SUPREME COURT OF FLORIDA

CASE NO.: SC10-430

SUSAN COHN, an individual, **Appellant/Defendant/Counter-Plaintiff,** **vs.** **THE GRAND CONDOMINIUM ASSOCIATION, INC.**, a Florida non-profit corporation, **Appellee/Plaintiff/Counter-Defendant**	**LOWER TRIBUNAL CASE NOS.:** **3D08-3051** **07-44460**

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. New Legislation and the Significance of § 718.102 Fla. Stat.

In their answer briefs, the appellees argue that the statutes in effect when a condominium is created are the only statutes that will govern that condominium for all eternity, regardless of whether or not the Legislature, in utilizing its wisdom, passes new laws to better promote the health, welfare and safety of the millions of citizens in this state who make condominiums their homes. This is not only a wildly absurd notion that leads to every condominium association in this State being governed by a different set of laws, but simply ignores a plain reading of § 718.102 Fla. Stat. (1976), which, in relevant part, reads as follows:

> "The purpose of this chapter is:
>
> ***
>
> (2) To establish procedures for the … operation of condominiums.
>
> Every condominium created **and existing** in this state shall be subject to the provisions of this chapter." (Emphasis added)

Can there be any doubt that it was the Legislature's intention, when the Condominium Act was enacted, that all condominiums in this State be governed by a uniform set of laws? Can it be any clearer that the Legislature never intended to have virtually every condominium in this State, even those on the same block, governed by different laws, predicated solely on the date the declaration of

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condominium was recorded? As a matter of practicality and common sense, all amendments to the Condominium Act apply to all condominiums, regardless of when the condominium was created insomuch as condominiums are creatures of statute and subject to the Legislature's regulation and control. *Rogers & Ford Construction Corp v Carlandia Corp.*, 626 So.2d 1350, 1352 (Fla. 1993); see also *Turnberry Court Corp. v Bellini*, 962 So.2d 1006, 1008 (Fla. 3d DCA 2007)

Senate Bill 1196, entitled "The Distressed Condominium Relief Act," was recently passed by the Legislature and became law on July 1, 2010 - less than 2 weeks ago. The bill amended several provisions of the Condominium Act, which the Legislature deemed necessary because of the horrific economic downturn Florida has suffered. If one accepts the arguments raised by the appellees, there is not a single condominium in this State that is subject to any of the amendments set forth therein insomuch as every condominium in this State already existed before the amendments were passed. It naturally follows, according to the appellees, that the Legislature is absolutely powerless to exercise any legislative changes that it believes, in its wisdom, would promote the health, welfare and safety of the millions of condominium residents in this State. In sum, if this Honorable Court buys the appellees' arguments, the Legislature lacks the authority to pass laws that will assist existing condominiums, and the "Distressed Condominium Relief Act" apparently only applies to condominiums that are yet to be built, and thus, are not

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distressed to begin with. Needless to say, this Honorable Court cannot interpret § 718.102 Fla. Stat. (1976) in a manner that would lead to an unreasonable, harsh or absurd consequence. *Fla. Dep't of Envtl. Prot. v. Contractpoint Fla. Parks, LLC,* 986 So.2d 1260, 1270 (Fla. 2008).

The Distressed Condominium Relief Act makes massive changes to the Condominium Act, which necessarily alter existing declarations of condominium. Previously, unit owners had the right, pursuant to their declarations, to use the common elements they own without exception. That right has been curtailed by the Legislature, and limits same to unit owners who are not at least ninety (90) days delinquent in the payment of assessments. See § 718.303 Fla. Stat. (2010) Previously, landlords who were delinquent in payment of assessments still had the right to collect rents from their tenants. Now, however, § 718.116(11) Fla. Stat. (2010) allows associations to collect rents directly from tenants if the unit owners are delinquent.

Prior to July 1st, 2010, a foreclosing bank's liability to an association when it acquired title to a unit via a foreclosure sale was limited to the lesser of 6 months of unpaid assessments or one percent (1%) of the original mortgage debt. The Legislature amended § 718.116 Fla. Stat. (2010) to increase that liability to twelve (12) months of unpaid assessments or one percent (1%) of the mortgage debt.

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Before July 1st, 2010, directors were deemed to have abandoned their positions if they were more than ninety (90) days delinquent in the payment of assessments. The Legislature amended § 718.112 Fla. Stat. (2010) and directors are now deemed to have abandoned their positions if they are more than ninety (90) days delinquent in the payment of **any** monetary obligation to the association, including fines.

Clearly, if this Honorable Court buys the appellees' argument that laws passed in Florida can have no impact on existing condominiums, the Legislature just wasted a massive amount of time in passing The Distressed Condominium Relief Act insomuch as it cannot be applied to any of the tens of thousands of condominiums that are actually distressed, and can only apply to condominiums that do not even exist yet.

Again, practicality and common sense dictate that the Legislature, in its discretion and when so required, obviously possesses the ability, pursuant to its police powers, to make the lives of owners in existing condominiums safer, healthier and more economically advantageous. The Legislature wisely utilized that discretion in amending § 718.404 (2) Fla. Stat. (2007) (the "Statute") to allow the majority of residential unit owners to elect a majority of the board of directors who live in mixed-use condominiums, rather than the butcher, baker or candle stick maker who only occupy commercial units a few hours a day with the sole

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intent to make a buck. To hold that new condominium legislation cannot be applied to already existing condominiums would be to make the Legislature powerless to help the millions of Florida condominium residents who look to their elected officials to make necessary changes to the Condominium Act when needed.

Moreover, if amendments to the Condominium Act are not to be applied to existing condominiums, then § 718.102 Fla. Stat. (1976) would not clearly state that all condominiums created and **existing** in this State are subject to its provisions. Without question, there would be no need for the inclusion of the word "existing" if the appellees' positions had merit and amendments to the Condominium Act can only apply to condominiums yet to be created. Additionally, if amendments to the Condominium Act are not to be applied to existing condominiums, and can only be applied to future condominiums there would be no purpose for statutes such as § 718.1085 Fla. Stat. entitled, "Certain regulations **not be to be retroactively applied**."

It simply cannot be the policy in Florida that the Legislature is only able to enact laws to protect condominiums that do not even exist yet, and is powerless to help the millions of citizens who live in condominiums, simply because the condominiums already exist. That notion is simply untenable.

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B. The Pomponio Decision is Limited to Contractual Relationships That Are Not Creatures of Statute

The appellee, The Grand Condominium Association, Inc. ("The Grand") argues in its Answer Brief that the application of the test set forth in *Pomponio v. Claridge of Pompano Condo., Inc.,* 378 So.2d 774 (Fla. 1979) is unlimited in that it "…sets forth a **general** test to be utilized when analyzing whether a statute violates [the Contracts Clause]." (See The Grand's Answer Brief at 12) (Emphasis added) The general test set forth in *Pomponio* is just that, it is general. Not all contracts are alike and neither are all statutes. Thus, a "*general*" test, such as the one upon which The Grand relies cannot be used to measure the constitutionality of all statutes that affect all contracts. *Pomponio* is in no way imaginable all encompassing.

What the appellees have consistently ignored is the fact that condominiums are creatures of statute, and derive their powers, rights, abilities and obligations from the statutes that create them. *Woodside v Jahren*, 806 So.2d 452, 455 (Fla. 2002) As creatures of statute, condominiums are completely subject to the Legislature's regulation and control. *Rogers & Ford*, at 626 So.2d 1352; see also *Turnberry Court* at 962 So.2d 1008 Moreover, this Honorable Court established that unit owners do not have a vested interest in a declaration, as originally written *Woodside*, at 806 So.2d 460 (quoting *McElveen-Hunter v. Fountain Manor Association, Inc.*, 386 S.E.2D 435 (1989)). Noticeably absent from the appellees'

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briefs are any arguments or citations to any authority that refute the holdings in *Woodside*, *Rogers & Ford* or *Turnberry Court*, establishing that condominiums are subject to the Legislature's regulation and control. Their silence in this regard is absolutely deafening.

What the appellees further ignore is that there is not a single decision that cites to *Pomponio* that pertains to a contractual relationship that is a creature of statute, such as that between a condominium association and its membership. Instead, every case that uses *Pomponio* as its measuring stick pertains to contractual rights that exist in the organic law, whereas rights pursuant to a declaration of condominium do not. This huge distinction is what separates *Pomponio* from the instant action, and the appellees have not cited to anything that can bridge the gap between rights that exist in the organic law and rights that are subject to legislative control in order to establish that *Pomponio* is somehow applicable to this issue.

As a result, The Grand is completely incorrect when it states that Cohn has failed to cite any authority which limits the application of *Pomponio*. Without question, *Rogers & Ford*, *Turnberry Court*, and *Woodside*, as well as others, clearly demonstrate that the application of *Pomponio* is not only limited, but remains inapplicable to this case.

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C. The Burden of Demonstrating the Statute's Unconstitutionality was Squarely on the Shoulders of the Appellees, not the Appellant.

The appellees, PH Hotel, Inc. and PH Retail, Inc. (collectively the "Controlling Entities") argue in their Answer Brief that the burden was somehow on the appellant, Susan Cohn ("Cohn") to prove that the Statute was constitutional, and that it was not their burden to prove its unconstitutionality (See the Controlling Entities' Answer Brief at 2, 13, and 16 - 18) The Controlling Entities even went so far as to suggest that statutes in the State of Florida are presumed to be ***un***constitutional until proven otherwise when they relate to a retroactive application. (See the Controlling Entities Answer Brief at 2 and 16) Despite the Controlling Entities' arguments in this regard, the law in the State of Florida could not be clearer. Without question, statutes are presumed to be constitutional until affirmatively proven otherwise. See *Fla. Dep't of Revenue v. City of Gainesville*, 918 So.2d 250, 256 (Fla. 2005) And the extremely heavy burden of proving that a statute is unconstitutional, and thereby overcoming that presumption, lies squarely on the shoulders of the statute's challenger. See *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210, 1214 (Fla. 2000) Noticeably absent from the Controlling Entities' Answer Brief is there a citation to a single authority that would serve to overrule this Honorable Court's relatively recent decisions in this regard.

Quite clearly, these arguments are being raised in an attempt to overshadow and deflect attention away from the fact that the appellees failed to demonstrate in

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any meaningful fashion, or through any form of evidence, that the Statute is unconstitutional. The appellees' mere assertions that the Statute is unconstitutional and their expressed fear of what could possibly happen under an array of wildly speculative scenarios is wholly insufficient to establish that the Statute is unconstitutional. The burden was on their shoulders to prove that the Statute is unconstitutional and they failed to meet that burden. To try and evade this irrefutable fact, they now try and argue that the Statute is unconstitutional because it was somehow Cohn's burden to prove that the Statute is constitutional and she failed to do so. These arguments are without merit.

D. The Controlling Entities' Rights Were Not Vested

In response to Cohn's argument that the impairment of the Controlling Entities' contractual rights caused by the retroactive application of the Statute is minimal, the appellees state in their briefs that the Controlling Entities' right to vote for directors was somehow shielded from legislative regulation because such rights are an appurtenance to a condominium unit pursuant to § 718.106(2)(d) Fla. Stat. (See The Grand's Answer Brief at 15, 20, 23 & 27; see also the Controlling Entities' Answer Brief at 7 & 11) The appellees contend that the Statute cannot impair the Controlling Entities' rights because it would be incongruent with the provisions of § 718.106(2)(d) Fla. Stat. Clearly, the appellees claim that the Controlling Entities' voting rights are "vested" pursuant to § 718.106(2)(d) Fla.

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Stat. Thus, the basis upon which they rely in suggesting that the rights were "vested" was nothing more than a mere expectation based on an anticipation of the continuance of an existing law. When the Statute was amended by the Legislature, the law changed. Therefore, the Controlling Entities' voting rights were not vested to begin with insomuch as they were predicated upon a statute, and the impairment of those rights by the retroactive application of the Statute was permissible. *Florida Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478, 490 (Fla. 2008); see also *R.A.M. of South Florida, Inc. v WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2nd DCA 2004)

Moreover, as established by this Honorable Court in *Woodside*, unit owners do not have a vested interest in a condominium's governing documents. *Id.* at 460 If unit owners, simply because they want to be happier, can change the terms of an existing declaration, there can be no question that the State has the same authority to do so in order to protect the best interests of all condominium unit owners. Since the appellees' contractual rights were not vested to begin with, the retroactive application of the Statute is constitutional.

E. No New Arguments Were Raised by Cohn and the Standard of Review is De Novo

The appellees' argument that Cohn has impermissibly raised new arguments for the first time in her Initial Brief is without merit. While it is a general rule that parties should not raise issues for the first time on appeal, a lower court's legal

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conclusions are reviewed de novo. *Valladares v Junco-Valladares*, 30 So.3d 519, 523 (3d DCA 2010) Accordingly, all arguments raised by Cohn regarding the constitutionality of the Statute are permissible regardless of whether they were raised before the lower courts. Furthermore, the arguments raised by Cohn in the appeal to this Honorable Court are direct responses to the legal conclusions adopted in the decision of the Third District Court of Appeal and could only be addressed in this very proceeding.

F. There is Nothing in the Record to Demonstrate That the Impairment of the Controlling Entities' Contractual Rights is Severe

The appellees state in their briefs that the impairment to The Grand's Declaration of Condominium, caused by the retroactive application of the Statute, would be severe. Meanwhile, there is absolutely no evidence in the record to support this naked allegation. At no time did any of the appellees ever proffer any evidence to the trial court to show that when residential unit owners elect a majority of the members to the board of directors of a condominium with both residential and non-residential units, the condominium association or non-residential unit owners somehow suffer.

The best the Controlling Entities could come up with to show how "severe" the retroactive application of the Statute ***might*** be was to state that ***maybe*** a board of directors would be elected that is careless, and that careless board of directors ***might*** neglect the proper upkeep of the condominium … in some unspecified

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manner, or that ***maybe*** a board of directors would be elected that is over-zealous and ***might*** pass unspecified rules and regulations that ***might*** interfere with the Controlling Entities' businesses … in some unspecified manner. The Controlling Entities suggest that "**[t]he mere prospect**" of the residential unit owners electing a majority of the members to condominium's board of directors somehow "negatively impacts the value of the hotel and retail units," of course in some unspecified manner. (See Controlling Entities' Answer Brief at 15 - 16) Despite making these highly speculative arguments, the record in this case is completely devoid of any evidence that can even remotely support a single one of these completely hypothetical suppositions.

To the contrary, § 718.404(2) Fla. Stat. was originally enacted in 1995, and if the commercial unit owners in mixed-use condominiums were suffering the massive trauma, hardships and turmoil conjured up by the Controlling Entities' collective imaginations because the majority of the members to their boards of directors were elected by residential unit owners, the Legislature never would have amended the Statute in order to remind every applicable mixed-use condominium that it is subject to the Statute's provisions. Clearly, the Legislature did not amend the Statute in order to increase the completely and utterly speculative "harm" about which the Controlling Entities are complaining.

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And while the Controlling Entities attempt to influence this Honorable Court with doom and gloom speculation regarding potential worse case scenarios if the Statute is applied retroactively, The Grand offers up nothing but dogma. The Grand has consistently stated that the retroactive application of the Statute would cause a substantial impairment "…of the existing contractual relationships of The Grand and its unit owners…" but has never even alleged what the impairment would be, much less presented any evidence to prove it. (See The Grand's Answer Brief at 15) And worse, while The Grand continuously claims that the retroactive application of the Statute would impact its unit owners (the Controlling Entities), it has never once alleged, much less demonstrated, that **IT** would somehow be adversely effected by the retroactive application of the Statute. At no stage during the instant litigation has The Grand **ever** endeavored to explain how the Statute will impact **IT** or **ITS** rights.

None of the appellees presented any evidence to the trial court to show that similar condominiums that were constructed after 1995 were somehow worth less because the majority of the members of their boards of directors are elected by residential unit owners. Likewise, the appellees did not present evidence from owners or directors of other mixed-use condominiums who could show the trial court the supposed great harm that supposedly results when residential unit owners elect a majority of the members to these board of directors. The appellees did not

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present evidence from an expert in the field of commercial real estate or hospitality management who could show the trial court that the value of the Controlling Entities' units would drop if the Statute was applied to The Grand.

Not only did the appellees fail to produce any evidence to substantiate their claims that the retroactive application of the Statute would severely impair vested contractual rights, but to this day the appellees have failed to even allege, much less show, what the supposed harm would **actually** be if the Statute is applied retroactively. Instead, all this Honorable Court has been provided with is dogma and conjecture. Certainly, if the Statute does serve to create a severe impairment of contractual rights, the appellees would have been able to show this Honorable Court something to prove it. The appellees have not shown this Honorable Court anything to prove their claims, because there simply is no substantial impairment to their rights when the Statute is applied to the Controlling Entities, and absolutely no impairment whatsoever when the Statute is applied to The Grand.

Even the authority upon which the appellees attempt to rely does not support their position. More specifically, the Controlling Entities cite to *Lee County v Brown*, 929 So.2d 1202, 1209 (Fla. 2d DCA 2006) for the proposition that the Statute can be deemed unconstitutional without even applying the *Pomponio* test. In *Lee County*, however, the Second District Court of Appeals ruled that a statute is unconstitutional and repugnant to the Florida Constitution when it "…results in

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an immediate diminishment in value of the contract that '**retroactively turns otherwise profitable contracts into losing propositions**'…." (See Controlling Entities Answer Brief at 6) (Emphasis added) Never before have the Controlling Entities argued that their businesses would somehow fail if the Statute is applied retroactively. More importantly, there is absolutely nothing in the record that can support this wildest of contentions that the Controlling Entities would go out of business if the Statute is applied restoratively.

Insomuch as there is absolutely no evidence in the record to demonstrate that the retroactive application of the Statute would somehow constitute a severe impairment of the appellees' contractual rights, the *Pomponio* test need not even be applied to determine whether the Statute is constitutional. Given the arguments raised by the appellees, the overwhelming majority of which are either pure unadulterated dogma or wildly hypothetical conjecture, it has not, and cannot be shown that the retroactive application of the Statute creates a severe impairment of the appellees' contractual rights. Therefore, the retroactive application of the Statute is constitutional.

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CERTIFICATE OF COMPLIANCE BY COUNSEL

I HEREBY CERTIFY that this Initial Brief on the Merits complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to Rosenbaum, Mollengarden, Janssen & Siracusa, 250 S. Australian Avenue, Suite 500, West Palm Beach, Florida 33401-5506 and Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., 201 Alhambra Circle, Suite 1102, Coral Gables, Florida 33134, this 13th day of July, 2010.

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