No. 1180945

IN THE SUPREME COURT OF ALABAMA

BRETT/ROBINSON GULF CORPORATION; CLAUDETTE BRETT; THOMAS BRETT; WILLIAM T. ROBINSON, JR.; AND BRETT REAL ESTATE AND ROBINSON DEVELOPMENT COMPANY, INC.,

Appellants,

v.

PHOENIX ON THE BAY II OWNERS ASSOCIATION, INC.; AND PAMELA MONTGOMERY,

Appellees.

From the Circuit Court of Baldwin County
CV-2015-900942

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLEES' APPLICATION FOR REHEARING

Steven F. Casey
JONES WALKER LLP
420 20TH Street North Suite 1100
Birmingham, Alabama 35203
(205) 244-5200
scasey@joneswalker.com
Attorney for *Amicus Curiae* Community Associations Institute

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEES' APPLICATION FOR REHEARING

The Community Associations Institute respectfully moves the Court for permission to appear as *amicus curiae* and to submit the attached brief in support of the Application for Rehearing of Appellees, Phoenix on the Bay II Owners Association, Inc., and Pamela A. Montgomery.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Community Associations Institute ("CAI"), located in Falls Church, Virginia, is composed of over 40,000 members, has 64 chapters worldwide, including Canada, the Middle East and South Africa, and has relationships with housing leaders in a number of other countries, including Australia and the United Kingdom. CAI provides information, education and resources to the homeowner volunteers who govern communities and the professionals who support them. CAI members include association board members and other homeowner leaders, community managers, association management firms and other professionals who provide products and services to associations. CAI regularly advocates on behalf of common-interest communities and industry professionals before legislatures, regulatory bodies and the courts, and

publishes the largest collection of resources available on community association management and governance.

Approximately 234,000 Alabamians live in 95,000 homes found in somewhere between 2,000 and 3,000 community associations, including many condominium associations. These residents pay $429 million a year to maintain their communities, providing services that would otherwise fail directly upon local governments. By 2040, it is expected that the most common form of housing in the U.S. will be the community association model.

CAI is concerned that the majority opinion herein is not only directly contrary to the statutes and established principles governing condominium creation and development, but that, if not corrected, would grant inordinate power to condominium developers to the detriment of condominium owners and upset the balance of interests legislatively mandated by the Alabama Uniform Condominium Act. CAI also believes that the remedy of reformation adopted and utilized by the trial court herein is the most fitting remedy available to right the wrongs committed by the Appellants (hereinafter "Developers") and that the Court has mistakenly interfered

with what should be the trial court's discretionary authority to shape equitable remedies.

Accordingly, CAI respectfully requests that this Court grant it leave to appear as *amicus curiae* and accept the attached brief in support of Appellees' Application for Rehearing.

Respectfully submitted,

s/ Steven F. Casey
Attorney for *Amicus Curiae*, Community Associations Institute

OF COUNSEL:
JONES WALKER LLP
420 20th Street North, Suite 1100
Birmingham, Alabama 35203
205) 244-5200
scasey@joneswalker.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Statutes

BRIEF OF AMICUS CURIAE

ARGUMENT

I. Introduction.

The Court's per curiam decision glosses over routine statutory requirements for condominium creation, allowing the Developer's failed attempt to create certain "commercial units" to stand.

It also turns a deaf ear to the equitable remedy chosen by the trial court, when it ought to applaud that effort as the absolute best way to unravel the mess created by the Developer.

Two of the concurring opinions also mistakenly conclude that the only claim for reformation comes from the Association's president. However, the record reflects that the Association itself is also a counterclaim plaintiff. Moreover, it has the authority by statute to bring actions on behalf of its members.

The Court ought to grant the Association's Application for Rehearing and issue a new opinion which properly applies the statutory scheme for condominium establishment, recognizes the Association's claims, and reinstates the trial

court's appropriate and wise remedy for the Association's difficulties, which were caused solely by the Developer.

II. The Court's per curiam decision glosses over statutory requirements for condominium establishment.

Respectfully, the per curiam opinion released by the Court on June 30, 2021 reflects an unfortunate and distressing misapprehension of basic condominium law, resulting in the creation of a developer-friendly climate for condominium construction and development not intended by the legislature.

Indeed, while the Court demonstrates a rudimentary knowledge of the Alabama Uniform Condominium Act, it picks and chooses which parts of the Act developers must comply with and which they do not. For example, the Court quotes pertinent portions of section 35-8A-205, which include the requirement that the declaration of a condominium "**must contain** . . . [a] description of the boundaries of each unit . . . **including the unit's identifying number**." Opinion at 24 (emphasis added). Yet there are no identifying numbers in the Declaration for these so-called "commercial units." Identifying numbers are used throughout the Declaration for the creation of the residential units. The Court mistakenly and unwisely waives that requirement for the Developers.

Furthermore, throughout the Declaration is the statement that the condominium is a 104 unit residential condominium. The Declaration is very clear that the condo is to be used solely for single family residences. It is also very clear that the condo consists solely of 104 residential units. While there is some passing reference in the Declaration to commercial units, the language of the Declaration itself neither creates any such units, nor reserves the right to do so.

Ignoring what might be motivating the Developer in its frantic attempt to hang on to the so-called "commercial units," the fact is that the Declaration does not create the commercial units or reserve them to anyone, much less the Developer. Chief Justice Parker recognizes this in his dissent. Opinion at 63 (Parker, C.J., dissenting). The Chief is right.

It is clear from the Act what must be done to create condominium units. Condominium units were created in this Declaration. Pam Montgomery owns a residential unit and the members of the Association own residential units. But the Declaration does not contain the language that the Act

requires in order to create any of the so-called "commercial units."

The per curiam opinion here allows the commercial units by judicially easing the Developer's requirements for unit creation. Indeed, the opinion admits that: "This case does not involve a **complete** failure to comply with the requirements of § 38-8A-205(a)(4) and (5) with regard to the commercial units." Opinion at 27 (emphasis added). If the Court believes the requirements of the Act are too strict, it ought to suggest a legislative solution and resist the temptation to fix this itself.

But the per curiam opinion unfortunately shows that the Court could not help itself and gave in to the temptation to legislate. The reasoning the Court articulates for that places great emphasis on what it senses is the intention of the Act to encourage "development and construction of condominium property." Opinion at 28. The desire to give voice to the Act's intent, as referenced, ignores, however, the consumer protection intent of the Act. There is an entire Article of the Act for the "Protection of Condominium Purchasers." See Ala. Code §35-8A-401, et seq. By picking and choosing which provisions of the Act are most important,

the Court elevates developer interests over consumer interests. The Court ought to grant the Application for Rehearing and change that.

Moreover, Justice Wise, who joined the per curiam opinion, expresses her "concerns regarding the way in which the developers added the commercial units" and elaborates on the "future disputes" that its methodology may impact on the parties. Opinion at 46 (Wise, J., concurring specially). Justice Wise's concerns are appropriate and a revision of the per curiam opinion that takes those concerns into account would be consistent with the law and provide needed guidance to the parties and others in similar situation. As it stands, the Court's opinion will only create more difficulty.

III. The per curiam opinion discounts the fraud claims made by the Association.

The Court stated that "Montgomery was the only POB II residential-unit owner who brought a fraud claim . . . ." Opinion at 39. This assertion ignores the counterclaims asserted by the Association.

The Association and Pam Montgomery both answered the Developer's complaint and asserted counterclaims and third party complaints against the original plaintiffs, including

the Developer, on September 9, 2015, and included claims for "material misrepresentations [and] material omissions" resulting in damage to both. C. 126-137. Both the Association and Pam Montgomery sought equitable relief and money damages for the misrepresentations. *Id.*

Furthermore, the Association may act on behalf of its members. Ala. Code § 35-8A-302(4)[1]. And it did so here. The Court's treatment of the Association's misrepresentation claims stands in stark contrast to its willingness to cut the Developer slack in its disregard of statutory requirements in creating condo units.

IV. Reformation is a perfect remedy here.

Truthfully, since the Declaration did not create the fictitious "commercial units," they don't exist. So, it is possible that the trial court could have simply declared that and not gone further. Perhaps this Court would not have objected to that. However, the trial court's reformation order was undoubtedly formulated to create certainty and

[1] The Association has authority under the Alabama Uniform Condominium Act to "[i]nstitute, defend, or intervene in litigation . . . in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." Ala. Code §35-8A-302(a)(4).

eliminate confusion going forward for the Association and its members.

Money damages would not make the Association and its members whole. Reformation puts this condominium right where the Association and its members understood it should be, according to the public offering statement representations.

V. Alternatively, the Court should affirm the trial court's order finding the creation of the "commercial units" void, but refrain from reformation.

As set forth elsewhere herein, there is more than sufficient evidence to support a result affirming the trial court's decision that the Developer's attempt to create "commercial units" was void. The Court should at the very least replace the June 30, 2021 per curiam decision with one that lets that portion of the trial court's stand.

The question of whether reformation is a proper remedy here obviously troubles this Court. In light of that concern, the Court should turn its attention to the severability provision of the Declaration, which allows for portions of Declaration deemed invalid without affecting the validity of the remaining portions. C. 1460-61. The Declaration could arguably stand on its own, without reformation, as long as the right result is reached on the "commercial units" issue.

VI. Conclusion.

This Court should grant the Application for Rehearing, consider the position taken on rehearing by Appellees and their amicus curiae and replace the June 30, 2021 per curiam opinion with one affirming the trial court's decision in all respects. As an alternative, the Court should at a minimum declare the Developer's effort to establish the "commercial units" void, even if it remains uncomfortable with reformation of the Declaration.

Respectfully submitted,

s/ Steven F. Casey
Attorney for *Amicus Curiae*, Community Associations Institute

OF COUNSEL
JONES WALKER LLP
420 20th Street North, Suite 1100
Birmingham, Alabama 35203
(205) 244-5200
scasey@joneswalker.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on this 14th day of July, 2021, to the following by United States mail and/or electronic mail:

Robert E Poundstone
BRADLEY ARANT BOULT CUMMINGS LLP
445 Dexter Avenue
Montgomery, AL 36104
bpoundstone@bradley.com

Marc James Ayers
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
mayers@bradley.com

Albert L. Jordan
Oscar M. Price, III
WALLACE, JORDAN, RATLIFF & BRANDT L.L.C.
800 Shades Creek Parkway, Suite 400
Birmingham, AL 35209
bjordan@wallacejordan.com
oprice@wallacejordan.com

Daniel G. Blackburn
Grant Blackburn
Blackburn & Conner PC
P.O. Box 458
Bay Minette, AL 36507
dblackburn@blackburnpc.com
gblackburn@blackburnpc.com

Glenn Murdock
2906 Canterbury Road
Birmingham, AL 35223
mrdck7@aol.com

Steve Marshall
Edmund G. Lacour Jr.
Kelsey J. Curtis
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
Edmund.Lacour@AlabamaAG.gov

E. Hamilton Wilson, Jr.
BALL, BALL, MATTHEWS & NOVAK
445 Dexter Avenue, Suite 9045
Montgomery, AL 36104
hwilson@ball-ball.com

Forrest S. Latta
BURR & FORMAN LLP
Post Office Box 2287
Mobile, AL 36652-2287
Forrest.latta@burr.com

Ed R. Haden
Robert V. Baxley
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35203
ehaden@balch.com
rbaxley@balch.com

Jessica M. McDill
Chason & Chason, P.C.
P.O. Box 100
Bay Minette, AL 36507
jmm@chasonlaw.com

David A. Hamby, Jr.
Spear, Spear & Hamby, P.C.
P.O. Box 1347
Mobile, AL 36633
dah@sshlawpc.com

Freddie N. Harrington, Jr.
Stott & Harrington, P.C.
2637 Valleydale Road
Suite 100
Birmingham, AL 35244
freddie@stottharrington.com

Robert R. Riley, Jr.
Jay Murrill
Riley & Jackson, P.C.
3530 Independence Drive
Birmingham, AL 35209
rob@rileyjacksonlaw.com
jay@rileyjacksonlaw.com

William A. Short, Jr.
27582 Canal Road, Unit 2303
Orange Beach, AL 36020
peteshort6@gmail.com

John C. Barnes
Alford & Barnes, LLC
100 Brook Drive, Suite D
Helena, AL 35080
jcb@alfordbarnes.com

Jonathan D. Terry
1813 3rd Avenue North
Bessemer, AL 35020
jdterry@bainsterry.com

s/ Steven F. Casey
Of Counsel