Filing # 176096070 E-Filed 06/26/2023 10:51:10 AM

Case No. 6D23-170

IN THE FLORIDA SIXTH DISTRICT COURT OF APPEAL

AVATAR PROPERTIES, INC.,

Defendant/Petitioner,

v.

NORMAN GUNDEL, ET AL.,

Plaintiffs/Respondents.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

NOTICE IS GIVEN that Avatar Properties, Inc., Defendant/Petitioner, invokes the discretionary jurisdiction of the supreme court to review the decision of this Court rendered June 22. 2023. A copy of the decision is attached hereto as **EXHIBIT A**. Review of this decision is within the discretionary jurisdiction of the Florida Supreme Court because the decision passes on a question certified to be of great public importance and it expressly and directly conflicts with a decision of another district court of appeal. *See* Art. V, §§ 3(b)(3), 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv) & (v).

Dated: June 26, 2023 Respectfully submitted,

/s/*Joseph H. Lang, Jr.*
Fla. Bar No. 59404
CARLTON FIELDS, P.A.
4221 W. Boy Scout Blvd.
Suite 1000
Tampa, FL 33607
Phone: (813) 229-4253
Facsimile: (813) 229-4133
E-mail: jlang@carltonfields.com
E-mail: kathompson@carltonfields
E-mail: tpaecf@cfdom.net

Attorneys for
Avatar Properties, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of June, 2023, the foregoing notice to invoke discretionary jurisdiction was electronically filed with the Clerk of the Court by using the Florida Courts eFiling Portal and was served using the Florida Courts eFiling Portal to all counsel listed below.

J. Daniel Clark
Clark & Martino, P.A.
3407 W. Kennedy Boulevard
Tampa, Florida 33609
dclark@clarkmartino.com
jliza@clarkmartino.com

J. Carter Anderson
Harold Holder
Bush Ross, P.A.
Post Office Box 3913
Tampa, Florida 33601-3913
canderson@bushross.com
hholder@bushross.com

Kristin A. Norse
Stuart C. Markman
Brandon K. Breslow
Kynes, Markman & Felman, P.A.
Post Office Box 3396
Tampa, Florida 33601-3396
smarkman@kmf-law.com
knorse@kmf-law.com
bbreslow@kmf-law.com
efilings@kmf-law.com

Kenneth G. Turkel
Bajo Cuva Cohen & Turkel, P.A.
100 North Tampa Street, Suite 1900
Tampa, Florida 33602-5853
kturkel@bajocuva.com

Matthew A. Crist
Crist Legal, P.A.
2904 West Bay to Bay Boulevard
Tampa, Florida 33629-8113
cristm@cristlegal.com

/s/ *Joseph H. Lang, Jr.*
Fla. Bar No. 59404

EXHIBIT A

SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

____

Case No. 6D23-170
Lower Tribunal No. 2017CA-001446-0000-00

____

AVATAR PROPERTIES, INC.,

Appellant,

v.

NORMAN GUNDEL, et al.,

Appellees.

____

Appeal from the Circuit Court for Polk County.
Wayne M. Durden, Judge.

June 22, 2023

COHEN, J.

Avatar Properties, Inc., Appellant, created and developed Solivita, a retirement community in Polk County.[1] Along with the individual residential parcels, Solivita included commercial parcels, where a bank, a pharmacy, and other businesses were eventually located. As in most planned-unit developments, Avatar

---

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

constructed recreational facilities, consisting of a spa and fitness center, dining venues, indoor and outdoor pools, parks, tennis courts, bocce courts, and pickleball courts, all on land that Avatar owned and did not designate as common areas. These recreational facilities were collectively called the Club.

To buy a home in the community, the purchaser was required to become a permanent member of the Club and was obligated to pay Club membership dues. Those dues, which represented the expenses of the Club as well as a perpetual membership fee that constituted pure profit to Avatar, were determined solely by Avatar. As part of the purchase agreement, the landowner also agreed that Avatar could foreclose on their property to collect any unpaid Club dues, but neither the landowner nor the homeowner's association had any input over the Club. Avatar could eliminate all the facilities, but the perpetual membership fees would still be due.

Before any parcels were sold, Avatar recorded the documents necessary to create a homeowner's association under the Florida Homeowners' Association Act, chapter 720, Florida Statutes. The purpose of that Act is to "to provide procedures for operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions." § 720.302(1), Fla. Stat. (2017). The Act provides benefits and imposes responsibilities on the developer, residents, and homeowner's association.

One of the statutory powers granted to an association is the power to make financial assessments, requiring the residents to share in expenses incurred by the association for maintaining common areas and otherwise maintaining the community as the association sees fit. § 720.308, Fla. Stat. (2017). When the statutory requirements are met, section 720.3085, Florida Statutes (2017), establishes a lien on the property for the failure to pay an assessment, which permits the association to foreclose on the property for payment of unpaid dues or other assessments.

The homeowners' association was known as the Solivita Community Association, Inc. (the "Association"). The responsibilities of the Association were limited to "fountains, buffer and/or landscape areas, private roads, and wetlands" and other minor responsibilities such as sidewalks and parking but included no role in the operation or maintenance of the Club facilities.

In many ways, the assessment collection process used by Solivita was the same as most other associations. After the Association developed an annual budget and ascertained the proportionate amount owed by each landowner, the Association would bill the landowner for the amount of the assessment. This was limited to the expenses for the landscaping and other limited responsibilities granted to the Association. A less common component of the Association's collection process

involved billing the residents for Avatar's Club membership dues, required to be paid by each landowner under the residential purchase agreement.

The assessment imposed by Avatar for Club membership had two components, and a separate invoice was generated for each.[2] One component was the amount required for Club expenses, which was to be shared proportionally by each resident. The second component was for a membership fee, which represented an annual profit charged to each landowner and payable to Avatar.[3] The fee was payable regardless of whether the facilities were removed and all services discontinued, all of which could be done at Avatar's sole discretion, with no input from any resident or the Association. In sum, each resident was subject to three assessments: 1) the Association's expenses pursuant to its budget; 2) Avatar's expenses for the Club; and 3) Avatar's membership fee representing profit from the Club.

On occasion, a resident did not pay an assessment, resulting in a foreclosure proceeding being initiated against the concerned parcel. In the mechanics of the foreclosure actions, there was no difference between foreclosures for failure to pay

---

[2] Evergreen Lifestyles Management, a third-party community management company, sent the monthly assessments on behalf of the Association and Avatar. Despite the dissent's contention, it is undisputed that the membership fee constituted an assessment under this statute.

[3] This fee, set by Avatar, increases $1 per month each year, until a cap set by Avatar is reached.

Association dues as opposed to Club dues. All processes were prosecuted under the authority of chapter 720.

Appellee, Norman Gundel, is a resident of Solivita. As typical of the other residents, Gundel agreed to pay the assessments for Club membership (both Club expenses and Avatar's fee), and he acknowledged that Avatar had a lien on the property for any unpaid assessments related to the Club. He paid those assessments for the time he owned his property.

Gundel brought the present action, seeking to declare the assessments for Avatar's Club profit illegal under section 720.308 and payments for those assessments to be returned. Gundel argued below that section 720.308 does not permit an assessment for profit, only expenses. The trial court agreed with Gundel and entered summary judgment in his favor. [4] We review the trial court's decision de novo.[5] *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001).

Section 720.308 provides:

> **(1) Assessments. -** For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof.

---

[4] The dissent's lengthy discussion of the earlier summary judgment is a red herring. A successor judge is fully authorized to vacate or modify a predecessor's ruling issued much earlier in the litigation. *See Hull & Co. Inc. v. Thomas*, 834 So. 2d 904, 906 (Fla. 4th DCA 2003).

[5] We have jurisdiction. Art V, § 4(b)(1), Fla. Const.

> (a) Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors.
>
> . . . .
>
> **(3) Maximum level of assessments. -** . . . Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate share of the expenses as described in the governing documents.

Section 720.301, Florida Statutes (2017), provides the definition of "community" and "assessment":

> (1) "Assessment" or "amenity fee" means a sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.[6]
>
> . . . .
>
> (3) "Community" means the real property that is or will be subject to a declaration of covenants which is recorded in the county where the property is located. The term "community" includes all real property, including undeveloped phases, that is or was the subject of a development-of-regional-impact development order, together with any approved modification thereto.

[6] Under section 720.301(1), the terms "assessment" and "amenity fee" are synonymous.

Gundel's position is that any assessment leveled by Avatar, as a developer of a community after October 1, 1995, "must describe the manner in which expenses are shared and specify the member's proportionate share thereof." § 720.308(1). Section 720.308 mandates that assessments are limited to the member's proportionate share of the "expenses," and Avatar's fees representing profits, by definition, are not expenses.

Solivita meets the definition of a community pursuant to the statute and was the subject of a development-of-regional-impact development order. Further, the legislature did not confine the definition of assessments to sums of money payable to an association; instead, it specifically included money payable "to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels." § 720.301(1). This includes Avatar and assessments it makes against any parcel within the community.

Avatar offers a more nuanced response. Avatar maintains that the assessments made for the Club are not limited by section 720.308, because chapter 720 does not apply to commercial enterprises. It relies on section 720.302(3)(b), which provides that chapter 720 does not apply to the "commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use." This provision exempts the parcels of land that are used for commercial or industrial purposes from being assessed for a proportional

share of amenities the industrial or commercial parcels typically do not use. For example, assessments imposed by a homeowner's association could not be imposed against a bank, pharmacy, or other businesses on commercial parcels to cover a portion of the expenses for community pools, spas, pickleball courts, or other amenities. Contrary to Avatar's position, it does not stand for the proposition that any entity that happens to own such a parcel is free to charge unlimited assessments to residents without regard to the limits of chapter 720.

The argument that the Club is not a part of the "community" is not accurate. Nor was that the position advocated by Avatar in its briefing. Avatar did suggest that commercial property was exempt from assessments, a proposition that is not in dispute. Indeed, Avatar's principal argument is that chapter 720 does not apply to the commercial or industrials parcels *in a community* that contains both residential parcels and parcels intended for commercial or industrial use.

Avatar claims its assessments are not governed by chapter 720, on the one hand and, on the other, relies on chapter 720 for enforcement of its assessments against homeowners. In its assessment-collection efforts, including in foreclosure suits, Avatar consistently invoked chapter 720 as its authority. Avatar cannot reap the advantages of the Act to foreclose on owners for failing to pay the Club membership fee and then change its narrative to claim that it is shielded from

complying with the statute because the Club facilities, upon which the residentially imposed fee is based, are exempted as commercial property.[7]

Avatar argues that, by its terms, the limits imposed by section 720.308(3) apply only to assessments imposed by the association pursuant to its annual budgeting process and not to the assessment imposed by Avatar. This is based on the following language:

> assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate share of the expenses as described in the governing documents.

§ 720.308(3), Fla. Stat.

According to Avatar, "adopted budget" refers to the Association's budget, so the limitation applies only to assessments made by the Association. Section 720.303(6), Florida Statutes (2017), does require a homeowner's association to adopt an annual budget, but the language of section 720.308(3) does not refer to that

---

[7] Avatar argues it did not need chapter 720 to collect the Club dues and to foreclose when they were not paid. This is an issue we do not address because, in fact, it brought its foreclosure actions under chapter 720. Avatar's Club Plan utilizes chapter 720 in other respects. The Club Plan indicates its lien relates back to the original recording date, similar to section 720.3085(1)(a), includes a late fee that tracks section 720.3085(3)(a), and includes language requiring a homeowner "to pay a reasonable rental" if they remain in possession after foreclosure corresponding to section 720.3085(1)(e). Avatar uses chapter 720 in an effort to support its affirmative defense of waiver, seeking to utilize chapter 720 at the same time as disclaiming its applicability.

statute when it uses the term "adopted budget." "Assessments" includes financial obligations imposed by entities other than the association. § 720.301(1). Section 720.308(3) refers to budgets and proportional expenses "as described in the governing documents." Under the governing documents in this case, the Club was required to adopt an annual budget of expenses.

Avatar's reading of the statute would limit the amount of assessments that may be imposed by the Association (over which homeowners exercise control) and leave the ability of others such as the developer (over whom the homeowners have little or no control) to impose unlimited assessments. This runs contrary to the prevailing purpose behind chapter 720 "to protect the rights of association members without unduly impairing the ability of such associations to perform their functions." § 720.302(1).

Avatar contends that, even if section 720.308(3)'s limitation on assessments to "expenses" applies to Avatar's assessments, that section would not prohibit the assessment for the Club membership fee. It argues that, while to Avatar the money represents profit, to the homeowner it represents an expense. The "expenses" referred to in section 720.308(3) are the "expenses as described in the governing documents." Avatar made the Club Plan part of the governing documents. The Club Plan defines expenses as "all costs . . . of owning (including Club Owner's debt service and depreciation), operating, managing, maintaining, insuring the Club." It

then lists a cavalcade of examples of expenses, but nowhere do those expenses include a profit component. Here, and in other parts of the Club Plan, there is a clear distinction between Club expenses and the Club membership fee, including the separation of the assessed Club dues into a cost component and a fee component.

Avatar argues that this result forces them to operate the Club on an "at cost" basis. However, "at cost" is an inexact concept. The residents are not challenging the assessments for the Club expenses. The Club Plan's definition of an expense, while broad, does not include profit.

Nothing, other than the marketplace, prevented Avatar from keeping the parcel as a true commercial operation and charging a fee for use of the amenities. The residents would then have the choice whether to pay such a fee, as they currently do with golf courses in the community which Avatar chose not to include in the Club Plan.[8]

The trial court held that section 720.308(3) prohibits the homeowners of Solivita from being assessed a membership fee (the profit component of the Club's operation.) We agree. The legislature set forth the statutory framework and Avatar

[8] In addition to the Club facilities and amenities, Avatar also operated two 18-hole golf courses, to which membership was voluntary.

chose how it wished to design the community including formation of a homeowner's association.[9]

The trial court ruled that Avatar's affirmative defense of waiver and its close relative, ratification, were not permitted to defeat Gundel's claim. In essence, Avatar alleges the Appellee waived his right to contest the propriety of Avatar's assessments for Club fees, as reflected in the contract documents signed by the purchaser of the property.[10] In other words, he waived the protection section 720.308(3) provides homeowners from the imposition of prohibited assessments.

In *Asbury Arms Development Corp., v. Florida Department of Business Regulation, Division of Florida Land Sales & Condos.*, 456 So. 2d 1291, 1293 (Fla.

---

[9] According to the amicus brief of the Florida Homebuilders Association, there were 48,500 homeowners' association in Florida in 2022. In the trial court, Avatar could only identify eleven communities it said had a similar "Club Plan" approach in their community. Avatar and the Florida Homebuilders Association argue a decision against Avatar could be disruptive to the residential homebuilding industry. It is highly unlikely since most developers appear to have followed a more concrete path which does not involve an interpretation of the statute allowing unlimited fees subject only to the developer's discretion, no input ever from the homeowner's regarding the services they receive, and no requirements that any services or facilities actually be provided. In exchange, they read the statute to allow a full lien on the homes in the community for non-payment of a broad spectrum of expenses the developer solely chooses to make, in addition to a guaranteed perpetual profit stream.

[10] The Club Plan included an exculpatory clause stating, "An estoppel and waiver exists prohibiting each owner from taking the position that any provision of this Club Plan is invalid in any respect."

2d DCA 1984), the court held that the defense of waiver could not be asserted to defeat rights granted under the Florida Condominium Act. As in the case of condominiums, by chapter 720, the legislature has mandated procedures for the creation, sale, and operation of homeowner's associations. We find *Asbury Arms* persuasive and hold that its rationale applies in this case to prohibit the defense of waiver to avoid the proscription of section 720.308(3) against assessments for Club profits. *See also Holt v. O'Brien Imps. of Fort Myers, Inc*., 862 So. 2d 87, 89 (Fla. 2d DCA 2003) (holding that a party could not waive the protections of the Florida Deceptive and Unfair Trade Practices Act); *Healthcomp Evaluation Servs. Corp. v. O'Donnell*, 817 So. 2d 1095, 1097 (Fla. 2d DCA 2002) (holding a waiver of right to appeal an arbitration decision was "in contravention to the Florida Arbitration Code" and unenforceable); *VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc*., 912 So. 2d 34, 38 (Fla. 4th DCA 2005) (holding a party cannot waive a violation of Florida Franchise Act).

Avatar argues that a waiver provision in the governing documents is enforceable, based on section 720.3075, Florida Statutes (2017). Section 720.3075 "prohibits the inclusion or enforcement of certain types of clauses in homeowners' association documents . . . ." For example, it is against public policy and, therefore, not permitted, to have the documents prohibit or restrict lawsuits against the developer or the homeowners' association.

Avatar attempts to employ *expressio unius est exclusio alterius*, that is, because the legislature listed certain prohibited provisions, it must have meant to allow all other acts. Under this theory, the legislature intended to allow, not just waiver provisions, but any other provision regardless of whether it violates other provisions of statutory or common law. While there are occasions to employ this rule of statutory construction, this is not one of them.

Without question, freedom of contract is an important consideration in our jurisprudence. *See Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101–02 (Fla. 1944) (noting a "fundamental public policy of the right to freedom of contract"). Equally strong is the principle that the legislature may make laws regulating commerce when, in its judgment, an unfettered free market results in circumstances that are unconscionable or otherwise not in society's best interest. Examples of these legislative actions, some of which are referred to above, are too numerous and well-known for a list of them to be useful here. One example, however, is the Florida Condominium Act, by which the legislature "establishes rights and obligations as between purchasers and developers of condominiums," as the *Asbury Arms* court explained. *Asbury Arms*, 456 So. 2d at 1293.

The Florida Homeowners' Association Act is another effort by the legislature to place some reasonable restrictions on free-market transactions. It is based on the legislature's judgment that this restriction is needed. It also represents a view that

the prevailing common law, which, to some extent, already restricts freedom of contract, is insufficient to protect those in need of protection in this arena. Accordingly, it adds to the protections otherwise afforded by common law.

Avatar's construction of the statute does just the opposite. Avatar argues that, because section 720.3075 does not prevent it from including a waiver provision in its contract, a waiver provision is permitted. In other words, the common law governing the enforceability of waiver clauses (and, presumably, many other common law principles governing contracts) should be abrogated. This runs counter to any reasonable reading of chapter 720, as, indeed, it would for the Condominium Act, the Unfair and Deceptive Trade Practices Act, or any of the many more legislative enactments meant to protect Florida residents from unfair business practices.

If, as Avatar argues, the restrictions of section 720.3075 are meant to permit all other prohibitions on restrictive provisions in contracts or governing documents, including those regulated by common law, there is no telling what sort of mischief would be allowed. Under this reading of the statute, a contract could have a provision by which the parties waive all provisions of chapter 720, effectively writing chapter 720 out of the law books. We find nothing in section 720.3075 that suggests it is intended to be an exhaustive list of all prohibited provisions. The common law principles governing waiver of statutory protections apply in this case.

Avatar's affirmative defense of voluntary payment is more problematic. Avatar maintains that, even if the assessment for Club fee was impermissible, it should not be required to return the money collected over the years from homeowners. Generally stated, the defense of voluntary payment is "where one makes a payment of any sum under a claim of right with knowledge of the facts such a payment is voluntary and cannot be recovered." *City of Miami v. Keton*, 115 So. 2d 547, 551 (Fla. 1959).

The defense may not be used in this case, however, because it is not available in contract cases. Under section 725.04, Florida Statutes,

> When a suit is instituted by a party to a contract to recover a payment made pursuant to the contract and by the terms of the contract there was no enforceable obligation to make the payment or the making of the payment was excused, the defense of voluntary payment may not be interposed by the person receiving payment to defeat recovery of the payment.

See Lord v. Die Polder, 113 So. 2d 440, 442 (Fla 2d DCA 1959) (holding that the statute vitiates the defense of voluntary payment); *accord Carol City Utils., Inc. v. Miami Gardens Shopping Plaza, Inc.*, 165 So. 2d 199, 201 (Fla. 3d DCA 1964) ("Nor is there any defense to the claim that the appellee voluntarily made the full payment under the contract, particularly in light of the provisions of [section 725.04]."); *Prudential Ins. Co. of Am. v. Clark*, 456 F.2d 932, 935 (5th Cir. 1972) ("This statute negates the common law defense of voluntary payment.").

Gundel paid the disputed fee assessments pursuant to his purchase agreement, and the provision of that purchase agreement is not enforceable. Section 725.04 operates to bar Avatar's defense of voluntary payment. The cases Avatar relies on for the voluntary payment defense, *Keton*, 115 So. 2d at 551 (Fla. 1959); *Easter v. City of Orlando*, 249 So. 3d 723 (Fla. 5th DCA 2018); and *McLeod v. Santa Rosa Cnty*, 157 So. 37 (Fla. 1934), do not involve payments "made pursuant to a contract."

Even in noncontract cases to which the voluntary payment defense would otherwise apply, it does not preclude recovery if the payment was made "under compulsion or coercion." *See Broward Cty., Fla. Bd. of Cty. Comm'rs v. Burnstein*, 470 So. 2d 793, 795 (Fla. 4th DCA 1985) ("[P]ayment of a tax is involuntary where the penalty for nonpayment is so severe that it constitutes coercion and duress."). Payment has been held to be under compulsion or coercion when the failure to pay would result, as it would here, in the imposition of a lien or other cloud on the homeowner's property. *See Disc. Sleep of Ocala, LLC v. City of Ocala*, 300 So. 3d 316, 324 (Fla. 5th DCA 2020).

For the reasons set forth in this opinion, the judgment of the trial court is affirmed. Having affirmed the trial court's order, we are cognizant of Avatar's assertion that our ruling could have far-reaching effects on homeowners' associations throughout the State. With this in mind, we feel a pronouncement on

the issues in this case from the Florida Supreme Court would be helpful. Therefore, we certify the following question to be one of great public importance:

> Whether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities?

AFFIRMED; QUESTION CERTIFIED.

STARGEL, J., specially concurs, with opinion.
WHITE, J., dissents, with opinion.

STARGEL, J., specially concurring.

I concur that the design of the Club Plan implemented by Avatar falls outside of the legislative framework set forth in chapter 720, and we must therefore affirm the decision of the trial court. I write to address the statutory interpretation analysis in further detail, as well as the notion set forth by Avatar that the majority's reading of the statute would force them to operate "at cost."

I agree with my dissenting colleague regarding our obligation to determine the plain meaning of the text. I agree with the outcome of the cases cited in the dissent based on the application of the canons to the issues at hand in those cases. I further agree that "[w]e err if we decide what a disputed provision means in isolation without considering context or utilizing interpretive canons" (citing *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022)). We must, however, start with the

supremacy of the text principle. With the exception of the word "expense," the key words in section 720.308 have statutory definitions, most notably, "assessment," "governing documents," "real property," and "community." § 720.308.

As the Florida Supreme Court has explained,

> [w]hen a contested term is undefined in statute or by our cases, we presume that the term bears its ordinary meaning at the time of enactment, taking into consideration the context in which the word appears. And we typically look to dictionaries for the best evidence of that ordinary meaning.

Conage, 346 So. 3d at 599. In *Conage*, the court was endeavoring to define the word "purchase" and employed Webster's and American Heritage dictionaries. As we explore the meaning of the word "expense," these are good places to start.

Webster's Dictionary defines "expense" as "financial burden or outlay," "an item of business outlay chargeable against revenue for a specific period," and "something expended to secure a benefit or bring about a result." *Expense*, Merriam-Webster, https://www.merriam-webster.com/dictionary/expense (last visited June 21, 2023). Similarly, the American Heritage Dictionary defines "expense" as "[s]omething spent to attain a goal or accomplish a purpose," "[a] loss for the sake of something gained; a sacrifice," and "[a]n expenditure of money; a cost."

Expense, The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=expense (last visited June 21, 2023).

Applying the definitions provided by the legislature and the dictionary, we can explore the meaning of section 720.308 and its context within the rest of the chapter:

> **(1) Assessments.--**For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof.

§ 720.308(1). The definitions lead us to the following understanding of the terms as they apply to this case:

1) Assessments: Fees charged by Avatar are included in the definition of assessments because Avatar was the developer and a lien could be placed against the property if not paid. *See* § 720.301(1).

2) Community: Solivita was a community within the definition of the chapter. There are exhibits in the record including letters from Polk County which show it was a development of regional impact. It is also important to note that the definition of community includes all the real property under a development of regional impact, so even the property to which Avatar retained title is included. *See* § 720.301(3). Nevertheless, Avatar argues that it is exempt under section 720.302(3)(b) as a

commercial parcel. This argument does not have merit as discussed in the majority opinion.

3) Governing Documents: The governing documents created by Avatar created a homeowners' association but assigned them limited powers over sidewalks, shrubs, signs, etc. Avatar maintained ownership and complete control over a portion of the real property in the community but assessed the homeowners for the expenses of those amenities. Appellees do not challenge those assessments in this appeal. The issue before us is the other fee Avatar charged, which it deemed a membership fee. That fee is a perpetual profit stream generating over $4 million dollars annually above the expenses.

4) Expenses: The dictionary definitions of the word "expense," do not include profits. This Court must apply standard knowledge of such common definitions to the legislature when passing statutes including such terms. *See Conage*, 346 So. 3d at 599-600.

With these definitions in mind, the legislative intent to limit certain actions by developers is clear from the first definition in the chapter, when "assessment" was not limited to monies payable to the not-for-profit homeowners' association but also to fees charged by developers, common-area owners, or to recreational facilities or other owner properties if their property could be subject to a lien for non-payment. § 720.301(1). It is clear throughout the chapter that developers are included in the

legislative purview because the legislature understood the developers were authoring the covenants, governing documents, and the fee structure that homeowners would have to pay or risk losing their homes. Developers are addressed dozens of times throughout the statute in areas including prohibited clauses in financial documents, § 720.3075, financial reports, § 720.3086, and passage of special assessments, § 720.315.

Any argument that the purpose of the statute stops at "corporations not-for-profit" under section 720.302 does not properly follow the canons of statutory interpretation. Section 720.302(1) provides that "[t]he purposes of this chapter are to give statutory recognition to corporations not for profit that operate residential communities in this state, to provide procedures for operating homeowners' associations, ***and*** to protect the rights of association members without unduly impairing the ability of such associations to perform their functions." (Emphasis added.) There are three distinct purposes set forth in the chapter. The third purpose, to protect the rights of association members, is at issue here as Avatar precludes control by the residents while assessing perpetual profits whether such facilities even continue to exist in the future.

If the legislature wanted to exclude developers entirely, they merely needed to say that. If that was the legislative intent, they simply could have excluded all fees by developers from the definition of assessment. They did not. Even more directly,

the legislature could have excluded mention of the developers entirely throughout the chapter if their intent was to only protect property owners from abuses by homeowners' associations. They did not. While Avatar argues it could not have been the legislative intent to have them operate such facilities "at cost," the legislature certainly could have intended to limit incentives for developers like Avatar to keep control and management of facilities and amenities by limiting them to collection of "expenses" and no profits. And they did.

WHITE, J., dissenting.

Although I agree that this case warrants certifying a question of great public importance (not as phrased by the majority) for review by the Florida Supreme Court, I disagree with the majority's decision to affirm the final judgment. I conclude that the proper interpretation of section 720.308, Florida Statutes, requires reversal. Therefore, I respectfully dissent.

Background

Before selling any homes in Solivita, Avatar recorded the Club Plan. Subsequently, Avatar recorded a Master Declaration, which established the Solivita Community Association, Inc. as the operating entity for the community and required each homeowner to be a member of the Solivita Association. The Master Declaration contained typical provisions for community operations, including

provisions that permitted the Solivita Association to levy assessments against each Owner. The Club Plan was attached as an exhibit to the Master Declaration.

The Club Plan stated that the Club Property, including the Club Facilities constructed thereon, included "any real property designated by the Club Owner." Avatar was provided "sole and absolute discretion" over the Club Property, including the Club Facilities. Pursuant to the Club Plan, Avatar invoiced each Owner for Club Dues, which included the pro rata portion of the Club Expenses and the Club Membership Fee. For years, the Owners paid those invoices.

In April 2017, Appellees filed suit against Avatar. Almost six months later, they filed a Second Amended Class Action Complaint containing twelve counts. Avatar responded with an Answer and Affirmative Defenses. Appellees countered with a Reply and Motion to Strike. Contentious and protracted litigation ensued.

An order was entered in January 2018 that granted, in part, a motion for summary judgment filed by Avatar. The trial court made several findings and conclusions, including: the Club Plan is not a "declaration" under section 720.301(4); the Club Plan is a "governing document" under section 720.301(8)(a); the Club Property, including the Club Facilities, is not a "common area" under section 720.301(2); and the Club Property, including the Club Facilities, is commercial property under section 720.302(3)(b). The parties have not appealed that order.

In July 2018, the trial court granted, in part, Appellees' amended motion for class certification. It certified a class for Counts II, V, partially VI (as to alleged direct violation of section 720.308), and VIII. The trial court found that its January 2018 order had resolved Counts I and III. It also concluded that Counts IV, VI (except as partially certified), VII, IX, X, XI, and XII were not amenable to class certification. On appeal, the Second District Court of Appeal affirmed the class certification order in all respects except to the extent that it excluded former homeowners from the class with respect to Count VIII. The Second DCA did not address any other legal determinations made by the trial court.

The case was on a trajectory to trial. That changed, however, after a flurry of motions and hearings in Summer 2021 led to the entry of five orders in October 2021. The trial court: granted Appellees' motion for partial summary judgment on Avatar's Third Affirmative Defense; granted Appellees' motion for partial summary judgment on their section 720.308 claim; denied Avatar's motion for summary judgment; denied Avatar's motion for reconsideration of an oral ruling on section 720.3086; and struck Avatar's Seventh, Eighth and Ninth Affirmative Defenses. The trial court specifically found that the Club Membership Fee was an illegal assessment that violated section 720.308 as a matter of law.

As a result, in November 2021, the trial court entered a Final Judgment that: severed and abated the individual claims and Counts II and V; granted Appellees'

motion for partial summary judgment on damages; entered a permanent injunction on the section 720.308 claim in Count VI; and awarded almost $35 million in damages on the section 720.308 claim in Count VIII. Avatar appealed invoking Florida Rules of Appellate Procedure 9.110(k) and 9.130(a)(3)(B).

Analysis

Since this case turns on the interpretation of a statute, our review is de novo. *See Alachua Cnty. v. Watson*, 333 So. 3d 162, 169 (Fla. 2022). Our obligation is to ascertain the plain meaning of the statute. *See id.* at 169-70. In doing so, we must not confine our scrutiny to the disputed language. *See Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022). We must instead "exhaust all the textual and structural clues that bear on the meaning of a disputed text." *Id.* (citations and internal quotations omitted). Our duty is to consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (citation and internal quotations omitted). We err if we decide what a disputed provision means in isolation without considering context or utilizing interpretive canons. *See id.* To determine plain meaning, we must analyze all interrelated statutory provisions "in concert" and decide "how as integrated bodies of law they fit together." *Watson*, 333 So. 3d at 169-70. With these principles guiding us, we turn to the task at hand.

Section 720.301 ("Definitions") states, in part:

> (3) "Community" means the *real property* that is or will be *subject to a declaration of covenants* which is recorded in the county where the property is located.
>
> (4) "Declaration of covenants," or "declaration," means a recorded written instrument or instruments in the nature of covenants running with the land which *subject the land comprising the community to the jurisdiction and control of an association . . . in which the owners of the parcels. . . must be members*.
>
> . . . .
>
> (8) "Governing documents" means:
>
> (a) The recorded *declaration of covenants* for a *community* and all duly adopted and recorded amendments, supplements, and recorded exhibits thereto; and
>
> (b) The articles of incorporation and bylaws of the *homeowners' association* and any duly adopted amendments thereto.
>
> (9) "Homeowners' association" or "association" means a Florida corporation *responsible for the operation of a community . . . in which membership is a mandatory condition of parcel ownership*, *and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.*

(Emphasis added).

"The *purposes* of [chapter 720] are to give statutory recognition to corporations *not for profit* that *operate residential communities* in this state, to provide procedures for *operating homeowners' associations*, and to protect the

rights of *association* members without unduly impairing the ability of such *associations* to perform their functions." § 720.302(1), Fla. Stat. (emphasis added).

Section 720.303 provides, in part:

> (1) Powers and duties.--An *association* which *operates a community* as defined in [section 720.301] must be *operated* by an *association* that is a Florida corporation. After *October 1, 1995*, the *association* must be incorporated and the initial *governing documents* must be recorded in the official records of the county in which the *community* is located. An *association* may operate more than one *community*. The officers and directors of an *association* have a fiduciary relationship to the members who are served by the *association*. The powers and duties of an *association* include those set forth in this chapter and, except as expressly limited or restricted in this chapter, those set forth in the *governing documents*.
>
> (2) Board meetings.—
>
> . . . .
>
> (c) The bylaws shall provide the following for giving notice to parcel owners and members of all board meetings and, if they do not do so, shall be deemed to include the following:
>
> . . . .
>
> 2. An *assessment* may not be levied at a board meeting unless the notice of the meeting includes a statement that *assessments* will be considered and the nature of the *assessments*. Written notice of any meeting at which *special assessments* will be considered . . . must be [provided] to the members and parcel owners and [posted

> on the property or broadcast on closed-circuit TV] not less than 14 days before the meeting.

(Emphasis added).

"The *association* shall maintain . . . official records." § 720.303(4), Fla. Stat. (emphasis added). Those records include:

> A current account and a periodic statement of the account for each member, designating the name and current address of each member who is obligated to pay *assessments*, the due date and amount of each *assessment* or other charge against the member, the date and amount of each payment on the account, and the balance due.

§ 720.303(4)(j)2., Fla. Stat. (emphasis added).

In section 720.303(6), the Legislature enacted extensive provisions relating to the association's budget, including:

> (a) The *association* shall prepare *an annual budget* that sets out the annual operating *expenses*. *The budget* must reflect the estimated revenues and *expenses* for that year and the estimated surplus or deficit as of the end of the current year. *The budget* must set out separately all fees or charges *paid for by the association for recreational amenities*, whether owned by the *association*, the developer, or another person. The *association* shall provide each member with a copy of *the annual budget* or a written notice that a copy of *the budget* is available upon request at no charge to the member.
>
> (b) In addition to annual operating *expenses*, *the budget* may include reserve accounts for capital expenditures and deferred maintenance for which the *association* is responsible. If reserve accounts are not established . . . funding of such reserves is limited to the extent that the *governing documents* limit increases in *assessments*,

> including reserves. If *the budget* of the *association* includes reserve accounts . . . such reserves shall be determined, maintained, and waived in the manner provided in this subsection. . . . This section does not preclude the termination of a reserve account . . . upon approval of a majority of the total voting interests of the *association*. Upon such approval, the terminating reserve account shall be removed from *the budget*.
>
> (c) 1. If *the budget* of the *association* does not provide for reserve accounts . . . and the *association* is responsible for the repair and maintenance of capital improvements that may result in a *special assessment* if reserves are not provided or not fully funded, each financial report for the preceding fiscal year required by subsection (7) must contain the following statement in conspicuous type:
>
> *THE BUDGET* OF THE *ASSOCIATION* DOES NOT PROVIDE FOR FULLY FUNDED RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN *SPECIAL ASSESSMENTS* REGARDING THOSE ITEMS. OWNERS MAY ELECT TO PROVIDE FOR FULLY FUNDED RESERVE ACCOUNTS . . . UPON OBTAINING THE APPROVAL OF A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE *ASSOCIATION* BY VOTE OF THE MEMBERS AT A MEETING OR BY WRITTEN CONSENT.

(Emphasis added).

The disputed text in this case, section 720.308(1)(a), states:

> (1) Assessments.--For any *community* created after *October 1, 1995*, the *governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof.*
>
> (a) *Assessments levied pursuant to the annual budget or special assessment* must be in *the member's proportional*

> *share of expenses as described in the governing document*, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors.

(Emphasis added).

All the following are uncontroverted:

> The "homeowners' association" or "association" is the Solivita Association;
> the "declaration of covenants" or "declaration" is the Master Declaration;
> the Club Property, including the Club Facilities, is not subject to the Master Declaration and is not subject to the jurisdiction and control of the Solivita Association; and
> the Club Membership Fee is not levied by the Solivita Association pursuant to its annual budget and is not a special assessment.

Avatar asserts that it has no liability under section 720.308(1)(a) because it only applies to certain assessments by the homeowners' association. Appellees, however, contend it applies to any entity that makes such assessments. Now we must use all contextual, structural and textual clues in the statutory provisions (many of them emphasized above) to solve the interpretative riddle. I conclude that Avatar got the correct answer.

The terms "community" and "governing documents" are loaded with meaning, using multiple interrelated terms. *See* § 720.301(3), (4), (8), (9), Fla. Stat. The Legislature imported all that meaning into section 720.308(1) by using "community" and "governing documents." The "community" operated by the

"association" is the "real property . . . subject to a declaration of covenants" that subjects "community" land to the "jurisdiction and control" of the "association." § 720.301(3), (4), Fla. Stat. "Governing documents" include the "declaration of covenants for a community" and the "articles of incorporation and bylaws of the homeowners' association." *Id.* (8). The "association" that operates the "community" may "impose assessments that, if unpaid, may become a lien on [a member's] parcel." *Id.* (9). All the meaning in section 720.308(1) necessarily carries over into its paragraphs.

In paragraph (a), "levied pursuant to *the annual budget* or *special assessment*" (emphasis added) immediately follows "[a]ssessments." The term "budget" (annual or otherwise) is not defined in section 720.301. However, the identical language used in paragraph (a) (i.e., "the annual budget") is used in section 720.303(6)(a) to describe the association's budget. Its budget is also referred to as "an annual budget" and "the budget." § 720.303(6)(a), (b), (c), Fla. Stat. Furthermore, "community," "governing documents," "assessments," "special assessment" and "expenses" are used throughout section 720.303 in connection with "association." *Id.* (1), (2), (4), (6).

Paragraphs (b) and (c) of section 720.308(1) also use "assessments" in relation to "association." Paragraph (d) states: "This *section* does not apply to an *association*, no matter when created, if the *association* is created in a *community* that

is included in an effective development-of-regional-impact development order as of *October 1, 1995*, together with any approved modifications thereto." (emphasis added). This harkens back to section 720.308(1) by using "community" and "October 1, 1995."

Therefore, section 720.308(1)(a) only applies to assessments by the association levied pursuant to its annual budget or as a special assessment. Such assessments to pay the association's expenses to operate the community must be in accordance with the governing documents' description of the way the members share community expenses and each member's proportional share of such expenses. Accordingly, the trial court erred when it found that the Club Membership Fee was an illegal assessment that violated that statute. Section 720.308(1)(a) and other sections of chapter 720 discussed previously provide a firm contextual, textual and structural foundation to support that conclusion.

The majority (and Appellees) say that the Club Membership Fee runs afoul of section 720.308(1)(a) because "assessments" include amounts payable to other entities and "the annual budget" includes the budgets of those other entities. Therefore, they assert, Avatar is liable under the statute. I disagree.

Their contention disregards all the previously discussed terms and meaning encompassed in section 720.308(1), including "association" and its meaning. Their assertion also ignores the fact that the Club Property, including the Club Facilities,

is not included in the "community" operated by the Solivita Association. The term "assessments" is constrained by the language that precedes and follows it, and by the context and structure of chapter 720. *See Conage*, 346 So. 3d at 598; *Watson*, 333 So. 3d at 169-70. Thus, section 720.308(1)(a) does not apply to the Club Membership Fee levied by Avatar.

Furthermore, chapter 720 requires the association to adopt a budget and uses the exact same language (i.e., "the annual budget") in section 720.303(6)(a) and section 720.308(1)(a). Chapter 720 does not require any other entity to adopt a budget and uses no language regarding the budget of any other entity. That should have dispelled the notion that "the annual budget" includes the budgets of other entities. The case law makes such notion untenable.

"'The indefinite article <u>a</u> has an accepted sense of 'any,' while the definite article, <u>the</u>, used before a noun specifies a definite and specific noun, as opposed to any member of a class.'" *Covey v. Shaffer*, 277 So. 3d 694, 696-97 (Fla. 2d DCA 2019) (quoting *Myers v. State*, 696 So. 2d 893, 900 (Fla. 4th DCA 1997), *quashed on other grounds* 713 So. 2d 1013 (Fla. 1998)); *see also Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) ("Here grammar and usage establish that 'the' is 'a function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context.' Congress's 'use of the definite article [in a reference to 'the appraisement'] means an appraisement specifically provided for.'")

(citations omitted); *WCI Communities, LLC v. Sheridan*, 244 So. 3d 1171, 1173 (Fla. 4th DCA 2018) ("the use of the definite article 'the,' when conjoined with the noun 'venue,' exclusively limits a forum selection clause to only one venue, 'to the exclusion of all others'") (quoting *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004)); *Signtronix, Inc. v. Annabelle's Interiors, Inc.*, 260 So. 3d 1186, 1187 (Fla. 1st DCA 2018) (citing *Golf Scoring*, 877 So. 2d at 829); *Travel Exp. Inv. Inc. v. AT & T Corp.*, 14 So. 3d 1224, 1227 (Fla. 5th DCA 2009) (citing *Golf Scoring*, 877 So. 2d at 829).

In view of the foregoing, it is meritless to espouse the view that "the annual budget" does not refer exclusively to the annual budget of the "association." Such a view contravenes the law and defies common sense. "The annual budget" may not exist for any other entity because chapter 720 does not impose a mandate on any other entity to adopt a budget (annual or otherwise). It is also nonsensical to argue that "the annual budget" includes the budget of any other entity "as described in the governing document" because the Legislature did not require such a budget to be described in the governing documents. In addition, the phrase "as described in the governing document" modifies "the member's proportional share of expenses," not "the annual budget." § 720.308(1)(a).

The majority's (and Appellees') reliance on section 720.308(3) also falls flat. It states:

> **(3) Maximum level of assessments.--**The stated dollar amount of the *guarantee* shall be an exact dollar amount for each parcel identified in the *declaration*. Regardless of the stated dollar amount of the *guarantee*, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of *the adopted budget* and *the member's proportionate share of the expenses as described in the governing documents.*

(emphasis added).

The preceding subsection is titled: "Guarantees of common expenses." § 720.308(2). That subsection and the following subsections include "guarantee," "guarantor," or both. *Id.* (2)-(6). Thus, section 720.308(3) is inapplicable because the parties do not contend, and the trial court did not find, that the Club Membership Fee levied by Avatar relates in any way to a "guarantee" or "guarantor." In any event, Appellees' claim under section 720.308(3) fails for the same reasons their claim under section 720.308(1)(a) fails.

Avatar argues that no provision of chapter 720 applies in this case because the Club Property, including the Club Facilities, is commercial property under section 720.302(3)(b). In this case, it is not necessary to decide the full scope of the commercial property exemption. I do conclude, however, that the exemption is broad enough to exclude such commercial real property which Avatar operates from the "community" real property which the Solivita Association operates. I also conclude that the exemption precludes construing "the annual budget" and "the adopted budget" to include any budget for the operation of that commercial real

property. For those reasons, section 720.302(3)(b) provides an independent and alternative basis for Avatar to prevail in this appeal.

In sum, Appellees invite us to adopt arguments clothed in swatches of the statute stitched together, and ignore the rest of the contextual, structural, and textual fabric of chapter 720. The majority accepts that invitation. I must decline. *See Conage*, 346 So. 3d at 598; *Watson*, 333 So. 3d at 169-70.

Therefore, the trial court erred by granting Appellees' motion for partial summary judgment on their section 720.308 claim. Because it did so based on that ruling, the trial court also erred by striking certain affirmative defenses, and by entering a Final Judgment which granted partial summary judgment on damages, entered a permanent injunction and awarded millions of dollars in damages.

Conclusion

For all the foregoing reasons, I would reverse in their entirety the Final Judgment, the order granting Appellees' motion for partial summary judgment on their section 720.308 claim, and the order striking Avatar's Seventh, Eighth and Ninth Affirmative Defenses, reverse the other October 2021 orders to the extent that they are inconsistent with this opinion, and remand for further proceedings. Therefore, I respectfully dissent.

Joseph H. Lang, Jr., of Carlton Fields, P.A, Tampa, and Daniel Fleming and J.D. Zarate, of Johnson Pope Bokor Ruppel & Burns, LLP, Tampa, for Appellant.

Clayton T. Osteen, Benjamin B. Bush, Patrick S. Bickford, and Joshua R. Funderburke, of Ausley & McMullen, P.A., Tallahassee, for Amicus Curiae, Florida Home Builders Association.

Lisa A. Magill and Shawn G. Brown, of Kaye Bender Rembaum. P.L., Pompano Beach, for Amicus Curiae, Community Associations Institute.

Kristin A. Norse, Stuart C. Markman, and Brandon K. Breslow, of Kynes, Markman & Felman, P.A., Tampa, and J. Carter Andersen, Bryan D. Hull, and Harold D. Holder, of Bush Ross, P.A., Tampa, for Appellees Norman Gundel, William Mann, and Brenda N. Taylor.

No appearance for Appellee, AV Homes, Inc.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED