

IN THE SUPREME COURT OF FLORIDA

ASSOCIATION OF GOLDEN GLADES
CONDOMINIUM CLUB, INC., etc.,

Petitioner,

v.

SECURITY MANAGEMENT CORP.,

Respondent.

CONDOMINIUM ASSOCIATION OF PLAZA
TOWERS NORTH, INC.,

Petitioner,

v.

PLAZA RECREATION DEVELOPMENT CORP.,
a Florida corporation, and SECURITY
MANAGEMENT CORP., a Maryland corpor-
ation,

Respondents.

CASE NO. 71,909

FILED

SID J. WHITE

FEB 22 1989

CLERK, SUPREME COURT

By

Deputy Clerk

CASE NO. 71,594

SUPPLEMENTAL BRIEF OF
CONDOMINIUM ASSOCIATION OF PLAZA TOWERS NORTH, INC.

On Discretionary Review from the
Third District Court of Appeal
Case No. 86-3097

JEFFREY E. STREITFELD, ESQ.
BECKER, POLIAKOFF & STREITFELD, P.A.
Attorneys for Petitioner
Post Office Box 9057
Fort Lauderdale, FL 33310
(305) 732-0803 (WPB); 987-7550 (BR)

TABI OF ITENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii-iii
INTRODUCTION	1-2
ARGUMENT	3-7

POINT I

THE LOWER COURT HAS FAILED TO CONSIDER THE INTENT OF THE LEGISLATURE	3-5
---	-----

POINT II

FLORIDA STATUTE §718.401(8) WAS <u>NOT</u> REPEALED	6-7
CONCLUSION	8-9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Ansora Enterprises, Inc. v. Cole,</u> 439 So.2d 832 (Fla. 1983), <u>cert. denied,</u> 466 U.S. 927, 104 S.Ct. 1710 (80 L.Ed.2d 183 (1984)). . .	1
<u>Carawan v. State,</u> 515 So.2d 161 (Fla. 1987)	7
<u>Century Villase, Inc. v. Wellinston, etc., Condominium Association,</u> 361 So.2d 128 (Fla. 1978)	1
<u>Cove Club Investors, Ltd. v. Sandalfoot South One, Inc.,</u> 438 So.2d 354 (Fla. 1983)	2
<u>Fleeman v. Case,</u> 342 So.2d 815 (Fla. 1976)	1
<u>Goldenbers v. Dome Condominium Association, Inc.,</u> 376 So.2d 37 (Fla. 3d DCA 1979)	4
<u>Griffith v. Florida Parole and Probation Commission,</u> 485 So.2d 818 (Fla. 1986)	4, 5
<u>In re General Coffee Corp.,</u> 758 F.2d 1406 (11th Cir. 1985)	7
<u>McCord v. Connor,</u> 180 So. 519, 132 Fla. 56 (1938)	6
<u>McKibben v. Mallory,</u> 293 So.2d (Fla. 1974)	4, 7
<u>Morton v. Mancari,</u> 417 U.S. 535, 94 s.ct. 2474, 41 L.Ed.2d 290 (1974) . . .	7
<u>State v. Dunmann,</u> 427 So.2d 166 (Fla. 1983)	4, 7
<u>Sweet v. Josephson,</u> 173 So.2d 444 (Fla. 1965)	4, 7
<u>U.S. v. Cruz-Valdez,</u> 743 F.2d 1547 (11th Cir. 1984)	7
<u>United States v. Second National Bank of North Miami,</u> 502 F.2d 535 (5th Cir. 1974)	4

FLORIDA STATUTES

PAGE

§711.231	34. 9
§718.401(8)	12. 6
	8, 9
§718.4015	123. 8

MISCELLANEOUS

1962 Op. Atty. Gen., 062-14. Jan. 23. 1962	6
--	---

INTRODUCTION

WHY THIS COURT SHOULD CONSTRUE SECTION 718.4015, FLORIDA STATUTES (1988) IN ANSWERING THE CER- TIFIED QUESTION PRESENTED BY THE COURT BELOW.

This Court is being asked, hopefully once and for all, to what extent and under what circumstances may legislation adopted to ban the enforcement of certain escalation clauses in condominium and co-operative long-term recreation or other leases be applied to contracts entered into prior to its effective date?

This Court has previously determined that a lease entered into prior to June 4, 1975, may not be affected by such legislation absent an intent to apply the Florida Statutes "as the same may be amended from time to time". Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Century Village, Inc. v. Wellinston etc. Condominium Ass'n, 361 So.2d 128 (Fla. 1978); Ansora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied, 466 U.S. 927 (1984).

This Court has made it clear that escalations put into effect **after** June 4, 1975, are not enforceable because they violate 5711.231, Florida Statutes (1975), or §718.401(8), Florida Statutes (1977), where the declaration of condominium evidences an intent to apply the Florida Condominium Act "as the same may be amended from time to time".

Thus, escalation clauses in long-term recreation leases tied to the cost of living are enforceable where the declaration and lease were in existence prior to June 4, 1975, and there was no "amended from time to time" language. Such clauses were not

enforceable as to such contracts that predated **§718.401(8)**, Florida Statutes, where there existed "amended from time to time" language, without exception, until this Court decided Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., **438 So.2d 354** (Fla. **1983**).

It was the intent of the **1988** Legislature to broaden the scope of the application of such legislation to leases entered into prior to June **4, 1975**, even where there is no "amended from time to time" language. This Court recognized that intent when it denied Respondents' Motion to Dismiss the appeal perfected by the Petitioner ASSOCIATION OF GOLDEN GLADES CONDOMINIUM CLUB, INC., in Case No. **71,909**. However, the Third District Court of Appeal has decided otherwise, in Sky Lake Gardens Recreation, Inc. v. Sky Lakes Gardens Nos. 1, 3 and 4, Inc., **14 FLW 324** (Fla. **3d DCA 1988**).

Therefore, to fully and finally address the question as to the extent to which such legislation shall apply to pre-existing contracts, where the declaration evidences an intent to apply the Florida Condominium Act "as the same may be amended from time to time", this Court should address the scope and construction of **§718.4015**, Florida Statutes (**1988**).

A R G U M E N T

POINT I

THE LOWER COURT HAS FAILED TO CONSIDER THE INTENT OF THE LEGISLATURE.

This Court must, as its primary objective, determine the intent of the Legislature. In so doing, it should look at the actions of the Legislature since the initial adoption of **§711.231**, Florida Statutes, on June 4, 1975. Since that date, escalation clauses such as those involved in this litigation have been void as against public policy. Nowhere in the 1988 legislation has the Legislature expressed any intention to validate clauses that otherwise would be void as against public policy.

The 1988 session of the Florida Legislature, in stating that **§718.4015** "may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October 1, 1988", clearly intended that should escalations of lease rents otherwise be valid under the law that existed prior to October 1, 1988, **§718.4015**, Florida Statutes, would not operate to invalidate them. The Legislature did not intend the converse to be true; that is, to validate an escalation of rent that otherwise would have been unenforceable under the then-controlling statutory law.

When faced with an argument that the literal meaning of a statute is at variance with the legislative purpose, a court can follow no better guide than Sir Edward Coke's "Mischief Rule": "The office of judges is always to make such construction as to suppress the Mischief and advance the Remedy; and to suppress

subtle inventions and evasions for continuance of the mischief." United States v. Second National Bank of North Miami, 502 F.2d 535, 541 (5th Cir. 1974).

This Court should consider the preamble to House Bill 45 (S.APP.1) and Senate Bill 1422 (S.APP.2), the title of the enrolled bill, and the body of the bill, in conjunction with the history of the Legislature's efforts to void escalation clauses in condominium long-term leases. If so, this Court would not reach the conclusion reached below, that the Legislature, by implication, intended to validate clauses that had previously been illegal. Such a result should not be accomplished absent a clear legislative intent. McKibben v. Mallory, 293 So.2d (Fla. 1974); State v. Dunmann, 427 So.2d 166 (Fla. 1983); Sweet v. Josephson, 173 So.2d 444 (Fla. 1965); Goldenbers v. Dome Condominium Association, Inc., 376 So.2d 37 (Fla. 3d DCA 1979).

The intent of the Legislature was to reach out and protect those persons bound by leases that predated the initial legislation voiding such clauses as being contrary to public policy, 5711.231, Florida Statutes (1975). The intent of the Legislature was to **extend** the statutory protection, **not take it away**.

The Third District Court of Appeal has misapplied Griffith v. Florida Parole and Probation Commission, 485 So.2d 818 (Fla. 1986). In Griffith, this Court determined that the repeal of the statute governing administrative review operated to terminate certain existing appeals by prisoners from decisions of the Parole and Probation Commission. In so doing, this Court expressly held that:

However, with the demise of Section 120.68 Jurisdiction, the situation has reverted to that situation existing at the time of Moore; judicial review is still available through the common law writs of mandamus, for review of PPRD's, and habeas corpus, for review of effective parole release dates.

485 So.2d at 820.

The statute before this Court is not a procedural one, nor is there an equivalent alternative remedy available to condominium associations and their unit owners subjected to cost of living escalations in long-term leases which pre-date June 4, 1975, that were in effect prior to October 1, 1988.

POINT II

FLORIDA STATUTE §718.401(8) WAS NOT REPEALED.

In Sky Lake Gardens, supra, the Third District Court of Appeal made an express finding that the Florida Legislature repealed former §718.401(8), Florida Statutes. The entire text of the legislation, including its title, is provided to this Court in the form of a Supplementary Appendix, with this Brief. There is no express repeal language in the title, nor is there express repeal language within the body of the Act. Instead, in amending former §718.401(8), the Legislature stated that it was "making technical changes--".

An act may expressly or impliedly provide for the repeal or modification of an inconsistent statute or a statute on the same subject although such repeal, amendment or modification is not indicated or referred to in the title, without violating a constitutional requirement that the subject matter of an act be expressed in its title. However, where the Legislature desires to repeal a statute, not in conflict with the subject matter of the legislation before it, notice must be given of such an intention to repeal by reference thereto in the title to the legislation in question. McCord v. Connor, 180 So. 519, 132 Fla. 56 (1938); 1962 Op. Atty. Gen., 062-14, Jan. 23, 1962).

Repeals by implication are not favored. In the absence of an affirmative showing of an intention to repeal, the only justification for an implied repeal is when the earlier and later versions of the statute are irreconcilable. There must be a

positiverepugnancybetweenthe twotocreatearepealby implication. Refinement in the language of the statute does not invalidate a previous enactment, unless **it** is expressly stated in the law. McKibben v. Mallory, supra; State v. Dunmann, supra; Sweet v. Josephson, supra; U.S. v. Cruz-Valdez, 743 F.2d 1547 (11th Cir. 1984); Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); Carawan v. State, 515 So.2d 161 (Fla. 1987); In re General Coffee Corp., 758 F.2d 1406 (11th Cir. 1985).

While no repeal exists in this case, even where a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment, whereas as additions or changes are treated as amendments effective from the time the new statute goes into effect. McKibben v. Mallory, supra.

CONCLUSION

In adopting 5718.4015, Florida Statutes (1988), the Legislature did not intend to validate escalations of rent that otherwise would have been unenforceable because they violated §718.401(8), Florida Statutes (1977).

Petitioner suggests that this Court should resolve the question certified to it as a matter of great public importance, as follows:

1. Section 718.401(8), Florida Statutes, does not apply to condominiums declared prior to June 4, 1975, absent an intent to apply the Florida Condominium Act "as the same may be amended from time to time".

2. An intent to apply the Florida Condominium Act "as the same may be amended from time to time", shall exist where the circumstances surrounding the creation of the condominium and the execution of the lease are such that the lessor or lease is tied up with the declaration. A lessor or leasehold shall be considered tied up with the declaration where the lessor and developer are the same person, or created by the same person or persons, with interlocking officers or directors, as a part of a common development plan, or, where the lease adopts and incorporates by reference, in whole or in part, the relevant portions of the declaration of condominium so as to effectuate an intention to be bound by the Florida Condominium Act "as the same may be amended from time to time".

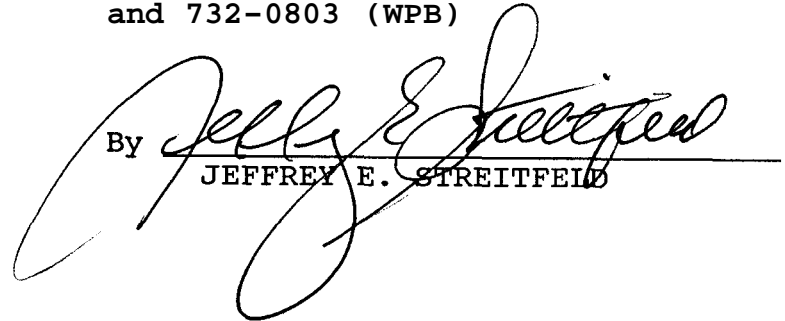
3. Section 718.4015, Florida Statutes (1988), does not operate to validate escalations of rent in effect prior to October

1, 1988, which have been rendered void by virtue of the operation of former §711.231, Florida Statutes (1975), or §718.401(8), Florida Statutes (1977), or by judgment of a court of competent jurisdiction.

Respectfully submitted,

Attorneys for Petitioner CONDOMINIUM
ASSOCIATION OF PLAZA TOWERS NORTH
Post Office Box 9057
Fort Lauderdale, FL 33310-9057
(305) 987-7550 (BR); 944-2926 (DADE)
and 732-0803 (WPB)

By



JEFFREY E. STREITFELD

CATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Supplemental Brief were furnished by mail to: NANCY SCHLEIFER, ESQ., Co-Counsel for Petitioner, 801 Brickell Avenue, Suite 1200, Miami, FL 33131; ALAN C. SUNDBERG, ESQ. and SYLVIA H. WALBOLT, ESQ., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Attorneys for Respondents, Post Office Drawer 190, Tallahassee, FL 32302; and CYPHEN & CYPHEN, 825 Arthur Godfrey Road, Miami Beach, FL 33140, this 20th day of February, 1989.

BECKER, POLIAKOFF & STREITFELD, P.A.
Attorneys for Petitioner CONDOMINIUM
ASSOCIATION OF PLAZA TOWERS NORTH
Post Office Box 9057
Fort Lauderdale, FL 33310-9057
(305) 987-7550 (BR); 944-2926 (DADE)
and 732-0803 (WPB)

By



JEFFREY E. STREITFELD