IN THE SUPREME COURT OF FLORIDA

WILLIAM MANN, et al.,

Appellants,

v.

POINCIANA COMMUNITY DEVELOPMENT DISTRICT, et al.,

Appellees.

CONSOLIDATED CASES

Case No. SC17-1806

L.T. Case No. 2016-CA-004023
Circuit Court, Polk County

MARTIN KESSLER,

Appellant,

v.

POINCIANA COMMUNITY DEVELOPMENT DISTRICT, et al.,

Appellees.

Case No. SC17-1807

On Appeal from the Tenth Judicial Circuit, In and for Polk County, Florida

REPLY BRIEF OF APPELLANTS MANN AND TAYLOR

J. CARTER ANDERSEN
Florida Bar No. 143262
HAROLD D. HOLDER
Florida Bar No. 118733
CAITLYN E. PARSLEY
Florida Bar No. 1003680
BUSH ROSS, P.A.
P.O. Box 3913
Tampa, FL 33601
(813) 224-9255

KRISTIN A. NORSE
Florida Bar No. 965634
STUART C. MARKMAN
Florida Bar No. 322571
KYNES, MARKMAN & FELMAN, P.A.
P.O. Box 3396
Tampa, FL 33601
(813) 229-1118
Co-Counsel for Appellants
William Mann and Brenda Taylor

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES

REPLY BRIEF

The answer briefs of the Districts and the State avoid rather than confront a key point of the initial briefs: That the "valuation" the Districts instructed their consultant to perform to support this bond validation was not a determination of the *value* of the amenities they intended to purchase at all. It was a calculation intended to capitalize 30 years of Club Membership Fees for AV to the tune of over $70 million, regardless of value. The very foundation of the calculation was the revenue that 30 years of those fees could generate, which then determined the "maximum affordable" price the Districts could pay AV under the framework AV proposed.

The trial court concluded the Districts' decision to use the amount of the Club Membership Fees to apportion assessments was "arbitrary and capricious" because there was *no objective basis* for the amount of fees Solivita residents were required to pay. A11448-51. Rather, the "sole basis" for the amount of Club Membership Fees residents paid was "the Developer's original **subjective** decision." A11451 (emphasis in original). The trial court denied validation on this one point. A11452. But despite its ruling that it was arbitrary and capricious to apportion assessments based solely on the subjectively set Club Membership Fees, the trial court declined to hold it was arbitrary and capricious to base the *entire bond validation* on those same fees. And the trial court found no fault with the Districts' failure to even consider whether those fees could be legally charged or assessed in the first place.

The trial court's rulings that approved the Districts' actions were error. They were error because (1) the law required the Districts to evaluate the fair value of the amenities they intended to purchase; (2) the resulting transaction—which would funnel tens of millions in pure profits to AV—lacked a sufficiently strong public purpose to overcome the overwhelming private benefit to AV; and (3) the Districts acted arbitrarily and capriciously when they failed to even consider the value of the amenities or whether capitalizing AV's profit would effectively legitimize an illegal club fee scheme. The trial court also erred when it denied discovery that bore directly on arguments the Districts made and the trial court adopted.

I. This Court has jurisdiction to review the trial court's judgment denying validation and the issues presented are not moot.

As the Districts noted, section 75.08, Florida Statutes (2016), permits any party to a bond validation who is "dissatisfied with the final judgment" to appeal it. The statute is consistent with the "well-settled" rule that "[a] party may appeal from a judgment in his favor when the court entering the judgment has committed some error prejudicial to him." Lovett v. Lovett, 112 So. 768, 783 (Fla. 1927).

There is no question that a judgment *validating* bonds has a conclusive effect. See § 75.09, Fla. Stat. (2016). Florida law does not appear to have addressed whether a judgment *denying* a bond validation has a preclusive effect as to issues that were ruled on but not dispositive of the result. If it does not, the trial court's rulings on issues other than the validity of the assessments would be "dicta upon which no

claim of res judicata or collateral estoppel could lie." See Gen. Dev. Utils. v. Fla. Public Serv. Comm'n, 385 So. 2d 1050, 1051 (Fla. 1st DCA 1980).

In any event, the trial court's rulings denying Mann and Taylor's other defenses to the bond validation are prejudicial to them. The Districts' answer brief makes clear they will make a technical adjustment to the apportionment of assessments the trial court disapproved, pursue a new validation proceeding, and argue that Mann and Taylor are barred from raising the defenses the trial court overruled in this case. Dist.AB17-18. For these same reasons, the issues presented in this appeal are not moot. See Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992) (issues are moot when they "cease[] to exist").

II. The trial court erred as a matter of law when it ruled that the Districts complied with all legal requirements.

A. The Districts failed to determine the fair value of the properties purchased with the bonds.

On appeal as at trial, the Districts' main contention is that they were authorized to issue special assessment bonds to purchase the amenities without considering the fair value of those amenities. Dist.AB19-25. To make this argument, the Districts advance a crabbed interpretation of section 190.016(1)(c), Florida Statutes (2016), reading the statute narrowly and out of context so that it applies to a single scenario a district could easily contract around: One in which a district literally pays for a project in bond certificates. Dist.AB21. The Districts

interpretation must be rejected. It is refuted by the plain language of section 190.016(1)(c), both standing alone and read in context with the other provisions in chapter 190 relating to special assessment bonds.

The Districts seek to validate special assessment bonds. A41. Special assessment bonds must be project-based. Section 190.022, Florida Statutes (2016), only authorizes a district to levy special assessments for "the construction, reconstruction, acquisition, or maintenance of district facilities." See also § 190.003(3) (defining "assessment bonds" as those "payable solely for proceeds of the special assessments levied for an assessable project"). A district may also issue revenue bonds, which are also project based. See § 190.016(8) (authorizing districts to issue revenue bonds payable from revenues "derived from any project or combination of projects"). In contrast, a district may issue general obligation bonds for a variety of other purposes. § 190.016(9).

It is in this context that section 190.016(1) sets up a separate framework for special assessment and revenue bonds, which "may be *delivered* by the district as payment of the purchase price of any project or part hereof, . . . or as the purchase price or exchange for any property . . . or services rendered by any contractor . . . ." (emphasis added). Section 190.016(1)(c) specifically provides that "[i]n the case of special assessments or revenue bonds," the price or prices for the special assessment or revenue bonds so delivered is "the amount of any indebtedness to contractors or

other persons paid with such bonds, or the fair value of any properties exchanged for the bonds, as determined by the board." And as explained in the initial brief—and unchallenged in the Districts' answer brief—"fair value" connotes a value using customary valuation concepts for similar transactions. IB33.

There can be no question that the Districts are delivering special assessment bonds as the purchase price in exchange for property in this transaction. The Asset Sale and Purchase Agreement and related bond documents establish a transaction in which the bonds are delivered, the Districts receive title to the amenities, and AV receives the purchase price—all occurring simultaneously and as a condition of the closing of the transaction. IB37 (citing A11771); A104-85, 648-705.

As explained in Mann and Taylor's initial brief—and never responded to by the Districts—the Districts' argument that the statute doesn't apply to this transaction elevates form over substance. Section 190.016(1)(c) plainly and unambiguously requires that when special assessment bonds are delivered as the purchase price or exchange for any property, the fair value of that property must be determined. To read the statute otherwise would mean there would be no provision in that section at all for the price or prices for special assessment bonds unless they were part of a literal exchange. That interpretation not only lacks practical sense, it would permit any district to make an easy end-run around the fair value requirement (as the Districts seek to do here). Section 190.016(1)(c) prohibits that abuse. It

requires the Districts to determine fair value.

B. The Districts failed to comply with the legal requirements governing the valuation of real property.

Having first argued that they had no obligation to determine fair value at all, the Districts next argue that if they really had to determine fair value, then fair value is whatever they say it is. But as noted above and in the initial brief, determining "fair value" involves using established, customary, and current valuation techniques for similar transactions. IB33. This the Districts did not do. Their own expert—who testified at trial as an "economist and management consultant," not an expert on the valuation of real property—admitted his calculations *employed no concept of fair value.* A12319.

The Districts were purchasing real property. Real property is valued by appraisals. See § 475.611(1)(a)(1), Fla. Stat. (2016) (defining appraisal in part as "rendering an unbiased analysis, opinion, review, or conclusion" relating to the value of real property). Any communication of an appraisal is an appraisal report. § 475.611(1)(e). And section 475.612, Florida Statutes (2016), prohibits anyone other than a certified, licensed, or registered appraiser from issuing such a report. The Districts, at AV's urging, sought to avoid a fair value analysis. But the law required the Districts to consider the fair value of the property. And it required that any opinion on the value of the real property be rendered by an appraiser.

Termaforoosh v. Wash, 952 So. 2d 1247 (Fla. 5th DCA 2007), which both the

Districts and the State cite (Dist.AB24, StateAB17-18), has no application here. Termaforoosh involved the interpretation of the term "appraisal" in a contract, and the court found the term was used ambiguously in that context. Termaforoosh did not consider whether an appraisal was required by law under the circumstance presented, or whether a formal opinion of the value of property from an independent third party (as the Districts sought here) had to be a true appraisal. Id. at 1249-50.

In their statement of facts, but tellingly not in their argument, the Districts suggest that the calculation EFG performed is an "income-based approach" to value. Dist.AB10; see also State AB15-16. It is not. EFG never determined the amount of income AV actually received. A12347-57. Had it done so, EFG admitted, its calculation would have resulted in a purchase price of $24 million less. A8449, 12355-57.

In any event, the calculation itself—as Harder, who performed it, confirmed—bears no resemblance to the customary valuation technique for real property. IB20-21, 25-28. Instead it was indisputably calculated based on what AV and the Districts concluded the Districts *could afford to pay*. IB20-21, 25-28. The Districts' and the State's repeated attempts to label this calculation a valuation do not make it so.

III. The trial court erred as a matter of law when it ruled that the issuance of bonds served a sufficient public purpose.

The Districts acknowledge (as they must) that under Donovan v. Okaloosa County, 82 So. 3d 801, 805 (Fla. 2012), the public purpose required for bond

validation must be "sufficiently strong" when, as here, a private party stands to benefit substantially from the use of the public funds. Dist.AB25-26; see also State v. Housing Fin. Auth. of Polk County, 376 So. 2d 1158, 1160 (Fla. 1979) (stating public purpose must be "reasonable and adequate" when ad valorem taxing power is not implicated). But the Districts fail to apply this analysis. Instead, they take the position that the bonds serve some public purpose—namely, the acquisition or construction of amenities—so nothing else is required.

Relying on that premise, the Districts never address whether the public purpose is sufficiently strong if—as the evidence showed—the bond proceeds give a windfall to AV of over $50 million more than the value of the amenities the Districts purchase. The Districts also avoid the issue of whether the $73.7 million purchase could be justified at all in light of the fact that the residents already have access to the amenities and the developer may be legally obligated to relinquish control of the amenities to the residents later anyway. IB3-5. Instead, according to the Districts, the fact that residents will benefit from $11.2 million of construction for new or existing amenities is a "sufficiently strong" public purpose to support the issuance of up to $102 million in special assessment bonds—even though the public benefit would account for only 11% of the bond proceeds the residents would have to fund.

Such a windfall to a developer appears unprecedented, despite the Districts'

insistence that this sort of thing happens all the time. As noted, the purchase price calculation is founded entirely on the Club Membership Fees. The only legal support the Districts could muster to attempt to defend AV's authority to collect perpetual assessments in the form of Club Membership Fees—fees intended to drive a pure monthly profit to AV over and above the expenses associated with the amenities—is a citationless paragraph from a Florida Bar treatise. A6505; Dist.AB5n.1. And when the Districts tried to show in the trial court (as they try to assert without citation here, Dist.AB5n.1) that district purchases of amenities like this are "common," they offered a list of only six that they claimed—without supporting documentation—involved income-based amenity purchases. A6602. But five of the six involved purchases of less than $10 million and the remaining purchase was for $20 million. A6602. None compared to the $102 million in bonds sought here to purchase aging amenities that the Districts refused to value before buying.[1]

This Court has previously warned that there are limits on how much a private party may benefit from a bond issuance at the expense of residents who are required to pay the indebtedness. See Housing Fin. Auth. of Polk County, 376 So. 2d at 1160;

[1] The Districts also seek to sidestep concerns about the real-life implications their decision may have on residents if the Districts were required to refund these tax-exempt bonds with taxable ones. The Districts assert the "Internal Revenue Service accepted the income-based valuation approach" that the Districts advance when the IRS dealt with tax exempt bonds issued by the Villages. Dist.AB29n.10 (citing A11724-25). In fact, the testimony shows the IRS dropped its investigation *after* the Villages refunded the tax exempt bonds with taxable ones. A11724.

Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1098-1100 (Fla. 2008). To date it appears the Court has not considered a case in which the private interest served by a similar bond validation exceeded those limits. But if this case does not exceed rational limits, it is hard to imagine one that does. Without such limits, the expedited bond validation process—which gives every benefit of the doubt to a developer-created district and few if any protections for residents who may lack the resources to even defend such cases—will undoubtedly spawn requests equally and even more outlandish.

IV. The trial court erred when it ruled the Districts did not act arbitrarily and capriciously.

As noted, the State and the Districts ignore the fact that the Districts never sought to determine the value of the amenities they intended to purchase. The Districts also ignore the issue of whether they were required to consider if the Club Membership Fees were illegal before using them as the very foundation for their request to validate $102 million in special assessment bonds. Rather than respond to the latter argument, the Districts make the inapt argument that the trial court was not required to resolve the legality of those fees because that issue was collateral to the bond validation. Dist.AB28.[2]

[2] The Districts also repeatedly refer to Mann and Taylor's arguments dismissively as a "conspiracy theory," even inserting that term in brackets when they quote the trial court's order. Dist.AB10. The trial court never used that term, A11445, and Mann and Taylor did not allege a conspiracy.

The Districts miss the point. As explained in the initial brief, it is arbitrary and capricious to act on the bald assertions of another without examining or evaluating relevant information. IB44. The value of the amenities and the legality of the Club Membership Fees were relevant—and a key ingredient—to this transaction.

Having ducked these specific points, the Districts spend two paragraphs in an attempt to brush away the arguments that their actions were arbitrary and capricious.

Without example or elaboration, the first paragraph accuses Mann and Taylor of "contextomy," "verbosity," and "shotgun" or "repetitious" arguments. It also claims Mann and Taylor have asked the Court to reweigh the evidence. Not so. The arguments speak for themselves. The evidence need not—and should not—be reweighed. Viewing all of the evidence and inferences in the light most favorable to the Districts, the Districts' actions were arbitrary and capricious. They approved the issuance of over $100 million in bonds to purchase amenities without even trying to discern what the amenities were actually worth. They based a purchase price entirely on what Club Membership Fees would generate without even exploring the developer's legal authority to collect those fees or whether a purchase was even appropriate. The trial court properly ruled that the Districts' decision to allocate assessments based on the Club Membership Fees that had been set solely and subjectively by AV was arbitrary and capricious. It follows that basing the entire purchase price on these same subjectively set fees was also arbitrary and capricious.

The Districts' second paragraph attempts to minimize Mann and Taylor's arguments, characterizing them as "quibbling" or "second guessing" methodology, negotiations, and judgment. Dist.AB29-30. Similarly, the State repeatedly attempts to recharacterize Mann and Taylor's arguments as a dispute over the value of the amenities—ignoring that the Districts never valued the amenities at all. State AB2, 7, 10-11. Those characterizations fail. Undisputed evidence shows that from the start, the Districts agreed to pursue this transaction with blinders on. Their expert acknowledged he never considered the actual value of the amenities under any accepted, or even common-sense notion of "value." A12318-19, 12347-57. Instead, the undisputed goal of his calculation was to produce a "maximum affordable" purchase price. A8509, 8511 8513, 8516, 12315-16, 12389-90. Indeed, the evidence showed (and the Districts acknowledge) that the Districts instructed him to perform that very calculation using the framework provided by AV—the beneficiary of this maximum-price approach. Dist.AB6; A8508, 10022-25.

The Districts' request to validate over $100 million in bonds at the expense of their residents and without performing even the most basic due diligence should be rejected. It is arbitrary and capricious.

V. The trial court erred when it denied Mann and Taylor relevant discovery.

The Districts' answer brief repeatedly relies on the trial court's findings that AV did not improperly control or exercise undue influence over the Districts'

boards. Dist.AB9-10, 27-28, 34. That reliance only confirms that the trial court abused its discretion when it denied Mann and Taylor any discovery from AV or testimony from its principals. That information was undeniably reasonably calculated to lead to the discovery of admissible evidence on improper control and undue influence—an issue that the trial court found critical to its analysis.

The Districts suggest that because Mann and Taylor received *some* discovery from the Districts and their board members, Mann and Taylor had all of the relevant information they needed. That is not correct. As an initial matter, the trial court denied Mann and Taylor discovery from Tony Iorio even though he was a district supervisor throughout much of the negotiations. A12099-100.

Even if the only relevant discovery was what the District board members (other than Tony Iorio) knew—and it was not—that discovery was both incomplete and potentially inaccurate. For example, board supervisor Leonard Vento testified in deposition that he did not recall meeting with AV's Tony Iorio to discuss the amenities purchase after Iorio resigned his board position. A4963. When he was shown an email exchange between him and Iorio in which Iorio sought to schedule such a meeting, Vento acknowledged the accuracy of the email but said he did not think they had actually met. A4964. After further questioning, Vento changed his answer again. A4972. He admitted he did meet with Iorio, but said he could not recall any of the details of the conversation save one. A4972, 4975. And Vento was

not the only board member Iorio had sought to speak to individually. Vento acknowledged that Iorio had solicited meetings with each of the board members. A4964.

Mann and Taylor were entitled to discover what Iorio knew and recalled about his meetings and conversations with district supervisors and district consultants regarding the amenities purchase that is the very basis of this bond validation proceeding. They were entitled to discover documents from AV that discussed the transaction and what the district supervisors were told or said about it. They were also entitled to discover evidence that may have impeached the testimony of the Districts' witnesses who had the incentive to downplay AV's role in the transaction. See, e.g., Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 997 (Fla. 1999) (party is entitled to discover evidence relevant to impeaching witnesses based on potential financial bias).

The Districts cannot meet their burden of showing the trial court's error in denying this discovery was harmless. To do so, the Districts would have to show there is "no reasonable possibility that the error contributed to" the trial court's decision. Special v. West Boca Med. Ctr., 160 So. 3d 1251, 1256 (Fla. 2014). The Districts have not even attempted to argue that. Indeed, the Districts themselves have asserted that the trial court's ruling hinged on its evaluation of the evidence regarding AV's influence over the Districts' process. Dist.AB9-10, 27-28, 34. And as the

initial brief noted, the trial court deemed the limited evidence that Mann and Taylor discovered "insufficient" to prove control and undue influence. A11481-82, 11486. It was error for the trial court to deny relevant discovery about AV's influence on the Districts' boards and then fault Mann and Taylor for not having more evidence to prove that influence. If the trial court's rulings on the legal issues are not reversed, Mann and Taylor should, at the least, receive a new trial after adequate discovery.

CONCLUSION

The Court should reverse the final judgment to the extent that it rejected Mann and Taylor's arguments that the Districts failed to comply with legal requirements for the bond validation, failed to show a sufficiently strong public purpose, and failed to act in a manner that was not arbitrary and capricious. Alternatively, the Court should remand this case for a new trial after Mann and Taylor are permitted to obtain the discovery the trial court denied.

Respectfully submitted,

/s/ *Kristin A. Norse*

KRISTIN A. NORSE
Florida Bar No. 965634
STUART C. MARKMAN
Florida Bar No. 322571
KYNES, MARKMAN & FELMAN, P.A.
P.O. Box 3396
Tampa, FL 33601
(813) 229-1118

Co-Counsel for Appellants
William Mann and Brenda Taylor

J. CARTER ANDERSEN
Florida Bar No. 143262
HAROLD D. HOLDER
Florida Bar No. 118733
CAITLYN E. PARSLEY
Florida Bar No. 1003680
BUSH ROSS, P.A.
P.O. Box 3913
Tampa, FL 33601
(813) 224-9255

CERTIFICATE OF SERVICE

I CERTIFY that this Reply Brief of Appellants Mann and Taylor has been e-filed and e-served through the Florida Courts e-Filing Portal this 18th day of December, 2017, on the following:

Douglas M. Smith, Esq.
Mohammad O. Jazil, Esq.
Michael Eckert, Esq.
Lindsay C. Whelan, Esq.
Michael A. Alao, Esq.
Hopping Green & Sams, P.A.
119 S. Monroe St., Suite 300
Tallahassee, FL 32314
dougs@hgslaw.com
mohammadj@hgslaw.com
michaele@hgslaw.com
lwhelan@hgslaw.com
michaela@hgslaw.com
lindah@hgslaw.com

Robert Gang, Esq.
Greenberg Traurig, LLP
333 SE 2nd Ave., Suite 4400
Miami, FL 33131
gangr@gtlaw.com

Courtney M. Keller, Esq.
Greenberg Traurig, P.A.
450 S. Orange Ave., Suite 650
Orlando, FL 32801
kellerc@gtlaw.com
FLService@gtlaw.com
nef-iws@gtlaw.com

Victoria Avalon, Esq.
Assistant State Attorney
255 N. Broadway Ave.
Bartow, FL 33830
vavalon@sao10.com
appeals.felonypolk@sao10.com

Martin Kessler, *Pro Se*
759 Largo Pass
Poinciana, FL 34759
mdk4130@aol.com

J. Carter Andersen, Esq.
Harold D. Holder, Esq.
Caitlyn E. Parsley, Esq.
Bush Ross, P.A.
1801 N. Highland Avenue
Tampa, FL 33602
candersen@bushross.com
hholder@bushross.com
cparsley@bushross.com
ksalter@bushross.com
aflowers@bushross.com

Daniel J. Fleming, Esq.
Gray | Robinson
401 East Jackson St., Suite 2700
Tampa, FL 33602
daniel.fleming@gray-robinson.com

/s/ *Kristin A. Norse*
Kristin A. Norse

CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I CERTIFY that this brief was prepared using Times New Roman 14-point font.

/s/ *Kristin A. Norse*
KRISTIN A. NORSE