IN THE SUPREME COURT OF FLORIDA

CASE NO: SC11-2590

DISTRICT COURT CASE NO.: 2D11-1188

GRANADA LAKES VILLAS CONDOMINIUM ASSOCIATION, INC., VELINDA STRAUB, PAOLO FERRARI, MICHAEL OROFINO, and KW PROPERTY MANAGEMENT CONSULTING, LLC,

PETITIONERS,

vs.

METRO-DADE INVESTMENTS CO. and SANTA BARBARA LANDINGS PROPERTY OWNER'S ASSOCIATION, INC.,

RESPONDENTS.

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS OF RESPONDENTS

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[1] Respondents have rephrased the issues since the argument by the Petitioners on the Condominium Act and the Not-for-Profit Corporation Act is essentially the same.

TABLE OF AUTHORITIES

Cases:

Constitution:

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STATEMENT OF THE CASE AND THE FACTS

The Petitioners have failed to present this Court with all the facts that were before the trial court. The facts are critical to an understanding of the decision of the Second District Court of Appeal. The Respondents will add those facts that they believe are important for the full presentation of the issues and which support the decision of the Second District.

The problems at the condominium involving the parties deteriorated to the point where Santa Barbara Landings Property Owner's Association, Inc. (the Master Association) and Metro-Dade Investments Co. filed an Emergency Motion for Receiver and Injunction[1]. (R. Vol. I Tab 4) The motion cites to the trial court's previous observation: "this is looking real ripe for an arbitration or receivership or to bring someone in to go through all of these books and straighten them out." (Id.) The necessity of a receiver was based upon:

> 1. The Condo Association has collected and retained the Master Association fees which are being commingled with the Condo Association fees.
> 2. The Condo Association has failed to provide a complete accounting.
> 3. The Master Association's property manager feels threatened and unsafe due to human feces placed at the front door of the Master Association's office, verbal harassment and abused from the president of the Condo Association, and graffiti at the Master Association office with a sign that said "DIE BITCH."
> 4. Nightly raids harassing and threatening Metro-Dade's tenants in an effort to have them pay the rent to the Condo Association.

[1]The Petitioners did not seek review of the injunction to the Second District.

> 5. The Condo Association has recorded fraudulent and exaggerated claims of lien against Metro-Dade Units.
> 6. The County health department has cited the community for the unsanitary condition of the pool.
> 7. The County has cited the community and the Master Association for sanitation issues which are caused by the Condo Association's failure to addresses these issues although it was collecting all monthly assessments.

(Id.)

In support of their motion, the Master Association and Metro-Dade filed the affidavits of Armando J. Bucelo, Jr. and Maggie Pedraza. Both affidavits have extensive exhibits attached, including the affidavits of tenants who swore to the "commando tactics" being used. (R. Vol. I Tab 5 and 6)

Mr. Bucelo is a director of the Master Association and also the president of Metro-Dade. Mr. Bucelo states that Granada Lakes Villas Condominium Association, Inc. (the Condo Association) is still collecting and retaining Master Association fees and interfering with the Master's efforts to collect its assessments by advising the unit owners to make all payments to the Condo Association. (R. Vol. I Tab 5)

Mr. Bucelo's affidavit explains, under oath and supported by exhibits, how initially both the master association fees and those of the condo association were collected by the same property management company, KW Property Management Consulting, LLC (KW), which also paid the master association expenses. (Id.)

The agreement terminated since the Condo Association was not paying the Master Association expenses, but still continued to collect the master's assessments. (Id.) The Condo Association has refused to provide an accounting of the amounts collected. (Id.) Due to the lack of funds collected and turned over to the Master Association, Metro-Dade advanced funds to pay for Master Association expenses including utilities, repairs, and management fees. (Id.) The total paid exceeds $87,000.00. (Id.) The detailed bills and payments were attached to the affidavit.

Mr. Bucelo detailed the audit findings of the auditors (selected by the Condo Association and KW), which show that at a minimum, the Condo Association owes Metro-Dade money. (Id.) Internal accounting records of the Condo Association also evidence that the Condo Association owes the Master Association more than $500,000.00. (Id.)

The accounting records support the claim that the liens filed by the Condo Association against the 55 units owned by Metro-Dade are fraudulently exaggerated. (Id.) The liens filed by the Condo Association interfered with Metro-Dade contracts for sale of some of its units. (Id.)

Mr. Bucelo also detailed the "Nightly Condo Commando Raids" used to intimidate Metro-Dade's tenants, advising them to pay the rent to the association and not to Metro-Dade's property manager. (Id.) Paolo Ferrari, the president of the Condo Association led these raids.

Maggie Pedraza was the property manager for the Master Association and also now manages the units owned by Metro-Dade. The affidavit of Ms. Pedraza supports the fact that the Master Association and Metro-Dade have not been able to collect the fees for the Master Association and rent and fees from the units owned by Metro-Dade. The employees have been harassed, confronted, and threatened. (R. Vol. I Tab 6) Mr. Ferrari has personally harassed, confronted and threatened Metro-Dade tenants. (Id.) Mr. Ferrari has demanded that the Metro-Dade tenants deliver their rent payments to Mr. Ferrari and the Condo Association. (R. Vol. I Tab 6 and Exhibit A - affidavits of tenants Tomas Sanchez and Canes Demezier) Mr. Ferrari has referred to Metro-Dade as crooks and demanded payment of rent from the tenants living in the units owned by Metro-Dade. (Id.)

In their Response in Opposition to Plaintiffs' Motion to Appoint a Receiver (R. Vol. II Tab. 7), the Petitioners did not assail the factual predicate. They argued that even if the facts were true, the trial court had no authority. (Id.) None of the Petitioners filed any affidavits in opposition to the appointment of a receiver or to the request for injunctive relief. The Petitioners did not call any witnesses to refute the affidavits and the live testimony presented to the trial court on February 1, 2011.

At the hearing held on December 13, 2010 on the motion, the Petitioners'

opposition at the hearing was based on the Condominium Act, Chapter 718, Florida Statutes. (R. Vol. II Tab 11at 19) The trial court heard argument of counsel and received into evidence, without objection, the affidavits of Mr. Bucelo and Mr. Pedraza with the attached exhibits. At this December hearing, the trial court orally granted the motion to appoint a receiver to collect all rents from both the Master Association and the Condo Association. The trial court also orally granted the motion for entry of an injunction. No written order was entered at that time.

In its Motion for Rehearing (R. Vol. II Tab 8), the Petitioners limited their objection to the appointment of a receiver to Chapter 718 and 617, the Not-For-Profit Corporation Act. They took the legal position that the trial court's authority was limited and required statutory support.

On February 1, 2011, the trial court heard testimony and more argument on the issue of the appointment of a receiver. The first witness was George Casio who works for Collier County Utilities Education and Compliance Section. (R. Vol. I Tab II 12 at 13) He described the problem with rotting trash in 2009. (Id. at 15) There was another complaint 15 to 20 days later about the same problem and an illegal connection to the county's water system. (Id. at 16) A County special magistrate issued fines of $5,000 and $20,000 on the property due to violations.

(Id. at 18) Mr. Casio identified photographs of the dumpster area taken January 14, 2011. (Id. at 20)

Mr. Casio testified that the County's issue is the health and safety of the residents. (Id. at 21) He also identified pictures taken the day of the hearing which showed the same conditions as on the earlier date plus a discarded television (a safety hazard), rotting garbage, broken glass, and construction debris. (Id. at 23) He described the problem of constant garbage on the ground. (Id. at 32)

KW told the witness that they were not responsible for trash collection or cleaning up property. (Id. at 33) KW told him that it was Metro-Dade's responsibility. (Id. at 33) KW took the position that the condition was not their responsibility. Mr. Casio testified on cross examination that whenever he called Bucelo or Maggie things were taken care of. (Id. at 52)

The trial court told counsel that the court would decide "who is responsible, but then again that dovetails into the question of who was collecting the monies and then if they were being properly being collected and disbursed to pay the fees." (Id. at 50) During this colloquy, counsel for the Petitioners did acknowledge that the Plaintiffs [Respondents] were seeking an equitable remedy from the court. (Id.)

The second witness the Respondents called was Mr. Addison from Collier County Public Utilities, who testified that the conditions that he saw were much worse than the photos he was shown in court. (Id. at 54) A super fine of $25,000 had been imposed and was still pending. (Id.) He has written notices as to problems with the property from late 2007 to present. (Id. at 53)

In December of 2010, the County started getting complaints again. The County was willing to drop the $25,000 fine, but now trash had become an issue again. (Id. at 55) Mr. Addison agreed that it was not an easy problem to address. (Id. at 56)

After the end of the testimony and additional argument, the trial court read its ruling into the record and entered the order reversed by the Second District. The order outlines some of the procedural, factual, and legal issues faced by the trial court. These include "the collection of master and association fees by one property management company and the inability to collect assessments from some units has resulted in insufficient funds to pay all of the ongoing obligations of both associations." (R. Vol. I Tab 1) The Condo Association has failed to file an accounting although one was commissioned. This has caused an impasse. (Id.)

The trial court identified the clear "inability or refusal" of the property management company (KW) to segregate and apply payments. (Id.) Even after court intervention, the problems of collection, segregation, and proration of master

and condominium assessments remained. (Id.) The trial court recognized the ongoing health and nuisance issues on the property and the notices and fines imposed by Collier County. (Id.)

> The Court finds that the pool has been locked due to maintenance issues, the trash has been allowed to accumulate resulting in violations, that renters who are occupying some of the 55 units owned by Metro Dade have been approached after hours to demand payments of rent and that members representing Metro Dade, who have been working on the property, have suffered from health issues.

(Id.)

The trial court further acknowledged that: "It is clear from the history outlined above and the multiple issues in this case that a receiver would be of great assistance to both the Court and the parties."

The injunction portion of the order that the trial court issued exemplifies and supports the need for a receiver. The trial court ordered:

> 1. Granada Lakes Villas Condominium Association, Inc., a Florida non-profit corporation, Velinda Straub, Paolo Ferrari, Michael Orofino and any of its representatives shall be enjoined as follows:
> a. Interfering with the master associations' [sic] collection of its monthly assessments
> b. Interfering with Metro-Dade's collections of its rents, except as specifically provided by statute within the parameters set by statute and law
> c. harassing, threatening or otherwise physically confronting Metro Dade's tenants
> d. harassing, abusing, intimidating, threatening or defaming Pedraza and or Bucelo.

(R. Vol. I Tab 1).

The Second District issued its decision to reverse the trial court based on this factual foundation.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal in *Metro-Dade Investments, Co. v. Granada Lakes Villas Condominium, Inc.*, 74 So.3d 593 (Fla. 2d DCA 2011) correctly concluded that neither the Florida Condominium Act nor the Not-For-Profit Corporation Act limits the inherent authority of a trial court to exercise its equitable jurisdiction when faced with the proper facts. *Insurance Management, Inc. v. McLeod*, 194 So.2d 16, 17 (Fla. 3d DCA 1967). Neither Chapter 718, nor Chapter 617, limits the trial court's equitable jurisdiction. Both Chapters simply provide instances when a receiver may be appointed.

The testimony and evidence presented to the trial court clearly supported the need for a receiver. The health and sanitation issues presented by the evidence and the witnesses affect the heath, safety and welfare of the residents of this condominium. The trial court found a clear need for a receiver based on the history of the case and all the efforts made by the court prior to the motion for the appointment of a receiver.

The trial court has inherent equitable authority to appoint a receiver where the facts warrant the court's intervention. *Insurance Management, Inc. v. McLeod,* 194 So.2d 16, 17 (Fla. 3d DCA 1967). The trial court's ability to appoint a receiver is not limited by any statutory authority.

The decision of the Second District does not expressly and directly conflict with the decision of the Third District Court of Appeal in *All Seasons Condominium Association, Inc. v. Busca,* 8 So.3d 2009 (Fla. 3d DCA 2009). Without the constitutionally mandated conflict, there is no basis for this Court's discretionary jurisdiction.

This Court should dismiss this appeal for lack of conflict jurisdiction, or , in the alternative, affirm the decision of the Second District.

STANDARD OF REVIEW

The Respondents agree that, on the merits, the standard of review of this Court is de novo since it involves an issue of law. As the Second District[2] noted in its decision, 74 So.3d at 594: "if the trial court was incorrect in its determination that it did not have the authority to appoint a receiver, this decision is an incorrect application of an existing rule of law, not an abuse of discretion. *See Canakaris v. Canakaris*, 382 So.2d 1197, 1202 (Fla.1980)." Thus, the de novo standard applies.

[2] *Metro-Dade Investments, Co. v. Granada Lakes Villas Condominium, Inc.*, 74 So.3d 593 (Fla. 2d DCA 2011).

On the jurisdictional issue, this Court must determine if the decision of the Second District Court of Appeal expressly and directly conflicts with a decision of this Court or of another district court of appeal. Art. V, § 3(b)(3), Fla. Const.

ARGUMENT

I.

NEITHER THE FLORIDA CONDOMINIUM ACT NOR THE FLORIDA NOT-FOR-PROFIT CORPORATION ACT LIMITS THE INHERENT EQUITABLE JURISDICTION OF THE TRIAL COURT TO APPOINT A RECEIVER.

The Respondents do not disagree with the language contained in the sections of the Chapter 718 and 617 cited by the Petitioners. The sections refer to situations when a receiver "may" be appointed. However, no section of either Chapter 718 or 617 limits the use of a receiver to those exemplified in the statutes. Clearly, the legislature could have tried to limit the jurisdiction of the trial courts, but did not do so. Without a specific prohibition, this Court must look to existing law, as did the Second District.

The Second District in *Metro-Dade Investments, Co. v. Granada Lakes Villas Condominium, Inc.*, 74 So.3d 593 (Fla. 2d DCA 2011) held that "the trial court erred as a matter of law because its right to appoint a receiver in this instance

is inherent in a court of equity, not a statutorily created right." 74 So.3d at 595. The opinion in *All Seasons Condominium Association, Inc. v. Busca,* 8 So.3d 434 (Fla. 3d DCA 2009), does not address the legal theory that a trial court has inherent equitable authority to appoint a receiver. In fact, the Third District specifically cited with approval non-condominium cases dealing with the appointment of a receiver. *See, e.g., Akers v. Corbett,* 138 Fla. 730, 190 So. 28 (1939); *County Nat'l Bank of N. Miami Beach v. Stern,* 287 So.2d 106 (Fla. 3d DCA 1973); *Apalachicola N. R.R. Co. v. Sommers,* 79 Fla. 816, 85 So. 361 (1920); *McAllister Hotel v. Schatzberg,* 40 So.2d 201 (Fla.1949); *Conlee Constr. Co. v. Krause,* 192 So.2d 330 (Fla. 3d DCA 1966).

The facts in *All Seasons* show that "the trial court appointed a receiver for the association, apparently in order to conduct that process more efficiently." *Id.* at 435. "That" refers to the suit "by the owners of condominium units against the association for money damages arising out of the latter's alleged failure properly to maintain and repair the common elements." *Id.* The legal issue decided by the Third District was that the "appointment of receiver must be pursuant and subsidiary to primary claim." Nowhere did the court hold that it must be pursuant to a "statutory" authority. The *All Seasons* court cited case law that the "appointment of a receiver [is] improper in absence of fraud, self dealing, or waste

of secured asset." *Apalachicola N. R.R. Co. v. Sommers*; *McAllister Hotel v. Schatzberg*; *Conlee Constr. Co. v. Krause*. Thus, the appointment of a receiver was not based on the condominium statutes, but was denied based on the facts presented for the use of the receiver. Thus, *All Seasons* did not hold that a receiver could only be appointed based on the Florida Condominium Act or the Florida Non-Profit Corporation Act. *All Seasons* makes no reference to any statute.

The decision of the Second District followed long established legal precedent to determine that the trial court had inherent equitable jurisdiction to appoint a receiver. The Second District in *Metro-Dade* acknowledged that "'The power to appoint a receiver ... lies in the sound discretion of the chancellor to be granted or withheld *according to the facts and circumstances of the particular case.' Ins. Mgmt., Inc. v. McLeod,* 194 So.2d 16, 17 (Fla. 3d DCA 1966) (emphasis added); *see also Edenfield v. Crisp,* 186 So.2d 545, 549 (Fla. 2d DCA 1966) ('The power to appoint a receiver is *always* one that is inherent in a Court of equity ....' (emphasis added))." 74 So.3d at 594. In *Metro-Dade* the trial court reversed its initial oral decision to appoint a receiver due to its belief that it did not have a statutory basis to do so. *Id.* at 594.

The Second District in *Metro-Dade* considered and rejected the Petitioners' argument that *All Seasons* was on point.

> In *All Seasons*, the Third District summarily held that "there [was] simply no cognizable basis for such an appointment in such a case." 8 So.3d at 435. The cases the appellate court relied upon in support of its conclusion pertained to a proper appointment of a receiver pursuant to a primary claim or in conjunction with the presence of fraud, self-dealing, or waste of a secured asset. *Id. All Seasons* does not cite to sections 617.1432, 718.117, and 718.1124 in support of its holding.

74 So.3d at 595. The Second District also noted that "*All Seasons* does not cite to sections 617.1432, 718.117, and 718.1124 in support of its holding." 74 So.3d at 595.

The Second District "disagree[d] with Granada Lakes' [Petitioners] assertion that sections 617.1432, 718.117, and 718.1124 restrict the right of a trial court to appoint a receiver in *any* action concerning a nonprofit corporation or condominium association." 74 So.3d at 595 (emphasis in original). The Petitioners' position would limit the appointment of a receiver in any action involving a condominium to "the dissolution of a nonprofit corporation, after a natural disaster when members of a condominium's board of directors are unable or refuse to act, or when a condominium association fails to fill vacancies on its board of directors to constitute a quorum in accordance with its bylaws." *Id.* This Court should reject this theory as it would limit the equitable powers of the trial court without regard to the facts of the case before the court.

The Second District addressed each of the Petitioners' arguments that the appointment of a receiver by the trial court was limited to sections 718.117 and 718.1124 of the Condominium Act and section 617.1432 of the Not-for-Profit Act. The Petitioners' argument that the decision in *Metro-Dade* is contrary to Florida law and the above statutes is not correct. The legal concept that the authority to appoint a receiver is inherent in the equitable jurisdiction of the trial court is not new. *Insurance Management, Inc. v. McLeod*, 194 So.2d 16, 17 (Fla. 3d DCA 1967).

The Second District correctly reversed the trial court and remanded for the trial court to exercise its jurisdiction on whether to appoint a receiver.

II.

THE DECISION OF THE SECOND DISTRICT IN METRO-DADE INVESTMENTS, CO. V. GRANADA LAKES VILLAS CONDOMINIUM, INC., DOES NOT CONFLICT WITH THE DECISION OF THE THIRD DISTRICT IN ALL SEASONS CONDOMINIUM ASSOCIATION, INC. V. BUSCA.

The jurisdiction of this Court is constitutionally limited by Article V, §3(b)(3), Florida Constitution. Although the Petitioners have attempted to invoke this section as a basis for jurisdiction, no conflict exists to allow review by this Court of the decision of the District Court. Article V, section 3(b)(3) provides that the Florida Supreme Court:

> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

To be within the Supreme Court's jurisdiction to review a District Court of Appeal decision in express and direct conflict with another decision, the District Court decision under review must contain a statement or citation effectively establishing a point of law upon which the decision rests. *Tippens v. State*, 897 So.2d 1278 (2005). To keep within the constitutional limits, this Court does not "exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court." *The Florida Star v. B.J.F.*, 530 So.2d 286, 289 (Fla. 1988). "Express and direct conflict" must be based on the four corners of the decision of the lower court. *Reaves v. State*, 485 So.2d 829 (Fla. 1986).

In order to have conflict jurisdiction, this Court must find "a real, live and vital conflict within the [constitutional] limits." *Nielsen v. City of Sarasota*, 117 So.2d 731, 735 (Fla. 1960) (rejecting certiorari jurisdiction under former conflict provision, Art. V, §4(2), Fla. Const. (1957)). There is conflict jurisdiction where the rule of law conflicts with a decision of the Florida Supreme Court or of the other District Courts or where there are contrary results on substantially the same facts involved in prior decisions. *Id.*; *Continental Video Corp. v. Honeywell*, 456 So.2d 892 (Fla. 1984) (no

basis for conflict jurisdiction where contracts and terms are not similar to those in other cases alleged to be in conflict). No basis exists in the present case.

The decision of the Second District followed long established legal precedent to determine that the trial court had inherent equitable jurisdiction to appoint a receiver. The legal concept that the authority to appoint a receiver is inherent in the equitable jurisdiction of the trial court is not new. *Insurance Management, Inc. v. McLeod*, 194 So.2d 16, 17 (Fla. 3d DCA 1967).

The Third District's holding also followed established precedent in the appointment of a receiver. *All Seasons* does not support conflict jurisdiction. It does not stand for the proposition espoused by the Petitioners that a statutory basis is required for the appointment of a receiver in a situation involving a condominium. The facts presented in *All Seasons* simply did not support the appointment of a receiver.

No conflict exists to provide a constitutional basis for discretionary review by this Court.

CONCLUSION

RESPONDENTS, METRO-DADE INVESTMENTS CO. and SANTA BARBARA LANDINGS PROPERTY OWNER'S ASSOCIATION, INC., respectfully request that this Court find that there is no express and direct conflict for this Court to resolve. The decision of the Second District Court of Appeal forms no basis for conflict jurisdiction for review by this Court. The District Court followed well-settled law and precedent, including decisions by this Court.

In the alternative, this Court should affirm the decision of the Second District Court of Appeal. The facts before the trial court provide a factual predicate and the trial court's inherent authority provides the legal basis for the trial court on remand to consider the appointment of a receiver.

Respectfully submitted,

/s/
Denise V. Powers, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this 10th day of October 2012 to: John S. Penton, Esq., Cole, Scott & Kissane, P.A., 1645 Palm Beach Lakes Boulevard, 2nd Floor, West Palm Beach, Florida 33401 john.penton@csklegal.com; Eric M. Glazer, Esq., Glazer and Associates, P.A., One Emerald Place, 3113 Stirling Road, Suite 201, Hollywood, Florida 33312 eric@condo-laws.com; Jeffrey P. Shapiro, Esq., Shapiro Ramos, P.A., 19 West Flagler, Suite 601, Miami, Florida 33130 jps@shapiroramos.com, and Jose M. Herrera, Esq., Jose M. Herrera, P.A., 2350 Coral Way, Suite 201, Miami, Florida 33145 jmh@herreralawfirm.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition has been prepared with Times New Roman 14-point font and is in compliance with Fla. R. App. P. 9.210(a)(2).

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