

IN THE SUPREME COURT OF FLORIDA

PROVIDENCE SQUARE ASSOCIATION, INC.,

Petitioner,

vs.

CONNIE BIANCARDI,

Respondent.

DISTRICT COURT OF APPEAL
CASE NO.: 85-461

SUPREME COURT CASE NO.
68,304

PETITION FOR DISCRETIONARY REVIEW OF
THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT OF FLORIDA

BRIEF OF RESPONDENT,

CONNIE BIANCARDI,

ON JURISDICTION

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STATEMENT OF CASE AND FACTS

Petitioner, PROVIDENCE SQUARE ASSOCIATION, INC., is seeking to review a decision of the District Court of Appeal, Fifth District, State of Florida, dated January 16, 1986.

Petitioner was the Defendant at the Circuit Court level and the Appellee appearing before the District Court of Appeal. The Respondent, CONNIE BIANCARDI, was the Plaintiff at the Circuit Court level and 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. The District Court reviewed such matter and reversed the lower court judgment and remanded the cause for further proceedings to the Circuit Court.

PROVIDENCE SQUARE ASSOCIATION, INC., shall be referred to as the Petitioner in this brief and the Respondent, CONNIE BIANCARDI, shall be referred to as such in this brief.

On July 1, 1981 the 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, and with the State of Florida in Tallahassee. The condominium, Providence Square, was a five unit condominium as depicted on the Declaration of Condominium and as reflected in the decision rendered by the District Court of Appeal below. The Respondent purchased two units of such condominium. One such purchase being on January 31, 1984, the other purchase being on March 19, 1984. The properly recorded Declaration of Condominium, along with the Articles of Incorporation and By-Laws of the con-

dominium, were furnished to Respondent prior to the time she purchased her units. According to the documents she owned a forty (40%) percent interest in the common elements and common surplus of the building for the combined ownership of her two units. According to the documents she was entitled to a 40% interest in any insurance proceeds of the condominium should there be destruction of the premises. Providence Square condominium was destroyed by fire shortly after Respondent's purchases on April 6, 1984. Respondent sought forty (40%) percent of the insurance proceeds and was denied. The Respondent brought action in the Circuit Court for determination that she was entitled to 40% interest in the insurance proceeds. The Circuit Court reformed the recorded Declaration of Condominium finding that Respondent was only entitled to twelve and one-half (12-1/2%) percent ownership interest in the insurance proceeds of each of the condominium units she owned. The basis for the Circuit Court action, as found by the District Court of Appeal, was based upon the fact that her two units comprised only a 25% mass of the building. The Circuit Court never used the term "scrivener's error" in the decision it rendered as has been represented by Petitioner in its Statement of Case and Facts. The Circuit Court merely concluded that through a mistake of the developer and the attorney drafting the Declaration of Condominiums that there had been an improper division of the undivided share in the land based upon the mass of the building. The lower court then reformed the Declaration of Condominium changing the ownership interest of Respondent after her purchase of the two units and after reliance upon the recorded Declaration of Condominium. The Respondent appealed the decision of the Circuit Court and

the District Court ruled that the Declaration of Condominium was not ambiguous and the developer sold the units according to the Declaration of Condominium and other recorded documents unto Respondent. The District Court of Appeal found that the trial court's finding of a mutual mistake was erroneous and the judgment of the Circuit Court was reversed and the cause remanded for further proceedings. The District Court of Appeal made no further findings regarding the factual matters of the Circuit Court.

SUMMARY OF ARGUMENT

The holding of the present case in the decision of the Fifth District Court of Appeal is not in direct conflict with the decision of any other District Court, but is in specific compliance, by its very wording, with the dicta urged by Petitioner in Clearwater Key Association South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983) reflecting that a correction may be made for draftsman's mistake. This language is clearly endorsed by the District Court of Appeal and found in the quote of such court recited by Petitioner at page 5 of its brief wherein the District Court recited that "a scrivener's error or like mistake may be corrected by the developer or its successor by following the proper procedure in Tallahassee".

The holding of the District Court of Appeal is likewise in accordance with the decisions rendered by this court as expressed in the case of Carr v. Kissimmee, 80 Fla. 759, 86 So. 699 (Fla. 1920) where there is a unilateral act absent a mutual mistake. There was no mutual mistake in the present case and the court so found in its decision.

QUESTION PRESENTED

WAS THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THE CASE BEFORE THE COURT IN DIRECT CONFLICT WITH THE DECISION OF ANY OTHER DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA OR OF THIS COURT IN ANY PRIOR DECISIONS?

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THE CASE BEFORE THE COURT IS NOT IN DIRECT CONFLICT WITH THE DECISION OF ANY OTHER DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA OR OF THIS COURT IN ANY PRIOR DECISIONS.

The Petition sets out as its sole basis for urging this court to exercise its right for discretionary review its interpretation of the Fifth District Court of Appeal's decision that such court ruled that a Circuit Court had no power to reform a Declaration of Condominium to correct the draftsman's mistake. This was not the finding of the District Court of Appeal. In fact the District Court of Appeal at 11 FLW 214 specifically found:

a scrivener's error or like mistake may be corrected unilaterally by the developer or its successor by following the proper procedure in Tallahassee.

The decision of the District Court of Appeal, Fifth District, is thus not in conflict with any other District Court of Appeal decision nor a decision of this court. The court's true decision was founded upon the basis that such document had been distributed unto Respondent after it was properly recorded in Volusia County and after it was properly recorded with the State and reliance was made upon such documents by Respondent and the condominium subsequently burned to the ground. The court was thus ruling that after such destruction and at a point in time when the status quo could not be restored there could be no unilateral correction of a

document upon which the proper reliance had been placed. The District Court found that there was no mutual mistake.

The District Court found that condominium declarations are similar to City Charters and like documents. In a case decided very early by this Court, Carr v. Kissimmee, 80 Fla. 759, 86 So 699 (Fla. 1920), this court found that 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. Courts have reasoned that in such instances 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 before it can be reformed. The District Court found there was no mutual mistake. The present condominium declaration would thus stand as written and not be reformed following such reasoning.

In the case cited by Petitioner, Clearwater Key Association South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983) there was a mutual mistake and the court did not merely rely upon a scrivener's error for its reformation. The actual facts in the Clearwater Key case indicated that it was a case in which an owner of two condominium units was one of the parties of the Condominium Association was the other party by virtue of disputed language. The dispute was over whether a monthly management fee should be assessed for one unit or two units. The unit owner therein owned two units; however, at the time of purchase the sales staff indicated that there would be only one fee assessed and such was a mutual understanding of the parties. The Declaration, however, was to the

contrary. The mutual misunderstanding was one of representations made by the agent of the seller, developer and the purchaser of the true intent regarding assessment. The two parties clearly had one understanding of the document while the clear language of the declaration specifically spelled out another interpretation. This is not the case before the court. The Clearwater Key case did not rule based upon the scrivener's error. In fact such matter was clearly contrary to the final ruling of the court and is merely dicta. The court in the Clearwater Key case specifically found that it was invalid to reform the Declaration of Condominium (where mutual mistake existed) when it materially conflicted with controlling statutory provisions. The District Court of Appeal in the present decision found that the Declaration of Condominium did not conflict with any provision of the condominium statute, but should not be reformed absent a mutual mistake. The decisions are thus consistent rather than being inconsistent.

The decision of the Fifth District Court of Appeal is likewise consistent with the finding of this court in the case of Carr v. Kissimmee, 80 Fla. 759, 85 So. 699 (Fla. 1920) which ruled that there must be a mutual mistake before a reformation shall occur and such would not follow in the instance of a resolution of City Council expressing only the intention of the city. The District Court of Appeal in the present case found "the trial courts' finding of a mutual mistake is erroneous". The decision of the District Court of Appeal is thus consistent with the rulings of this court.

The decision of the District Court of Appeals is not inconsistent with the Clearwater Key case and in fact specifically agrees with such case by its very

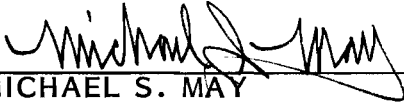
language in regard to the dicta recited in the Clearwater Key case. The District Court of Appeal decision is likewise not inconsistent with the findings of this court and for such reasons discretionary review should be denied.

CONCLUSION

The specific point urged by Petitioner and its authority Clearwater Key Association South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2d DCA 1983) are consistent with the decision of the District Court by the very language of the District Court expressed in their opinion which acknowledges that a scrivener's error may be corrected provided appropriate action is taken following the proper procedure in Tallahassee. The present decision is likewise consistent with the rulings of this court wherein it has been found that a resolution of a City Council expressing only the intention of the city with no other parties involved cannot be reformed in the courts. Respondent would therefore urge this court to find that the decision reached by the Fifth District Court of Appeal is not in conflict with other decisions rendered and therefore this court should not exercise jurisdiction to review the present decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. mail to: HARLAN L. PAUL, Attorney for Providence Square Association, Inc., Post Office Drawer DD, DeLand, Florida 32720; and to PATRICK W. GILLEN, JR., Attorney for Empire of America, FSA, Post Office Box 3010, DeLand, Florida 32723-3010, this 3 day of March, 1986.



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