

IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
FEB 17 1986
CLERK, SUPREME COURT
BY _____
Case No. 68,304

PROVIDENCE SQUARE ASSOCIATION, INC.,

Defendant/Petitioner,

-vs-

CONNIE BIANCARDI,

Plaintiff/Respondent,

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

BRIEF OF PETITIONER ON JURISDICTION

Harlan L. Paul, Esquire
JAMES, ZIMMERMAN, PAUL & CLAYTON
P. O. Drawer DD
DeLand, Florida 32720
(904) 734-1200
Attorney for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
CITATION OF AUTHORITIES	ii
STATEMENT OF THE CASE AND OF THE FACTS	1
QUESTION PRESENTED	4
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	8
APPENDIX - COPY OF DECISION OF DISTRICT COURT OF APPEAL, FIFTH DISTRICT	9
CERTIFICATE OF SERVICE	13

CITATION OF AUTHORITIES

	<u>Page</u>
<u>Clearwater Key Association--South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2nd DCA 1983)</u>	6, 7, 8

STATEMENT OF CASE AND FACTS

Defendant, Petitioner, PROVIDENCE SQUARE ASSOCIATION, INC., seeks to have reviewed a decision of the District Court of Appeal, Fifth District, dated January 16, 1986.

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. 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. 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. 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". 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. 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 had 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.

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 did not dispute the factual findings of the trial court but instead

reversed the trial court's decision as a matter of law stating "There are some mistakes which a court cannot correct and this is one example. The courts cannot change a Declaration of Condominium...". Petitioner seeks to have the Appellate Court's decision reviewed as it expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same point of law.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THOSE CASES HOLDING THAT A COURT OF EQUITY HAS THE POWER TO REFORM CONDOMINIUM DECLARATIONS TO CORRECT A DRAFTSMAN'S MISTAKE.

SUMMARY OF ARGUMENT

Jurisdiction of this Court is founded upon direct and express conflict with a decision of this Court or the decision of another District Court. The holding of the Fifth District Court of Appeal in the instant case expressly and directly conflicts with the case of Clearwater Key Association--South Beach, Inc., v. Thacker. 431 So.2d 641 (Fla. 2nd DCA 1983). The Fifth District Court held that Condominium Declarations are not subject to reformation by the courts on account of mistake or scrivener's error. The Second District Court's holding in the Clearwater Key case stands for the proposition that Condominium Declarations can be reformed to correct draftsman's mistakes. Because of this apparent conflict, Petitioner requests this Court to extend its discretionary jurisdiction to this cause.

ARGUMENT

THE PRESENT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THOSE CASES HOLDING THAT A COURT OF EQUITY HAS THE POWER TO REFORM CONDOMINIUM DECLARATIONS TO CORRECT A DRAFTSMAN'S MISTAKE.

In reviewing the opinion of the Fifth District Court, and the holdings noted therein, it is clear that the court determined that Condominium Declarations are not subject to reformation on account of mistake or scrivener's error. The court held in the instant case:

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."

The court further stated:

Any fault or inequity alledged 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 the District Courts holding in its opinion attached hereto in the Appendix.

The same point of law was involved in the case of Clearwater Key Association--South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2nd DCA 1983). In that case, the Second District considered the reformation of a Declaration of Condominium by the trial Court. Although the court concluded that the reformation was invalid because it was 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.

It is clear that the decision of the Fifth District Court of Appeal in the instant case expressly and directly conflicts with the Second District Court of Appeal's case of Clearwater Key Association--South Beach, Inc. v. Thacker and therefore discretionary review should be granted.

CONCLUSION

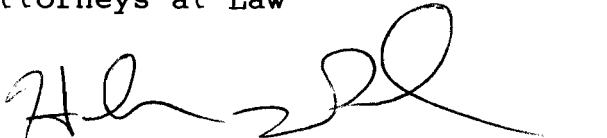
The decision of the District Court of Appeal, Fifth District, that the Petitioner, PROVIDENCE SQUARE ASSOCIATION, INC., seeks to have reviewed is in direct and express conflict with the decision of the District Court of Appeal, Second District, in the case of Clearwater Key Association--South Beach, Inc. v. Thacker, 431 So.2d 641 (Fla. 2nd DCA 1983). Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous and that the conflicting decision of the District Court of Appeal for the Second District is correct and should be approved by the Court as the controlling law of the State.

Petitioner, therefore, requests this Court to extend its discretionary jurisdiction to this cause, and to enter its order quashing the decision and order hereby sought to be reviewed, approving the conflicting decision of the District Court of Appeal of Florida, Second District, as the correct decision, and granting such other and further relief as shall deem right and proper to this Honorable Court.

Respectfully submitted,

JAMES, ZIMMERMAN, PAUL & CLAYTON
Attorneys at Law

By: _____


Harlan L. Paul, Esquire
Attorney for Petitioner
P. O. Drawer DD
DeLand, Florida 32720
(904) 734-1200