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Community Up-Date™

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CHARACTER COUNTS

"Be more concerned about your CHARACTER than your REPUTATION because your CHARACTER is who you are and REPUTATION is what others think of you."
– Anonymous

Although this may be sage wisdom, we all still value our reputations and the law of defamation exists to protect them from unsubstantiated and unfair tarnishment. Of course, once a person's good name has been wrongly damaged, juries are fond of awarding large sums to the injured party. Defamation awards can frequently reach six figures. See, e.g., *McGovern v. Grapski*, 793 So. 2d 935 (Fla. 1st DCA 2001) (affirming a $250,000 jury award for defamation when the plaintiff only sought $25,000).

With this in mind, community associations would do well to take the precaution of educating themselves. Can you be sued for negative comments made at a board meeting? What about when an ex-employee's past record comes up? Does every answer need to be "no comment" in order to avoid exposure to liability? Community associations should be aware of how this area of the law can affect them. But, armed with a bit of knowledge, they need not be paralyzed by the fear of an economically-crippling defamation suit.

The Basics of Defamation

Libel is a written or broadcasted defamation, and slander is a spoken defamation. The law looks at them both equally. The four essential elements of a defamation claim are set forth in *Valencia v. Citibank*, Int'l., 728 So. 2d 330 (Fla. 3d DCA 1999). These are as follows: "(1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) the falsity caused injury to the plaintiff." If the plaintiff cannot prove all four of these elements, then the defendant in a defamation action will prevail.

Publication - In order for an allegedly defamatory statement to be considered "published," it need not be splashed across the front page of your community's newsletter (although this certainly would constitute "publication"). Even a letter from one person to another, about a third person, is publication in the eyes of the law [*Thomas v. Jacksonville TV*, 699 So. 2d 800, 803 (Fla. 1st DCA 1997)]. Whether it is an action for libel or slander, any defamation action requires only three people. The person making the allegedly defamatory statement, the person about whom the defamatory statement is made, and, the third party receiving the defamatory statement [See *Shafran v. Parrish*, 787 So. 2d 177, 179-80 (Fla. 2d DCA 2001)].

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TiDBiTS

Did You Know ???

There are only a few states that provide homestead exemptions and Florida's exemption, contained within its Constitution, is considered to be one of the most generous. Most people are familiar with the homestead exemption that allows a reduction in the real estate taxes that would otherwise be owed, but Florida also provides a homestead exemption for asset protection purposes.

- ✔ The homestead exemption for real property tax purposes provides an owner of real property with a $25,000.00 reduction from the assessed value of the property (a savings of $650.00 each year).
- ✔ The homestead exemption for asset protection purposes protects your home against judgments and liens, except those incurred by real estate taxes, mortgages and work or labor performed on the home. To qualify for this exemption

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Proving Injury - One problem area for a defamation plaintiff is proving that the statement actually caused harm to his or her reputation. An off-hand remark about someone might be false, but, as they say, "no harm, no foul." One notable exception to this rule is when a statement falsely accuses another of committing a crime. Any such statement is presumed to harm the reputation of the subject and constitutes defamation per se [*Shafran v. Parrish*, 787 So. 2d 177, 179 (Fla. 2d DCA 2001)].

As an illustration, in the case of *Bass v. Rivera*, 826 So. 2d 534 (Fla. 2d DCA 2002), plaintiff Bass was attempting to purchase a home in a planned residential subdivision. Rivera, a police officer who lived in the subdivision, told Bass' contractor and future neighbors that Bass was a drug dealer. The court held that Bass did not need to prove damages, because "malice and the occurrence of damage are both presumed from the nature of the defamation." Any statements that accuse someone of criminal wrongdoing should be made with great caution.

Privilege

Sometimes, defamatory statements are made in the heat of an argument, or in a gossip session. Other times, there might be a legitimate business reason for a communication about another person. For example, discussions among a board of directors about a potential resident of a community do serve a legitimate interest. These statements may be protected by a "qualified privilege" as articulated in *Randolph v. Beer*, 695 So. 2d 401 (Fla. 5th DCA 1997). In *Randolph*, a member of a credit union's board of directors circulated a memorandum to the other members of the board containing a rumor that an insurance agent seeking to do business with the credit union was involved in a kickback scheme. The audience that received the allegedly defamatory statement had a legitimate business interest in the substance of the communication because, if true, the rumors reported would have affected the credit union. This placed the burden on the plaintiff of showing that the statements were motivated by malice and not out of a desire to fulfill a duty to the credit union.

What if an association fires an employee and a new potential employer calls the association for a reference? An employer who discusses the job performance of a former employee with that person's prospective new employer is presumed to be doing so in good faith and is immune from all civil liability for the consequences of such good faith statements, unless the former employee can dispel this presumption of good faith by showing clear and convincing evidence that the statements were made with malicious intent. Statements which are deliberately misleading or made for a malicious purpose will remove the statutory presumption of good faith [*Linafelt v. Beverly Enterprises-Florida, Inc.*, 745 So. 2d 386, 389 (Fla. 1st DCA 1999)].

Whether a privilege applies will depend on the mode, manner, and motivation of the speaker. If statements are made with malice, or made for an improper purpose, any potential privilege may be lost. Therefore, any otherwise defamatory statements made during the course of a board's review of a potential tenant's application, which are motivated by a desire to protect the community from the possible ills that could accompany the tenant, will be protected by the privilege. However, if the potential tenant can show that the motivation for the statements was rooted in malice, then the privilege is waived. Simply using strong words or behaving with a lack of tact will not automatically dispel the privilege, but the law will look at whether the speaker used his or her privileged position in a manner to purposely harm the plaintiff.

Public Figures

The First Amendment demands that citizens have access to wide-open and robust political debate, and grants wide latitude to criticisms of public officials – even if those statements are false. The case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), states that in order for a public official to sue for defamation, the allegedly defamatory statements must be made with actual malice – knowledge of the falsity of the published material or reckless disregard as to its truth.

The definitions of "public figure" and "public official" are not necessarily always clear. While the mayor is, without question, a public figure, what about the president of your condominium association? It all depends on the context of the defamation.

TiDBiTS

Did You Know ???

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the real property must be your primary residence and no larger than 1/2 acre of contiguous land within a municipality and 160 acres of contiguous land outside a municipality.

- ✔ The homestead exemption is available only to natural persons and not to trusts, corporations, partnerships, or other entities.
- ✔ Mobile homes, motor homes and modular homes are eligible for homestead exemption, even if they are located on land the owner does not own.
- ✔ The homestead exemption may continue to apply even if a person leaves the home due to financial, health, or family reasons.
- ✔ Homestead exemption is not available for vacant land. It is not **absolute** and does not protect you against the claims of all creditors.

Insurance Coverage for Defamation Cases

What if your association loses a defamation suit? Some cases can result in enormous awards for the plaintiff. Will the association's liability insurance cover this award? Although your policy may cover the association for negligent defamation - that is, defamation caused accidentally - it may very well have a provision excluding coverage for intentional acts of defamation.

Conclusion

As you can see, this area of the law is marked by many intricacies and nuances that can save or cost your association money. The old adage, "think before you speak," is still the best practical advice.

EVERY VOTE COUNTS!

Voting and elections in community associations can cause as much, or more, confusion, turmoil and fervor as any national, state or local governmental election. Adding to the confusion is that the procedures for casting votes and conducting elections is very different for homeowners and condominium associations.

Chapter 718, Florida Statutes, (the Condominium Act), contains specific procedures and requirements governing voting and elections. Chapter 719, Florida Statutes, (the Cooperative Act) contains identical provisions regarding voting and elections, so references in this article concerning condominium requirements are also applicable to cooperatives. The provisions of the bylaws of a condominium association concerning the election of directors are superceded by the provisions of the Condominium Act. Although the bylaws for many condominium associations provide for the establishment of a nominating committee and voting for directors by proxy, the Condominium Act prohibits both. Under the Condominium Act, unit owners or other eligible persons intent on running for the board must submit a written notice of intent to be a candidate for the Board of Directors not less than forty (40) days prior to the election meeting and votes must be cast by ballot, mailed or delivered to the association, or cast in person at the election meeting. In order to ensure secrecy, the ballot is placed by the unit owner in an inner ballot envelope which is then placed in an outer envelope that must identify the owner's unit and be signed by the person authorized to vote for the unit. Upon receipt by the condominium association, a ballot may not be changed or rescinded and the association must verify the outer envelope information and open and count the ballots in accordance with the procedures of the Condominium Act and the Administrative Rules of the Division of Florida Land Sales, Condominiums and Mobile Homes.

If a condominium association prefers the voting and election procedures set forth in its bylaws, the Condominium Act provides that an association may, by a vote of a majority of the total voting interests of its membership, opt out of the statutory voting and election procedures and follow the different election and voting procedures in its bylaws. If a condominium association votes to opt out of the statutory voting and election procedures, the association should record a certificate among the public records of the county in which the condominium is located as notice to the world that the association has opted out of the statutory voting and election procedures.

In direct contrast to condominium associations, Chapter 720, Florida Statutes, the Homeowners' Association Act, provides that elections of directors are governed by the provisions of the association's governing documents. Such statute does provide, however, that all members of a homeowners' association shall be eligible to serve on the board of directors and a member may nominate himself or herself as a candidate at the election meeting. Thus, in conducting elections of directors in homeowners' associations, the members of the association must be given the opportunity to nominate themselves as candidates from the floor at the election meeting.

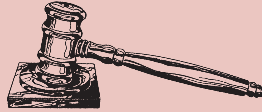
Typically, the bylaws for a homeowners' association provide that votes may be cast by the members in person or by proxy. Therefore, unlike condominium associations (which have not opted out of the election and voting procedures of the Condominium Act), members of a homeowners' association may vote for directors by proxy unless otherwise provided by the governing documents for the association. Unless the governing documents for a homeowners association expressly authorize its members to vote by absentee ballot, such method of voting is not permitted.

There are also significant differences between condominium and homeowners' associations with respect to voting on issues other than the election of directors. The most significant difference is the manner in which votes may be cast by proxy. Under the Condominium Act, a unit owner may not vote by general proxy, but may vote by limited proxy on matters for which the Condominium Act requires or permits the owners to vote, such as, amendments of the governing documents, waiver or reduction of reserves, approval of material alterations and additions to the common elements, etc. A limited proxy specifically instructs the proxyholder how to vote on the issue or issues being addressed at the meeting. General proxies may be used to establish a quorum and to vote on non-substantive changes to issues for which a limited proxy is required. Unless the governing documents for a homeowners' association provide otherwise, owners may vote by general or limited proxy on any issue being addressed by the association, including the election of directors.

Finally, a frequently asked question is whether members of a community association may vote by written agreement or consent in lieu of holding or conducting a meeting of the membership. The Condominium Act provides that any approval of the unit owners called for by the Condominium Act or the declaration of condominium or the bylaws shall be made at a duly noticed meeting of the unit owners except that owners may take action by written agreement, without a meeting, on matters for which action by written agreement without a meeting is expressly allowed by the bylaws, declaration or a statute that provides for such action. Thus, absent the bylaws, declaration or a statute providing that a condominium association may take a specific action by written agreement, such action must be taken or made at a duly noticed and convened meeting of the members of the association.

Approval of the members of a homeowners' association for any action should also be attained at a properly convened meeting of the members, absent specific authority to take action by written consent in the governing documents or in an applicable statute.

Written agreements or consents must describe the action taken, be dated, and signed by the requisite number of authorized voting members required to approve the action, and be delivered to the association. In addition, to be effective the requisite number of votes to approve an action must be received within sixty (60) days of the date of the earliest dated consent or agreement. Within ten (10) days after obtaining authorization by written consent or agreement, notice must be given to the members of the association who are entitled to vote on the action but who do not consent in writing. The notice must fairly summarize the material features of the approved action.



CASENOTES

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"TOTAL RECALL"

In the case of *Ocean Gate Phase I Condominium Association, Inc. v. Unit Owners Voting For Recall,* Arb. Case No. 02-5594, Recall Arbitration Summary Final Order (October 10, 2002), a petition for recall arbitration was filed by the Association with the Division of Florida Land Sales, Condominiums and Mobile Homes (Division).

In order for the Division to effectuate the recall, the Arbitrator ordered the Association to produce, among other items, evidence that the Board considered the objections raised at its meeting, as the basis for its decision to request the recall.

In its findings of fact, the Division stated that on September 10, 2002, the Board of Directors received a recall by written agreement together with ballots representing 55.65% of the Condominium's voting interests petitioning for the recall of one of the board members.

As required by s.718.112(2)(j), Florida Statutes, the Board held a meeting to determine whether or not to certify the recall. The Board decided that the recall should not be certified and that the issue should be referred to the Division.

The Division noted that the Board failed to include its reasons for not certifying the recall in the minutes of the board meeting.

Rule 61B-23.0028(4)(d), Florida Administrative Code, requires that the specific reasons for the Board's decision not to certify a recall must be recorded in the minutes of the meeting in which the decision to certify or not to certify the recall is made. The Division noted that the petitioner has sought to raise additional issues that were not contained in the minutes presented. As a result thereof, those issues not appearing in the minutes of the meeting, as a matter of law, were not admissible for review by the Division.

Rule 61B-23.0027(6)(d), F.A.C., provides that the minutes of the meeting at which the Board determines not to certify the recall shall record the "specific reasons" the recall was not certified. The intent of the rule is to ensure that the grounds for the Board's decision to reject a recall are articulated in such a way that the Board's action can be reviewed by an arbitrator. In *The Village of Kings Creek Condominium Association, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 99-1919, Final Order Certifying Recall (November 1, 1999), the Arbitrator addressed this issue as follows:

> "The arbitrator's charge in these proceedings is to review the reasonableness of the action taken by the Board in voting not to certify the recall. She must review the evidence before the Board at the time it voted and the reasons relied on by the board in its vote."

When a board at its recall meeting does not advance reasons for its decision to not certify the recall, reasons cannot later be asserted as justification for the board's refusal to certify the recall. Boards entertaining a recall petition must ensure that their reasons for not certifying that recall are accurately and sufficiently memorialized in their minutes to support their actions.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.