DISTRICT COURT OF APPEAL
SECOND DISTRICT
LAKELAND, FLORIDA

MELVYN S. HOBBS and SUZANNE HOBBS,

Appellants/Cross Appellees,

vs.

GRENELEFE ASSOCIATION OF CONDOMINIUM OWNERS NO. 1, INC., *et al.*,

Appellees/Cross Appellants.
_____/

Case No. 2D04-4806

LT No. GC-G-00 3867

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The appellants, Melvyn S. Hobbs And Suzanne Hobbs, will be referred to as "the Hobbses." Appellee Grenelefe Association of Condominium Owners No. 1, Inc. will be referred to as "the Association." Appellee members of the Association's board of directors will be referred to collectively as "the directors." The court to which this action was tried will be referred to as "the trial court," "the lower court," or "the court below."

Citations to the Record are cited in the same way as in the Initial Brief.

SUMMARY OF THE ARGUMENT

The trial court erred in concluding that the purported 1984 bylaw amendments were properly adopted. More specifically, the court erred in reaching that conclusion solely on indirect, circumstantial evidence presented by the Association, which could not overcome the direct evidence that showed no record of a vote.

The trial court was equally wrong to grant a directed verdict for the Association on the unit accounting issue, when the Association presented no evidence that unit accounting was maintained, and all of the evidence showed that individual unit accounting was not maintained.

Finally, the trial court erred in dismissing the Association's directors under the business judgment rule, when the cause of action was not asserted against them personally for money damages, and was not related to a business decision.

ARGUMENT

I. The trial court erred in concluding, solely upon indirect and circumstantial evidence, that the purported 1984 bylaw amendments were properly adopted.

The Association makes three arguments in its assertion that the lower court properly concluded that the purported 1984 bylaws were correctly adopted. The Association first argues that the abuse of discretion standard is the appropriate standard of review. The Association then argues that that the parol evidence supported the lower court's ruling. Finally, the Association argues that case law holding that parol evidence may be introduced to complete incomplete minutes makes the parol evidence dispositive. All three arguments should be rejected.

A. The right standard of review is the clearly erroneous standard.

The question before this Court is whether the lower court erred in concluding, solely upon indirect and circumstantial evidence, that the purported 1984 bylaw amendments were properly adopted. The issue is not, as the Association contends, whether the trial court properly admitted parol evidence at trial. (Answer Br. at 16.) The Hobbses have never disputed the admission of the parol evidence. Rather, the Hobbses have demonstrated that such evidence was, as a matter of law, insufficient to permit the lower court to rule as it did. (Initial

Br. at 3-14). The issue before this Court relates, not to the admissibility of evidence, but the inferences drawn from that evidence. Accordingly, the standard of review is not the abuse of discretion standard (which is reviewed with some deference), but is the clearly erroneous standard (which is reviewed "in the nature of a legal conclusion"). Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956).

B. The parol evidence does not support the lower court's conclusion.

The Association is also wrong that the parol evidence upon which the lower court relied is inimical to the Hobbses argument. (Answer Br. at 16-17.) In fact, the parol evidence shows that the lower court erred in its conclusion that the such evidence could form a basis for its ruling. The reasons are clear:

- The evidence is uncontroverted that there was no record of a members' vote -- let alone a two-thirds vote -- which was necessary for a lawful bylaw amendment under the Condominium Act. (R. 5867.)
- The purported 1984 bylaw amendments were not recorded until 1999, even though recording was a necessary condition to the validity of the purported amendments. (R. 5875.)
- The 1982 and 1985 minutes show that the Association knew how to record and reflect clearly any amendments to its bylaw, which did not happen with respect to the purported 1984 bylaw amendments. (R. 5876; R. 5877.)
- The Association recognized repeatedly throughout its investigation that there was no record of a vote. (R. 5868 at 3; R. 5869 at 7; R. 5870 at 3; R. 5884 at 16.)
- On September 23, 1999 -- only days before the Association's directors attempted to ratify the bylaw amendments -- the Association's counsel

wrote the Association to inform it of the necessity to conduct a vote regarding term limits. (R. 5872.)

- In November 1999, when the Association's president had a second opportunity to present the purported bylaw amendments to a members' vote, he chose not to. (R. 5884 at 16-17.)

In the face of such evidence, the Association argued below, and the trial court erroneously agreed, that limited circumstantial evidence outweighed both (a) the absence from the Association's records of any direct evidence of a vote, and (b) all of the remaining evidence that no vote was ever taken.

For example, the Association argues, that its investigation concluded that a vote had been taken, in spite of the clear absence of record evidence to the contrary. (Answer Br. at 18.) The Association argues that the bylaws must have been amended in 1984 because the Association followed some of the purported bylaw changes. (Id. at 18-19.) The Association argues that because term limits were voted on in 1990 and rejected, then they must have been voted on an rejected in 1984. (Id. at 19.) Finally, the Association argues its "most compelling evidence," which is that no member ever complained about the purported bylaw amendments, which, paradoxically, the Association admits were never recorded. (Id. at 19.) The Association's arguments strain belief and prove nothing. (Initial Br. at 26.)

C. The case law upon which the Association relies does not make the parol evidence dispositive.

The Association relies on Wimbledon Townhouse Condominium I, Ass'n v. Wolfson, 510 So.2d 1106 (Fla. 4th DCA 1987), to suggest that the lower court ruled appropriately. Wimbledon, however, only stands for the general proposition that parol evidence may be used to complete incomplete minutes. In that case, the appellate court held that parol evidence via testimony of the condominium association's president and administrative assistant, should have been admitted to prove what was missing from the minutes. The appellate court did not rule that the evidence conclusively would have corrected the incomplete minutes instead, it ruled only that the evidence should have been admitted. Moreover, in Wimbledon, the condominium association could provide testimony from witnesses with direct, contemporaneous knowledge that the minutes were incomplete. Here, the Association could produce no such testimony or other evidence.

The Association's arguments should be rejected. The right standard of review is the clearly erroneous standard. *See* Holland, 89 So.2d 255. The parol evidence was, as a matter of law, insufficient for the trial court to conclude that a proper vote had been taken. *See* Shepard v. Finer Foods, Inc., 165 So.2d 750, 753 (Fla. 1964); *see also* Girdley Constr. Co. v. Ohmstede, 465 So.2d 594 (Fla. 1st DCA 1985). Finally, the case law relied on by the Association is inapposite. Ultimately, there is no basis in fact or law on which the lower court could have

ruled that the parol evidence was sufficient to conclude that a proper vote had been taken.

II. The trial court erred in granting an involuntary dismissal on the unit accounting issue, when the Association presented no evidence that it ever maintained individual unit accounting.

The Association makes four arguments that the lower court properly granted an involuntary dismissal, even though the Association presented no evidence that it ever maintained individual unit accounting records. The Association argues (a) that the Hobbses did not meet their burden of proof; (b) that the Hobbses relied on the wrong year's version of the Condominium Act; (c) that the Association complied with the Act by keeping "condominium" accounting records instead of "unit" accounting records; and (d) that the overall evidence supports the lower court's ruling. Each of the arguments is without merit.

A. The Hobbses could not have been expected to prove a negative, and, to the extent they could, it was proven by the Association's inability to produce any evidence that it had maintained individual unit accounting records.

It strains common sense for the Association to argue that the Hobbses did not meet the burden of proving that the Association did not maintain the accounting records required by the Condominium Act. Where there was no evidence that the Association maintained the accounting records required by the Condominium Act, the Hobbses could only prove the conspicuous absence of these records. Accordingly, and as requested by the Hobbses, it was appropriate for the

lower court to create a rebuttable presumption at trial in the absence of such evidence: when "evidence peculiarly within the knowledge of the adversary is . . . not made available to the party which has the burden of proof" it becomes appropriate to shift "the burden of producing evidence when essential records are found to be either missing or inadequate through the defendant's negligence." Public Health Trust of Dade County v. Valcin, 507 So.2d 596, 599 (Fla. 1987). Here, however, the trial court refused to create such a presumption even though evidence of individual accounting records was completely absent.[1] (R. Vol. 20, Trial Tr. at 3-9.)

B. There is no difference between the controlling portions of the Condominium Act from 1999, 2000, and 2001.

The Association makes much of the fact that the Complaint the Hobbses filed in 2000 referred to the Condominium Act of 1999. (Answer Br. at 23.) It fails, however, to represent that attached as an exhibit to the Complaint was the Condominium Act of 2001, which is identical to the relevant portions of the 2000 version of the Act, which is identical to the relevant portions of the 1999 version of

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[1] In addition to the law, common sense should act as a guide: How could the Hobbses prove that the Association failed to maintain the accounting records required by the Condominium Act in the absence of such records. And in the absence of such records, how could the lower court have concluded that the Hobbses failed to meet a burden of proof that no such records were maintained as required by the Act. The conclusion is obvious: the Association never kept the

the Act. The issue before this Court, which is unchanged by any version of the Act, is whether the Association maintained, as required by the Act, "[a] current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due." § 718.111(12)(a)(11)(b), FLA. STAT. (1999-2001) (emphasis added). Every condominium under the Act is required to keep these accounting records for every unit it operates. This is the only question before the Court as it relates to accounting under the Condominium Act.

C. The Association confuses the difference between the accounting for a "condominium" and the accounting for a condominium "unit."

Here again the Association confuses the issue before the Court. It confuses the "unit" accounting requirement with the "condominium" accounting requirement, which are two distinctly different requirements. There is no question relating to the accounting requirements for the condominium, which is defined by the Act to mean "that form of ownership of real property created pursuant to [the Act], which is comprised entirely of units that may be owned by one or more persons . . . ." § 718.103(11), FLA. STAT. (2001). The issue here is not whether the

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records required by the Act. If it did, it would have presented the records as evidence in its defense, which it was unable to do. (Initial Br. at 35-37.)

Association maintained records for the condominium. Rather the issue is whether the Association maintained records for the condominium's units, which is defined by the Act to mean "that part of the condominium property which is subject to exclusive ownership." § 718.103(27), FLA. STAT. (2001). The Hobbses alleged, and proved, that the Association failed to maintain those records. The Association failed to maintain "[a] current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due." § 718.111(12)(a)(11)(b), FLA. STAT. (2001) (emphasis added).

D. The Association misstates crucial evidence.

The Association cites evidence improperly and out of context. Specifically, it states in its Answer Brief: "In the interest of economic feasibility and efficiency of the Association's operations, the Association kept a master account for the unit owner, Sports Shinko Realty, and kept a sub-account for each unit owned by Sports Shinko Realty." (Answer Br. at 24.) That assertion is entirely inconsistent with the actual testimony on which the Association relies for that statement. The actual testimony was:

> The Association does not maintain an individual account for each unit owned by Sports Shinko. The Association does maintain a summary for all of the units owned by Sports Shinko which would show what was invoiced to and paid by Sports Shinko on account of all of its units

> and the total balance owed by Sports Shinko. This summary was provided to the Plaintiff on March 9, 2000.

(R. Vol. 20, Trial Tr. at 74) (emphasis added). (R. 5879 at 2.)

The Association also argues that the Sports Shinko account had been paid in full, therefore no harm was done even if the Association had violated the Condominium Act. (Answer Br. at 26.) That argument also misses the point. The issue before the trial court was whether the Association complied with the Condominium Act, which required that the Association maintain certain unit accounting records, which the Association never kept. The issue before this Court is whether the lower court erred in granting an involuntary dismissal on unit accounting when the Association presented no evidence that it ever maintained unit accounting.

III. The trial court erred in dismissing the Association's directors under the business judgment rule, when the cause of action against them was not for personal money damages and was not related to a business decision.

As with the other issues before this Court, the Association similarly misstates both the law and application of the business judgment rule. In the Association's world, the business judgment rule would shield directors against <u>any</u> suit, regardless of type or purpose. The rule has never been applied that way, and should not be applied in that manner here.

A. The business judgment rule applies only to shield directors against suits for personal liability arising from business decisions.

As the Association, itself recognizes, the business judgment rule shields a director from personal monetary damages for a decision "regarding corporate management or policy." § 607.0831(1), FLA. STAT. (1999). Moreover, there is no logical basis upon which the Association can infer a simple rule "that the business judgment rule protects directors in the absence of fraud, self-dealing, dishonesty, or incompetency." (Answer Br. at 29.)

The business judgment rule is limited to actions against directors for personal monetary damages relating to business decisions. It does not extend beyond those limits. It is clear from the language of the statute that the business judgment rule applies only to actions for personal monetary damages. *See* § 607.0831(1), FLA. STAT. It is equally clear from the case law that the business judgment rule applies only to business decisions, and not legal decisions. *See* Lake Region Packing Ass'n v. Furze, 327 So.2d 212, 216 (Fla. 1976) ("exercise of business judgment"); International Ins. Co. v. Johns, 874 F.2d 1447, 1458 n.20 (11th Cir. 1989) (referring to "business decisions"); Kloha v. Duda, 246 F.Supp.2d 1237, 1244 (M.D. Fla. 2003) (referring to "business judgment"); Bal Harbour Club, Inc. v. Ava, 316 F.3d 1192 (11th Cir. 2003) (complying with the bankruptcy code was not a decision that enjoyed the benefit of the business judgment rule). The business judgment element is also a necessary element under Delaware law, a

leading jurisdiction on the development of the business judgment rule, which Florida follows.[2]

Simply put, the directors' decision regarding compliance with the statutory requirement to maintain unit accounting records is not a business decision. It is, instead, a legal decision that the business judgment rule does not shield. In Grimes v. Donald, No. Civ. A. 13358, 1995 WL 54441 at *7 (Del. Ch. Jan. 11, 1995), the Delaware Chancery Court held that whether certain contracts violated a provision of the Delaware corporate statutes "is a question of law directly concerning the legal character of the contract and its effect upon the directors." The Chancery Court held that the "question whether these contracts are valid or not does not fall into the realm of business judgment; it cannot be definitively determined by the informed, good faith judgment of the board. It must be determined by the court." Id. *See also* Lake Monticello Owners' Ass'n v. Lake, 463 S.E.2d 652, 656 (Va. 1995) (holding the same with respect to interpreting and applying a statute and corporate bylaw). For this same reason, the lower court here cannot properly have concluded that the business judgment rule shielded the directors from suit -- their

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[2] *See* Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) ("In business judgment rule cases, an essential element is the fact that there has been a business decision . . . ."). *See also* International Ins. Co. v. Johns, 874 F.2d at 1459 n.22. ("We rely with confidence upon Delaware law to construe Florida corporate law.").

decision not to comply with the Condominium Act was not, and could not be, a business decision.

B. The Association relies on inapposite case law.

The Association's reliance on Sonny Boy, L.L.C. v. Asnani, 798 So.2d 25 (Fla. 5th DCA 2004) and Perlow v. Goldberg, 700 So.2d 148 (Fla. 3d DCA 1997), to assert that the business judgment rule in Florida makes no distinction "for business decisions or for compliance with statutory requirements" is a *non sequitur*. Those cases hold only that a director may enjoy the benefit of the business judgment rule against suits for personal liability for alleged breaches of fiduciary duties for failing to properly administer insurance funds and maintain and repair certain common elements -- that is, business decisions. *See* Sonny Boy, 879 So.2d at 26; Perlow, 700 So.2d at 150. Those cases do not state or support the general proposition that the Association would have this Court believe. *Compare* Lake Region, 327 So.2d at 216; International Ins., 874 F.2d at 1458 n.20; Kloha, 246 F.Supp.2d at 1244; Bal Harbour, 316 F.3d 1192; Nixon 626 A.2d at 1376; Grimes, 1995 WL 54441 at *7; Lake Monticello, 463 S.E.2d at 656.

The business judgment rule is a limited protection, and does not shield the Association's directors from their decision not to comply with the requirements of the Condominium Act brought before the lower court.

CONCLUSION

For the reasons set forth above, and those stated in the Initial Brief, paragraphs 4 and 5 of the final judgment below should be reversed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fla. R. App. P. 9.210.

Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by U.S. mail on July 15, 2005.

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