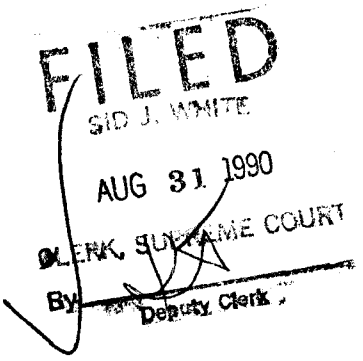
IN THE SUPREME COURT,
STATE OF FLORIDA

CASE NO: 76,167



PALMA DEL MAR CONDOMINIUM ASSOCIATION #5 OF ST. PETERSBURG, INC., a Florida not-for-profit corporation,

Petitioner,

vs.

COMMERCIAL LAUNDRIES OF WEST FLORIDA, INC., a Florida corporation,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Petition for Discretionary Review from the Second District Court of Appeal, Case No: 89-02144, after appeal from Circuit Court Hillsborough County Civil, Division Case No: 88-19407 Div. F Honorable J.C. Cheatwood

FERDIE AND GOUZ
Attorney for Respondent
717 Ponce de Leon Blvd., Suite 215
Coral Gables, Florida 33134-2084
Telephone: (305) 445-3557

TABLE OF CONTENTS

TABLE OF CASE AND OTHER AUTHORITIES

CONTINUATION OF TABLE OF CASES

TABLE OF OTHER AUTHORITIES

STATEMENT OF THE FACTS AND CASE

Respondent agrees with Petitioner's Statement of the Facts and Case subject to the following clarifications and additions.

First, the August 1, 1983 lease constituted a third lease on the premises and was a renegotiation of the prior lease.

Second, while couched in terms of declaratory judgment the substance of Petitioner's complaint (and relief sought and granted in trial court) was to declare the lease unenforceable and to evict Respondent from the premises, although there was no default in the lease.

Third, prior to the Summary Judgment hearing Judge Cheatwood had denied a Motion to Dismiss.

Fourth, the Respondent had filed an affidavit in opposition to Petitioner's Motion for Summary Judgment. Petitioner never filed an Affidavit or sworn pleading or evidence in the trial court. Respondent had performed all conditions required by the lease.

Fifth, petitioner's invocation of "discretionary jurisdiction" is based on stated conflict in the opinion, however, such conflict in fact was moot since the Second District Court of Appeal also recognized legislative clarification, to the erroneous opinion in Wash Bowl.

Sixth, the present proceeding is directed to the Second District Court of Appeals' opinion which is now reported at 561 So.2d 1233 (Fla. 2d DCA, 1990).

SUMMARY OF ARGUMENT

The Second District Court of Appeal's opinion was correct that Fla.Stat., 718.3025 did not apply to the lease of space in the common elements or limited common elements by an association, where the association as landlord received rent from a Tenant such as a Commercial Laundry Vendor. Even if there was room for interpretation i.e. Wash Bowl v. Village Green, 485 So.2d 1307 (Fla. 3d DCA, 1986) when the legislature adopted 718.3025(4) in 1986 such amendment was "clarifying" or "remedial" and had retrospective effect. Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985); Adams v. Wright, 403 So.2d 391 (Fla. 1981); and U.S. Fire Ins. Co. v. Roberts, 541 So.2d 1297 (Fla. 1st DCA, 1989).

Any law suit two years later seeking to make a lease unenforceable based on Wash Bowl was frivolous, the law having been settled by clear legislative intent.

A landlord has no vested property right where a provision is not contained in the lease but only by statutory implication, and such legislative grant may be abrogated by the legislature and will be given retrospective effect. Xanadu of Cocoa Beach Inc. v. Lenz, 504 So.2d 518 (Fla. 5th DCA, 1987).

The acceptance of rent for two years after the Amendment constituted a waiver as a matter of law. Akins v. Bethea 33 So.2d 638 (Fla. 1948). If not waiver or estoppel as a matter of law, it was a matter of fact precluding Summary Judgment.

In Declaratory Judgment actions the Court will look to

substance over form and allow attorney's fees where contract or statute allow the same. The Court will not take a technical or unrealistic view but will look at a broad interpretation to allow attorney's fees. All Ways Reliable Building Maintenance Inc. v. Moore, 261 So.2d 131 (Fla. 1972). A Court of appeals need not make specific findings to allow attorneys fees as costs under Fla.Stat., 57.105 or under the lease or "previous lease". Where the respondent, a corporation is required by law to have an attorney to appear in Court to enforce the lease and prevent the lease from being declared void and and enfoceable and the tenant evicted, fees are appropriate fees are allowable under both theories since Petitioner raised no issue of fact, and its legal argument was frivolous having been acted on previously and the legislative intent being clear.

POINT I

THE SECOND DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT SECTION 718.3025, FLORIDA STATUTES, (1983), DID NOT APPLY TO LAUNDRY SPACE LEASES

Judicial construction of a Statute is to be applied only when legislative intent cannot be determined. Where the legislature has spoken, the Courts will favor the upholding of legislative intent.

Particularly troublesome is the Florida Condominium Act. The act itself is in derogation of Common Law and is to be strictly construed.

The policy reason for this is that the act restricts, restrains, and imposes various requirements that may impact upon Federal and State constitutional prohibitions against impairment of contract, equal protection and due process. For example, the act may make a contract with a condominium different that a similar contract with an apartment building or interval ownership.

Likewise, other laws i.e., age discrimination etc., may impact or restrict condominium activity.

This present case was determined by the trial court on a summary judgment in which Petitioner presented no sworn motion or pleading or affidavit and in which the Tenant had complied with all lease requirements and presented affidavit in opposition.

Conversely, Wash-Bowl Vending Co. Inc., v. No. 3 Condominium Association Village Green, Inc., 485 So.2d 1307 (Fla. 3d DCA, 1986), was a result of a contested non-jury trial resulting in a judgment upheld by the Third District Court of Appeals.

The standard thus applied in Wash Bowl by the Third District Court of Appeals was whether Judge Barad's decision itself was clearly erroneous, and even there the language of the decision was curious. For example, pg. 1310 "Second, we are asked to decide whether Wash-Bowl complied with the Statute as much as was practicable given the differences between a laundry space lease and a contract for the operation, maintenance or management of property serving the unit owners."

The Court then goes on to make factual determinations and fails to distinguish between "unit owners", "unit tenants", "visitors" and the ASSOCIATION.

Instead, the Third District Court of Appeals said:

> "Since no valid explanation is offered by Wash-Bowl as to why the nature of laundry space lease makes it impracticable to conform to these requirements, Wash-Bowl's contention that it complied with the Statute to the extent it was feasible to do so fails".

This was a factual determination that failed to answer the fundamental question as to the distinction and applicability to "space leases", while acknowledging that a space lease is different than a "contract for the operation, maintenance or management of property serving the unit owners".

By their reasoning, the Coca Cola machine, the utilities, the restaurant lease, the pay telephone, newspaper delivery, taxi service, medical treatment, and any other vendor or provider coming to the premises or "serving" a unit owner off the premises would be covered by the Statute. Indeed, it would create a separate class of persons without a showing of why such group is singled out.

The holding of Wash-Bowl as to the applicability to laundry leases was promptly rejected by the legislature. The Wash-Bowl opinion was dated March 14, 1986 and Rehearing Denied April 16, 1986. On June 3, 1986 the house adopted the amendment to Florida Statute §718.3025(4) as part of CS for SB 192 which become law as C-86-175.

The Amendment provided:

> "Notwithstanding the fact that certain vendors contract with associations to maintain equipment or property which is made available to serve unit owners, it is the intent of the Legislature that this section applies to contracts for maintenance or management services for which the association pays compensation. This section does not apply to contracts for services or property made available for the convenience of unit owners by lessees or licensees of the association, such as coin operated laundry, food, soft drink, or telephone vendors; cable television operators; retail store operators; businesses; restaurants; or similar vendors."
> (emphasis added)

The Dade Circuit Court (the same Circuit from which the Wash Bowl case emanated) entered an Order Dismissing Cause with Prejudice in case of The Blue Grass Beach Club Motel Condominium, a Florida corporation, Not-for-profit, v. Cleanco Inc., a Florida corporation, Dade County Circuit Court, 11th Judicial Circuit, Case No. 86-41069 (27) dated December 23, 1986; and Seashore Club South Motel Condominium Association, Inc., not-for-profit, v. Wash-Bowl Vending, Inc., Dade County Circuit Court, 11th Judicial Circuit, Case No. 86-41068 (27), on December 24, 1986 based on the amendment.

Each order in effect held the Legislative Act to be remedial

and retroactive to negate the applicability of the Wash-Bowl decision to laundry lease cases decided after the amendment. Hillsborough County Circuit Court in Harbor Light Condominium v. Coin Operated Laundry, Inc., et. al.. in Case 87-12114 similarly found the statute remedial by dismissing that case with prejudice on October 12, 1987. In that case an appeal was taken to the Second District Court of Appeal which appeal was subsequently dismissed rendering the Judgment Final.

The legislature thus by the amendment made clear their initial intent and rejected the convoluted and impracticable reasoning and construction of the statute given by the Third District Court.

While these Circuit Court decisions are not controlling precedent, they were nevertheless an indication that the issue was considered settled until the present action, and was relied on by all concerned entities.

The controlling law on the effect of the Amendment is Lowry v Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). In this case this Court stated:

> "When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. United States ex rel. Guest v. Perkins, 17 F.Supp. 177 (D.D.C.1936); Hambel v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. Gay v Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952).

> In examining Chapter 947 in light of section 755.021(4), Florida Statutes (1983) and section 775.087(2), Florida Statutes (1983), it is unmistakable that the amendments contained in the pending bill are expressions of prior and continuing legislative intent. Thus we hold that while AGO 85-11 is a reasonable interpretation of the law, it does not represent legislative intent."

The Second District Court of Appeal, in Englewood Water District v J.D. Tate et al, 334 So.2d 626 (Fla. 2d DCA 1976) stated:

> "...If the intent of the legislature is clear and unmistakable from the language used, it is the Court's duty to give effect to that intent." (See also S.R.G. Corp. v Department of Revenue, Fla. 365 So.2d 687 (Fla., 1978).

In Adams v Wright, Fla., 403 So.2d 391 (Fla. 1981); this Court in holding 768.043(3) Fla.Stat. "Remedial", [a statute which employed words similar to 718.3025 Fla.Stat. (1986) i.e.; the words] "It is the intent of this legislature..." and finding that since a "Remedial Statute is designed to correct an existing law,...", the act was to have retrospective application.

Other cases have construed statutes of a remedial nature to be retroactive. City of Orlando v. Desjardines, 493 So.2d 1027 (Fla. 1986); American Cast Iron Pipe Co. v. Foote Bros., 458 So.2d 409 (Fla. 4th DCA, 1984); Fogg III v. Southeast Bank N.A., 473 So.2d 1352 (Fla. 4th DCA, 1985); Kawaski of Tampa Inc. v. Calvin, 348 So.2d 897 (Fla. 1st DCA, 1977); General Cap. Corp. v. Tel Service Co., 212 So.2d 369, (Fla. 2d DCA, 1965) and Grammer v. Roman, 174 So.2d (Fla. 2d DCA, 1965).

In the case of General Cap Corp. v. Tel Service Co., supra,

the Second District Court of Appeal addressed the effect of an amendment in the Usury Statute. In that case applying the law in effect at the time of execution, the instrument was prima facie usurious. However, a subsequent amendment was held to be retrospective and to dissipate the usury asserted at time of trial.

Section 718.3025(4) Fla.Stat., should receive like treatment, since a holding of "unenforceability" of a freely entered into contract is a penalty of the highest magnitude.

Since the decision in the Trial Court turned on judicial interpretation of a statute this Court should adopt in this instance the rule that Legislative intent will overrule an inconsistent judicial interpretation of the same legislative intent. Where the legislature as in this case, clarifies its own statute such "remedial" action is retrospective to any subsequent action based on the statute. Lowry v. Parole and Probation Commission, supra.

The amendment was clearly not a change in the law, but was "...to clarify what was doubtful and to safeguard against misapprehension as to existing law." U.S. Fire Ins., Co. v. Roberts, 541 So.2d 1297 (Fla. 1st DCA, 1989).

In Wash Bowl, the Third District Court further rejected a waiver argument. This was an alternate reason for rejecting the interpretation, since as a matter of law waiver, or its "kissing cousin", estoppel were clearly present in this case.

In the Wash Bowl opinion, it states at p. 1310, "waiver is the intentional relinquishment of a known right...however, there can be

no waiver without knowledge, express or implied, of that which is being waived..." (Emphasis added).

Means of knowledge, with duty of using them, are in equity equivalent to knowledge itself.

However, knowledge or notice may be actual, constructive, or implied. Applefield v. Commercial Standard Ins. Co., 176 So.2d 366 (Fla. 2d DCA, 1965). "...Every citizen is charged with knowledge of the domestic law of this jurisdiction". Akins v. Bethea, 33 So.2d 638 (Fla. 1945).

One can waive any contractual statutory or constitutional right. Doctrine of waiver can encompass not only intentional or voluntary relinquishment of known right, but also conduct that warrants inference of relinquishment of those rights. Miami Dolphins Ltd. v. Genden & Bach, P.A., 545 So.2d 294 (Fla. 3d DCA, 1989).

Public statutory law must be judicially noticed by the Courts. Florida Statute 90.201(1). The law thus constitutes either constructive or implied actual knowledge. All entities are presumed to know the law and while existing law generally is part of a contract, the parties may waive the same in the absence of a special specific legislative public policy holding that prevents the waiver or agreement.

A distinction should be made between vested contractual agreements freely bargained for and contained in the agreement [as in Fleeman v. Case, 342 So.2d 815 (Fla. 1976)] and those inferred as part of the contract, by statute. General Cap Corp. v. Tel

Service, Co., 212 So.2d 369 (Fla. 2d DCA, 1965); Xanadu of Cocoa Beach v. Lenz, 504 So.2d 518 (Fla. 5th DCA, 1987). As retroactive provision of a legislative act is not necessarily invalid. Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978).

The acceptance of benefits such as rent clearly constitutes waiver or estoppel as a matter of law.

If not as a matter of law, then as a matter of material fact, precluding the Summary Judgment entered by Judge Cheatwood. See Tollius v. Dutch Inns of America Inc., 244 So.2d 467 (Fla. 3d DCA, 1970). See also Bodden v. Carbonell, 354 So.2d 927 (Fla. 2d DCA, 1978). (As to acceptance of rent on an apartment complex laundry lease). The estoppel follows familiar rules such as apparent authority of agent to bind the principal. Stiles v. Gordon Land Co., 44 So.2d 417 (Fla. 1950).

Even if the condominium act is a consumer act for the protection of an individual unit owner, the same policy does not apply to contracts freely entered into by a unit controlled association. Indeed, frequently the condominium association has greater economic bargaining power than the parties it deals with. The unit owner would not necessarily under the condominium act receive all the information pertaining to the complex, and may not even occupy the unit, but such information would be available to the association board (and their management company, where such is employed). This case does not deal with a "developer" lease and in fact was a third laundry lease by the association with the same tenant or its predecessor.

The legislature has frequently amended the act to direct provisions towards conduct of developers and management companies. However, any restraint in contract is both in derogation of common law and the constitutional prohibition against impairment of contract. Thus, strict construction is called for and the courts should leave it to the legislature for specific clear determination of what is covered. This does not diminish the judicial role of limitation when the legislature goes too far and impacts on constitutional restraints.

The clear legislative intent should be given effect, and the Second District result upheld.

POINT II

THE REQUIREMENTS OF SECTION 718.3025, FLORIDA STATUTES, ARE CONTROLLING AS OF THE DATE OF THE CONTRACT WHICH IS THE SUBJECT TO THIS ACTION AND ANY SUBSEQUENT AMENDMENTS OPERATE PROSPECTIVELY AND NOT RETROACTIVELY.

Even if the above statement were accepted, the Amendment clearly defines the rules after June 3, 1986. Presuming the substance applied, and not the provisions relating to "enforceability", the associations remedy, if any, were damages for the breach. If they claimed eviction then exclusive jurisdiction was vested by constitution and statute in the county court. Palm Corporation v. 183rd Street Theater, 344 So.2d 252 (Fla. 3d DCA, 1977). Florida Statutes 34.011(2).

The association accepted the rent and benefits for two years before bringing their action. The action was decided on Summary Judgment and not trial. The Petitioner offered no evidence to indicate that they had not received separately or subsequently the "information". Their contention simply was form over substance.

The ratification after June 1986 for two years of the lease by acceptance of benefits would estop the association from the present action in light of the Amendment (Suit was filed July 27, 1988). Tollius v. Dutch Inns of America, Inc., 244 So.2d 462, 470 (Fla. 3d DCA, 1970). Shaw Brothers v. Parrish, 99 So.2d 610 (Fla. 1955); United Chemicals, Inc. v. Welch, 460 So.2d 540 (Fla. 1st DCA, 1984) Further, this was a third lease.

In Taylor v. Rosman, 312 So.2d 239 (Fla. 3d DCA, 1975) the Appellate Court reversed a trial court finding that a lease was

unenforceable (for non-compliance with §689.01 Fla.Stat.). The Court said that since a prior lease on "substantially the same form" existed, that the second agreement was not a "new lease" ..."but merely constituted an extension by renewal of the first lease." The Court further went on to find estoppel since the space was "...occupied...for almost two years under the similar first rental agreement, making rental payments thereto".

Here the prior lease would have renewed after October 1, 1986 (effective date of Amendment), so that the argument of ratification by renewal and estoppel should be equally applicable even if the amendment had prospective rather than remedial effect.

The amendment specifically stated: "This section does not apply to contracts, etc.". The Amendment does not state "not apply to contracts" entered into hereafter.

If the legislature give a right, the legislature retained the right to take that same right away. This has been applied in other real estate situations, i.e., Balloon Mortgage act; Usury acts; Marketable Title acts. Analogous to the relief sought was an action for specific performance which has a statute of limitations of one year. Florida Statutes 95.11(5) and a provision that laches follows the statute. Florida Statutes 95.11(6).

No vested contract right was involved. Where a rental agreement does not contain a statutory provision, it does not vest landlord with substantive rights one way or the other which for due process reasons preclude application of later enacted statute extending or withdrawing rights. Xanadu of Cocoa Beach Inc. v.

Lenz, 504 So.2d 518 (Fla. 5th DCA, 1987). At the most in this case there was an implied right under a statute which right had been abrogated by the legislature.

Since the law was changed previous decisions were no longer controlling. Dees v. State, 19 So.2d 705 (Fla. 1944) and further as a result of the changed law the contract should no longer be declared unenforceable, even if it previously might have been. Jaffee v. International Company, 80 So.2d 910 (Fla. 1955).

Even if prospective in effect, since there was a complete absence of any reliance by the Association on the Wash Bowl's opinion, the amendment is effective for the present litigation and petitioner could not properly proceed. The prospective effect would still make the lease enforceable.

POINT III

THE SECOND DISTRICT COURT OF APPEAL ERRED IN AWARDING APPELLEE ATTORNEY'S FEES SINCE NO BASIS FOR RECOVERY OF ATTORNEY'S FEES EXISTS BY CONTRACT OR STATUTE.

Unlike trial courts, Appellate Courts may award fees for frivolous actions without the usual findings under F.S. 57.105. The condominium act itself provides for attorney's fees under certain circumstances. Costs and attorney's fees are provided by Rule 9.400 Florida Rules of Appellate Procedure.

In the Trial Court below, Petitioner filed his action and asked for the following relief:

> "Wherefore, Plaintiff requests this Court order the following relief:
>
> A. Judgment declaring that the Exhibit "A" contract is unenforceable against Plaintiff and that Defendant is not entitled to possession, use, control or the right to operate or manage the portion of the condominium property which is the subject of the action. (Emphasis added)
>
> B. An order directing and requiring Defendant to remove its equipment from the subject condominium property and to return the operation and management of such property to Plaintiff. (Emphasis added)
>
> C. An award of general damages and the costs of this action.
>
> D. Such other and further relief as the Court deems proper."

The lease attached provided in paragraph 10:

> "In the event Lessee must resort to the services of an attorney for enforcement hereof or collection hereunder, then the Lessor shall be responsible to pay Lessee's reasonable attorney's fees incurred as a result thereof, together with all other costs or any other relief as provided by law."

The 1981 lease had the same provision:

Under Florida Law except in Small Claims actions, Small Claims Rule 7.050(f), a corporation must engage an attorney to enforce its rights and maintain a defense of enforceability of a lease.

It is conceded that Fla.Stat., 86.081 as provides "Costs" that the Court may award costs as are equitable. Florida Statutes 57.105 is considered a cost statute.

While the section, Fla.Stat., 86.081 cannot be expanded to provide attorney's fees in the absence of a contract or other statute, the existence of either another statute or contractual provision will be broadly constructed to allow the same since such is an equitable result.

The case cited by respondent are inapplicable and distinguishable. In Harris v. Richard N Groves Realty, Inc., 315 So.2d 528 (Fla. 4th DCA, 1975), fees were disallowed because the "broker was not a formal party to the contract". In Chesterfield Co. v. Ritzenheim, 350 So.2d 15 (Fla. 4th DCA, 1977), fees were denied based on a different language of the lease limiting fees to a "breach", and not "for enforcement hereof or collection hereunder".

By analogy Fla.Stat. 723.068 (Mobile Home Parks) provides attorney's fees "in any proceeding between private parties to enforce provisions of this chapter" an exception is made for refusal to mediate or arbitrate under Fla.Stat. 723.037(6).

In Vidibor v. Adams, 509 So.2d 973 (Fla. 5th DCA, 1977), the provision was held to be "mandatory" requiring an award of attorney's fees against a party voluntarily dismissing their suit in an action for "declaratory relief".

This court in All Ways Reliable Building Maintenance, Inc. v. Moore, 261 So.2d 131 (Fla. 1972) rejected in connection with attorney's fees under the insurance code a "...highly technical and unrealistic...view" preferring to look at the broad interpretation. Here, the Tenant, COMMERCIAL, while performing its covenants and paying its rent was forced to defend an attack on the "enforceability" of their lease and the right of possession of the space. While Fla.Stat. 718.303 may not be applicable since the Tenant is not a unit owner (or developer) still the contracted provision should be given its intended purpose. See Dolphin Towers Condo v. Del Bene, 338 So.2d 1268 (Fla. 2d DCA, 1980). The Final Summary Judgment in part said:

> "D. ...The laundry space lease...is invalid and unenforceable".

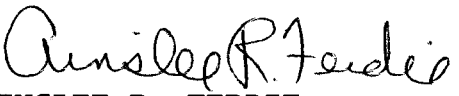
Thus, the proceedings in both Trial Court and Appellate Court andhere is an attack on the respondent's right to enforce their fees were proper.

Petitioner has failed to demonstrate that the Second District Court was erroneous.

CONCLUSION

Florida Statute 718.3025 did not apply to laundry space leases or similar space leases in which a condominium association is landlord and receives rent for a lease of a portion of common elements or limited common elements. From a judicial standpoint the 1986 Amendment was to be given retrospective effect as a remedial or clarifying act. Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). Even if the statute applied, the offending provisions not being in the lease, the legislature was free to abrogate them. Xanadu of Cocoa Beach Inc. v. Levy, 504 So.2d 518 (Fla. 5th DCA, 1987). The Second District Court of Appeal Opinion and the result should be upheld and the authorization of attorney's fees approved and further fees allowed the Respondent for services in this Court.

RESPECTFULLY SUBMITTED,



AINSLEE R. FERDIE

FERDIE AND GOUZ
Attorneys for Commercial Laundries
of West Florida
717 Ponce de Leon Blvd., Suite 215
Coral Gables, Florida 33134-2084

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of August, 1990 to: BRIAN P. DEED, ESQ., DEEB & BRAINDARD, P.A., Attorneys for Palma Del Mar, One 4th Street North, Suite 1770, St. Petersburg, Florida 33701 and to SPENCER & KLEIN, P.A., Suite 1901, 801 Brickell Avenue, Miami, Florida 33131.

FERDIE AND GOUZ
Attorney for Commercial Laundries
of West Florida, Inc.,
717 Ponce de Leon Blvd., Suite 215
Coral Gables, Florida 33134
Telephone: (305) 445-3557

By: Ainslee R. Ferdie
AINSLEE R. FERDIE
F.B. 024273