB 902 (2007), Staff Analysis 18 (Apr. 18, 2007). Due to the complete lack of record evidence on this point, the Third District reasonably and correctly concluded that the retroactivity clause in section 718.404(2) was not enacted to deal with a broad, generalized economic or social problem.

Cohn argues the Third District's conclusion regarding the first prong of the Pomponio test was erroneous because Florida courts are generally "required to

presume that the Legislature enacts a law for a purpose." (IB. 44). Cohn contends, without citing any authority, that Florida law required The Grand, PH Hotel, and PH Retail to prove "that the Statute was enacted for no legitimate purpose." Id. Such an argument must fail because it would essentially require The Grand, PH Hotel, and PH Retail to prove a negative, i.e., that section 718.404(2) was not enacted to deal with a broad, generalized economic or social problem, which is nearly impossible to do and which is not the first prong of the Pomponio test.

If a statute is revised to deal with a broad, generalized economic or social problem, then evidence of the problem should exist in the enacting legislation or in the Legislature's Staff Analysis. A review of the enacting legislation and the Legislature's Staff Analysis in this case, however, does not even suggest that the retroactive application of section 718.404(2) was designed to deal with any broad, generalized economic or social problem. In fact, the amendment to section 718.404(2) was quite narrow and focused only on a small number of mixed-use condominiums that: (1) were created before 1995, (2) possessed a number of residential units that equaled or exceeded 50% of the total units operated by the association, and (3) contained governing documents that did not entitle the owners of residential units to vote for a majority of the seats on the board of directors.

The Legislature's Staff Analysis expressly acknowledged that the retroactive application of section 718.404(2) could result in the "unconstitutional impairment

of obligation of contract," and it even cited the balancing test set forth by this Court in Pomponio. Fla. S. Comm. on Judiciary, CS for SB 902 (2007), Staff Analysis 18 (Apr. 18, 2007); Crescent Miami Ctr., LLP v. Fla. Dep't of Revenue, 903 So. 2d 913, 918 (Fla. 2005)(the Legislature is presumed to know the existing law, including judicial decisions, when a statute is enacted). The Legislature was fully aware of the Pomponio balancing test when it amended section 718.404(2), yet it still failed to identify any broad, generalized economic or social problem that the amended statute was intended to remedy. In light of these facts, the Third District properly concluded that the amendment to section 718.404(2) failed to satisfy the first prong of the Pomponio balancing test. Cohn, 26 So. 3d at 10-11.

The second factor under the Pomponio balancing test is whether section 718.404(2) operates "in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?" Pomponio, 378 So. 2d at 779. The term "mixed-use condominium" did not exist when The Grand came into existence, and the subject matter of section 718.404(2) invades an area that was never before the subject of state regulation, i.e., the right of a condominium which is commercial, retail and residential, to create its own equitable voting system for the election of its board of directors. The Third District acknowledged that The Grand conformed to Florida law when it was

incorporated in 1986, and that "special regulations for mixed-use condominiums did not come into existence until 1995." Cohn, 26 So. 3d at 11.

Cohn argues, without citing any pertinent authority, that The Grand "has always been a residential condominium even though it has both residential and commercial units." (IB. 45-46). The Grand is a large DoubleTree Hotel, and has always been principally a hotel with commercial retail shops. Contrary to Cohn's assertion, nothing in section 718.103 of the Florida Statutes (1985) states that The Grand was a "residential condominium." (IB. 45). In fact, the definition of "residential condominium" in the 1985 version of section 718.103 expressly states that "[i]f a condominium is a residential condominium but contains units intended to be used for commercial or industrial purposes, then, with respect to those units which are not intended for or used as private residences, the condominium is not a residential condominium." Thus, The Grand was not a "residential condominium" when it was formed in 1986 and was excluded from being such by the definitions provided in the Condominium Act.

Under The Grand's Governing Documents, the residential unit owners, the retail unit owners, and the commercial/hotel unit owners equally hold 29% of the voting interests. (R. 504). In addition, all residential unit owners, the retail unit owners, and the commercial/hotel unit owners share a 13% interest in voting for the "at large" director. Id. When The Grand was created in 1986, nothing in the

Condominium Act precluded the existence of such an equitable voting structure for the election of its board of directors. When section 718.404(2) was enacted, however, it addressed an area that was never before the subject of state regulation, i.e., the right of a mixed-use condominium to create its own equitable voting system. Thus, the Third District correctly concluded that the second prong of the Pomponio balancing test was satisfied in this case.

The third prong of the Pomponio balancing test is whether the law creates "a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?" Pomponio, 378 So. 2d at 779. Here, section 718.404(2) retroactively imposes a severe, permanent, and immediate change in a contractual arrangement that was created more than twenty years ago. For example, when The Grand's retail unit owners purchased their units, they were entitled to have an equal say in how The Grand is managed because they elected two directors and had the right to vote for one "at large" director. Any retroactive change in this arrangement would necessarily deprive the retail unit owners the benefit of their bargain, i.e., the equitable voting system for electing the Board of Directors, which is a significant vested right, which is an appurtenance to the unit under the Condominium Act. § 718.106(2)(d), Fla. Stat.

The retail, residential, and commercial/hotel unit owners were all afforded

equivalent voting rights when they purchased units at The Grand. Retroactive application of section 718.404(2) would immediately undermine The Grand's contractual arrangement by granting one type of unit owner a greater say over how The Grand is operated than was ever contemplated by the Declaration or the Governing Documents. Such an immediate diminishment in the value of the contracts of The Grand and its unit owners would be "repugnant to our constitutions." Sarasota County v. Andrews, 573 So. 2d 113, 115 (Fla. 2d DCA 1991). Since the third factor of the Pomponio balancing test strongly weighs against the retroactive application of section 718.404(2), the Third District's decision in this case should be affirmed.

An analogous issue was addressed by the Fifth District Court of Appeal in Wellington Prop. Mgmt. v. Parc Corniche Condominium Ass'n, Inc., 755 So. 2d 824 (Fla. 5th DCA 2000). In Wellington Prop. Mgmt., when the condominium unit at issue was put on the market, Florida law required any amendment that altered the "appurtenances to the unit" to be approved by all of the unit owners. Id. at 827. The condominium association, however, claimed that a subsequent amendment to section 718.110(4) of the Florida Statutes "related back" and permitted the common elements of the condominium to be altered or modified by the association upon a vote of 75% of the total voting interest. The Fifth District rejected the condominium association's argument and concluded that "[p]ermitting

this provision to 'relate back' would unconstitutionally interfere with the owners' contractual rights with the developer." Id. at 828. Similarly, permitting section 718.404(2) to apply retroactively would unconstitutionally interfere with the contractual rights of The Grand and all of its unit owners. Id.; Tradewinds of Pompano Ass'n v. Rosenthal, 407 So. 2d 976, 977 (Fla. 4th DCA 1982)("because the lease existed prior to the effective date of Section 718.401(4), Pomponio dictates a finding that under these facts the application of the statute is unconstitutional as impairing the contract rights of the lessors."); Gans v. Miller Brewing Co., 560 So. 2d 281, 283 (Fla. 4th DCA 1990)(virtually no degree of contract impairment has been permitted in the State of Florida).

Cohn argues, again without citing any authority, that the Third District's conclusion regarding the third prong of the Pomponio balancing test "was simply incorrect." (IB. 46). According to Cohn, the impairment caused by the retroactive application of section 718.404(2) is "simply illusory and does not exist" because (1) PH Hotel and PH Retail "would still be guaranteed representation on the association's board of directors," and (2) "even a residential unit owner controlled board of directors will still owe the Controlling Entities a fiduciary duty pursuant to § 718.111 Fla. Stat., and the Controlling Entities would still be entitled to all of the protections already given to them under the governing documents." (IB. 46-47). As an initial matter, this argument should be rejected because it was never

raised below. Metropolitan Dade County, 737 So. 2d at 499 n.7; M.W., 756 So. 2d at 97 n.17.

Even if Cohn had raised such an argument regarding the third prong of the Pomponio balancing test below, it would be without merit because the right to vote for The Grand's Board of Directors constitutes an appurtenance to the unit and is a vested property right under Florida law. § 718.106(2)(d), Fla. Stat. As an appurtenance to the unit, the ***full*** voting rights have the same degree of importance as the common elements, which are also appurtenances to the unit. § 718.106(2)(a), (b) & (d), Fla. Stat. Due process concerns preclude the State from abolishing vested rights. Rupp v. Bryant, 417 So. 2d 658, 665-666 (Fla. 1982). Furthermore, a legislative enactment is invalid when its application impairs vested rights, creates new applications, or imposes new penalties. Laforet, 658 So. 2d 55 at 61 (Fla. 1995); McCord v. Smith, 43 So. 2d 704, 708-709 (Fla. 1949)(retroactive application of a law is invalid "in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated."). The retroactive application of section 718.404(2) unconstitutionally impairs the vested rights of The Grand's unit owners. Coral Lakes Cmty. Ass'n, 30 So. 3d at 584 (retroactive application of statute was unconstitutional because it would impair the bank's vested contractual

rights). Therefore, Cohn's argument that any impairment caused by the retroactive application of section 718.404(2) is minimal should be rejected.

The Decision in Woodside is Inapposite

Cohn contends that the Third District's decision should be reversed based upon the analysis set forth in Woodside Village Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002). A review of the record in this case, however, reveals that once again, Cohn never made such an argument before the Third District and is trying to raise a new argument in this Court. In fact, Cohn did not even cite Woodside in the briefs she submitted to the Third District. Accordingly, Cohn's argument on this point should be rejected because it was never raised below. Metropolitan Dade County, 737 So. 2d at 499 n.7; M.W., 756 So. 2d at 97 n.17.

Cohn's reliance on Woodside is misplaced because that case did not involve the retroactive application of a statute that infringed upon the vested rights of the condominium unit owners. Instead, the Woodside case dealt with the amendment of a condominium's declaration pursuant to the amendment process set forth in the condominium's controlling documents. Although the amendment at issue in Woodside impacted the ability of the unit owners to freely lease their units, the amendment was duly enacted under the amendment process that all unit owners agreed to be bound by when they purchased their units. Woodside, 806 So. 2d at 460-461. Under these circumstances, this Court concluded that the amendment at

issue was valid and enforceable because the "respondents were on notice that the unique form of ownership they acquired when they purchased their units in the Woodside Village Condominium was subject to change through the amendment process, and that they would be bound by properly adopted amendments." Id. at 461-462.

Cohn claims, without citing any authority, that the "principles espoused in *Woodside* and the cases discussed therein are applicable to the case sub judice and support the Statute's constitutionality." (IB. 27). Such an argument is without merit because the Woodside case involved the voluntary amendment of a condominium's governing documents by the process set forth in the documents themselves. Article I, Section 10 of the Florida Constitution was not at issue in Woodside, and the retroactive application of a statute to condominium unit owners was never discussed. The instant case, unlike Woodside, involves the retroactive application of a statute that infringed upon the vested rights of The Grand's unit owners. Accordingly, Cohn's argument on this point should be rejected because Woodside is inapplicable to the instant case.

Cohn's "Police Powers" Argument

Cohn argues that the Third District's decision should be reversed because "[t]he legislative exercise of police powers cannot constitute the impairment of a contract, reasonably or unreasonably." (IB. 36). According to Cohn, the Florida

Legislature has the unfettered authority to undermine The Grand's constitutional right to enter into binding contracts pursuant to the Legislature's "police powers." (IB. 32-37). Cohn's argument should be rejected because it is only the ***legitimate*** exercise of the "police power" that cannot constitute an impairment of contract. Springer v. Colburn, 162 So. 2d 513, 514 (Fla. 1964).

The Contract Clause of the United States and Florida Constitutions "limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation." U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 21 (1977). Cohn's "police power" argument must fail because "[t]o justify retroactive application it is not enough to show that this legislation is a valid exercise of the state's police power because that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts." Yamaha Parts Distrib. Inc. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975). Since Cohn previously acknowledged that the retroactive application of section 718.404(2) constitutes an impairment of The Grand's established contractual relationships (IB. DCA 32), the decision in Yamaha Parts is controlling.

The Grand and all of its unit owners voluntarily entered into a contract. The contractual arrangement included a specific method for selecting The Grand's Board of Directors. Voting rights are "vested rights" which are appurtenant to a

unit, which require 100% approval of all unit owners and lienors to change. § 718.106(2)(d), Fla. Stat.; § 718.110, Fla. Stat. Section 718.404(2) cannot retroactively undo The Grand's voting system because it would violate Article I, Section 10 of the Florida Constitution (no "ex post facto law or law impairing the obligation of contracts shall be passed.") and conflict with sections 718.106 and 718.110 of the Florida Statutes. Cohn does not cite any case law holding that the State of Florida can utilize its police power to retroactively apply a statute that would eviscerate a condominium's equitable voting system for the election of its board of directors. The Grand's research has not uncovered such a case, probably because "[v]irtually no degree of contract impairment has been tolerated in this state." Yamaha Parts, 316 So. 2d at 559. Accordingly, Cohn's "police powers" argument should be rejected.

The Grand is aware that the State may, under certain limited circumstances, exercise its police power in a manner that infringes upon an existing contact. For example, in Yellow Cab Co., the Third District addressed whether the state interest of encouraging free competition of taxi-cab services outweighed the degree of contract impairment that would result from such an ordinance. In that case, a cab company contracted with five hotels to be the exclusive taxi-cab provider, specifying that "competitor cabs may bring passengers to those hotels, but are not permitted to pick-up passengers at those locations." Yellow Cab Co., 412 So. 2d at

396. Dade County subsequently enacted ordinances prohibiting exclusive tax-cab service, articulating its interest to "encourage free competition, provide passenger choice, and promote flow of taxi-cab service in such a fashion as to conserve fuel and improve transportation efficiency on behalf of Dade County citizens." Id. at 396-97.

Applying the balancing test in Pomponio, the Third District held that a state may use its police power to regulate taxi-cabs, which have historically been subject to state regulation, and failed to find how Dade County "could have achieved its stated goal without abrogating the exclusive agreements." Id. at 397. The Third District concluded "that the interests of the County far outweigh the severity of impairment to appellants' private contracts," and held that the ordinances were "a reasonable and necessary exercise of . . . police powers." Id.

The decision in Yellow Cab Co. is distinguishable because it involved the regulation of taxi-cabs and private contracts that were designed to limit free competition, prevent passenger choice, and preclude the flow of taxi-cab service. The instant case does not involve limitations on free competition or the inhibition of a vital method of public transportation. Rather, this case involves the retroactive application of a statute that would eliminate the equitable voting system for the election of a condominium's board of directors and undermine the unit owners' vested rights. Therefore, even though the Third District utilized the proper

constitutional analysis in Yellow Cab Co., that case is factually distinguishable from the instant case.

Argument that the Court "Need not Address" the Constitutionality of Section 718.404(2) of the Florida Statutes

Cohn argues that the decision below should be reversed because the Third District Court of Appeal was not required to pass upon the constitutionality of section 718.404(2) in this case. (IB. 21-24). Such an argument should be rejected because it was never presented to the trial court, or the Third District. Dober v. Worrell, 401 So. 2d 1322, 1323-1324 (Fla. 1981)(it is "inappropriate for a party to raise an issue for the first time on appeal from summary judgment."). In fact, the argument is so new that Cohn failed to raise it in the original version of her Initial Brief. Cohn waited until after the Court struck her original Initial Brief for failing to comply with the Florida Rules of Appellate Procedure before she inserted this issue into the case. The law is clear that a party cannot raise an argument for the first time on appeal, and Cohn's argument on this point should be rejected. Metropolitan Dade County, 737 So. 2d at 499 n.7; M.W., 756 So. 2d at 97 n.17.

In an abundance of caution, The Grand will briefly address Cohn's unpreserved argument. According to Cohn, the Third District's decision should be quashed because there was no need to address the constitutionality of section 718.404(2) in this case. (IB. 24). Cohn's argument is without merit because The Grand sought a declaratory judgment that section 718.404(2) violated Article I,

Section 10 of the Florida Constitution and constituted an unreasonable impairment of contract. (R. 11). This Court has "previously recognized that under ordinary circumstances the constitutionality of a statute should be challenged by filing a suit for declaratory judgment in circuit court." Moreau v. Lewis, 648 So. 2d 124, 126 (Fla. 1995). Since The Grand properly challenged the constitutionality of 718.404(2) by filing a suit for declaratory judgment in the circuit court, Cohn's argument on this point should be rejected.

Cohn contends that the Third District's constitutional analysis in this case was unnecessary because section 39.1 of the Declaration purportedly put The Grand and all unit owners on notice "that the provisions of the Declaration could be declared invalid at any time." (IB. 23). Cohn does not cite a single case, or any other authority, to support such an assertion. The existence of the "severability" clause contained in The Grand's Declaration merely states that if any portion thereof is held to be invalid, then the validity of the remainder of the Declaration will not be affected. Nothing in section 39.1 of the Declaration states that the vested rights of a unit owner "could be declared invalid at any time," and Cohn's argument on this point is without merit.[1]

[1] Cohn's argument, taken to its logical conclusion, would authorize the State of Florida to infringe upon the vested property rights of all condominium owners with similar "severability" clauses in their declarations. According to Cohn's argument, it would permissible for the Florida Legislature to enact legislation transferring the title of all of PH Hotel's and PH Retail's units based upon the "severability" clause

Cohn claims that the right to vote for The Grand's Board of Directors does not constitute a "vested right" under Florida law due to the "severability" clause contained in the Declaration. (IB. 23-24). Such an argument must fail because every unit owner at The Grand has a vested right to vote for the Board of Directors pursuant to the method set forth in the Governing Documents. § 718.106(2)(d), Fla. Stat.

Voting rights are clearly "vested rights" because they constitute an appurtenance to the condominium unit under Florida law. Id. Furthermore, Section 9.21 of the Declaration states that no amendment shall "**materially alter or modify the appurtenances to such Unit**, or change the proportional percentage by which a Unit Owner shares the Common Expenses and owns the Common Surplus unless the record Owner thereof and all record owners of liens or mortgage encumbrances thereon shall join in the execution of such amendments." (IB. App. 10)(emphasis added). Section 718.110(4) of the Florida Statues precludes any amendment to the Declaration from materially altering or modifying the appurtenances of the units without approval from all of The Grand's unit owners. Since full voting rights are clearly appurtenances to every unit at The Grand, section 718.110(4) and Section 9.21 of the Declaration require the consent of all of

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contained in the Declaration. The absurdity of such an argument is patent, and Cohn's argument should be rejected because it is contrary to well-established Florida law. Yamaha Parts, 316 So. 2d at 559 ("Virtually no degree of contract impairment has been tolerated in this state.").

The Grand's unit owners, and all record owners of liens, before the voting rights of any unit can be altered or modified. Thus, retroactive application of section 718.404(2) would constitute an unlawful alteration or modification of the appurtenances to The Grand's units without the consent of all the unit owners, or the record owners of liens on the units.

Cohn's reliance upon this Court's decision in Century Village v. Wellington E, F, K, L, H, J, M & G, Condo. Ass'n, 361 So. 2d 128 (Fla. 1978) is misplaced. In Century Village, the Court addressed whether section 711.63(4) of the Florida Statutes could be applied retroactively to a condominium. The declaration at issue in Century Village specifically defined the "Condominium Act" as the condominium act of the State of Florida "[a]s it may be amended from time to time." Id. at 133. In light of the unambiguous language contained in the declaration, this Court held that section 711.63(4) of the Florida Statutes was retroactively applicable to the condominium because future amendments to the Condominium Act were incorporated by reference as part of the declaration.

The Grand's Declaration, unlike the declaration in Century Village, expressly defines the "Condominium Act" as the condominium act of the State of Florida "in effect as of the date of recording this Declaration." (IB. App. 1). Section 718.404(2) did not exist when The Grand's Declaration was recorded, and nothing in the Declaration states that future amendments to the Condominium Act

will be incorporated into the Declaration. Thus, the Court's decision in Century Village is distinguishable and Cohn's argument on this point is without merit.

Cohn's "Appellees Cannot Have it Both Ways" Argument

Cohn argues, without citing any pertinent authority, that the Third District's decision should be reversed because The Grand "cannot have it both ways." (IB. 24-26). The law is clear that "in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal." Singer v. Barbua, 497 So. 2d 279, 281 (Fla. 3d DCA 1986); Lester v. Arb, 658 So. 2d 583, 585 n.3 (Fla. 3d DCA 1995)(refusing to address argument because it was not properly raised as a point on appeal in the appellant's main brief). A review of Cohn's Initial Brief before the Third District reveals that her "both ways" argument was never presented as a ground for reversal below. (IB. DCA 24-43). Cohn's failure to present such an argument as a clear, concise, and separate point of appeal before the Third District precludes her from raising the argument for the first time on appeal before this Court. Singer, 497 So. 2d at 281; Metropolitan Dade County, 737 So. 2d at 499 n.7.

In an abundance of caution, The Grand will briefly address Cohn's unpreserved argument. Cohn claims, again without citing any authority, that The Grand was a "residential" condominium when it was originally formed. Cohn's assertion is flawed because (1) The Grand never claimed to be a "residential"

condominium, and (2) The Grand has always been a mixed-use condominium because it contains both residential and commercial units. Although the Florida Legislature did not utilize the term "mixed-use condominiums" until after The Grand's Declaration was filed, that does not change the fact that The Grand has been a mixed-use condominium since its creation.

Cohn cites the decision in United Grand Condo. Owners, Inc. v. The Grand Condo. Ass'n, Inc., 929 So. 2d 24 (Fla. 3d DCA 2006) to support her argument. Cohn's reliance on United Grand Condo. Owners is misplaced because that case merely shows that The Grand is a mixed-use condominium. The Grand has never disputed the fact that it is a mixed-use condominium. Contrary to Cohn's assertions, The Grand has not "position[ed] itself in a place of lawlessness so it can simply pick and choose those provisions of the Condominium Act it is willing to be controlled by, and those it wishes to simply ignore." (IB. 26). Instead, The Grand has simply maintained that the retroactive application of section 718.404(2) violates Article I, Section 10 of the Florida Constitution substantially impairs the vested voting rights of its unit owners. The trial court, and the Third District, agreed with The Grand's position. Cohn, 26 So. 3d at 10. Accordingly, Cohn's unpreserved "both ways" argument should be rejected.

Unrelated Amendments to the Condominium Act are Irrelevant

Cohn argues that retroactive application of 718.404(2) is permissible simply

because other portions of the Condominium Act are amended from time to time. (IB. 47-51). Cohn never raised such an argument before the Third District. Thus, Cohn's argument on this point should be rejected because she raises it for the first time on appeal. Metropolitan Dade County, 737 So. 2d at 499 n.7; M.W., 756 So. 2d at 97 n.17.

In an abundance of caution, The Grand will briefly address Cohn's unpreserved argument. Cohn claims that retroactive application of section 718.404(2) is permissible in this case because other portions of the Condominium Act are amended from time to time. To support this argument, Cohn cites a litany of changes to different portions of the Condominium Act that purportedly "add[ed] or t[ook] away rights or obligations set forth in associations' governing documents, thereby impairing them."[2] (IB. 49-50). Cohn's reliance on changes to different portions of the Condominium Act is misplaced because it ignores the general rule that "in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." Metropolitan Dade County, 737 So. 2d at 499.

Cohn's argument on this point must fail because she does not cite any authority holding that the purported changes to the Condominium Act actually

[2] Cohn's Initial Brief does not identify exactly (1) what changes to the Condominium Act were made, or (2) when the changes to the Condominium Act were actually made.

infringed upon a unit owner's vested property right. Id. If the purported changes to the Condominium Act do not retroactively impair vested property rights, like the application of section 718.404(2) to The Grand does, then they would be inapposite. Cohn's argument is also flawed because it does not even suggest that the constitutionality of these amendments to the Condominium Act have ever been challenged in court. The Grand's research has not revealed any case law addressing whether the revisions to sections 718.112, 718.110, 718.1265, or 718.301 of the Florida Statutes violated Article I, Section 10 of the Florida Constitution. Absent an actual lawsuit contesting the constitutionality of the changes to the Condominium Act cited on pages 48-49 of Cohn's Initial Brief, it is unclear whether these purported changes would be unconstitutional as applied to The Grand, or any other condominium associations.

Cohn also contends that "[q]uite simply, if § 718.404(2) Fla. Stat. (2007) is deemed unconstitutional, this Honorable Court is necessarily establishing that the policy in Florida is that every condominium in this state is governed not only by a different declaration of condominium, but by a different set of statutes as well, depending solely upon what statutes were already in existence at the time the condominium was created." (IB. 51). Cohn further claims that affirming the Third District's decision in this case would cause "nightmares" for condominiums and "would make it virtually impossible for a condominium association to know with

which laws it must comply with and those it must ignore." Id. Cohn's "parade of horribles" argument is a red herring and should be rejected because Florida law is clear that a legislative enactment is invalid when its application impairs vested rights, creates new applications, or imposes new penalties. Laforet, 658 So. 2d at 61; Chase Fed. Housing Corp., 737 So. 2d at 503 ("retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations.").

CONCLUSION

Based upon the foregoing arguments and authorities, The Grand respectfully requests that this Honorable Court affirm the Third District's decision in Cohn and hold that section 718.404(2) is unconstitutional as applied to The Grand in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **Eric M. Glazer**, counsel for Susan Cohn, Glazer & Associates, P.A., One Emerald Plaza, 3113 Stirling Road, Suite 201, Hollywood, Florida 33312, and **H. Hugh McConnell**, counsel for PH Hotel and PH Retail, Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., 201 Alhambra Circle, Suite 1102, Coral Gables, Florida 33134 on June 8, 2010.

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I HEREBY CERTIFY pursuant to Florida Rule of Appellate Procedure 9.210 that this Answer Brief has been prepared in Times New Roman 14pt. font.

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