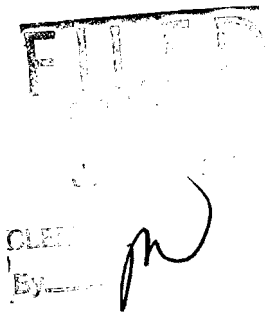
OA 10-29-86

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

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page

OTHER AUTHORITIES:

STATEMENT OF CASE AND FACTS

Respondent, CONNIE BIANCARDI, would adopt the Statement of Case and Facts provided by Petitioner with the following comments, changes and clarifications:

1. The purpose of the Statement of Case and Facts, as perceived by Respondent, is to advise the Court of chronological pleadings felt to be operative by the Petitioner. The argument is to be contained in each of the questions presented as is appropriate and is not to be contained in the Statement of Case and Facts, as the Petitioner has seen fit to include in its Brief. The Respondent will, therefore, recede from expressing argument in the Statement of Case and Facts and adhere to what it considers to be the proper format as expressed.

2. The Declaration of Condominium demonstrates that the condominium was a five unit condominium rather than a four unit condominium as expressed by Petitioner (R 307-339). The Fifth District Court of Appeal so found, in its decision, and attached exhibit depicting the condominium.

3. The Providence Square Condominium was completely destroyed by fire on April 6, 1984, which was 65 days after the purchase by Respondent of its initial unit in a purchase of two units and the Respondent relied upon the recorded Declaration of Condominium at the time of her purchase (R 149, 162).

4. The only indication of assessment of maintenance fees or taxes provided Respondent was that contained in the closing statement, an absolute figure with no figures for other units to compare such figures to (R 146, 147, 165).

5. The Fifth District Court of Appeals, upon review of the decision of the trial court, found that the Declaration of Condominium was subject to amendment but that proper statutory prerequisites must be followed in order to change the

Declaration of Condominium. The Fifth District Court of Appeals, likewise, found that the trial court's finding of a mutual mistake was erroneous. The Petitioner recites that the factual findings of the trial court were not disturbed. The Respondent would note that the Fifth District Court of Appeals did find that a determination by the trial court that there was a mutual mistake was erroneous. This, therefore, would necessarily involve an analysis of the factual basis.

6. The Petitioner herein seeks to have the decision of the Fifth District Court of Appeal overturned on the basis that such court erred in holding that condominium declarations are not subject to reformation on account of mistake or scrivener's error. The Fifth District Court of Appeals found that such declarations of condominium are subject to amendment and, therefore, reformation provided statutory prerequisites are followed.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeals found that a Declaration of Condominium could be amended or changed provided the proper statutory prerequisites were met. The Fifth District Court of Appeals did not find that condominium declarations are not subject to reformation and this certainly, is not the law of the State of Florida. The Condominium Act, and specifically, Fla. Stat. 718.110(4), provide for the amendment of the declaration of condominium of a condominium in those instances in which proportionate share of the common elements is to be changed. This is the controlling provision of law and must be adhered to as the Fifth District Court of Appeals expressed. The case of Clearwater Key Association - South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983), likewise, found that the provisions of the Condominium Act are controlling and must be adhered to. This was the very result of their decision. The present Court has, likewise, held that the Condominium Act must be followed and that it is the controlling law in regard to condominiums. Century Village, Inc. v. Wellington, 361 So.2d 128 (Fla. 1978); Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674 (Fla. 1985).

The very statutory provisions found in Fla. Stat. 718.110(4) which controlled the amendment of the Declaration when the percentage of common element ownership is affected, have also been found as controlling in the amendment of a condominium declaration by the very same Second District Court of Appeal, which ruled upon the Clearwater Key Association - South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1985). In a more recent case, such Court clears up any confusion as to the view of that Court and any apaprent diversity of opinion, as urged by the Petitioner, Beau Monde, Inc. v. Bramson, 446 So.2d 164 (Fla. 2d DCA 1984).

Such adherence to the provisions of Fla. Stat. 718.110(4) has been clearly followed by the Court of the Second District Court of Appeal, the Third District Court of Appeal, Towerhouse Condominium, Inc. v. Millman, 410 So.2d 926 (Fla. 3d DCA 1981), and in the present case here upon review, by the Fifth District Court of Appeal.

This Court should follow the consistent views of each of such District Courts and find that the holding of the Fifth District Court that, in order to reform a declaration of condominium, the statutory prerequistites must be followed. Such a finding would not be in conflict with the Clearwater court but would be in accord with the Clearwater court and the holding of that court in the case of Beau Monde, Inc. v. Bramson, 446 So.2d 164 (Fla. 2d DCA 1984) and would, therefore, uphold the view of the Second District Court of Appeal when amendment is made to a declaration of condominium changing the percentage of ownership of the common elements.

The Fifth District Court of Appeals further found that there was no mutual mistake. Such a finding is buttressed by the record reflecting that the Respondent relied on the recorded Declaration of Condominium and that she owned her two units in a five unit condominium, for a short two months prior to its destruction by fire (R 124, 374, 386). Respondent was not aware of any charges for other units as their contribution for taxes, maintenance or other charges (R 144, 147, 146). The only information available to Respondent was that contained in her sale closing statements with no evidence of the charges against other units for purposes of comparison (R 165, 166). There was, therefore, no mutual mistake and the Fifth District Court of Appeal found and this Court should uphold that finding.

Respondent would further urge this Court to find that the level of proof demonstrated by the very Final Judgment of the lower court (R 387) was found to be a preponderance of evidence. This is insufficient as a basis for reformation as has consistently been found by the courts in Bell Corporation v. Bahama Bar and Restaurant, Inc., 74 So.2d 294 (Fla. 1954) and Palilla v. St. Paul Fire & Marine Insurance Company, 322 So.2d 46 (Fla. 1st DCA 1975). The trial court further found that, upon changing the Declaration of Condominium, the Petitioner was the prevailing party. The Fifth District Court of Appeal disallowed such reformation of the Declaration of Condominium and, therefore, the Respondent would be the prevailing party. The Petitioner should not be deemed the prevailing party even if such reformation were allowed because the action, as initially instituted, to uphold the provisions of the Declaration of Condominium, were as they existed at the time of initiation and at the time when the Declaration of Condominium was recorded both in the Public Records of Volusia County, Florida and in Tallahassee, Florida. Straight's Trust v. Commissioner, 245 F.2d 327, 330 (8th Cir. 1957).

I. QUESTION

DID THE DISTRICT COURT ERR IN FINDING THAT A DECLARATION OF CONDOMINIUM MUST BE AMENDED IN ACCORDANCE WITH THE FLORIDA STATUTES?

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN FINDING THAT A DECLARATION OF CONDOMINIUM MAY BE AMENDED IN ACCORDANCE WITH THE FLORIDA STATUTES.

Petitioner states at page 6 of its brief:

> 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 scriveners error.

This was not the finding of the District Court. In fact, the District Court found that condominium declarations could be reformed or amended, but in order to do so, there must be an amendment in accordance with the proper statutory prerequisites.

The Petitioner consistently characterizes the error existent in the present Declaration of Condominium as a mistake of a scrivener. A scrivener is defined by BLACK'S LAW DICTIONARY, 1515 (5th ed. 1979), as one who transcribes writings. The error in the present circumstance is not one of transcription of writing. The error, if any, is in a substantive matter of the percentage of ownership of each unit owner of a condominium when there are five condominium units and twenty (20%) percent ownership of the common elements is ascribed to each unit owner when it was allegedly intended that two of the units should hold an interest ownership equal to that of any one of the remaining condominium units, or twelve and a half (12 ½%) percent each.

This clearly is not a scrivener's error, but an error in the substance

of the entire Declaration of Condominium as it relates to ownership interest.

9 Fla. Jur. 2d, in speaking of a scrivener's error, has stated:

> ...relief may be given where, through a mistake of the scrivener, the instrument contains a clerical error, or fails to define the terms as agreed on by the parties. 9 Fla. Jur. 2d, Cancellation, Reformation and Recission of Instruments, § 70 at 66.

The courts have further clarified this statement by case law in which the Supreme Court has stated:

> While equity would reform a written instrument when by a mistake it did not contain the true agreement of the parties, yet, it would only do so when the mistake was plain and the proof was full and satisfactory; that the writing should be deemed to be the sole expositor of the intent of the parties until the contrary was established beyond reasonable controversy; that such relief would not be granted where the evidence was loose, contradictory, or equivocal. Jacobs v. Parodi, 50 Fla. 541 (Fla. 1905), 39 So. 833, 837.

From this it is clear that the error contained, if any, is not a scrivener's error and if it be a scrivener's error, certainly, it is not of a nature that the Court would reform such.

The Petitioner cites the case of Clearwater Key Association - South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983) as standing for the proposition that declarations of condominium are subject to reformation. This does not conflict with the finding of the Fifth District Court of Appeal in the present case. The Fifth District Court, once again, found that declarations of condominium are subject to amendment (thus, including reformation) providing the proper statutory prerequisites are met. It should be noted that the Clearwater Key Association case merely stated that:

> A court of equity has the power to reform an instrument to correct a draftsman's mistake. Clearwater Key Association - South Beach, Inc. v. Thacker, 431 So.2d 646 (Fla. 2d DCA 1983).

This is not inconsistent with the findings of the Fifth District Court of Appeal. In fact, this is embodied in the very statutory prerequisites which have been discussed by the Fifth District Court of Appeal. The statutory prerequisites also provide for amendment of the Declaration of Condominium before a Circuit Court; they simply dictate the method which must be followed in seeking such amendment.

It is likewise important to note that the Clearwater Key Court ruled in favor of supporting the condominium statute. This is certainly what the Fifth District Court of Appeal did when it upheld an alteration or change in the Declaration of Condominium provided the same condominium statutes were followed.

The counterclaim filed by Petitioner at the trial court (R 242-250) was filed subsequent to the date of enactment of the applicable condominium provision contained in Florida Statute 718.110. This very statutory authority, in its title, provides for correction of error before the Circuit Court. Such action was never attempted by Petitioner. Clearly then, the denial which the Petitioner alleges of reformation by court, is provided for in the Statutes and is specifically acknowledged by the Fifth District Court of Appeal in its decision when it states that proper statutory prerequisites must be followed. Turning to the provisions in the Florida Statute, the applicable statutory sections read as follows:

> 718.110 Amendment of Declarations; Correction of Error or Omission in Declaration by Circuit Court.
>
> (1) If the declaration fails to provide a method of amendment, the declaration may be amended in subsection (4) or subsection (8) if the amendment is approved by the owners of not less than two-thirds of the units.

(2) ...

(3) ...

(4) Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any condominium unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentages by which the owner of the parcel shares in the common expenses and owns the common surplus unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all the record owners of all other units approve the amendment.

(5) ...

(6) ...

(7) ...

(8) ...

(9) If there is an omission or error in a declaration of condominium, or in any other document required by law to establish the condominium, the association may correct the error or omission by an amendment to the declaration or to the other document required to create the condominium in the manner provided in the declaration to amend the declaration, or if none is provided, by vote of a majority of the voting interests.

...This procedure for amendment cannot be used if such an amendment would materially or adversely affect property rights of unit owners, unless the affected unit owners consent in writing. This subsection does not restrict the powers of the association to otherwise amend the declaration, or other documentation, but authorizes a simple process of amendment requiring a lesser vote for the purpose of curing defects, errors, or omissions when the property rights of unit owners are not materially or adversely affected.

(10) If there is an omission or error in a declaration of condominium, ...which omission or error would affect the valid existence of the condominium and which may not be corrected by the amendment procedures in the declaration or this chapter, the circuit court has jurisdiction to entertain a petition of one or more of the unit owners in the condominium, or of the association, to correct the error or omission, and the action may be a class action. The court may require that one or more methods of correcting the error or omission be submitted to the unit owners to determine the most acceptable correction. All unit owners, the association, and the mortgagees of a first mortgage of record must be joined as parties to the action. ...If an

> action to determine whether the declaration ... complies with the mandatory requirements for the formation of the condominium which are contained in this chapter is not brought within three years of the filing of the declaration, a declaration and other documents shall be effective under this chapter to create a condominium, ... However, both before and after the expiration of this three year period, the circuit court has jurisdiction to entertain a petition permitted under this subsection for the correction of the documentation, and other methods of amendment may be utilized to correct the error or omissions at any time. [Emphasis added].

The statutory provisions therefore, contemplate that under certain conditions, amendment may be made by the circuit court. This approach, however, was not taken by the Petitioner at the trial court.

It should be noted that provisions which apply to the present circumstance would be those set forth in subparagraph 4 of Section 718.110 Fla. Stat. (1985). The provisions of subparagraph 10 would not apply because such subparagraph was applicable only when there are no other methods for correction:

> by the amendment procedures in the Declaration or this chapter. [Emphasis added]

The Clearwater court determined that it was without power to reform an instrument

> where the instrument, as reformed, would conflict in a material way with provisions of a controlling statute. Clearwater Key Association - South Beach, Inc. v. Thacker, 431 So.2d 641, 646 (Fla. 2d DCA 1983).

It would, therefore, seem to follow that if the Court was without power to reform an instrument when such reformation would conflict with the controlling statute, then it certainly seems that the same court would be bound to comply with the same controlling statutes in the very changing of the Declaration of Condominium itself.

The Petitioner, in its brief at page 10, has stated:

> 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.

This was not the holding of the Second District Court of Appeals in the Clearwater Key Association case. Actually, the holding in the Clearwater Key case was to uphold the statutory provisions of the Condominium Act and to find that charges against unit owners must be apportioned in the same amount as the ownership of common elements and common surplus and, that court held to the provisions of the Condominium Act which so stated. The Second District Court of Appeal has consistently ruled in favor of upholding the Condominium Act and the very provision contained in Section 718.110(4) for amendment of the Declaration to be in accordance with such statutory provision. The Second District Court has stated:

> Absent consent, or amendment of Declaration of Condominium as may be provided for in such Declaration or by statute, enjoyment and use of such real property as set forth in the Declaration cannot be impaired or diminished. [Emphasis added] Pepe v. Whispering Sands Condominium Association, Inc., 351 So.2d 755, 757, 758 (Fla. 2d DCA 1977)

The Second District Court has even been more specific in its findings and has stated:

> Since the action would alter or modify existing appurtenances to the Appellees' individual units without the consent of all record owners as required by 718.110(4), the attempted actions are ultra vires and, therefore, void...
>
> The purchase of the real estate described in the lease would materially alter or modify the existing appurtenances to their condominium units we, accordingly, hold that Beau Monde's attempt to do so is governed by Section 718.110(4) and the holding of the Third District Court of Appeal in the case of Towerhouse Condo., Inc. v. Millman, 410 So.2d 926 (Fla. 3d DCA 1981).
> Beau Monde, Inc. v. Bramson, 446 So.2d 164, 167 (Fla. 2d DCA 1984).

Thus, the Second District Court of Appeal has clarified any interpretation of its prior cases, including the Clearwater Key case, which might be construed to the contrary that it does intend to enforce the Florida Statutes and any amendment would have to be in accordance with the Florida Statute as it has specifically directed in its allusion to Section 718.110(4) in which it further cites the Third District Court of Appeal. This provision specifically includes that to change a percentage of ownership in the common elements or common surplus, there must be written agreement of all unit owners. This would obviously include the Respondent in the present action and that absent such approval of the Respondent, there can be no change in the Declaration of Condominium whether such be by reformation of the court or by other means. This statement is clearly found in the view of the Second District Court of Appeal, the Third District Court of Appeal and the Fifth District Court of Appeal.

Courts, including this Court, have held that condominiums are strictly a creature of statute. Suntide Condominium Association, Inc. v. Div. of Fla. Land Sales and Condominiums, 463 So.2d 314, 317 (Fla. 1st DCA 1984); concurring opinion of Justice Overton, Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674 (Fla. 1985). This Court has held:

> In Florida, condominiums are creatures of statute and as such are subject to the control and regulation of the Legislature. That body had broad discretion to fashion such remedies as it deems necessary to protect the interests of the parties involved. Century Village, Inc. v. Wellington, 361 So.2d 128, 133 (Fla. 1978)

Since condominiums are strictly a creature of statute, then it follows that the control of such statutorily created creatures should likewise be provided by statutes. This was exactly the view of the Fifth District Court of Appeal below. This view is further supported by cases which hold that the Declaration of

Condominium itself, setting out the positions of the parties and owners and interest, may not depart from the statutorily defined guidelines. Elbadramany v. Ocean Seven Condominium Association, Inc., 461 So.2d 1001 (Fla. 5th DCA 1984), was a case in which the courts found that condominium documents cannot lawfully provide for procedures which are inconsistent with the Condominium Act. If the procedures outlined in the very document which controls the condominium may not depart from the Condominium Act, then it certainly seems to follow that the enforcement and amendment of those very documents should not depart from the Condominium Act. It should, likewise, be noted that the very Declaration of Condominium upon which action was brought, directs that it shall be in compliance with the Condominium Act which embodies Section 718.110(4) (R 307, 339). These provisions contained in the Declaration of Condominium of Providence Square further buttress support of the Condominium Act and Chapter 718 of the Florida Statutes. Thus, enforcement by the courts, as was the view of the Fifth District Court, must be in accordance with the Florida Statutes, both because the Statutes spell out that it must be so, and secondly, because the Statutes are adopted in the very controlling document of the condominium, which is the Declaration of Condominium.

In yet another case before this Court, Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674 (Fla. 1985), proponents of amendment of a Declaration of Condominiums sought to expand the powers provided statutorily to a condominium by interpretation of yet another Florida Statute section dealing with not-for-profit corporations (Fla. Stat. Chapter 617 (1985)). This court found in such case

> Petitioner may exercise only those powers enumerated in the Condominium Act...
> Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985)

The court further found:

> It is a general principal of statutory construction, well established in Florida's Jurisprudence, that the mention of one thing implies the exclusion of another. Thayer v. State, 335 So.2d 815 (Fla. 1976); 30 Fla. Jur. Statutes § 90 (1974)
>
> This rule of expressio unius est exclusio alterius leads to the conclusion that no other power to purchase real property was intended to be within the association's authority. ...in allowing the association sufficient power to accomplish that specified end, implicitly refused to grant any broader exercise of the power.

This court has, therefore, specifically ruled that where specific powers are included, when discussing the Condominium Act, other powers, not mentioned, are not included and there is, therefore, no grant of any broader exercise of power. This would certainly apply to a circumstance where the power provided by Fla. Stat. Chapter 718.110(4) to alter the ownership interest of unit owners must be done as set forth in such provision and, even if attempted otherwise, must be done in accordance with the Condominium Act.

This very Court has ruled that the expression of certain powers would, therefore, be the omission of other powers not expressly mentioned. How then can a court reform a document to change an ownership interest in a condominium unit, controlled by the provisions of the Condominium Act, based upon the provisions other than the Condominium Act, which would grant broader powers than those contained in the very Act? The simple answer is that it cannot and be consistent with the findings of this Court.

Should this Court then provide an alternative method for amending a Declaration of Condominium in addition to those already contained in the Condominium Act reflected in the statutory provisions? This Court has, upon occasion, stated its view in such regard and most recently, in the case of Towerhouse

Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985), it said:

> We would, of course, decline to usurp the legislative power in any case....

It would, therefore, appear that the Court does not feel it proper to exercise its power to expand those specific provisions already contained in the Florida Statutes which should be interpreted just as they are set forth. This Court has likewise determined:

> The courts will not construe a Statute so as to achieve an absurd result.
> Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985); McKibben v. Mallory, 293 So.2d 48 (Fla. 1974)

An absurd result indeed would occur when the legislators, the drafters, and the very statutory provision itself, which confines amendment of the Declaration of Condominium to certain circumstances and, if it affects the common ownership interest, requires one hundred (100%) percent approval may be expanded to allow a simple reformation action in the circuit court. The Legislature intended for amendment of a Declaration of Condominium to be just as it is set forth in the very creature which created them; the Florida Statutes. It did not intend to expand such power to include an action before a court to reform the Condominium Declaration absent a following of the express provisions in the Condominium Act spelled out in the Florida Statutes. The rule of expressio unius est exclusio alterius still applies as does the view of the courts expressed in the cases cited herein which requires compliance with Section 718.110(4) when an amendment to a Declaration of Condominium occurs which changes the interest ownership of the common elements or common surplus.

Respondent would, therefore, urge this Court to find that the dictates of the Florida Statutes are controlling in the amendment of a Declaration of Condominium,

although such statutory provisions provide for amendment by the courts in certain circumstances, and that the Clearwater Key case and the Second District Court of Appeals in other more recent clarifying cases, including Beau Monde, Inc., are consistent in their upholding of the very wording of the Florida Statutes and the view of the Fifth District Court of Appeal in the present case and the finding of this Court in the case of Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674 (Fla. 1985), by finding that condominiums are creatures of Statutes and the specific provisions of the Condominium Act should be adhered to as controlling the conduct of such condominiums. This would, of course, include the provisions of Fla. Stat. 718.110(4) for the amendment of a Declaration of Condominium when a change in ownership of the common elements occurs.

The Fifth District Court expressed it most accurately when it stated:

> The developer sold the units according to the Declaration of Condominium and other recorded documents and Appellant paid for no more or no less than what the original specifications contained within those documents provided. Any fault or inequity alleged lies with the original draftsman of the Declaration of Condominium and related documents.
> Biancardi v. Providence Square Ass'n, Inc., 481 So.2d 1272, 1274 (Fla. 5th DCA 1986)

Any error existing in the Declaration of Condominium could, therefore, be amended in accordance with the Florida Statutes and failing such amendment, the ultimate responsibility for any errors would be that of the developer. If the Petitioner, Condominium Association, therefore, feels aggrieved and feel its owners did not receive their proper share of the proceeds of the fire based upon the common elements, then their action should be against the developer. This course of action has been consistently urged by the Respondent throughout each stage of these proceedings, at the trial court and at the District Court and now at the Supreme Court level and such course of action still appears to be the appropriate

direction for the Petitioner to take if it has been harmed. Certainly, if it has been harmed, it is not at the hand of the Respondent and Respondent would so urge this Court to find.

II. QUESTION

DID THE TRIAL COURT ERR IN REFORMING THE RECORDED DECLARATION OF CONDOMINIUM, AS A COURT OF EQUITY, THEREBY CHANGING THE OWNERSHIP INTEREST OF THE RESPONDENT?

ARGUMENT

THE TRIAL COURT ERRED IN REFORMING THE RECORDED DECLARATION OF CONDOMINIUM, AS A COURT OF EQUITY, AND THEREBY CHANGING THE OWNERSHIP INTEREST OF THE RESPONDENT.

Even assuming that the trial court was not bound to follow the Florida Statutes in amending the Declaration of Condominium of the Petitioner, there was not sufficient basis upon which such trial court could act as a court of equity and reform the Declaration of Condominium.

The Declaration of Condominium of PROVIDENCE SQUARE CONDOMINIUM was recorded on or about July 1, 1981, in the Public Records of Volusia County, Florida (R 307-339). The Declaration of Condominium was a matter of public record at the time Respondent purchased her two condominium units and she was delivered a copy of the Declaration of Condominium by each of the owners from whom she purchased, prior to the sale closing on each of the units (R 126, 129, 130, 149, 189). Appellant purchased units 4 and 5 of a total of five units of the PROVIDENCE SQUARE CONDOMINIUM on January 31, 1984, and March 20, 1984(R 124, 374). The court found that the condominium buildings were destroyed by a fire on April 6, 1984 (R 386). The Appellant had owned her properties for 65 days. The recorded Declaration of Condominium provided:

> 4.2(a) Common elements and common surplus. The undivided share in the land and other common elements and in the common surplus which are appurtenant to each office is as follows:

Unit Number	Undivided Share in Common Elements and Common Surplus
1	.20
2	.20
3	.20
4	.20
5	.20

6.1 Share of common expense. Each unit owner shall be liable for a proportionate share of the common expenses, and shall share in the common surplus, such shares being the same as the undivided share in the common elements appurtenant to the units owned by him.

8.4(b)(2) Insurance trustee; share of proceeds; Units. When the building is not to be restored - An undivided share for each unit owner, such share being the same as the undivided share in the common elements appurtenant to his office.
(R 312, 315, 317)

The Respondent subsequently made demand for payment of the 40% of insurance proceeds after the destruction of the condominium unit to which she was entitled by the recorded Declaration of Condominium (R 378). The trial court subsequently entered its order finding that the recorded Declaration of Condominium would be reformed so as to provide Respondent with 25% ownership of the common elements and thus, 25% share of the insurance proceeds apparently based on the square footage of the properties (R 386). It appearing to the court that Units 4 and 5, owned by the Respondent, were approximately one-fourth of the size of the entire condominium unit (R 162). The court makes specific findings of fact in its final judgment that (R 386, 387):

10(a) The quarterly association fee paid by the owners of Unit 1, was $230.00; Unit 2, $230.00; Unit 3, $230.00; Unit 4, $115.00; and Unit 5, $115.00.

(b) The ad valorem taxes for Unit 4 and Unit 5 was approximately one-half that of Units 1, 2 and 3.

(c) Assessments charged to the unit owners were twice as much for unit owners 1, 2 and 3 as for unit owners 4 and 5.

(d) The premium for the very fire insurance policy which is the subject of this lawsuit was paid out of the common expense fund to which unit owners 4 and 5 contributed only one-half that of unit owners 1, 2 and 3 as indicated in paragraph (a) above.

The entire transcript is void of any testimony or evidence as to these matters save the testimony by counsel for Petitioner by his questioning and his written closing argument. The lone exception was the 1983 County of Volusia tax receipts which were entered into evidence at the time of the trial and unknown to Respondent or Respondent's counsel until such date (R 168, 380). The only testimony before the court provided by the Respondent was that she received a sale closing statement with a proration for taxes and that she was made aware of the contribution for each of her units (R 146). There is no testimony that she was aware of the amounts contributed for the remaining units and thus have a basis upon which to determine if she was paying one-half, more or less, of the contribution of other units (R 144, 165). Respondent knew her tax proration only (R 147). Respondent did not know what other unit owners paid (R 165). There was, in fact, no basis for comparison (R 166). In fact, the fire occurred before she made any quarterly maintenance fee assessment or paid any quarterly taxes (R 164). In the real estate closing, the Respondent received her tax receipts only; she did not have knowledge of the rest of the units owners were paying (R 167). The developer, Mr. Jordan, even testified that the only taxes discussed were between units 4 and 5, those of the Respondent (R 185). Respondent, likewise, knew nothing of the payment for fire insurance nor is there any supporting testimony of such knowledge of Respondent and Respondent further had no time before the fire, after gaining ownership to her units, to treat her units as $\frac{1}{4}$ of the entire mass as alleged by Petitioner and found by the court. Respondent gained ownership January 31, 1984 and March 19, 1984.

The condominium declaration was of record in Volusia County when Respondent purchased her two units (R 307, 339, 124, 374).

Florida Statutes provide:

> 7. All provisions of the declaration are enforceable equitable servitudes, run with the land, and are effective until the condominium is terminated. [Emphasis added]
> Fla. Stat. 718.104(7).

The courts in the State of Florida in dealing with recorded declarations of condominium have found:

> Restrictions found in a declaration of condominium are clothed in a very strong presumption of validity which arises from the fact that each individual unit purchases his unit knowing of and accepting the restrictions to be imposed; such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy or that they abrogate some constitutional right.
> Hidden Harbor Estates, Inc. v. Basso, 393 So.2d 637, 639, 640 (Fla. 4th DCA 1981).

Real property authority is consistent that recording constitutes constructive notice. It has been said:

> Generally, recording constitutes constructive notice and subsequent purchasers are charged therewith. It is immaterial that they do not examine title or that they do not learn of the outstanding instrument or interest. This doctrine applies to all instruments regularly recorded within the chain of title. [Emphasis added]
> Florida Real Estate Transactions, Vol. 1, 1984, Section 24.14(a), pages 24-77, R.E. Boyer, Professor of Law, University of Miami. See First Federal Savings & Loan Association v. Fisher, 60 So.2d 496 (Fla. 1952); Sapp v. Warner, 105 Fla. 245, 141 So. 124, 143 So. 648 (Fla. 1932).

The author has noted that courts have provided the qualification "generally" to cover instances of nondelivery of instruments, forgery, deeds from an incompetent and when there is attendant fraud. The courts have gone on to state:

> If the document is properly executed by the owner or owners and regularly recorded in due course, it shall constitute constructive notice.
> Vetzel v. Brown, 86 So.2d 138, 140 (Fla. 1956); Daniel v. May, 143 So.2d 536 (Fla. 2d DCA 1962).

The court in Vetzel v. Brown, 86 So.2d 138, 140 (Fla. 1956), further stated:

> Where recorded use restrictions were placed on certain land by a common grantor for the benefit of all of his grantees as a part of a general scheme of development, such restrictions would be enforced by a court of equity against a grantee who took title with notice of the restrictions without regard to technicalities of law relating to covenants running with the land...
>
> Such restrictions are favored by our public policy today, and must be protected by the activities of courts of equity in preventing fraud and unfair dealing by those who take land with notice of a restriction upon its use so that in equity and good conscience they should not be permitted to act in violation of the terms of such restrictions. Vetzel v. Brown, 86 So.2d 140 (Fla. 1956)

It should be noted that each of the condominium unit owners, including the Respondent took title to their properties after the recording of the Declaration of Condominium and would be charged with knowledge of such Declaration of Condominium as espoused by the court in Vetzel v. Brown, 86 So.2d 138, 140 (Fla. 1956), and the Court in Hidden Harbor Estates, Inc. v. Basso, 393 So.2d 637, 639, 640 (Fla. 4th DCA 1981), and pursuant to Florida Statutes previously recited.

The uncontroverted testimony of Respondent and the evidence clearly reflect that Respondent took title to her two separate units on January 31, 1984 and March 19, 1984 (R 124, 374). The condominium fire occurred April 6, 1984 (R 386). It is thus apparent that there was no time for a quarterly meeting and no sums were assessed to any of the condominium units during the occupancy or ownership of the Respondent (R 164, 165, 166, 167). The actions during the ownership of Respondent did not show any indication of a normal course of dealing which reflected that the Respondent had a total of 25% combined interest

as asserted in the Final Judgment (R 387) and no testimony or evidence exists which reflects such dealings. The Respondent, therefore, took title to her properties with the clear unambiguous terms of the Declaration of Condominium providing that the owner of unit 4 and unit 5 would each be entitled to 20% of the insurance proceeds. There was thus, no ambiguity existent in the document and it should be construed as originally written.

Even in those cases where there is an ambiguity, the courts have found in Santa Rosa D.B.F.H., Inc. v. Island Echoes Condominium Association, Inc., 421 So.2d 534 (Fla. 3d DCA 1982) and in the case of Kaufman v. Schere, 347 So.2d 627 (Fla. 3d DCA 1977):

> Ambiguities in a declaration of condominium was to be construed against developer who authored the declaration.

Thus, even if there were ambiguities, it would not be construed against Respondent who took title relying upon such documents which were of record and constructive notice to the world. The developer, throughout his testimony, stated that there must have been a mistake in drafting the documents (R 178). This, then, would clearly be a matter between the draftsman of the documents and the developer. It should not affect any third party, such as Respondent, relying upon these documents at the time of purchase. It appears that the present action involves yet another party, PROVIDENCE SQUARE ASSOCIATION, INC., not the developer. It should further be noted that the interest taken by PROVIDENCE SQUARE ASSOCIATION, INC. is in behalf of three separate individual owners and each of such owners was charged with knowledge of the documents consisting of the condominium declaration which was spread on the public records and to which they should have been aware at the time of their purchase. At least two of the three owners were real estate people (R 90).

The cases are unending upholding the sanctity of the declaration of condominium and the terms of such declarations of condominium when they were of record at the time the individual owners obtained ownership. Trade Winds of Pompano, Inc. v. Rosenthal, 407 So.2d 976 (Fla. 4th DCA 1982).

The courts have specifically found in the case of Eros Properties, Inc. v. Cone, 418 So.2d 435 (Fla. 3d DCA 1982), that :

> Acquiring purchasers of individual units had a right to rely on the takeover provisions in the recorded declaration of condominium.

The courts have uniformly enforced the condominium declarations after the lower court has failed to enforce such. The case of Enright v. Seatowers Owners' Association, Inc., 370 So.2d 28 (Fla. 2d DCA 1979), the owners of a condominium unit brought action for removal of a building from their common area in contravention of the condominium declaration. The trial court found there was no need to remove the building and would not allow it. The appellate court found that the condominium declaration be adhered to and the case was remanded based upon such findings.

In the case of Pepe v. Whispering Sands Condominium Association, Inc., 351 So.2d 755 (Fla. 2d DCA 1977), action was brought by an owner seeking rights under the declaration of condominium and a determination of the appropriateness of two condominium associations consolidating to form one budget which was in contravention of the condominium association declaration, the appellate court denied this deviation from the declaration of condominium. The appellate court stated:

> The declaration of condominium is more than a mere contract spelling out mutual rights and obligations of parties thereto, but assume some of the attributes of a covenant running with the land, circumscribing limits of enjoyment and use of real property, that is, it spells out the true extent of the purchase and thus granted used interest. [Emphasis added]

The courts have variously addressed the extent to which purchasers bind themselves to the declaration of condominium when they purchase a unit such as the individual owners of PROVIDENCE SQUARE ASSOCIATION, INC., which now bring this suit to change the document under which they took title. In the case of Sterling Village Condominium, Inc. v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971), the court stated at page 686:

> The use, management and control of the Sterling Village Condominium are controlled by Florida Statute 711, the Florida Condominium Act, and by the Declaration of Condominium of Sterling Village Condominium, Inc. Defendants bound themselves by the Declaration of Condominium when they purchased the two units owned by them in the complex. [Emphasis added]

The present owners of the units, including the Respondent, have bound themselves to the declaration as recorded in the public records of Volusia County, Florida, and should not now be heard to change such document, after the fact, when the Respondent has relied upon the fact that she owned a 20% interest in the common elements for each of her units and she cannot be placed in a position of status quo after the buildings have been destroyed and she receives less than she has paid initially for the units.

Has the Petitioner even met the requisites required by law to reform the Declaration of Condominium? The equitable right to reformation is only granted when the requisites for the bringing of such action are present and when the true intention of the parties is not clear and accurately expressed in the document sought to be reformed. In the present situation, the "parties" does not happen to include Respondent since the Respondent only came into being after the document which is being reformed was already of record and was then relied on by said Respondent. The courts have also found that where reformation is the relief sought, a previous demand for correction of the instrument is essential.

Smith v. Pattishall, 176 So. 568, 127 Fla. 474, 129 Fla. 498 (Fla. 1937). Such requisite is clearly ingrained in the laws of the State of Florida and must be present before any action for reformation can be sustained.

No such demand for reformation is reflected in the testimony or evidence. The Final Judgment of the trial court provides in part:

> That through a mistake of the developer and the attorney drafting the Declarations of Condominiums attached to Plaintiff's Complaint, the Declarations improperly provided paragraph 4.2(a) thereof that the undivided share in the land and other common elements and in the common surplus was 20% for all five (5) units (R 386).

The lower court therefore seems to find a basis for reformation in the mistake of the developer. It is clear, again, that the mistake is not likewise the mistake of the Respondent because such mistake was unilateral at the hand of the developer at the time of drafting of the document. It was relied on in its then present form by the Respondent at the time of purchase of each of the units which were purchased individually and separately (R 149, 162).

The courts have steadfastly found that mistake, to be sufficient as a ground for reformation, must be mutual unless the mistake was accompanied by fraud or inequitable conduct on the part of the other party. The courts have found that unless the mistake contained in an instrument is mutual (in the absence of wrongdoing) then the instrument will not be reformed in equity. In the case of Carr v. Kissimmee, 80 Fla. 759, 86 So. 699 (Fla. 1920), the courts early on found the resolution of a city council expressing only the intention of the city with no other parties involved and not concerning other parties cannot be reformed in the courts. The courts have reasoned that there was no meeting of the minds when there is only one party and thus no agreement can be reformed when there is only one party. The mistake must be mutual and therefore, in the minds of

more than one party for it to be reformed. The present condominium declaration would thus stand as written and not be reformed following such reasoning, for as found by the court (R 386), the only mistake was that of the developer and his agent, the draftsman.

In the case of Rosenthal v. First National Fire Insurance Company, 74 Fla. 371, 77 So. 92 (Fla. 1917), the courts found that the documents would not be reformed when there was an impossibility of returning parties to the status quo position as is our case when the buildings have been destroyed and the only thing left to do is to divide proceeds. A return of 25% of the proceeds rather than 40% of the proceeds as called for in the Declaration of Condominium would be very clearly inequitable to the Respondent for reason that she would receive less than the amount she originally paid when she purchased the propert (R 145, 148). All other parties would receive more than the amount of their purchase. The evidence and testimony adduced at the trial court clearly indicated that a very short passage of time occurred between the purchase of the units by the Respondent and the destruction by fire of the condominium. During such time and prior thereto, the testimony further shows that the Respondent obtained copies of the Declaration of Condominium from each of the sellers and relied on such declaration and bought with constructive notice and belief that she obtained 20% ownership of the common elements and thus the insurance proceeds for each of the two units she purchased (R 126, 129, 130, 149, 189). There is no clear and convincing evidence to the contrary. The courts have variously found when dealing with mistake, (and even in such cases before the court the mistake was mutual), that where the evidence as to facts of any mistake is conflicting and does not establish a mistake in a satisfactory manner, reform will be denied. Fidelity Phenix Fire Insurance Company v. Hilliard, 65 Fla. 443,

62 So. 585 (Fla. 1913). The cases are all consistent that the mistake must be mutual in the absence of any inequitable conduct. The mistake in the present case was clearly not mutual because the Respondent was not involved in the original drafting and even in the Final Judgment of the trial court, the court has found that the mistake was that of the developer and the attorney employed by the developer (R 386).

Was there then, inequitable conduct or fraud present which is required by the court in the absence of mutual mistake? Such would clearly be necessary in the absence of a mutual mistake. In the case of Robinson v. Wright, 425 So.2d 589 (Fla. 3d DCA 1983), the court stated:

> A written contract will not be reformed on the basis of a unilateral mistake absent clear and convincing proof of a fraud or inequitable conduct by the other side. Camichos v. Diana Stores Corp., 157 Fla. 349, 25 So.2d 864 (Fla. 1946); Hopkins v. Mills, 116 Fla. 550, 156 So. 532 (Fla. 1934).

There is no testimony or evidence reflected in the lower court proceeding which demonstrates any fraud or inequitable conduct on the part of the Respondent and the lower court did not find any such conduct in its Final Judgment. The requisites for reformation, consisting of mutual mistake or in its absence, inequitable conduct or fraud, are clearly not present in this case. Even where there is a mutual mistake the courts have found that there will be no intervention, unless the party against whom the equity is asserted, as well as the party who asserts it, can be restored substantially to the same situation as prior to the reformation. Smith v. Pattishall, 176 So. 568, 127 Fla. 474, 129 Fla. 498 (Fla. 1937); Herring v. Fitz, 43 Fla. 54, 30 So. 804 (Fla. 1901).

The declaration of condominium clearly sets forth, in its provision, that each unit contains 20% ownership of the common elements and further, that any

insurance proceeds should be divided in accordance with the ownership of the common elements (R 317). There is no interpretation required of the clear wording of the declaration of condominium. Such declaration was likewise recorded among the Public Records of Volusia County, Florida and is indicated on the exhibit consisting of the Declaration of Condominium (R 307, 339). The declaration clearly spells out the interests of the parties and is constructive notice to the world and should be adhered to.

The declaration should not be reformed. First, because there is no mutual mistake; the mistake was unilateral as found by the court in the Final Judgment (R 386). Secondly, there is no inequitable conduct or fraud demonstrated in the testimony or evidence and the court did not find any in its Final Judgment (R 385, 388). Thirdly, the parties cannot be returned to their proper position even if the mistake were mutual and the courts will not grant reformation against a bona fide purchaser for value without notice or others who cannot be placed in status quo. Herring v. Fitz, 43 Fla. 54, 30 So. 804 (Fla. 1901). The reformation by the trial court was, therefore, in error and without basis in law.

III. QUESTION

DID THE TRIAL COURT FIND SUFFICIENT EVIDENCE TO SUPPORT REFORMATION OF THE DECLARATION OF CONDOMINIUM OF A THEN DESTROYED CONDOMINIUM?

ARGUMENT

THE TRIAL COURT DID NOT FIND SUFFICIENT EVIDENCE TO SUPPORT THE REFORMATION OF A DECLARATION OF CONDOMINIUM OF A THEN DESTROYED CONDOMINIUM.

Even if, arguably, a court of equity could reform a declaration of condominium without complying with the statutory Condominium Act provisions, the level of proof required to do so was not met by the trial court. The Final Judgment of the trial court recites:

> A preponderance of the evidence establishes facts from which it can be found...
> (R 387)

This court has held that a preponderance of evidence is not sufficient. Rather, grounds for reformation must be proven by clear and convincing evidence. Bell Corporation v. Bahama Bar and Restaurant, Inc., 74 So.2d 294 (Fla. 1954); Palilla v. St. Paul Fire & Marine Insurance Company, 322 So.2d 46 (Fla. 1st DCA 1975). Therefore, if consistency is to be preserved, this Court must find that the level of proof required by the court in the Bell Corporation case has not been met by the evidence before the trial court by its own published admission.

Absent such appropriate level of proof, case law requires that there be no reformation of a document and the finding by the trial court that the Declaration of Condominium be reformed should, therefore, be overturned.

IV. QUESTION

DID THE TRIAL COURT ERR IN FINDING PETITIONER TO BE THE PREVAILING PARTY AFTER REFORMING THE DECLARATION OF CONDOMINIUM?

ARGUMENT

THE TRIAL COURT ERRED IN FINDING THE PETITIONER TO BE THE PREVAILING PARTY AFTER REFORMING THE DECLARATION OF CONDOMINIUM.

If the trial court's reformation is upheld, the Petitioner could still not be deemed the prevailing party on the face of a Declaration which read in favor of Respondent at the time the action was initiated. Certainly, if the Declaration of Condominium is to be left intact as the Fifth District Court of Appeal found, then, Petitioner would not be the prevailing party.

The Declaration of Condominium provides that each unit shall be entitled to 20% of the common elements and upon destruction of the condominium insurance proceeds shall be shared on the basis of ownership of the common elements (R 317). Appellant brought action to enforce just such provision as it was written. The Declaration of Condominium further provides:

> 12.2 Compliance and default; Costs and attorneys' fees. In any proceeding arising because of an alleged failure of a unit owner or the Association to comply with the terms of the Declaration, Articles of Incorporation of the Association, the By-Laws, or the Regulations adopted pursuant to them, and the documents and Regulations as they may be amended from time to time, the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees as may be awarded by the court.

The Declaration of Condominium was not amended and existed in the form recited at the time action was brought by the Respondent. The trial court then entered a Final Judgment reforming the Declaration of Condominium and further finding:

> 3. The Plaintiff is not awarded attorneys fees and costs as prayed for in her Complaint for Declaratory relief as paragraph 12.2 of the subject Declaration provides that attorneys shall be awarded to the 'prevailing' party. Defendant and not Plaintiff is the prevailing party in this action.

5. This Court reserves jurisdiction to award attorneys fees and costs and such other orders as to the Court appears proper and just.

It thus appears that the specific wording of the Declaration of Condominium was originally in the form asserted by the Respondent and the provision allowing attorneys' fees for the enforcement of this specific provision was overlooked by the lower court. The lower court instead chose to reform the document and then, after the fact, find that the Petitioner was the prevailing party on the Declaration of Condominium not as it originally read, but in its changed form. Petitioner was not the prevailing party in the document as it originally was written at the time the lawsuit was filed.

The question then becomes whether the trial court can reform the document so that it relates back to a time prior to the reformation to provide that the Petitioner is the prevailing party, on the document as changed, and thus entitled to attorney's fees. The proper, equitable analysis of such a reformation really involves a determination of whether the reformation is between the parties to the original agreement or whether a third party is involved. In the present case clearly, Respondent is a third party and pursuant to the order of the court is not a party to the mistake (R 385). Is it then equitable to have the reformation relate back to the beginning of the present action and reform the document and find that the Petitioner was thus the prevailing party? This is clearly not within the contemplation of the courts. It has been found upon reformation of an instrument:

> It is a general rule that as between parties to an instrument a reformation relates back to the date of an instrument, but that as to third parties who have acquired rights under the instrument, the reformation is effective only from the date thereof.
> Straight's Trust v. Commissioner, 245 F.2d 327, 330 (8th Cir. 1957)

It would, therefore, be inappropriate for the trial court to reform the Declaration of Condominium and, once reformed, find that, as to the new language, unknown until such change, the Petitioner was the prevailing party and would thus be entitled to an award of attorney's fees. The trial court erred in so reforming the document and subsequently erred in finding the Respondent as the prevailing party since the Respondent was clearly a third party who acquired rights under the instrument and was not an original party to the Declaration of Condominium.

Finding Respondent entitled to reasonable attorney's fees would likewise be consistent with the provisions of the Condominium Act which have been adopted by the Declaration of Condominium (R 307), most specifically, Fla. Stat. 718.303(1), in which it is provided, and has been endorsed by the courts, that the prevailing party in an action brought pursuant to the provisions of the Condominium Act is entitled to recover reasonable attorney's fees. Towerhouse Condominium, Inc. v. Millman, 410 So.2d 926 (Fla. 3d DCA 1981). For these reasons, the Respondent should be considered the prevailing party in this action and be deemed by this Court to be entitled to reasonable attorney's fees under the Declaration of Condominium and under Chapter 718, Florida Statutes, the Condominium Act, which has been embodied in the Declaration of Condominium.

CONCLUSION

The decision of the Fifth District Court of Appeals, requiring that any amendment or change of a declaration of condominium requires that certain statutory prerequisites be followed, should be upheld. The courts have consistently found that such statutory provisions embodied in Fla. Stat. 718.110(4) which require statutory adherence when a declaration of condominium is amended or changed to alter the percentage of ownership in the common elements or common surplus must be adhered to. Such adherence has been espoused by the Second District Court of Appeal, the Third District Court of Appeal and the Fifth District Court of Appeal. This Court has likewise found that a condominium is a creature of statute and as such, the statute should control in those specific cases where an alteration of such declaration of condominium is clearly spelled out by the statutes. The decision of the Fifth District Court of Appeal should, therefore, be upheld.

The finding of the Fifth District Court of Appeal that there was no mutual mistake should likewise be followed for reason that the evidence supports the finding that the Respondent was not one of the parties to the original Declaration of Condominium as drafted and recorded, and did, in fact, purchase her two units of a five unit condominium based upon reliance upon those recorded condominium documents. The Respondent received exactly the interest in the common elements that was spelled out in the Declaration of Condominium as it existed, of record and in Tallahassee, on the date she obtained title to such units. The evidence further supports the finding that the Respondent made no mistake and all of her actions and the testimony reflect that she was not of the opinion that she owned a lesser interest than that spelled out in the Declaration of Condominium.

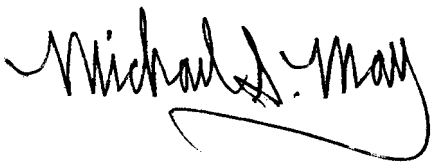
The decision of the Fifth District Court of Appeals should further be upheld for reason that the Petitioner failed to prove any mutual mistake by the required level of evidence necessary for a common law reformation which requires clear and convincing proof rather than the preponderance of evidence found by the trial court in its Final Judgment.

The trial court erred when it found the Petitioner to be the prevailing party and thus, entitled to attorney's fees and costs in an action to interpret the clear understanding and intent of the recorded Declaration of Condominium which uncontrovertedly, on its face, called for the Respondent to receive 40% of the insurance proceeds. The document, as it read at the time the action was instituted, was as has been interpreted and urged by the Respondent. The Petitioner could therefore, not be the prevailing party under the very wording of the Declaration of Condominium as it existed at the time action was brought to enforce it. Only after reformation and alteration of the Declaration of Condominium could the Petitioner be considered the prevailing party of a document which was later, by the decision of the Fifth District Court of Appeal, changed to deny such reformation thus, leaving the Respondent as the prevailing party. The law further provides support for the proposition that any reformation will not be construed retroactively to cut-off the rights and vested interest of third parties not initially parties to the document being reformed and Respondent was clearly not a party to the document but did have a vested right under such document. The decision of the Fifth District Court of Appeal should, therefore, be upheld in its finding that there was not mutual mistake and that the statutory provisions control the amendment of a declaration of condominium.

The Respondent should, therefore, be considered the prevailing party under

the Florida Statutes, embodied in the Declaration of Condominium and the very wording of the Declaration of Condominium and should thus, be entitled to reasonable attorney's fees as a matter of law. The decision of the Fifth District Court of Appeals should, therefore, be upheld and the cause remanded with directions to the trial court to enter Judgment for the Respondent as the prevailing party and with directions to award reasonable attorney's fees.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Resondent has been furnished by hand delivery to Harland L. Paul, Esquire, Attorney for Petitioner, 120 E. Georgia Avenue, DeLand, Florida 32720 and Patrick W. Gillen, Jr., Esquire, 345 N. Woodland Blvd., DeLand, Florida 32720, this 24 day of July, 1986.

MICHAEL S. MAY