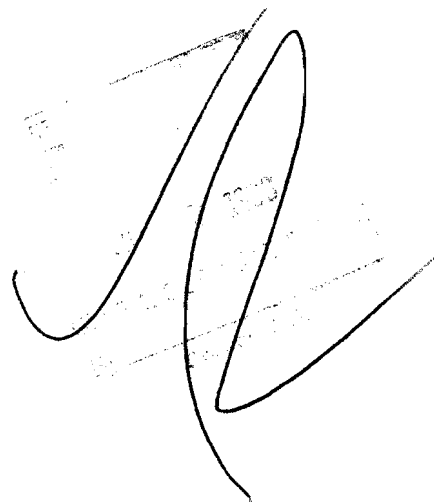


O/A 10-29-86
7-27



**IN THE SUPREME COURT
STATE OF FLORIDA**

PROVIDENCE SQUARE ASSOCIATION, INC.,

Defendant/Petitioner,

-vs-

CONNIE BIANCARDI,

Plaintiff/Respondent,

Case No.: 68,304

Fifth District Court
of Appeal No.: 84-461

Trial Court Case
No.: 84-6844-CA-03

**APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT OF FLORIDA**

INITIAL BRIEF OF PETITIONER

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STATEMENT OF CASE AND FACTS

Defendant/Petitioner, PROVIDENCE SQUARE ASSOCIATION, INC., seeks to have the decision of the District Court of Appeal, Fifth District, dated January 16, 1986 reversed and the Final Judgment of the Circuit Court of Volusia County, dated February 19, 1985 upheld.

Petitioner was the original Defendant/Counter-Plaintiff below and an Appellee before the District Court of Appeal. The Respondent, CONNIE BIANCARDI, was the original Plaintiff/Counter-Defendant in the trial forum and was the Appellant before the District Court of Appeal. The Respondent petitioned the District Court of Appeal to review a decision rendered by the Circuit Court of Volusia County after hearing all of the evidence in this cause. The District Court reversed the lower court judgment and remanded the cause for further proceedings.

In this brief, the Petitioner and the Respondent will be referred to as such.

On July 1, 1981, the subject office Condominium known as Providence Square was organized with a Declaration of Condominium of Providence Square being filed in the Public Records of Volusia County, Florida. (R. 307-309) The subject Condominium, Providence Square, was a four unit condominium of equal square footage, with the end unit being divided in half to make two separate units (hereinafter referred to as units "4" and "5").

The Respondent purchased both of the end units, (unit "4" and unit "5") one on January 31, 1984 and the other on March 19, 1984. (R. 374 and 379) Prior to her purchase of those units,

she was provided copies of the Declaration of Condominium, Articles of Incorporation and By-Laws of Providence Square, a Condominium.

The Providence Square Condominium was completely destroyed by fire on April 6, 1984. The Respondent claimed an ownership right to 40% of the insurance proceeds and common elements and filed suit for declaratory judgment. (R. 227-230) After hearing the testimony of the Respondent and the other unit owners, the trial court ruled that the condominium declarations contained a scrivener's error and it reformed the declarations to provide a 25% ownership interest in the common elements and insurance proceeds for the owners of units "1", "2" and "3" and 12.5% each for units "4" and "5". (R. 387-388) The Court found that paragraph 4.2(a) of the Condominium Declarations, which paragraph indicated that the undivided share in the land and other common elements was 20% for all five (5) units, was a mistake. It was the finding of the trial court that the provisions of the Declarations "were not intended to give the owners of Unit "4" and "5" 20% of any such proceeds, nor was that the understanding of any of the unit owners, including the Plaintiff." (R. 386) The court concluded that the Declaration of Condominium contained a scrivener's error and that Respondent and all other association members treated the interest in common surplus and liability for common expenses in a manner indicating the Plaintiff has a 12.5% interest for unit "4" and a 12.5% interest for unit "5", for a total interest of 25%. The Court then proceeded to reform the

Declaration of Condominium to meet the intention, conduct and course of dealings of the parties and association members. (R. 385-388)

The Respondent appealed the trial court's decision to the Fifth District Court of Appeal. After briefs were filed by both sides and oral arguments heard, the District Court reversed only the lower court's finding as to the appropriateness of reformation as a remedy and the finding of mutual mistake and did not disturb the factual findings of the trial court. The court held:

...Declaration of Condominium come into being by unilateral act. The only way the document may be altered is by amending it in accordance with the proper statutory prerequisites...

There are some mistakes which a court cannot correct and this is one example. The courts cannot change a Declaration of Condominium...

See the decision of the Fifth District Court of Appeal attached as Appendix A.

QUESTION PRESENTED

WHETHER THE FIFTH DISTRICT COURT OF
APPEAL ERRED IN HOLDING THAT
CONDOMINIUM DECLARATIONS ARE NOT
SUBJECT TO REFORMATION ON ACCOUNT OF
MISTAKE OR SCRIVENER'S ERROR?

SUMMARY OF ARGUMENT

A scrivener's error in condominium declarations should be subject to reformation. This is especially true when, as in the present case, the declarations can not be amended to make provisions for an act that has already taken place (destruction). In the case at bar, the trial court found that the Respondent was fully aware that it was the intention of the condominium documents to provide the Respondent with only a 25% interest in the common elements.

Since this ownership interest was known to all parties, including the Respondent, the scrivener's error would be subject to reformation, a remedy recognized in the case of Clearwater Key Association-South Beach, Inc. v. Thacker, 431 So. 2d 641 (Fla. 2d DCA 1983). The Fifth District's finding that condominium declarations are not subject to reformation should not be the law of the State of Florida. Equity mandates that errors such as these, clearly known by all parties, be subject to reformation. The Fifth District likens condominium declarations to Articles of Incorporation, City Charters and other documents filed with the Secretary of State and states that none of these documents can be reformed. Other jurisdictions have clearly held that similar documents (ie: articles of incorporation and recorded plats) are subject to reformation. The law of Florida should likewise provide a remedy for mistakes in condominium declarations other than by formal amendment.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEALS ERRED IN ITS DECISION AS A COURT OF EQUITY HAS THE POWER TO REFORM CONDOMINIUM DECLARATIONS TO CORRECT A DRAFTSMAN'S MISTAKE.

The Fifth District Court of Appeals reversed the judgment of the trial court determining that Condominium Declarations are not subject to reformation on account of mistake or scrivener's error. On pages 2 and 3 of the court's opinion the court stated the following:

Condominium Declarations like Articles of Incorporation, City Charters and other documents filed with the Secretary of State are not like deeds, mortgages or other documents subject to reformation on account of mistake or scrivener's error. While deeds, etc., contemplate dealings between two or more parties, a Declaration of Condominium comes into being by unilateral act. The only way the document may be altered is by amending it in accordance with the proper statutory prerequisites. A scrivener's error or like mistake may be corrected by the developer or its successor by following the proper procedure in Tallahassee...

Any fault or inequity alleged lies with the original draftsman of the Declaration of Condominium and related documents. There are some mistakes which a court cannot correct and this is one example. The courts cannot change a Declaration of Condominium any more than it can give a corporation or a municipality powers which are not specifically set out in their Articles of Incorporation. (See Appendix A attached hereto.)

The Petitioner has been able to find only one case in this and other jurisdictions which addresses the specific issue of whether Declarations of Condominium are subject to reformation. In Clearwater Key Association--South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983), the Second District Court of

Appeals considered the reformation of a Declaration of Condominium by the trial court. Although the court concluded that the reformation was invalid because the declarations, as reformed, would be in conflict with a Florida Statute, the Court stated on page 646:

Generally speaking, a court of equity has the power to reform an instrument to correct a draftsman's mistake. However, we hold that a court of equity is without power to reform an instrument because of a draftsman's mistake where the instrument, as reformed, would conflict in a material way with provisions of a controlling statute.

The Clearwater Key case stands for the proposition that Condominium Declarations can be reformed to correct a draftsman's mistake. In that case, unit owners of a condominium filed suit against the condominium association and others seeking reformation of the Declaration of Condominium and cancellation and removal of a claim of lien filed against them by the association. The Declaration of Condominium was drafted pursuant to the developer's direction. The developer in that case was United States Steel Corporation who was not a party to the original action nor a party seeking reformation. Id. at 644. The court held that condominium declarations could be reformed by the court but denied reformation in that instance because the Condominium Declarations, as reformed, would have conflicted with a controlling statute. Such conflict with a controlling statute is not an issue in the instant case.

Although Petitioner is unable to find other cases dealing with the specifics of Condominium Declarations as found here,

there are cases in other jurisdictions which have permitted similar documents to be reformed.

In the case of Millspaugh v. Cassedy, 191 App. Div. 221, 181 N.Y.S. 276 (Sup. Ct. App. Div. 1920), the New York court allowed the reformation of Articles of Incorporation. The court recognized the issue of reformation of this type of document as it stated:

The learned counsel for the appellants insist that the omission of the restriction in the articles of incorporation was an error of law, not to be relieved by a court of equity... They also urge that such relief is something beyond ordinary equitable remedies, in that articles of incorporation are not such a contract as may receive the high remedy of reformation by courts of equity. Id. at 281.

The court did not accept such a proposition and instead held that equity required that the instrument be reformed and the court so exercised its equitable jurisdiction and altered the articles.

In Gilbert v. Williams, 157 Mich. 226, 121 N.W. 739, (1909) and Rice v. Kelsit, 12 Minn. 511, 44 N.W. 535, (1890), the appellate courts held that errors in recorded plats of land were subject to reformation by the court. In both cases, plats duly recorded in the public records were reformed where the property was misdescribed and there was an error on the plats. In the Rice case, the Supreme Court of Minnesota held that a plat, which contained errors which was certified as true and correct at the time recorded, was subject to reformation. The court stated:

... that plat is a public record, but it is one in which private persons have rights, and the public is in no way interested in the matter in respect to which the correction is asked. As to that, the owners of the lots alone are interested... We think the court

ought to have directed the plat to be corrected to make the numbering of the lots in the original the same as in the certified copy... Id. at 536

It is stated in 9 Fla. Jur. 2d, Cancellation, Reformation and Rescission of Instruments, Section 59 that:

A deed issued pursuant to sale by operation of law, in which the owner of the land does not participate and in which there can be no mutual mistake, is not subject to reformation. This is in accordance with the general rule.

In one case, however, the Supreme Court of Florida reversed a dismissal by a Circuit Court of an action seeking, in part, the reformation of the description of land contained in a tax deed. The court stated that equity is the proper forum where such reformation is necessary for the protection of rights in real property.

The case referred to in this section was Crompton v. Kirkland, 24 So.2d 902 (Fla. 1946). Because Respondent contends that she is entitled to 40% of all land on which the destroyed building and common elements previously existed, the principal that reformation is necessary for the protection of rights in real property should also apply here.

Although the unit owners were not parties to the original condominium declarations, the Declarations recorded in the Public Records indicate the parties to the Declarations as the Developer, "for itself, its successors, grantees and assigns." The Respondent is a successor in interest as provided for in the Declarations.

A case which clearly holds that predecessors in interest have standing to seek reformation of instruments to which they were not actual parties is General Development Corporation v.

Kirk, 251 So.2d 284 (Fla. 2nd DCA 1971). In that case, a predecessor in title was found to have standing to sue for reformation of an instrument even though the Plaintiff was not himself a party to that instrument. In fact, the Plaintiff in General Development was not even the immediate predecessor in title as there were a number of other parties who were ahead of it in the chain of title. The General Development court stated, at page 286:

It is not "privity" but a legitimate interest warranting invocation of the judicial power of the state which ought to determine standing to sue.... In this case it is clear that General Development reasonably contends that the extent of the property conveyed to the Conways determined the extent of that conveyed to Florida West Coast Land Company, it's predecessor in title. We think the courts of Florida should be open to the presentation of such a contention as this.

It is also unnecessary for the only party to a Declaration of Condominium to be joined as a party to an action to reform such Declaration. In Clearwater Key Association--South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983), the Court held that a court of equity has jurisdiction to reform a paragraph of a Declaration of Condominium to correct a draftsman's mistake. The Court made that statement even though the parties to that action consisted only of the Association as Plaintiff and the co-owners of the two units as Defendants. The Declarations of Condominium in Clearwater Key were drafted pursuant to the developer's direction yet the developer was not required to be a party to the action which was maintained by the successors in title.

The court must reverse the decision of the Appellate Court as it would be a harsh result to hold that even if all parties agreed that an error existed in the Declarations of Condominium, that, no matter what the result, such an error could not be corrected except by formal amendment. Amendment of the Declarations cannot always be accomplished where, as in the instant case, a fire has destroyed the condominium structure and there is no reason for the Declarations to continue to exist nor can the Declarations be amended after the fact to provide for a previous occurrence. To hold that under no circumstance, regardless of the inequities, can Declarations of Condominium be reformed, would have a grave and widespread impact in this State in light of the growth of the condominium form of ownership of real property. To affirm the Fifth District's holding in this case would prevent a remedy where there is a wrong.

The general principles of equity annunciated in Fla. Jur. 2d (1980) appropriately discusses issues relevant to the instant case. That treatise states:

A court of equity is a forum for the administration of justice. Such courts evolved from the need to grant justice in cases wherein the law courts, in view of their rigid principles, were deficient. The purpose of equity is to remedy defects in the law. Illustrative of this basic function of equity jurisprudence is the maxim, 'Equity regards as done that which ought to be done'.

A court of equity accords remedies and enforces rights in view of all the circumstances. It may grant relief that is flexible depending upon the facts. Indeed it was the very lack of flexibility in the common law to meet changing circumstance that

gave rise to equity. 22 Fla. Jur. 2d,

Equity, §2 (1980) and various cases cited therein.

That same treatise provides that:

It is the duty of equity, while keeping within the rules and principles on which its remedial jurisdiction is founded, to adapt its course of proceedings to the existing state of things. The powers of equity are broad and flexible. And the boundaries of equity are constantly being extended in order to meet the demands of a complex and advancing society.

The absence of precedents is no obstacle to the exercise of the jurisdiction of a court of equity. Equity is not shackled by rigid rules of practice or law. And although it may not assume nonexistent jurisdiction, it may amplify remedies, or avail itself of new remedies or unprecedented orders, in emergent situations where they afford necessary relief without imposing illegal burdens. 22 Fla. Jur. 2d, Equity, §8 (1980) and various cases cited therein.

Finally, the Respondent should be estopped from asserting her right to 40% of the subject insurance proceedings and 40% of the common elements (including the land where the building once stood) since, as the trial court found, this was not the understanding of the Respondent or any of the other owners. R. 385-388. The Respondent should also be estopped to deny reformation since she has continuously accepted the benefits of paying less toward her share of the common expenses than is now asserted by her to be her interest. To find otherwise and reverse the trial court and affirm the appellate court would permit the Respondent to gain substantially by the fire which destroyed the condominium building thereby unjustly enriching the Respondent to the detriment of her "fellow" unit owners. The parties will thus be placed in status quo to meet with the prior

understanding of all parties, including Respondent, by affirming the decision of the trial court. To provide the Appellant more than she herself felt she was entitled to would not result in placing everyone in status quo but would unjustly enrich the Respondent.

CONCLUSION

The Fifth District Court of Appeals erred in holding that Condominium Declarations are not subject to reformation on account of mistake or scrivener's error. This case is in direct conflict with the Second District Court's decision in Clearwater Key Association--South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983) wherein the court stated that condominium declarations are subject to reformation. Other courts have also held that equity requires courts to reform instruments of a similar nature where errors are found. Because of the reasons and authorities set forth in this Brief, it is submitted that the appellate decision in the present case is erroneous and that the conflicting decision of the District Court of Appeal for the Second District (Clearwater Key) is correct and should be approved by the Court as the controlling law of the State.

Petitioner, therefore, requests this Court to quash the decision of the Fifth District Court and approve the conflicting decision of the District Court of Appeal of Florida, Second District, as the law of Florida, and grant such other and further relief as shall deem right and proper to this Honorable Court.

Respectfully submitted,

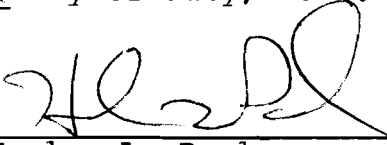
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished by U. S. Mail to: Michael S. May, Esquire, 218-E East New York Avenue, DeLand, Florida 32720, and Patrick W. Gillen, Jr., Esquire, P. O. Box 3010, DeLand, Florida 32723-3010, this 2nd day of July, 1986.



Harlan L. Paul