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2019 IL App (1st) 180059-U

FIRST DIVISION  
March 25, 2019

No. 1-18-0059

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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FRANKLIN P. FRIEDMAN, as Trustee of the Franklin	)	Appeal from the
P. Friedman Living Trust, Individually, and on Behalf of	)	Circuit Court of
All Others Similarly Situated,	)	Cook County
	)	
Plaintiff-Appellee,	)	
	)	No. 16 CH 15920
v.	)	
	)	
LIEBERMAN MANAGEMENT SERVICES, INC.,	)	The Honorable
	)	Thomas R. Allen,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PIERCE delivered the judgment of the court.  
Justice Griffin concurred in the judgment.  
Justice Walker dissented.

**ORDER**

- ¶ 1 *Held:* We vacate our order granting defendant’s Supreme Court Rule 308 application for leave-to appeal, dismiss this appeal, and remand to the circuit court.
- ¶ 2 This appeal is before us on two substantially similar questions of law certified by the circuit court under Illinois Supreme Court Rule 308 (eff. July 1, 2017). The questions ask whether a condominium seller can sue a third-party management company, acting as an agent for a condominium board, for charging an allegedly excessive fee for furnishing disclosure

documents, in violation of section 22.1(c) of the Condominium Property Act (Act) (765 ILCS 605/22.1 (West 2016)). After careful consideration of the limited record before us, we find that the certified questions are improper in form, and answering the questions would not materially advance the litigation toward termination. For the reasons that follow, we find that defendant's application for leave to appeal pursuant to Rule 308 was improvidently granted. We therefore vacate our order granting leave to appeal, dismiss this appeal, and remand this cause to the circuit court for further proceedings.

¶ 3

### I. BACKGROUND

¶ 4 Plaintiff's operative complaint alleges that Franklin P. Friedman decided to sell his condominium unit in the Mission Hills Condominiums in Northbrook, Illinois. The Mission Hills Condominiums Association (Association) retained defendant Lieberman Management Services, Inc., a for-profit property management company, to provide property management services. Plaintiff went to defendant's website and submitted a request for certain disclosure documents set forth in section 22.1(a) of the Act (765 ILCS 605/22.1(a) (West 2016)), so that plaintiff could give those documents to the potential condominium purchaser. Defendant furnished the documents requested and charged plaintiff a \$220 fee. Plaintiff also requested a paid assessment letter. Defendant furnished the paid assessment letter and charged plaintiff a separate \$250 fee, which included a rush fee and a buyer's transfer fee.

¶ 5 Plaintiff, as trustee of the Franklin P. Friedman Living Trust, individually, and on behalf of all others similarly situated, filed this action in the circuit court of Cook County against defendant. The Association was not named as a defendant. In relevant part, count I of plaintiff's complaint asserted that defendant "is a condominium association management company that, with the authorization of the applicable Condominium Association and/or its Board of Managers,

provides [section 22.1 disclosure documents] that a prospective condominium seller must, upon demand from the prospective purchaser, legally disclose[.]” Plaintiff alleged that defendant violated section 22.1(c) of the Act by charging an excessive fee to furnish copies of the section 22.1 disclosure documents. Plaintiff alleged that he “could not obtain [the disclosure documents] from any other source but the [d]efendant.”<sup>1</sup> The only exhibits attached to plaintiff’s complaint were copies of the order forms for the disclosure documents that were downloaded from defendant’s website and the paid assessment letter.

¶ 6 Defendant did not answer the complaint. Rather, defendant moved to dismiss count I of plaintiff’s complaint due to a failure to state a cause of action pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). Defendant argued that section 22.1 of the Act does not apply to third-party property management companies because, by its own terms, section 22.1 only applies to “the association or its Board of Managers.” 765 ILCS 605/22.1(c) (West 2016). Defendant further argued that the Act does not provide an express private right of action in favor of a condominium unit seller against a third-party property management company, and that no private right of action could be implied because the purpose of the Act is to protect condominium unit purchasers, not condominium unit sellers. Plaintiff’s response asserted, in part, that an agent may be held liable for a principal’s breach of a duty if the agent took an “active part” in violating the principal’s duty. Defendant’s reply asserted, in part, that plaintiff’s complaint “does not plead that [defendant] was the agent of the [Association] for the

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<sup>1</sup>At oral argument, we asked plaintiff’s counsel whether plaintiff ever sought the disclosure documents directly from the Association. Plaintiff’s counsel responded that plaintiff was “directed to the property management company.” When asked again whether the plaintiff asked the Association for the disclosure documents, plaintiff’s counsel answered “yes,” and she “believed” that was set forth in the complaint. The complaint is devoid of any allegations that plaintiff ever sought the disclosure documents directly from the Association at any time, or that the Association directed plaintiff to obtain the documents from defendant.

purpose of providing documents referenced in section 22.1 [of the Act].” After briefing and oral argument, the circuit court denied defendant’s motion to dismiss.

¶ 7 Defendant then filed a motion to certify a question for interlocutory appeal pursuant to Rule 308. Plaintiff did not oppose defendant’s request for a Rule 308 finding, but sought to ensure that additional documents—which were not before the circuit court when it ruled on the motion to dismiss—would be included in the supporting record that would accompany defendant’s Rule 308 application for leave to appeal. Both parties proposed different formulations of the questions to be certified. Both parties proposed certified questions that asked whether a cause of action existed under section 22.1 of the Act in favor of a unit seller against a third-party management company based on the fee it charged for section 22.1 disclosure documents. Defendant’s proposed questions, however, did not presume or assert the existence of an agency relationship between the third-party management company and a condominium association or its board of directors, whereas plaintiff’s proposed questions presumed or asserted that the third-party management company was acting as “agent” or “express agent” for a condominium association or its board of managers.

¶ 8 Defendant’s reply in support of its motion for a Rule 308 certification specifically objected to plaintiff’s attempts to include language in the certified questions that assumed the existence of an agency relationship between defendant and the Association. The record does not indicate that the circuit court heard argument on how to phrase the certified questions.<sup>2</sup> In a written order, the circuit court granted defendant’s motion and certified two questions of law:

“(1) Whether [section 22.1 of the Act] allows a cause of action to be brought by a condominium unit seller against a property management company,

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<sup>2</sup>The only report of proceedings that appears in the record is for the circuit court’s hearing on defendant’s motion to dismiss.

acting as an agent for the Condominium Board of Managers and/or the 'Unit Owners' Association, with respect to the fees charged by the property management company to the condominium unit seller for the documents described in Section 22.1(a) of the Act?

(2) Whether a private cause of action can be implied on behalf of a condominium unit seller and against a property management company, under Section 22.1 of the Act \*\*\* where the property management company is acting as agent for the Condominium Board of Managers and/or the 'Unit Owners' Association, with respect to the fees charged by the property management company to the condominium unit seller for the documents described in Section 22.1(a) of the Act?"

¶ 9 We granted defendant's application for leave to appeal. However, for the reasons that follow, we find that our earlier order granting defendant leave to appeal was improvidently granted, and we decline to answer the certified questions. We vacate our order granting defendant's application for leave to appeal, dismiss this appeal, and remand to the circuit court for further proceedings.

¶ 10

## II. ANALYSIS

¶ 11 Illinois Supreme Court Rule 308 allows a circuit court to make an otherwise interlocutory order immediately appealable upon a finding that the order involves a question of law as to which there is substantial ground for a difference of opinion and an appeal may materially advance the ultimate termination of the litigation. Ill. S. Ct. R. 308(a) (eff. July 1, 2017). Whether to grant a Rule 308 application for leave to appeal is within our discretion. *Id.* Our review is generally confined to the certified questions. *De Bouse v. Bayer AG*, 235 Ill. 2d 544,

550 (2009); *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 21. Certified questions under Rule 308 involve questions of law, and our review is *de novo*. *Yarbrough v. Northwestern Memorial Hospital*, 2017 IL 121367, ¶ 21. Our supreme court has cautioned, however, that if answering a certified question “will result in an answer that is advisory or provisional, the certified question should not be reached.” *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. Additionally, “if an answer to a certified question is dependent upon the underlying facts of a case, the certified question is improper.” *Id.* Certified questions, as required by the rule, must be framed in such a manner as to materially advance the ultimate termination of the litigation, and must address the underlying disputed question of law so as to avoid a situation where we are asked to render an advisory opinion on matters unrelated to the case before us. *Id.*

¶ 12 We find the two certified questions are improper in form because the underlying facts of the operative complaint do not allege or otherwise establish the existence of an agency relationship between the defendant and the Association or its board of managers, a relationship that forms the basis of both certified questions. There are two major flaws with the certified questions: each question contains an assumption that an agency relationship in fact exists between defendant and the Association or its board of managers. First, plaintiff’s complaint does not allege the existence of an agency relationship. Plaintiff merely alleged that defendant “is a condominium association management company that, with the authorization of the applicable Condominium Association and/or its Board of Managers, provides [section 22.1 disclosure documents] that a prospective condominium seller must, upon demand from the prospective purchaser, legally disclose[.]” Critically, plaintiff did not plead the existence of an agency relationship. It is well established that the existence of a principal-agent relationship is ordinarily a question of fact, and that it is the plaintiff’s burden to “plead facts, which, if true, could

establish the existence of an agency relationship.” *Knapp v. Hill*, 276 Ill. App. 3d 376, 382 (1995). Merely alleging that defendant was authorized by the Association or its board of managers to provide section 22.1 disclosure documents is insufficient to establish the existence of an agency relationship, as it says nothing about the nature of the relationship between the defendant and the non-party condominium association.

¶ 13 Furthermore, because defendant has not admitted that it is in fact the Association’s agent in providing the section 22.1 disclosure documents, we reviewed the briefing on the motion to dismiss and the briefing on the motion to certify a question of law under Rule 308 filed in the circuit court. Our review makes clear that defendant did not admit or concede that it acted as an agent of the Association or its board of managers in providing the section 22.1 disclosure documents, or that any agency relationship existed with either entity. Although the defendant did produce its management agreement with the Association and the management agreement does refer to defendant as the Association’s agent for purposes of the agreement, notably there is no duty under the agreement that requires the defendant to provide section 22.1 disclosure documents on the Association’s behalf; the capacity in which defendant provided the section 22.1 disclosure documents has not been established, either in the pleadings or by way of concession or an admission. Thus, defendant’s management agreement with the Association does not establish whether defendant was providing the section 22.1 disclosure documents as an agent of the Association. Defendant consistently urged the circuit court not to formulate any certified question that assumed an agency relationship with the Association as a factual matter. Therefore, we find that the certified questions ask us to answer questions that apply to an assumed agency relationship that has not been adequately pleaded, admitted, or otherwise established. As such, any answer to the certified questions as formulated would be advisory.

¶ 14 Second, because the existence of an agency relationship was not pleaded and is not yet at issue, an answer to the certified questions would be provisional and would not lead to the ultimate termination of this lawsuit. For example, assume that plaintiff properly pleaded that defendant acted as the Association's agent when it provided the section 22.1 disclosure documents, and that defendant answered by denying that it acted as the Association's agent. In that hypothetical situation, any answer to either certified question would not assist in the ultimate termination of this lawsuit because the question of agency would first need to be resolved; if that question of fact was resolved by finding that defendant did not act as an agent, our answers to the certified questions before us would have no connection to the case and would be advisory and provisional.

¶ 15

### III. CONCLUSION

¶ 16 Given our review of the pleadings and filings in the circuit court, as well as the form of each certified question, we vacate our order granting defendant's application for leave to appeal pursuant to Rule 308, dismiss this appeal, and remand this cause to the circuit court for further proceedings.

¶ 17 Appeal dismissed; cause remanded.

¶ 18 JUSTICE WALKER, dissenting.

¶ 19 I respectfully dissent. The majority chooses to not answer the certified question, finding that the answer will not avoid protracted litigation. Because one possible answer to the certified question would cause immediate dismissal of the lawsuit, the majority effectively concedes that the correct answer to the certified question is "Yes."

¶ 20 After the circuit court did not rule in its favor on a motion to dismiss, the defendant asked the circuit court to certify a question that involved application of the law to the specific facts,



effectively asking this court to resolve the factual issue of whether defendant acted as agent for the Association. Because questions of fact are not proper for certification, the circuit court instead properly certified two questions of law, which collapse to a single question because the Condominium Property Act (765 ILCS 605/1 *et seq.* (West 2016)) does not expressly provide for any cause of action when a party violates section 22.1 of Act (765 ILCS 605/22.1 (West 2016)). The Condominium Property Act does not explicitly create a cause of action, and a cause of action is allowed “if and only if” a private cause of action can be implied \*\*\* under Section 22.1 of Act. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). The circuit court asks only the legal question of whether a unit owner has a statutory cause of action against a managing agent for a condominium board, assuming the managing agent acted as agent for the board in providing the documents required under section 22.1 of the Condominium Property Act.

¶ 21 The certified question does not ask us to resolve any issue of fact. Cf. *De Bouse v. Bayer*, 235 Ill. 2d 544 (2009). If we answer “No” to the certified question, the plaintiff has no cause of action even if defendant acted as the board’s agent. Defendant would have no need to persuade the circuit court that, although it signed a contract to act as the board’s agent, and the board directed the plaintiff to obtain, from defendant, documents needed to complete the sale of his unit, the defendant still did not act as the board’s agent when it supplied the necessary documents to plaintiff. The circuit court’s certified question presents a question of law.

¶ 22 Rule 308 provides:

“When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. \*\*\* The Appellate Court may thereupon in its discretion allow an appeal from the order." Ill. S. Ct. R. 308 (eff. July 1, 2017).

¶ 23 Our supreme court modeled Rule 308 on the federal jurisdictional statute codified at 28 U.S.C. § 1292 (b) (2000). *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442 (1988). As with section 1292(b), Rule 308 serves the purpose of "facilitat[ing] disposition of the action by getting a final decision on a controlling legal issue sooner, rather than later" in order to "save the courts and the litigants unnecessary trouble and expense." *United States v. Adam Bros. Farming*, 369 F. Supp. 2d 1180, 1182 (C.D. Cal. 2004), quoting *John v. United States*, 247 F.3d 1032, 1051 (9th Cir.2001)(en banc)(J. Rymer, special statement). "[T]he central purpose of both provisions is to promote greater judicial efficiency." *Castle v. Sherburne Corp.*, 446 A.2d 350, 353 (Vt. 1982).

¶ 24 Rule 308 sets out the criteria for its application. First, the order must "involve[] a question of law." Ill. S. Ct. R. 308 (eff. July 1, 2017). "Certified questions must not seek an application of the law to the facts of a specific case." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21.

¶ 25 Second, the court must certify a question "as to which there is substantial ground for difference of opinion." Ill. S. Ct. R. 308 (eff. July 1, 2017). The federal district court for the Northern District of Illinois, in three separate cases, found that no Illinois case had addressed the issue raised here, and in all three cases, the court answered "No" to the certified question. *Horist v. Sudler & Co.*, 17 C 8113 (N.D. Ill. 2018); *Ahrendt v. Condocerts.com, Inc.*, 17-CV-8418 (N.D. Ill. 2018); *Murphy v. Foster Premier, Inc.*, 2018 WL 3428084. The circuit court agreed with the

federal courts that Illinois courts had not addressed the issue, but the circuit court did not agree with the inconsistent reasoning of the three federal cases or their resolution of the question. Therefore, the circuit court correctly found that the certified question involved an issue "as to which there is substantial ground for difference of opinion." Ill. S. Ct. R. 308 (eff. July 1, 2017).

¶ 26 Third, the circuit court should not certify a question for a Rule 308 appeal unless "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Ill. S. Ct. R. 308 (eff. July 1, 2017). If this court were to agree with the federal courts, the litigation would immediately terminate with dismissal of the complaint. Thus, the certified question here meets the criteria for resolution through a Rule 308 appeal.

¶ 27 Some courts have stressed that the appellate court need not accept jurisdiction in all cases that meet the requirements of Rule 308. In *Voss*, the court noted that federal courts applying section 1292(b) have refused to answer certified questions where the parties expected only short trials if the case proceeded without an appellate answer to the certified questions. *Voss*, 166 Ill. App. 3d at 447-48. The use of Rule 308 appeals, like section 1292(b) appeals, "is reserved for those cases where an intermediate appeal may avoid protracted litigation." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865-66 (2d Cir. 1996).

¶ 28 Here, if we refuse to answer the certified question, the parties will need to resolve issues concerning agency, the class certification plaintiff seeks, and possibly extensive accounting for damages to all members of the class. The parties and the circuit court all seek resolution of the legal issue because "early appellate review might avoid protracted and expensive litigation." *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 889 F. Supp. 849, 851-52 (E.D.N.C. 1995). Answering the certified question meets the criteria and serves the purpose of the rule.

¶ 29 The circuit court asks us whether the courts can imply a private cause of action for violation of the Condominium Property Act by a condominium unit owner against a property management company if the property management company acts as agent for the condominium board and charges fees in excess of the fees permitted by the Condominium Property Act for providing the documents required for sale of the condominium unit. To determine whether a statute implies a private cause of action, courts consider "(1) whether the plaintiff is within the class of persons the statute was designed to protect, (2) whether implying the cause of action is consistent with the underlying purpose of the Condominium Property Act, (3) whether the plaintiff's injury is one the statute was designed to prevent, and (4) whether implying a cause of action is necessary to effectuate the purposes of the [A]ct." *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 470 (1989).

¶ 30 In support of the amendment to the Condominium Property Act that included the language at issue here, a representative asserted that the amendment would be "consistent with the Uniform Condominium Property Act (Uniform Act)." 82nd Ill. Gen. Assem., House Proceedings, May 23, 1979, at 8. The Uniform Act serves the purpose of "specifying certain rights, duties, responsibilities and liabilities of lenders, unit owners, developers, and other persons and organizations having interests in condominiums; \*\*\* [and] specifying rights and duties of buyers and sellers of condominium units." *Anderson v. Council of Unit Owners of Gables on Tuckerman Condominium*, 948 A.2d 11 (Md. Ct. App. 2008). The Uniform Act protects both potential purchasers and owners, even owners who may later become sellers. *State v Rupe*, 428 S.E.2d 480, 488 (N.C. App. 1993); James H. Jeffries IV, Note, *North Carolina Adopts the Uniform Condominium Act*, 66 N.C.L. Rev. 199, 221 (1987). The Uniform Act "was enacted \*\*\* to make unit holders' 'bundle of rights' more uniform." *Plano v. Parkway Office*

*Condominiums Bever Properties, LLC*, 246 S.W.3d 188 (Tex. Ct. App. 2007). In accord with the Uniform Act, the Condominium Property Act "provides the necessary protections to the seller." 77th Ill. Gen. Assem., House Proceedings, May 9, 1972, at 33. Plaintiffs, "as [condominium] owners and sellers, therefore fall within a class for whose benefit the statute was enacted." *Murphy*, 2018 WL 3428084, at \*3.

¶ 31 The specific provision at issue limits the amount charged for the documents every owner must "obtain from the [condominium's] Board of Managers" before sale of the owner's unit. (765 ILCS 605/22.1(a) (West 2016)). As the Condominium Property Act specifies that the owner must pay the charge (765 ILCS 605/22.1(c) (West 2016)), the limitation of the charge protects the owner who seeks to sell his unit. Plaintiffs fall within the class of persons the legislature intended to protect when it adopted the provision.

¶ 32 Implying a cause of action for charging an amount in excess of the "reasonable fee covering the direct out-of-pocket cost of providing such information and copying," (765 ILCS 605/22.1(c) (West 2016)), serves the statutory purpose of limiting the fees charged for the required documents. See *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 523-24 (1990).

¶ 33 In one of the three cases in which the District Court for the Northern District of Illinois addressed the issue of whether the courts need to imply a private cause of action under section 22.1(c), the court implausibly concluded that Condominium Property Act protects only prospective purchasers, not unit owners seeking to sell, and therefore a cause of action in favor of owners would not serve the Condominium Property Act's purposes. *Horist v. Sudler & Co.*, 17 C 8113 (N.D. Ill. 2018). The *Horist* court disregarded the relationship between the Condominium Property Act and the Uniform Act, and the court did not address the many provisions throughout the Condominium Property Act that protect owners, not prospective

purchasers. See, e.g., 765 ILCS 605/18.4 (West 2016); *Boucher v. 111 East Chestnut Condominium Association, Inc.*, 2018 IL App (1st) 162233, ¶¶ 14-38 (specifying some of the owners' rights protected by Act). In the second case, the court found Illinois decisions insufficient and deferred to the *Horist* court. *Ahrendt v. Condocerts.com, Inc.*, 17-CV-8418 (N.D. Ill. 2018).

¶ 34 In the third case, the Northern District of Illinois acknowledged that the Condominium Property Act served the purpose of protecting owners, even when they sought to sell, but found no need to imply a private cause of action in favor of the owners for violations of section 22.1(c). *Murphy*, 2018 WL 3428084, at \*7. The *Murphy* court suggested unit owners could simply charge purchasers higher amounts for their units to cover the document costs. *Id.* However, the purchaser could in turn reduce the offer to ensure that the seller pays the cost. When the market favors purchasers, the suggestion offers no help at all to the overcharged owner. Moreover, the court's suggestion only makes the buyer a new victim of the statutory violation. Without a private cause of action against the party who overcharges the unit owner for the documents, the document supplier keeps the amount it overcharges its victims.

¶ 35 The *Murphy* court also suggested the overcharged owner could protest the charges to the condominium board. In an *amicus* brief filed by the Community Associations Institute – Illinois Chapter (the Institute), the Institute said that if managing agents recover only a "reasonable fee covering the direct out-of-pocket cost of providing such information and copying," "there would be no business reason to assume the risk of liability. With the reduced involvement of property management companies, in turn, it is likely that associations will be unable to meet the deadline for providing the disclosure documents." The Institute added a further threat: if condominium associations or the courts disallow the excessive charges managing agents demand, "it may

logically be assumed that associations within Illinois will be required to incur additional expenses \*\*\*, or by paying additional management fees to the management companies."

¶ 36 The Institute admitted that its "1300 members includ[e] 250 businesses, 350 community association Board members and unit owners, and over 650 community association managers and management companies," assuring that managers and management companies support the threats in the Institute's brief. Thus, the managing agents threaten to increase fees and withhold the required documents, thus preventing sales, if the courts apply statutory fee limits to them. In view of such threats one might conclude that the vast majority of condominium boards will accede to the demands of the managing agents, and ignore the protest of the owner who pays the excessive fee only when he sells the unit, and thus only when the board expects the owner to no longer have any say in the government of the condominium association.

¶ 37 Therefore, if the courts do not imply a private right of action against the board for violations of the Condominium Property Act's limitation on charges for documents that the owner must "obtain from the [condominium's] Board of Managers" to sell the unit (765 ILCS 605/22.1(a) (West 2016)), the owner will have no recourse, and the limitation on fees will have no effect. Applying the *Board of Education* factors, I would find that, as the majority implicitly concedes, the Condominium Property Act implies a private cause of action for violation of the limitation on charges for the required documents.

¶ 38 The trial court here specifically asked whether the Condominium Property Act implies that the unit owner has a cause of action against "a property management company, acting as an agent for the Condominium Board of Managers." An agent may incur liability if "he takes some active part in violating some duty the principal owes to a third person." *Landau*, 409 Ill. at 564. The Condominium Property Act imposes a duty on unit owners to obtain required documents

from the condominium boards, and it imposes a duty on condominium boards to provide the documents for a limited fee. A board breaches that duty if it directs the owner to obtain the documents from the board's agent, and the agent charges a fee that is excessive. The agent takes an active part in violating the duty the board owes to the owner when it charges an excessive amount for the documents.

¶ 39 In *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 810 (2007), Ramirez asked Pekin Hospital for medical records concerning her treatment at the hospital. In accord with its contract with Pekin, Smart Corporation sent the requested records to Ramirez along with a bill for \$34.78 for its services. Ramirez filed a class action complaint against Smart, alleging that Smart's charges exceeded the amount permitted under the Inspection of Hospital Records Act (Hospital Records Act) (735 ILCS 5/8-2001 (West 1998)). The circuit court granted Smart's motion for summary judgment. The appellate court found:

¶ 40 "Section 8-2001 of the Hospital Records Act obligates every hospital in Illinois to enable patients to obtain copies of their medical records. \*\*\*

¶ 41 The statute leaves implementation of that duty to those who are most intimately involved. It has been generally accepted that hospitals can compel a patient to obtain their records by paying an outside copying service. *Clay v. Little Company of Mary Hospital*, 277 Ill. App. 3d 175 (1995). In *Clay*, the court construed the statute to imply a reasonableness standard in both the charges to the patient as well as the manner of photocopying, finding that the intent of the statute could not be otherwise. Thus, in order to implement the Hospital Records Act, hospitals can use copying services, but they must act reasonably in its implementation. [Citation.] The purpose of section 8-2001, as construed, leads us to agree with *Pratt [v. Smart Corp.]*, 968 S.W.2d 868 (Tenn. App. 1997)] that, like Tennessee, this state has an interest in transactions that



violate "statutorily-defined public policy." *Pratt*, 968 S.W.2d at 872. \*\*\* Here, if proved, Smart's allegedly excessive charges might well violate the intent of the Hospital Records Act, i.e., that a party must act reasonably when fulfilling its mandate." *Ramirez*, 371 Ill. App. 3d at 810.

¶ 42 The Condominium Property Act here establishes a public policy of limiting the charge for the documents required for sale to the amount set by the Condominium Property Act. Just as the allegations against Smart, if proven, could show a violation of the Hospital Records Act, the allegation against defendant here could show a violation of the Condominium Property Act.

¶ 43 Defendant argues that this court should not follow *Landau* because our supreme court erred when it held that a court could hold an agent liable if "he takes some active part in violating some duty the principal owes to a third person." *Landau*, 409 Ill. at 564. We lack the authority to overrule *Landau*, and we must follow that decision. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28.

¶ 44 Moreover, *Landau* states a reasonable standard for liability of an agent. Defendant points out that the fees it charged to plaintiff could be charged to the Association, "and if passed through the Association to Plaintiff would comprise the Association's exact costs," so that the Condominium Property Act would permit the Association to recover the excessive charge from plaintiff. The Condominium Property Act's purpose of assuring that the owner can obtain the required documents at a limited price "would be completely defeated through a construction of Act that would allow [owners] to be charged more than the reasonable copying and mailing costs if the providers hire others to perform the task of supplying the records." *Cotton v. Med-Cor Health Information Solutions, Inc.*, 472 S.E.2d 92 (Ga. App. 1996). *Landau* establishes that the Condominium Property Act here, like the Hospital Records Act at issue in *Ramirez*, *Cotton*, and *Pratt*, "applies to independent entities that are retained to provide" the documents. *Pratt v. Smart*

*Corp.*, 968 S.W.2d 868 (Tenn. App. 1997). With *Landau's* appropriate assignment of liability to agents who actively overcharge for assuming the condominium board's statutory duty to supply the documents required for sale, the Condominium Property Act will effectively prevent overcharging for providing documents required for sale.

¶ 45 Thus, in accord with *Landau* and the purpose of the Act, this court should answer "Yes" to both of the circuit court's questions. The decision to not answer the certified question will have one obvious effect: managing agents will continue collecting excessive fees from condominium unit sellers, secure in the knowledge that many of their victims, leaving the condominiums, will not seek recompense even after the courts declare that the excessive fees violate the Condominium Property Act. The excessive fees will continue until Illinois law is made clear on this issue as explained here. Accordingly, I dissent from the decision to not answer the certified questions, and answer "Yes" a unit owner has a statutory cause of action against a managing agent for a condominium board, assuming the managing agent acted as agent for the board in providing the documents required under section 22.1 of the Act.