MONTGOMERY COUNTY, STATE OF MARYLAND

Kimberly Smallis,	:
	: COMMISSION ON COMMON
Complainant	: OWNERSHIP COMMUNITIES
	: Case No. 09-10
vs.	:
	: Date of Decision: February 18, 2011
	: Date of Hearing: December 16, 2010
The Willoughby of Chevy Chase Condominium,	: Panel: McCabe, Caudle, Wilson
Respondent	:
	:

DECISION AND ORDER

The above captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland on December 16, 2010 pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The Hearing Panel considered the testimony and evidence of record and finds, concludes and orders as follows:

I.
TESTIMONY AND EVIDENCE

This is a complaint filed by a unit owner in a residential condominium in Montgomery County, Maryland against her condominium. The Complainant, Kimberly Smallis (Ms. Smallis), owns Unit N1917 in The Willoughby of Chevy Chase Condominium. The Respondent, The Willoughby of Chevy Chase Condominium (The Willoughby), is a condominium organized under and subject to the Maryland Condominium Act, Title 11, Real Property, Annotated Code of Maryland.

Ms. Smallis claims that The Willoughby has not given its unit owners sufficient notice as

required by law of the increases in the deductible amount under the condominium's master property damage policy. She also claims that the condominium did not comply with applicable law when it failed to pay her the cost of repair to her unit resulting from a water damage incident. An element of contention regarding this issue is the extent to which the parquet floor in Ms. Smallis' unit must be repaired.

Ms. Smallis testified in support of her claim. On August 26, 2008, the water filter under the kitchen sink of Unit N2217 at The Willoughby failed. Water ran down into several units below including Ms. Smallis' unit. The unit immediately above Ms. Smallis, Unit N2017, was also damaged but apparently that unit owner has not made a claim. There was damage to the parquet floor, drywall and kitchen pocket door in Ms. Smallis' unit.

At the time of the incident on August 26, 2008, the deductible under The Willoughby's property damage insurance policy with Travelers was $10,000.00. After the damage occurred, The Willoughby investigated the loss and determined that the amount of damage to Ms. Smallis' unit was less than the $10,000.00 deductible. The Willoughby's position when damage to a unit resulting from an incident in another unit is less than the deductible is that there is no insurance coverage and no claim under the master policy will be made, and the unit owners of the condominium are themselves responsible to repair the damage in accordance with the allocation of repair and maintenance responsibilities under Section 11-108.1, Real Property, Annotated Code of Maryland, as that provision may be modified by the Declaration and By-laws of the condominium. The Willoughby advised Ms. Smallis and other unit owners who might have been affected by the August 26, 2008 incident that they should contact their own individual insurance

about the damage. (Commission Exhibit 1 - page 6).

Ms. Smallis eventually made a claim for her damage with her individual carrier, Firemans Fund Insurance Company, approximately one year after the occurrence. Fireman's fund began an investigation of Ms. Smallis' property claim on July 16, 2009, as a subrogation claim. (Commission Exhibit 1- page 30). There was no evidence presented on the status of this subrogation claim at the time of the hearing. However, on January 19, 2010, Fireman's Fund Insurance Company issued a check to Ms. Smallis for $7,032.00. (Commission Exhibit 1-pages 91-102). This amount was based on an estimate of damages by Pro Home Services, Inc. of $18,032.00. (Commission Exhibit 1-page 29) as explained in the Fireman's Fund letter of January 19, 2010. (Commission Exhibit 1 - Page 91).

There are three estimates in the record of the damage caused to Unit N1917, Ms. Smallis' unit, as a result of the water leak on August 26, 2008:

- **Paramount Decorators**, a company used for many years by The Willoughby to repair damages of this nature, presented a proposal dated October 2008. (Commission Exhibit 1 - page 28). The cost of the work if Ms. Smallis elected to remove and replace the parquet floor tiles was $2,210.00. The cost to replace the parquet floor with ceramic tiles was slightly more.
- **Pro Home Services. LLC**, provided an estimate dated July 15, 2009, to Ms. Smallis. (Commission Exhibit 1 - Page 29). The cost for the work in this estimate was $18, 032.00. Pro Home Services, LLC determined that a larger portion of the parquet floor would have to be replaced because the replacement titles for only the

damaged portion would not match the color of the remaining tiles.

- **Travelers** prepared an estimate dated August 14, 2009. Travelers prepared this estimate after it received a claim made by The Willoughby based on the Pro Home Services, LLC estimate. The individual who presented the Travelers' estimate, Michael Strain, testified at the hearing. (Commission Exhibit 1 - Pages 31-39). Mr. Strain testified that the estimates by Pro Home Services, LLC and by Paramount were not sufficiently detailed to be of use to Travelers. The amount of Mr. Strain's estimate was $2,236.05.

A central issue in this case is the amount of parquet floor that needs to be replaced. Ms. Smallis contended that because the tiles could not be matched the entire floor needed to be replaced. That is the basis for the Pro Home estimate of $18,032.00.

The Willoughby presented testimony from two witnesses who are members of the Board of Directors who also had experience with the replacement of parquet floors in their units due to water damage. Tom Keller is a twenty year resident who owns two units at The Willoughby. He is a Board member and the current Vice-President of the Board. He has had several experiences with the replacement of parquet floors with Paramount Decorators. He testified that The Willoughby has used Paramount for a number of years. Paramount retains a stock of replacement tiles which it collects when it makes repairs at The Willoughby. He also testified that he has used new tiles to replace damaged tiles and that Paramount's work is such in those cases that the difference between the original tiles and the replacement tiles is indistinguishable.

Martha Golden, also a long time resident of The Willoughby, a member of the Board and

the current President testified about her experience with replacement of parquet floor tiles. She has had to replace damaged parquet floor tiles on more than one occasion. Her experience was similar to that of Mr. Keller. The repairs consisted of replacing only the damaged tiles and the replacement tiles were satisfactorily matched to the existing tiles that were not damaged.

Michael Strain, who did the Travelers' estimate described above also testified that the entire floor did not need to be replaced and that the replacement tiles could be installed in such a way as to match the existing tiles that were not replaced and not damaged.

The testimony of Mr. Keller and Ms. Golden also addressed the issue of notice to unit owners of the changes in the amount of the deductible under the master property damage policy over the years. The Willoughby gives the unit owners notice by mailings, by flyers inserted under the doors of the units, and by publication in its newsletter. The deductible amount under the master property damage policy was last changed in 2004, when it was increased from $5,000.00 to $10,000.00. The testimony of these two witnesses was that The Willoughby gave notice to the unit owners of these changes in the manner described above. The Willoughby also mails notice to absentee owners such as Ms. Smallis when the absentee owners provide an address for mailing. The Willoughby sends the mailed notices by first class mail so that if an address has changed the notice will be returned. Neither witness had any recollection of receiving a return of notices sent to Ms. Smallis.

To address the issues of notice and of how The Willoughby makes a property insurance claim The Willoughby called Melvin Kuhn, its general manager of ten years. Mr. Kuhn testified that the change in the deductible last occurred in September 2004, from $5,000.00 to $10,000.00.

He said that The Willoughby gives notice to its unit owners by first class mail, flyers placed under the door and in its newsletter. (Commission Exhibit 1 - pages 45 -50) It is the obligation of the unit owners to provide a current address if they are absentee owners.

Mr. Kuhn explained that The Willoughby did not file a claim with Travelers, its master property damage carrier, until Ms. Smallis presented the Pro Home Services, LLC estimate of $18,032.00 because until that time the claim did not exceed the $10,000.00 deductible under the master property damage policy. The Willoughby then contacted Travelers and Travelers had Michael Strain, its commercial claim representative make a detailed analysis of the damages. Since Mr. Strain's estimate did not exceed the master property damage policy deductible, The Willoughby did not make a claim under the policy.

Mr. Kuhn explained the procedure followed by The Willoughby with respect to claims in units for damages resulting from incidents in other units. Namely, The Willoughby does not consider such claims to be an insured loss unless they have exceeded the deductible. If they have exceeded the deductible The Willoughby makes a claim under its master property damage policy. Then, under current law, The Willoughby will assess $5,000.00 of the deductible to the owner of the unit where the damage originated and will pay $5,000.00 of the deductible itself. If, however, the claim does not exceed the deductible amount, then The Willoughby advises the unit owners they must make the repairs in accordance with their maintenance responsibilities under Section 11-108.1, Real Property, Maryland Code and under The Willoughby's By-laws. The Willoughby does not make an insurance claim in such instance.

Regarding The Willoughby's policy and procedures for making property damage claims

under its master property damage policy, The Willoughby presented the testimony of Steve Dickerson. Mr. Dickerson qualified as an expert in the area of Maryland condominium insurance law and in the administration of condominium insurance claims.

The date of loss in this case, August 26, 2008, occurred after the decision of the Court of Appeals of Maryland in *Anderson v. Council of The Gables on Tuckerman*, 404 Md. 560 (2008) and before the amendments to Sections 11-108.1 and 11-114 became effective on June 1, 2009. Mr. Dickerson testified that the *Anderson* decision held among other things that a condominium is not required to carry what is called "single entity coverage". Single entity coverage is property damage coverage that requires the master policy to extend to cover damages in individual units, exclusive of improvements and betterments installed by the unit owner.

Mr. Dickerson further testified, however, that he advised his clients after the *Anderson* decision to continue to provide single entity coverage. The Willoughby did so. Part of the basis for this advice is that condominiums, after *Anderson*, still remained subject to the provisions of their by-laws. *See,* The Willoughby By-laws, Article VI, Commission Exhibit 1 - Pages 26 - 29. The Willoughby By-laws, in his opinion call for single entity coverage. After the amendments to Sections 11-108.1 and 11-114 became effective in June 1, 2009, Mr. Dickerson is of the opinion that single entity coverage is now required by statute.

Because The Willoughby maintained single entity coverage before and after the *Anderson* decision and before and after the amendments to Section 11-114, the nature of the actual insurance coverage in place throughout the time period involved probably did not change. One significant difference, however, is that the amendments to Section 11-114 allowed $5,000.00 of

the insurance deductible under the master property damage policy to be assessed to the condominium unit where the damage originated if the damage originated in a unit and not in the common elements. The By-laws of The Willoughby had no provision for assessing any portion of the deductible in this way before the 2009 amendments to Section 11-114. The amended Section 11-114 does not require that a condominium amend its by-laws to pass on the $5,000.00 amount of the deducible.

Mr. Dickerson's opinion is that to meet the level of an "insured loss" under a master property damage policy a loss must include three parts:

1. A covered type of loss;
2. A loss to covered property;
3. A loss over the deductible of the master property damage policy.

If any one of those elements is missing, then the single entity coverage does not apply and the condominium does not have a claim under the master property damage policy. The analysis of who pays for the damages then reverts back to the maintenance responsibilities as set forth in Section 11-108.1. Namely, the unit owner is responsible for the unit and the condominium is responsible for the common elements, except as may be provided otherwise in the governing documents. Mr. Dickerson's opinion was that his analysis as to what constitutes a "claim" or "insured loss" does not change after the adoption of the amendments to Section 11-114 in 2009. He concluded that Ms. Smallis' damage did not result in an "insured loss" because the loss was less than the deductible of the master property damage policy.

Article VII, Section 1 of the By-laws of The Willoughby is similar to the provisions of

current Section 11-114(g)(1). (Commission Exhibit 1 - page 79.) The By-laws provide that in the event of damage or destruction of any of the buildings as a result of fire or other causality, the Board of Directors shall arrange for the prompt repair and restoration of the buildings, *including any damaged units* and the floor coverings, kitchen or bathroom fixtures and appliances installed therein at the time of conveyance by the developer, but not including any improvements or betterments by the unit owner. Section 11-114(g)(1) requires that the council of unit owners shall promptly repair any portion of the common elements and the units damaged or destroyed, exclusive of improvements or betterments installed in the units by the unit owners. The General Assembly's preamble to the amendments to Section 11-114 effective June 1, 2009 provides:

> "It is the intent of the General Assembly that this Act:
>
> (a) Overturn the Court of Appeals ruling in *Diane Anderson, et al. v. Council of Unit Owners of The Gables on Tuckerman Condominium, et al., 404 Md. 560 (2008)*
>
> (b) Place an affirmative duty on the council of unit owners of a condominium association to:
>
> (1) Repair damage or destruction to the condominium that originated in a unit; and
>
> (2) Purchase property insurance that reflects this duty; and
>
> (c) Make the cost of the property insurance purchased by the council of unit owners of a condominium association under this Act a common expense, except in the case of damage or destruction originating from a unit, the payment of the property insurance deductible shall be the responsibility, up to the maximum amount provided under Section 11-114(g) of the Real Property Article, of the owner of the unit where the cause of the damage or destruction originated."

2009 Md. Laws Chs. 522 and 523, Section 2.

The analysis of this language by Mr. Dickerson was that it refers only to an "insured loss"

and a loss does not become an "insured loss" unless three elements stated by him above are present.

FINDINGS OF FACT

1. Based upon the evidence and testimony presented, the Panel finds that the most probative evidence of the cost to repair the damages resulting from the August 26, 2008 water leak is the Travelers' estimate presented by Michael Strain, (Commission Exhibit 1, pages 31-39). The cost of repair of the damages to Ms. Smallis' unit is therefore found to be $2,236.00.

2. The parquet floor is a developer installed item and not an improvement or betterment installed by the unit owner.

3. A satisfactory repair to the parquet floors in Ms. Smallis' unit can be made by repairing/replacing only those tiles actually damaged. It is not a correct measure of damage to require replacement of the entire parquet floor as Ms. Smallis argued on the basis of the Pro Home Services, LLC estimate.

4. Ms. Smallis was fully compensated for all damages to her unit resulting from the August 26, 2008 occurrence by Fireman's Fund Insurance Company, her individual insurer, when Fireman's Fund Insurance Company paid her $7,032.00 on January 19, 2010.

5. Until the adoption of the amendments to Section 11-114, Real Property, Maryland Code, effective June 1, 2009, there was no legal requirement to give annual notice to the unit owners of a condominium of the deductible under the master insurance property damage policy. Nevertheless, the testimony and evidence of record establish that The Willoughby did give such notice to its unit owners by several vehicles: First Class Mail, hand delivery and articles in the

newsletter. The Willoughby has made reasonable efforts to assure that notice would be sent and received.

CONCLUSIONS OF LAW

Based upon the foregoing testimony and evidence and Findings of Fact, the Panel concludes as follows:

1. The total amount of damages to which Complainant was entitled as a result of the August 26, 2008 water damage incident is $2,236.00. Complainant has recovered several times that by virtue of the $7,032.00 she received from Fireman's Fund Insurance Company. Complainant is entitled to only one recovery.

2. The law in effect at the time of this incident was the law after the decision in *Anderson v. Council of Gables*, 404 Md. 560 (2008) and before the amendment to Section 11-114, Real Property, Maryland Code, effective June 1, 2009. Under *Anderson*, a condominium was not required to provide single entity coverage. Therefore the analysis under Section 11-108.1 and under the governing documents that define the dimensions of a unit and the responsibilities to maintain and repair would apply. Under that analysis, the unit owner would be responsible for maintenance and repair of items damaged that are part of the unit. The condominium was not required to provide single entity coverage. Therefore The Willoughby would have had no obligation to pay the cost of repair to Ms. Smallis' unit or to make an insurance claim in the post-*Anderson*, pre-2009 Section 11-114 amendment time frame.

3. The testimony and evidence established however that The Willoughby continued to provide single entity coverage under its master insurance property damage policy even after

Anderson. That policy might therefore have provided coverage for the parquet floor. The policy was not introduced into the record, however.

4. Under single entity coverage The Willoughby might have had an obligation to make a claim for the damage to the Smallis' unit. The Willoughby might at least have been required to recognize the loss as an "insured loss". Since damage was under the then existing $10,000.00 deductible, The Willoughby would have paid that deductible as a common expense. The pre-2009 Section 11-114 provided in part that if the cause of any damage to or destruction of any portion of the condominium originates from a unit, the council of unit owners' property insurance deductible is a common expense. Former Section 11-114 (g) (2) (iii), Real Property, Maryland Code.

After June 1, 2009, Section 11-114 (g) (2) (iii) was amended to provide that if the cause of damage or destruction originated from a unit, the owner of the unit where the cause of the damage or destruction originated was responsible for the council of unit owners' property insurance deductible not to exceed $5,000.00. Section 11-114(g) (2) (iii) provides that the council of unit owners property insurance deductible amount exceeding the $5,000.00 responsibility of the unit owner is a common expense.

Thus if the loss had occurred after June 1, 2009, the condominium would be required to make the repairs and charge the first $5,000.00 to the owner of the unit where the damage originated. Before June 1, 2009, but after *Anderson*, The Willoughby would not have to pay for the repairs unless it provided single entity coverage, which it did. Thereafter, either way The Willoughby was responsible to pay for the damages to Ms. Smallis' unit in the amount of

$2,236.00. Under the earlier Section 11-114, The Willoughby might have amended its By-laws to shift $10,000.00 of the deductible to the unit where the cause of the damage originated, but it did not do so.

5. The Panel does not agree with the approach taken by The Willoughby for casualty losses under the amount of the master property insurance policy deductible of $10,000.00 and it does not agree with the analysis of Steve Dickerson. Mr. Dickerson presented a careful, well thought out analysis and was fully responsive to the many questions asked of him. However, there is a difference of opinion.

6. One reason for this difference of opinion is the statement by the General Assembly of Maryland when it adopted the amendments to Section 11-114 that its intention was to overturn the Court of Appeals ruling in *Anderson v. Council of The Gables,*, 404 Md. 560 (2008), quoted above.

The General Assembly intended to make the cost of a property insurance deductible over $5,000.00 for damage originating from a unit a common expense and to make the cost of the property insurance deductible up to the amount of $5,000.00 the responsibility of the owner of the unit where the cause of the damage or destruction originated. The procedure adopted by The Willoughby defeats the purpose of making the cost of the insurance deductible up to $5,000.00 the responsibility of the owner of the unit where the cause of the damage or destruction originated. The Willoughby instead makes the cost of the deductible that of the unit owner who is damaged. The Panel understands that the analysis of Mr. Dickerson would be that a loss under a deductible is not an" insured loss", but it does not agree based upon the clear statement of the

intention of the General Assembly and the language of Section 11-114 (g) (2).

The Respondent also argues that the analysis applied in the *Anderson* decision still applies whenever the amount of the damage is less than the master property insurance policy deductible. We do not agree.

The core of the *Anderson* ruling rests on these comments by the Court of Appeals:

> When we examine the context of the entire Condominium Act, it becomes clear that the master insurance provision was intended to cover only damage sustained to the common elements or the structure of a condominium.
>
> * * * * *
>
> The Owners argue, nevertheless, that Section 11-108.1 is inapplicable and that the Section only pertains to repair and replacement of a unit in the course of ordinary maintenance, while Section 11-114 prescribes the council of owners' duty to repair and replace a unit in the event of a casualty loss. We disagree; if the Legislature had intended to limit Section 11-108.1 as the Owners suggest, it could have fashioned the statutory language accordingly. Section 11-108.1 does not distinguish the duty of an owner to repair in the course of ordinary maintenance from the duty to repair following a casualty loss.

Anderson, supra, 404 Md. at 587-88.

The General Assembly then did exactly what the Court faulted it for not having done. It took Section 11-108.1 and added the emphasized clarification:

> Except to the extent provided by the declaration or the bylaws, *and subject to Section 11-114 of this subtitle,*, the council of unit owners is responsible for the maintenance, repair and replacement of the common elements and each unit owner is responsible for the maintenance, repair and replacement of his unit.

The amendment clearly declares Section 11-114 as an exception to the general rule otherwise stated by Section 11-108.1, rather than subordinate to it, as the *Anderson* court had interpreted it to be.

7. The Panel is not in a position to adjust any amounts paid by the Fireman's FundInsurance Company to Ms. Smallis, even if that should be appropriate. It is also not in a position to order the condominium to pay Ms. Smallis any amounts under the single entity insurance coverage in place at the time of the loss, since Ms. Smallis has already been paid more than once for the amount of her loss, as found by the Panel.

8. The Willoughby has requested reimbursement of attorney's fees on the basis that Ms. Smallis filed or maintained a frivolous dispute or filed or maintained a dispute other than in good faith pursuant to Section 10B-13(d), Montgomery County Code, 1994. The Panel concludes that Ms. Smallis had a colorable claim for the amount she argued as necessary to repair the damages to her unit. The Panel further concludes that The Willoughby did not follow the law as it was in effect at the time of the loss or the law as it is in effect today. The Panel disagrees with The Willoughby's analysis of how to treat losses under the master insurance property damage policy deductible. Consequently there were legitimate issues in this case that would preclude the award of attorney's fees to the Respondent.

ORDER

Based upon the foregoing testimony and evidence, Findings of Fact and Conclusions of Law, the Panel orders that the Complaint be dismissed. Attorney's fees are denied against the Complainant and the Panel leaves the parties as it found them.

The decision of the Panel was unanimous.

Any party aggrieved by the action of the Panel may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days of the date of this

decision, pursuant to the Maryland Rules of Procedures governing administrative appeals.

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John F. McCabe, Jr., Panel Chair
February 18, 2011