

IN THE FLORIDA SUPREME COURT

ORLANDO LAKE FOREST JOINT VENTURE,
a Florida joint venture; ORLANDO LAKE FOREST INC.,
a Florida corporation; NTS MORTGAGE INCOME FUND,
a Delaware corporation; OLF II CORPORATION,
a Florida corporation; ORLANDO CAPITAL CORPORATION,
a Kentucky corporation,

Petitioners,

vs.

LAKE FOREST MASTER COMMUNITY
ASSOCIATION, a Florida not for profit
corporation,

Respondent.

CASE NO: _____
Fifth District Court of Appeal
Case No. 5D08-2096
L.T. Case No.: 07-CA-1867

**PETITIONERS' BRIEF IN SUPPORT OF NOTICE TO INVOKE
DISCRETIONARY JURISDICTION**

T. Todd Pittenger
Florida Bar No. 0768936
Kristopher Kest
Florida Bar No. 15411
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
450 South Orange Avenue
Suite 800
Orlando, Florida 32801

Attorneys for Petitioners

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	iii
STATEMENT OF CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. The Opinion of the Fifth District Court of Appeal expressly and directly conflicts with decisions of this Court and of the Second, Third and Fourth District Courts of Appeal, and represents a departure from the Fifth District’s own precedent, on the issue of abatement versus dismissal as the proper remedy for failure to comply with a statutory limitation of authority and condition precedent to the institution of litigation which Section 720.303(1), Florida Statutes in fact represents	4-10
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF COMPLIANCE	11
APPENDIX	

TABLE OF CITATIONS

	<u>Page</u>
<u>Alhambra Homeowners Assn. v. Asad</u> , 943 So.2d 316 (Fla. 5 th DCA 2006)	5, 6
<u>Blumberg v. USAA Casualty Ins. Co.</u> , 790 So.2d 1061 (Fla. 2001).....	...7
<u>Bruce H. Lynn v. Miller</u> , 498 So.2d 1011 (Fla. 5 th DCA 1986)	5, 8
<u>City of Coconut Creek v. City of Deerfield Beach</u> , 840 So.2d 389 (Fla. 4 th DCA 2003)	5, 6, 8
<u>Ferry-Morse Seed Co. v Hitchcock</u> , 426 So.2d 958 (Fla. 1983)	5, 7
<u>Hallstrom v. Tillamook</u> , 493 U.S. 20 (1990).....	8
<u>Levine v. Dade County School Board</u> , 442 So.2d 210 (Fla. 1983).....	5, 7, 8
<u>Motor v. Citrus County School Board</u> , 856 So.2d 1054 (Fla. 5 th DCA 2003)	5, 8
<u>Progressive Express Ins. v. Menendez</u> , 979 So.2d 324 (Fla. 3 rd DCA 2008).....	5, 8
<u>Sheriff of Orange County v. Boulton</u> , 595 So.2d 985 (Fla. 5 th DCA 1992)	5, 8
<u>Wright v. Life Insurance Co. of Georgia</u> , 762 So.2d 992 (Fla. 4 th DCA 2000)	7
 <u>Statutes</u>	
Florida Statute §720.303(1).....	<i>passim</i>
Florida Statute §720.305(1).....	1, 10
Florida Statute §720.306(7).....	<i>passim</i>

STATEMENT OF CASE AND OF THE FACTS

This appeal involves the alleged failure of the homeowners' association board of directors for Respondent (the Plaintiff below), Lake Forest Master Community Association (the "HOA"), to comply with Section 720.303(1), Florida Statutes, prior to initiating a \$4 million alleged construction defect lawsuit against the Petitioners on June 29, 2007, one day before a change in the Section 95.11(c)(3) statute of repose from 15 to 10 years. The Trial Court dismissed the case upon a finding that the HOA Board had failed to comply with Section 720.303(1), which the Petitioners and Trial Court both characterized as a statutory condition precedent which must be satisfied before an HOA commences litigation involving amounts in controversy in excess of \$100,000. Section 720.303(1) requires that "before commencing litigation against any party in the name of the association involving amounts in controversy in excess of \$100,000, the association must obtain the affirmative approval of the majority of voting interests at a meeting of the membership at which a quorum has been attained." Petitioners were lot owners, so Petitioners had standing to raise lack of authority to sue.

As HOA members, Petitioners had the right under Section 720.305 to invoke all remedies provided for law for redress, and the Trial Court agreed with Petitioners that a remedy for failure of the Section 720.303(1) statutory condition precedent was dismissal of this lawsuit. Petitioners asserted that the HOA did not secure majority approval of all 732 lots owners, as required by Section 720.303(1). Even if only the vote of a majority of a quorum was required under Section

720.303(1), Petitioners argued the HOA failed to properly adjourn the January 7th annual meeting due to inadequate notice, so that the February 13th and March 13th continuation meetings “broke the chain” of the annual meeting¹. Petitioners relied upon the HOA Board-approved meeting minutes, which the HOA Secretary confirmed at his deposition were accurate, to support Petitioners’ contention that neither Section 720.306(7) nor the HOA Bylaws were complied with when the January 7th annual meeting was reconvened by providing oral notification of the date, but not the time or the place, of the February 13th meeting. The Trial Court entered summary judgment of dismissal, based upon HOA Section 720.303(1) non-compliance for inadequate notice, but did not reach the majority vote issue.

On June 20, 2009, the Fifth District Court of Appeal, issued its revised opinion (the “Opinion”), which is included in the Appendix. Although the holding of the Opinion was that fact issues precluded summary judgment on the Section 720.303(1) statutory non-compliance issue², the Fifth District also addressed the

¹ Lake Forest has 732 lot owners, so a majority of *all* lot owners would require a vote of 367. A quorum is thirty percent of the 732 lot owners, or 220. The January 7, 2007 annual meeting, according to HOA, was adjourned and reconvened on February 13, 2007, for the purpose of obtaining additional proxies to vote for candidates for the ARC. The February 13, 2007 meeting was then adjourned and reconvened on March 13, 2007, for the purpose of asking residents to vote on pursuing legal action with the developer. At the March 13, 2007 meeting, the motion to pursue legal action against the developer allegedly passed 255 to 35, which represents 34.83% of lot owners.

² In Footnote 4 of the Opinion, Section 720.303(1) is construed to only require approval of a majority of voting interests present, in person or by proxy, at a meeting at which a quorum has been attained, which is the same standard as

issue of whether dismissal or abatement would be appropriate if Petitioners demonstrate to the Trial Court that the HOA did not properly obtain prior approval for the instant lawsuit pursuant to Section 720.303(1)³. The Fifth District decided that abatement, not dismissal, would be the proper remedy for the HOA's failure to comply with Section 720.303(1), and rejected the Trial Court's characterization of such statutory non-compliance as a statutory condition precedent to commencing litigation in excess of \$100,000. The Fifth District agreed that Petitioners had the right to complain about defective notice because of their status as owners with voting interests, but held it would be a ground for any aggrieved association member to enjoin HOA from prosecuting this lawsuit. The Fifth District ruled that Petitioners, as aggrieved owners, were at most entitled to seek abatement pending statutory compliance, not dismissal. The Opinion explains:

This is a statutory limitation on the authority of the Homeowners' Association to commit the resources of the Association to litigation, designed for the protection of its members, which, if violated, the members may or may not elect to enforce. It is not a condition precedent running in favor of a defendant to the right of any

imposed by Section 720.306(1)(a). Petitioners contend Section 720.303(a) requires: (*what*) the affirmative approval of a majority of voting interests (*where*) at a meeting of the membership at which a quorum has been attained.

³ The Opinion states the Bylaws did not displace Section 720.306(7), and Section 720.306(7) does not require anything more than the "changed date, time or place" to be announced. The Opinion holds summary judgment for Petitioners to be improper based on a fact issue presented by the HOA Secretary's deposition testimony which "amplified the minutes" to show verbal notice of the date, time and place of the February 13th meeting was allegedly given.

association to file suit to recover damages on behalf of the Association. Opinion at 14-15⁴.

SUMMARY OF ARGUMENT

Because Section 720.303(1) requires that an HOA obtain the required vote before commencing litigation, Petitioners contend that this requirement is a statutory condition precedent to an HOA initiating litigation. The Fifth District's Opinion expressly and directly conflicts with decisions of this Court and of the Second, Third and Fourth District Courts of Appeal, on the issue of abatement versus dismissal as the proper remedy for failure to comply with a statutory limitation of authority and condition precedent to the institution of litigation, which is in fact what Section 720.303(1), Florida Statutes represents. This Court has jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

ARGUMENT

I. The Opinion of the Fifth District Court of Appeal expressly and directly conflicts with decisions of this Court and of the Second, Third and Fourth District Courts of Appeal, and represents a departure from the Fifth District's own precedent, on the issue of abatement versus dismissal as the proper remedy for failure to comply with a statutory limitation of authority and condition precedent to the institution of litigation which Section 720.303(1), Florida Statutes in fact represents.

⁴ The Fifth District's initial Opinion was rendered April 3, 2009. The revised Opinion came after Petitioners April 17, 2009 Motion for Rehearing, Motion for Rehearing En Banc, and Motion for Certification, which was denied. The only difference between the revised Opinion and the initial one is the addition of these two sentences which concern the statutory condition precedent issue.

The Fifth District decided that abatement, not dismissal, would be the proper remedy for the HOA's failure to comply with Section 720.303(1), should Petitioners establish such statutory non-compliance in proceedings to enjoin the HOA from prosecuting this lawsuit. This statement of law concerning a statutorily mandated authorization needed to bring this suit expressly and directly conflicts with the following decisions: Alhambra Homeowners Assn. v. Asad, 943 So.2d 316 (Fla. 5th DCA 2006); Bruce Lynn v. Miller, 498 So.2d 1011 (Fla. 5th DCA 1986); City of Coconut Creek v. City of Deerfield Beach, 840 So.2d 389 (Fla. 4th DCA 2003); Ferry-Morse Seed Co. v Hitchcock, 426 So.2d 958 (Fla. 1983); Levine v. Dade Co. School Board, 442 So.2d 210 (Fla. 1983); Progressive Express Ins. Co. v. Menendez, 979 So.2d 324 (Fla. 3rd DCA 2008); Wright v. Life Ins. Co. of Georgia, 762 So.2d 992 (Fla. 4th DCA 2000). It is also a clear departure from the Fifth District's own precedent in Sheriff of Orange Co. v. Boulton, 595 So.2d 985 (Fla. 5th DCA 1992) and Motor v. Citrus Co. School Board, 856 So.2d 1054 (Fla. 5th DCA 2003). This Court should therefore grant discretionary review.

First, the Fifth District's conclusion that Section 720.303(1) is not a condition precedent running in favor of a defendant – even ones such as Petitioners whom the Fifth District found have standing to complain because they are lot owners with the attendant association voting interests –conflicts with the Fourth District Court of Appeal's decision construing a different section of the HOA Chapter (Chapter 720) to be a condition precedent. *See* Alhambra Homeowners Ass'n, Inc. v. Asad, 943 So.2d 316, 317-319 (Fla. 4th DCA 2006).

In Alhambra the Fourth District affirmed a final summary judgment in favor of the defendant/HOA member after the defendant raised the affirmative defense of failure to allege a statutory condition precedent required by Section 720.311(2)(a), Fla. Stat. (2004). “Section 720.311(2)(a), Florida Statutes (2004) provides that ‘[d]isputes between an association and a parcel owner regarding use of or changes to the parcel ... and other covenant enforcement disputes ... *shall* be filed with the department [of Business and Professional Regulation] for *mandatory* mediation before the dispute is filed in court.’” Alhambra at 317 n.1. The HOA statute relied upon by the defendant in Alhambra is very similar to the language in Section 720.303(1), upon which Petitioners in the instant case relied. Also, like the defendant in Alhambra, Petitioners raised the failure to comply with a statutory condition precedent provided for in Chapter 720 as an affirmative defense, and also relied on that failure as the basis of their Motion for Summary Judgment. In Alhambra, the court approved of the dismissal based on the affirmative defense of failure to comply with this statutory condition precedent. Alhambra is consistent with other Fourth District cases which make clear that a case must be dismissed, not just abated, where there is a failure to comply with a statutory condition precedent. See City of Coconut Creek⁵, 840 So.2d at 393 (“Our courts have repeatedly affirmed that failure to comply with a statutory condition precedent, absent waiver or estoppel, requires dismissal.”)

⁵ City of Coconut Creek involves the presuit notice requirements for standing to enforce a local comprehensive plan in Section 163.3215, Fla. Stat.

It is acknowledged there are situations where the legislature has explicitly prescribed abatement, not dismissal, as the remedy, such as with Section 558.003, Florida Statutes. Chapter 720 does not so provide, so the rule that dismissal is the remedy applies. The Fourth District has recognized that abatement has sometimes been permitted when litigation is prematurely brought, *see Wrights v. Life Insurance Co.*, 762 So.2d 882 (Fla. 4th DCA), but that situation applies only where the condition precedent can be cured by the mere passage of time. *See also Blumberg v. USAA Casualty Ins. Co.*, 790 So.2d 1061 (Fla. 2001)(the proper remedy for premature litigation is an abatement or stay of the claim for the period necessary for its maturation under the law). Here, more than “claim maturation” is required. Section 720.303(1) is explicit that the HOA does not have the authority to commence litigation for more than \$100,000 without statutory compliance.

This Court has itself acknowledged a statutory cause of action cannot commence until after claimant complies with all valid conditions precedent. *Ferry-Morse v. Hitchcock*, 426 So.2d 958, 961 (Fla. 1983). Where (as here), a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, not abatement, is the proper remedy. *Levine v. Dade County Sch. Bd.*, 442 So.2d 210, 212-13 (Fla. 1983)⁶. The Opinion expressly and directly conflicts with such statements of law emanating from this Court. Even the United States Supreme Court has held in persuasive but not binding precedent that

⁶ *Dade County Sch. Bd.* involved the statutory notice of claim to the Department of Insurance required as a prerequisite to overcoming sovereign immunity.

failure to meet a mandatory condition precedent prior to the institution of suit requires dismissal. Hallstrom v. Tillamook, 493 U.S. 20 (1990).

The Opinion further expressly and directly conflicts with decisions from the Second and Third District Courts of Appeal. In Lynn v. Miller, 498 So.2d 1011, 1012 (Fla. 2d DCA 1986), the Second District reversed the denial of motion to dismiss where plaintiff failed to comply with medical malpractice presuit notice requirements now codified in Fla. Stat. Chapter 766. In Progressive Express v. Menendez, 979 So.2d 324 (Fla. 3rd DCA 2008), the Third District held that:

“Where a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, not abatement, is the proper remedy”.

Progressive Express involved the statutory requirement of written notice of intent to initiate a lawsuit to recover overdue PIP benefits, but the similarity to Section 720.303(1) is clear. In both instances, a lawsuit requires a showing of compliance by a plaintiff with the statutory prerequisites in order for the case to proceed. Dismissal is appropriate even if such dismissal will cause the plaintiff to lose claims to the statute of limitations or statute of repose and even if the dismissal will bar the plaintiff’s claims entirely. See Lynn v. Miller, 498 So.2d at 1012; Coconut Creek, 840 So.2d at 393; Dade County, 442 So.2d at 212-13.

The Fifth District’s Opinion even departs from its own precedent in Motor v. Citrus County, 856 So.2d 1054, 1055 (Fla. 5th DCA 2003) (failure to allege compliance with statutory presuit requirement is grounds for dismissal) and Sheriff of Orange Co. v. Boulton, 595 So.2d 985 (Fla. 5th DCA 1992) (failure to comply

with statutory condition precedent is fatal to wrongful death claim, requiring dismissal of case), which both involve Section 768.28 notice requirements. Section 768.28(6)(a) expressly states an action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the required notice is submitted to the Florida Department of Financial Services. Section 720.303(1) entitled “powers and duties” similarly provides that “before commencing litigation against any party in the name of the association involving amounts in controversy in excess of \$100,000, the association must obtain the affirmative approval of a majority of voting interests at a meeting of the membership at which a quorum has been attained”. Both impose statutory requirements, although the Fifth District suggests that Section 720.303(1) – which it labels a “statutory limitation on the authority of the Homeowners’ Association to commit the resources of the Association to litigation” - is not a condition precedent, but rather something “designed for the protection of the members which, if violated, the members may or may not elect to enforce.” Opinion at 14.

The issue of dismissal versus abatement regarding Section 720.303(1) affects large numbers of HOA members. The issue of whether dismissal or abatement is appropriate when the Section 720.303(1) statutory condition precedent has not been complied with is a fundamental legal issue affecting the parties’ substantive rights, as well as the rights of members of HOAs throughout the State of Florida. By enacting Section 720.303(1), the legislature clearly intended to limit the right of HOAs to commence litigation involving amounts in

controversy in excess of \$100,000 unless the requisite percentage of voting interests in the community approved. The Opinion impedes this statutory mandate and may actually encourage non-compliance because it relegates compliance to the situation where an aggrieved association member seeks and obtains injunctive relief, rather than recognizing it as a statutory condition precedent to bringing suit.

The dismissal versus abatement question under Section 720.303(1) is one of first impression and public importance. This question of the majority vote required by Section 720.303(1) is also one of first impression and public importance. Section 720.305(1) allows for actions at law or in equity, or both, to redress alleged failure to comply by any member against the HOA, but Section 720.305(1)(d) expressly states that “[t]his relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.” Petitioners respectfully submit that moving for dismissal for failure of a statutory condition precedent is one of those other rights or remedies, and the Fifth District’s Opinion expressly and directly conflicts with other District Courts of Appeal, and departed from the precedent of this Court, when the Fifth District’s Opinion held abatement, but not dismissal, was the only remedy.

CONCLUSION

Petitioners suggest that the Opinion expressly and directly conflicts with the decisions of this Court and the other District Courts of Appeal on the same statement of law and this Court should grant the request for discretionary review, together with such other and further relief as this Court deems just and proper.

Dated this 6th day of July, 2009.

/s/ Thomas Todd Pittenger

T. Todd Pittenger
Florida Bar No. 0768936
Kristopher Kest
Florida Bar No. 15411
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
450 South Orange Avenue, Suite 800
Orlando, Florida 32801
Telephone: (407) 843-4600
Facsimile: (407) 843-4444
Attorneys for Petitioners

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 in compliance with Florida Rules of Appellate Procedure 9.210(2).

/s/ Thomas Todd Pittenger

T. Todd Pittenger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to: PATRICK C. HOWELL, ESQ., and ROBYN SEVERS BRAUN, ESQ., Taylor & Carls, P.A., attorney for Plaintiff, 850 Concourse Parkway South, Ste. 105, Maitland, FL 32751, with a copy by U.S. Mail to Beth-Ann Schulman, Esquire, Law Offices of Jeffrey G. Slater, 2420 Lakemont Avenue, Suite 125, Orlando Florida 32814 on July 6, 2009.

/s/ Thomas Todd Pittenger

T. Todd Pittenger