IN THE SUPREME COURT OF FLORIDA

PORT OF THE ISLANDS RESORT HOTEL CONDOMINIUM ASSOCIATION, INC., SCOTT HUNT AND YOLANDA DEBARTOLO,

Defendants/Petitioners,

Case No: SC16-160

V.

L.T. Case No: 2D14-5507

THE RETREAT AT PORT OF THE ISLANDS, LLC, GARY LOCKE, RANDY KARES, AND CURT BRENNER,

Plaintiffs/Respondents.

_____/

PETITIONERS' BRIEF ON JURISDICTION

Alfred F. Gal, Jr.
Florida Bar No: 0146791
SAMOUCE & GAL, P.A.
Attorneys for Petitioners
5405 Park Central Court
Naples, FL 34109
Telephone: (239) 596-9522
Facsimile: (239) 596-9523

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PRELIMINARY STATEMENT

THE PARTIES.

The Respondents, The Retreat at Port of the Islands LLC, Gary Locke, Randy Kares and Curt Brenner, are collectively referred to as "The Retreat"

The Petitioners, Port of the Islands Resort Hotel Condominium Association, Inc., Yolanda Debartolo and Scott Hunt are collectively referred to as the "Association."

STATEMENT OF THE CASE AND FACTS

The Appellate Court's opinion, if it stands, will have a far-reaching detrimental impact on individuals who own condominium units within the State of Florida and the governance of condominiums. According to the Bureau of Standards & Registration, Division of Florida Condominiums, Timeshares, and Mobile Homes, Department of Business and Professional Regulation there are approximately 1,516,249 declared condominium units located within the State of Florida.

The Association is a Florida not-for-profit corporation governed by Florida's Condominium Act, Fla. Stat. § 718.101, et. seq., the Declaration of Condominium of Port of the Islands Resort, a Hotel Condominium , the Amended and Restated Articles of Incorporation of Port of the Islands Resort Hotel Condominium Association, Inc. and the Amended and Restated Bylaws of Port of the Islands Resort Hotel Condominium Association, Inc. (the "Bylaws").

Appellant, the Retreat owns 38 of 94 units at Port of the Islands Resort Hotel Condominium (the "Condominium"). Importantly, during the relevant time period, the Retreat owned each unit as a single owner. None of the units were jointly owned or co-owned with any other individual or business entity.

On March 8, 2014, the Association held its annual meeting. The annual meeting included an election for three directors. Eight candidates submitted a notice of intent to be a candidate for the Board of Directors. Four of the eight candidates were managing members of The Retreat, including Respondents Locke, Kares and Brenner. The Retreat's four managing members were eligible candidates pursuant to Section 4.2 of the Bylaws.

Section 4.2 of the Bylaws states:

> **4.2 Qualifications**. Each Director must be a unit owner or the spouse of the owner. If a unit is owned by a corporation, only a Director of the corporation is qualified to be a Director. If a unit is owned by a limited liability company, only a managing member may be a Director. If a unit is owned by a partnership, only a general partner is qualified to be a Director. If a unit is owned by a trust, only a trustee is qualified to be a Director. Co-owners of a unit may not serve as members of the Board at the same time unless they own more than one unit or unless there are not enough eligible candidates to fill the vacancies on the Board at the time of vacancy.

Respondents Locke, Kares and Brenner received the highest number of votes and Petitioners Hunt and Debartolo received the next highest number of votes. However, the Association announced at the election that only one of the Retreat's managing members, Locke, Kares or Brenner, could serve on the board.

The Association's position is that the Retreat can only have one representative managing member serve on the Association's Board of Directors. The Association takes this position because a Director must be a unit owner. The Retreat is the unit owner. Mr. Locke, Mr. Kares or Mr. Brenner are eligible to

serve on the board as the representative of the unit owner. However, the unit owner, The Retreat, is not entitled to have three seats on the board. Like any other individual, The Retreat is entitled to one seat on the board.

The Retreat argued that there was nothing expressly stated in the Bylaws limiting a unit owner that owns more than one unit to one seat on the board.

As a result of the Association's announcement, the Retreat filed a complaint in court seeking a declaration that the three managing members of The Retreat were duly elected to the Board of Directors of the Association. The parties filed cross-motions for summary judgment. The Trial Court granted the Association's motion for summary judgment and entered final judgment for the Association.

The Retreat appealed the final judgment and, on November 6, 2015, the Appellate Court filed an opinion reversing the Trial Court's final judgment and remanded the case for further proceedings. The Association timely filed a motion for rehearing en banc. On December 30, 2015, the Appellate Court rendered an order denying the motion for rehearing en banc. A copy of the opinion and the order denying the motion for rehearing en banc are attached to the Appendix that accompanies this brief.

SUMMARY OF ARGUMENT

The material issue in this case is whether or not a single business entity that owns more than one condominium unit, such as a corporation or limited liability company, should be treated the same as an individual person that owns more than one unit; or, does a single business entity have greater rights than an individual owner? Specifically, should the court construe the Bylaws of the Association to create two classes of condominium ownership?

This court has discretionary jurisdiction as the Appellate Court's opinion expressly and directly conflicts with another district court of appeal on the same question of law, i.e. *Pearlman v. Lake Dora Villas Management, Inc.*, 479 So. 2d 780 (Fla 5th DCA 1985) *review denied* 488 So.2d 830 (Fla. 1986). Moreover, this court has discretionary jurisdiction because the opinion expressly and directly conflicts with the same question of law set forth by the Supreme Court in *Woodside Vill. Condo. Ass'n v. McClernan*, 806 So. 2d 452 (Fla. 2002).

ARGUMENT

I. The Appellate Court's opinion conflicts with the Fifth District Court of Appeal finding that a provision in a Declaration of Condominium that creates two classes of owners violates equal protection.

The Appellate Court's interpretation of Section 4.2 of the Bylaws conflicts with the law set forth in *Pearlman v. Lake Dora Villas Management, Inc.*, 479 So. 2d 780 (Fla 5th DCA 1985) *review denied* 488 So.2d 830 (Fla. 1986) that a provision of a condominium's Declaration violates the equal protection of owners if the term creates arbitrary treatment of two classes of owners.

In *Pearlman*, a provision in the condominium declaration made an exception to an age restriction by allowing grantees of institutional first mortgagees, who had children below the age restriction, to occupy a unit while, on the other hand, no children of owners who were of similar minor age were permitted to occupy a unit. On equal protection grounds, the court found the exception to the valid age restriction was arbitrary and discriminatory because there was no reasonable basis to treat differently owners who held an institutional mortgage versus all other owners. The court stated, "We agree with the Pearlmans that the provision on its face violates equal protection by its arbitrary creation and treatment of two classes of grantees." *Id.* at 780.

The Association construed Section 4.2 of its Bylaws so that a single individual that owns multiple condominium units is treated equally and the same as

a single business entity that owns multiple condominium units. If an individual human being owned 38 units and submitted his candidacy for the Board of Directors and won the required vote, that individual human being would occupy one seat on the Board of Directors. Similarly, the Retreat, a business entity, which is an individual unit owner that owns 38 units, based upon equal protection principles, should be entitled to occupy one seat on the Board of Directors.

However, the Appellate Court's opinion conflicts with the law set forth in *Pearlman* by interpreting Section 4.2 of the Bylaws to arbitrarily create two different classes of owners: 1) individual human beings who own multiple units; and, 2) corporate business entities that own multiple units. The individual human being is entitled to one seat on the Board of Directors while a corporation is entitled to multiple seats on the Board of Directors simply by virtue of submitting four of its managing members as candidates for the board.

II. The Appellate Court's opinion conflicts with the Supreme Court's recognition that provisions in a Declaration of Condominium that grant different benefits or impose different restrictions on owners are subject to challenge if discriminatory.

The Florida Supreme Court recognizes that terms in the governing documents of a condominium that grant different benefits or impose different restrictions on truly similar situated unit owners may be rendered unenforceable. "We recognize that amendments which grant different benefits or impose different

restrictions on truly similarly situated unit owners may be subject to challenge." *Woodside Vill. Condo. Ass'n v. McClernan*, 806 So. 2d 452, 463 (Fla. 2002).

In *Woodside*, the Supreme Court analyzed whether an amendment to a Declaration of Condominium impermissibly created two classes of condominium unit ownership. The amendment was a restriction on an owner's ability to lease a unit. The court distinguished *Pearlman* by finding that the leasing restriction was not an arbitrary and discriminatory creation of two classes of unit owners in its attempt to accommodate the disabled.

However, in this case, the Appellate Court's interpretation of the Bylaws, arbitrarily creates two separate classes of owners: 1) owners of units that are individual human beings and; 2) owners of units that are business entities such as corporations, limited liability companies, and trusts. Owners of multiple units who are individuals can only occupy one seat on a Board of Directors while owners of multiple units that are business entities can potentially occupy all the seats on a Board of Directors.

CONCLUSION

The Association respectfully requests that this Court accept jurisdiction in this case.

Submitted,

/s/ Alfred F. Gal, Jr.
Alfred F. Gal, Jr., Esq.
Florida Bar No. 0146791
SAMOUCE & GAL, P.A.
Attorneys for Petitioners
5405 Park Central Court
Naples, FL 34109
Telephone: (239) 596-9522
Facsimile: (239) 596-9523
alfredgal@sandglawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court using the E-Filing Portal System, to: Mark A. Ebelini, Esq., mbelini@knott-law.com, 1625 Hendry Street, Suite 301, Ft. Myers, Florida 33901 and Christina L. Wohlbrandt, Esq., chrisw@vogel-law.net, joanh@vogel-law.net, Vogel Law Office, P.A., 4099 Tamiami Trail North, Suite 200, Naples, Florida 34103, *Attorneys for Respondents*, this 5th day of February, 2016.

By: /s/ Alfred F. Gal, Jr.

Alfred F. Gal, Jr.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2).

By: /s/Alfred F.Gal, Jr.
Alfred F. Gal, Jr.