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

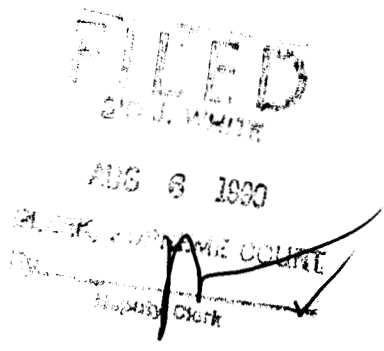
Petitioner

vs.

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

Respondent

_____/



PETITIONER'S INITIAL BRIEF ON THE MERITS

Petition for Discretionary Review from
the Second District Court of Appeal
Case No. 89-02144

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STATEMENT OF THE FACTS AND THE CASE

The Petitioner, PALMA DEL MAR CONDOMINIUM ASSOCIATION #5 OF ST. PETERSBURG, INC., is a condominium association charged with the operation, maintenance and management of a condominium located in Pinellas County, Florida. On or about August 1, 1983, the Petitioner executed a lease as lessor with the Respondent, COMMERCIAL LAUNDRIES OF WEST FLORIDA, INC., as tenant, for the use and occupancy of certain facilities on the condominium property as a laundry room. Under the lease, the Respondent was permitted to install and operate laundry equipment for the use and benefit of the residents of the condominium, and in exchange, the Respondent would pay rental to the Petitioner, which rental was based on a percentage of the revenue received by the Respondent through the use of the machines by the residents.

On July 27, 1988, the Petitioner filed its Complaint in the Circuit Court for Pinellas County, Florida, seeking the entry of a declaratory judgment declaring its rights under the subject lease. The prayer for relief by the Petitioner requested the Trial Court hold that the lease was unenforceable against the Petitioner, and that the Respondent was not entitled to use, occupance or possession of the laundry room facilities on the condominium property. The Complaint also requested the Trial Court to order the Respondent to remove its equipment from the condominium property. Pursuant to order of the Circuit Court of Pinellas

County, the case was transferred to the Circuit Court for Hillsborough County, Florida, based on a contractual provision concerning venue.

Both parties moved for entry of Summary Judgment, and at hearing, the Trial Court denied the Respondent's Motion and granted the Petitioner's Motion. On May 9, 1989, the Final Summary Judgment in favor of the Petitioner was filed in the Circuit Court for Hillsborough County. A Motion for Rehearing was filed by the Respondent, and, after hearing on July 19, 1989, was denied.

The Respondent filed its Notice of Appeal to the Second District Court of Appeal on or about July 31, 1989, which Notice sought review of the Final Summary Judgment, the Trial Court's denial of the Respondent's Motion for Rehearing, and the Trial Court's denial of the Motion of Amerivend Corporation to file a brief as Amicus Curiae on behalf of Respondent relating to the Motions for Summary Judgment. On October 12, 1989, Amerivend Corporation was granted permission by the Court of Appeal to file a brief as Amicus Curiae on behalf of the Respondent. On or about October 2, 1989, the Respondent filed a Motion for Attorney's Fees. After briefs, the Court of Appeal heard oral argument of the parties on April 11, 1990.

On May 11, 1990, the Court of Appeal rendered its Opinion reversing the Final Summary Judgment (A-19), and awarding the

Respondent attorney's fees pursuant to its Motion therefor (A-24). On May 23, 1990, the Petitioner filed its Motion for Rehearing as to the award of attorney's fees, and on June 8, 1990, the Court of Appeal entered its Order denying the Petitioner's Motion for Rehearing. On June 11, 1990, the Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction with this Court, seeking review of both the Order reversing the Final Summary Judgment, and the award of attorney's fees to the Respondent.

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

SUMMARY OF ARGUMENT

The Second District Court of Appeal based its reversal of the trial court's Summary Judgment solely on its disagreement with the opinion expressed in Wash-Bowl Vending Co., Inc. vs No. 3 Condominium Association Village Green, Inc. The Wash-Bowl decision was well reasoned and represented the only logical interpretation of 718.3025 as it existed at the time the contract between the parties hereto was signed. In Wash-Bowl the Court held that the requirements of 718.3025 applied to laundry space leases. The Second District Court of Appeal based its disagreement with that holding on the strength of the legislature's subsequent amendment. The subsequent amendment was not a "clarifying" amendment but was part of an overall revamping of the Condominium Act where rights were given to laundry vendors through one statute and taken away in another statute. This Court should uphold the Wash-Bowl decision and, in turn, uphold the decision by the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

ARGUMENT

In 1986, the Third District Court of Appeal decided the case of Wash-Bowl Vending Co., Inc. v. No. 3 Condominium Association, Village Green, Inc., 485 So. 2d 1307 (3rd DCA 1986), holding that a lease between a condominium association and a laundry equipment provider was subject to the requirements of Section 718.3025(1), Florida Statutes (1985). In the instant case, the Second District Court of Appeal disagreed with the opinion of the Third District, holding instead that the statute was not intended by the

Legislature to apply to laundry vending contracts. The basic issue on appeal is to determine which of the District Courts of Appeal is correct in its interpretation of that statute.

In order to make this determination, the Court must look at the discussions and the reasons given by each of the Districts. Such a review will disclose that the opinion of the Third District is based on a more detailed and well-reasoned analysis.

The key to the entire argument is the determination of what types of contracts are covered by the statute. If laundry equipment contracts are considered to have been proper subjects for regulation by the statute at the time the contract in this case was signed, then the Third District prevails. If not, then the Second District is correct. Petitioner maintains that the weight of authority, as well as the more logical reasoning, rests with the Third District's interpretation.

In plain english, the Section 718.3025(1) applies to contracts which provide for the "operation, maintenance or management of a condominium association or property serving the unit owners". There is nothing vague or ambiguous about the words used in this phrase. The statute clearly covers any contract which deals with the operation or maintenance of any property used by unit owners of the condominium.

The question then is whether the term "property" is meant to refer to real property, personal property, or both, or either. That term is not defined in Chapter 718, Florida Statutes, and must therefore refer to any kind of property. The case of Wash and Dry,

Inc. v. Bay Colony Club Condominium, Inc., 368 So. 2d 50 (4th DCA 1979) dealt with that very term, in a case involving a laundry equipment contract, and that Court held, eleven years ago, that the term "property" referred to both real and personal property (See Footnote 2 at Page 51), including specifically, laundry equipment. Applying the finding in Wash and Dry to the issue here allows the substitution of the term "laundry equipment" for the term "property", and the statute would then read that it applies to contracts for the operation, maintenance and management of "laundry equipment serving the unit owners". This clearly disposes of any controversy over whether laundry equipment is considered "property" under the statute. Conclusively, it is.

The Third District looked to existing case law, and the analysis another court had made of the same issue, before arriving at its interpretation. That Court considered how Wash and Dry had come to the conclusion that the "property serving unit owners" included laundry equipment. The Fourth District in Wash and Dry discussed the use of that same phrase in a companion portion of Chapter 711, Florida Statutes (the predecessor to Chapter 718).

In a review of the opinion of the Second District in this case, the Court failed to cite any prior case law on the subject, and merely rendered its own judgment that it did not believe the Legislature intended to include laundry equipment contracts within the purview of the statute. The Court offers no authority or other basis for its opinion - just that it disagrees with its sister Court of Appeal. The Second District then attempts to bootstrap

its decision by referring to a statute that was enacted after the decisions in Wash and Dry and Wash-Bowl, and after the subject contract was signed. Using this reasoning, and assuming arguendo that the Respondent's claim that the subsequent amendment of the statute was a clarification of the Legislature's intent to be applied retroactively, it would appear that a shopkeeper, after his customer has tripped over a crack in the floor, may fix the crack, and then defend the customer's claim for damages by saying that he never meant the crack to be there. As will be discussed later in this brief, the use of the subsequently enacted statute is improper, and therefore, the decision of the Second District conflicts directly with the decisions of two other Courts of Appeal, without any basis in law to support it.

In order to fully understand the significance of the statute with which we deal here, an analysis of the history and reason for the statute is important. By looking at the reason behind the Legislative actions, this Court can better appreciate why the 1987 amendment to Section 718.3025 actually bolsters the Petitioner's argument.

The Condominium Act is essentially a consumer protection statute. The basic substance of the Act is to ensure that the purchaser of a unit obtains the value for which he has bargained, that is "what you see is what you get". See eg.: Stirling Village Condominium, Inc. vs. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971). The statute endeavors to provide the consumer the opportunity for full disclosure of all pertinent facts about the

ownership, operation, maintenance and management of his unit, and the property he owns in common with all other unit owners under the condominium concept. The Act contains provisions relating to disclosure of his ownership interest in and encumbrances against the condominium property (Section 718.104), the appurtenances to the unit which cannot be taken away from the owner (Section 718.106), the freedom from having basic rights and privileges eliminated without his consent (Section 718.110[4]), the right to access to all official records of the condominium association upon request (Section 718.111[12]), the right to be informed of the financial status of the condominium on a yearly basis (718.111[13]), the right to notice before the association can take any action to enforce a lien on his unit (718.116[5]), the right to have his purchase deposit held by an independent escrow agent until the developer has completed construction of improvements (Section 718.202), statutorily mandated warranties of fitness and merchantability (Section 718.203), the right to control the association when the developer's interest in the condominium is substantially reduced (Section 718.301), the prohibition against waiver of rights under the Act (Section 718.303[2]), the right of disclosure concerning leaseholds affecting the condominium property (Section 718.401), the right to full disclosure of a multitude of information relating to the purchase of the unit (Part V of the Act), and the right to disclosure if even more information relating to a condominium that is a conversion of existing improvements (Part VI of the Act).

Prior to 1978, the Condominium Act was found in Chapter 711, Florida Statutes. In 1977, the Legislature made significant changes to the Condominium Act, and renumbered the Act as Chapter 718. One of the consumer protections built into the Condominium Act early on was the right of purchasers of units not to be stuck with long term, unreasonable or "sweetheart" contracts signed by the condominium association while it was under the control of the developer of the condominium. See Section 711.13(4), Florida Statutes (1973), amended in 1975 to become Section 711.66(5).

In 1978, when the Condominium Act was substantially amended, and renumbered, Section 718.302 became the successor to 711.66(5). Originally, the predecessors of Section 718.302 provided the purchasers of units the ability to terminate all "sweetheart" contracts involving the operation, maintenance or management of property serving the unit owners. Then, the Legislature recognized that vending contractors, such as laundry equipment companies and soda machine companies, did not necessarily fall into the same category as developer management contracts, so these special types of contractors were given distinctive rights to be free from termination, as long as they met certain other requirements. See Section 718.302(1)(e), Florida Statutes (1979). Essentially, the Legislature agreed, because of the nature of the contracts involved, to protect vending companies who may have contracted with the association while it was under the control of the developer of the condominium, from losing their contracts, as long as they complied with the controls set up by the Legislature. Again, the

overriding concern was protection of the consumer.

In 1978, the Legislature enacted Section 718.3025. This statute set forth certain minimum disclosure requirements for all contracts involving the "operation, maintenance and management of a condominium association or property serving the unit owners". Once again, the obvious reason for such a statute was consumer protection, that is, that the association was entitled to be advised up front of certain types of information, so it could readily understand the nature of its obligations under the contract.

This new statute went one step further than had Section 718.302, though. That existing Section only applied to contracts or reservations made by the association while the developer was in control of it, while the new Section 718.3025 encompassed all contracts of the association, even those executed by the association after control thereof had been assumed by the unit purchasers. There is no reasonable basis for applying this standard to contracts for lawn and landscape maintenance services, swimming pool maintenance services, accounting services, property management services and other essential maintenance and operational services, but not to contracts for the provision of laundry equipment. Under the Second District's holding, an association may require a landscaper to identify whether he has the obligation to pull weeds, but it may not require a laundry equipment contractor to specify whether he has any obligation to fix his equipment.

In 1986, the Third District was faced with the Wash-Bowl case

in which a contract between an association and a laundry equipment contractor did not meet the requirements of Section 718.3025, and the Court held that the contract was not enforceable against the association. Subsequent to the Third District's opinion in Wash-Bowl, the Legislature amended Section 718.3025 to express that the intent of that Section was to cover contracts for management and maintenance services only, and not to contracts the basis of which is the provision of services or property merely for the convenience of unit owners, such as vending and coin-operated laundry equipment (See Section 718.3025, Florida Statutes [1987]). Interestingly, though, at the same time that this amendment was made, the Legislature also saw fit to eliminate the special exemption the vending equipment contractors formerly enjoyed in Section 718.302(1)(e). The freedom from termination that had been unique to vending equipment contractors was no longer available, and those contractors were now subject to the same right of termination as all other contractors under Section 718.302. (See Section 718.302(1), Florida Statutes [1987]).

At first glance, the amendment to Section 718.3025 appears to be nothing more than a legislative pronouncement of "this is what we meant all along", when, in reality, it was a trade-off to vending equipment contractors for the rights they lost in the elimination of Section 718.302(1)(e). The contractors lost the right to have their developer contracts remain free from termination, and picked up the right to be free from having to make certain types of disclosures in any of their contracts in order to

make them enforceable. When viewing the whole statutory amendment scheme together, it is obvious that the 1987 amendment to Section 718.3025 was not merely a gratuitous clarification of the Legislature's past intentions, but really an exchange of a former right for a new one.

Keeping this in mind, it is clear that the Second District's reliance on the 1987 amendment to Section 718.3025 was a misguided attempt to inject its view on equity, that is, that the application of the statute to the Respondent's contract just was not fair, despite the clear and unambiguous reasoning and legal basis for the Third District's decision on the same issue. For these reasons, the Petitioner believes that the Second District Court of Appeal departed from the essential requirements of law in rendering a decision in conflict with the Third District in Wash-Bowl, and the Petitioner respectfully requests that this Court reverse the Second District's ruling in this case, and affirm the holding of the Trial Court.

POINT II

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

SUMMARY OF ARGUMENT

The Lease which was the subject of this action was signed by the parties on August 1, 1983. At that time, Section 718.3025, Florida Statutes (1983), required certain information to be disclosed in contracts with condominium associations for management and maintenance services. The subject lease did not contain the minimum required information and, by statute, is invalid and unenforceable

The legislature's subsequent amendment of the statute, in 1986, which eliminated laundry leases from the disclosure requirements, did not operate retroactively since no clear expression of retroactive application was made. Even if such an intent were expressed by the legislature, a retroactive application of the 1986 amendment would be an unconstitutional impairment of the contract rights of the Petitioner herein.

ARGUMENT

The Second District Court of Appeal seemed to suggest in its opinion the intent of the legislature with respect to the "non-application" of 718.3025 to laundry space leases but declined to address the merits of the case law regarding the retroactive application of such amendment. However, since the Second District Court of Appeal raised the "intent" issue with respect to the amendment of 718.3025, the Petitioner feels compelled to address that point in this Brief.

The laws which exist at the time and place of the making of a contract enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including those laws which affect its construction, validity, enforcement or discharge. Southern Crane Rentals, Inc. vs. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983); Florida Beverage Corporation vs. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, 503 So.2d 396 (Fla. 1st DCA 1987). See also: Brickell Bay Club, Inc. vs. Ussery, 417 So.2d 692 (Fla. 3d DCA 1982). Furthermore, contracts are made in legal contemplation of the existing applicable law. Southern Crane Rentals, Inc. vs. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983); Carter vs. Government Employees Insurance Co., 377 So.2d 242 (Fla. 1st DCA 1979).

The contract, which is the subject of this action (A. 1-4) was entered into between the parties on August 1, 1983. At that time, Section 718.3025, Florida Statutes (1983) (A. 5) mandated that certain contracts contain certain information.

There was never any dispute that the contract, on its face, did not meet the minimum requirements of Section 718.3025, Florida Statutes (1983). On appeal, COMMERCIAL LAUNDRIES instead relied on its contention that the legislature's 1986 amendment to Section 718.3025, Florida Statutes operated retroactively to all contracts which were in existence as of the date of the amendment.

In 1986, the Florida legislature amended Section 718.3025, Florida Statutes by adding the following language:

> 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.

Nowhere does the new statute state that it is to be applied retroactively. Yet COMMERCIAL LAUNDRIES insisted that the "amended" statute applied to the contract which was entered into in 1983.

In Florida, it is clear that in the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only. Young vs. Altenhaus, 472 So.2d 1152 (Fla. 1985). Even a clear legislative expression of retroactivity will be ignored by the courts if the statute impairs vested rights, creates new obligations, or imposes new penalties. Anderson vs. Anderson, 468 So.2d 528 (Fla. 3d DCA 1985).

It certainly cannot be disputed that Section 718.3025, Florida Statutes (1983) created vested rights belonging to condominium associations and unit owners. The statute provided that a minimum amount of information must be provided in certain contracts for such contracts to be valid and enforceable. This protected associations by assuring that all aspects of the service or maintenance contract would be disclosed. This substantive vested right was eliminated by the 1986 amendment. However, such amendment did not impair the substantive rights of the association which arose in 1983 when the contract was signed. The legislature

cannot constitutionally enact a statute that impairs obligations of contracts or vested rights. Standard Distributing Company vs. Florida Department of Business Regulation, Division of Alcoholic Beverages, 473 So.2d 216 (Fla. 1st DCA 1985). Statutes that interfere with vested rights will not be given retroactive effect. Young vs. Altenhaus, 472 So.2d 1152 (Fla. 1985).

COMMERCIAL LAUNDRIES attempted to argue around the impairment of vested rights by its statement that the 1986 amendment was "remedial" which falls into the carved out exception that a remedial statute is applicable to all pending cases and DOES operate retroactively. COMMERCIAL LAUNDRIES's argument appears to be that since the statute provides a remedy for noncompliance with its provisions, that the statute itself is "remedial". Such an interpretation stretches the imagination beyond the bounds of reason.

By definition, a remedial statute is one which confers or changes a **remedy**; a remedy is the **means** employed in enforcing a right or in redressing an injury. St. John's Village I, Ltd. vs. Department of State, Division of Corporations, 497 So.2d 990 (Fla. 5th DCA 1986) (emphasis supplied). Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes. City of Lakeland vs. Catinella, 129 So.2d 133 (Fla. 1961).

There is no interpretation of Section 718.3025, Florida Statutes (1986) that could possibly be construed to be a remedial statute or amending a remedy. The amendment eliminated the obligation of laundry companies to provide certain information to associations in their contracts and eliminated the association's right to have such information. There is no clearer case of the elimination of "vested rights". Therefore the law is clear that the statute is not remedial and the law which existed at the time the contract was entered into is the controlling law.

COMMERCIAL LAUNDRIES raised two arguments in support of its contention that Section 718.3205, Florida Statutes, as amended in 1986, was remedial in nature, and should be applied retroactively. The first of these two arguments was COMMERCIAL LAUNDRIES's contention that the legislature DID intend for the statute to operate retroactively and that the intent WAS clear in the statute. To support this argument, COMMERCIAL LAUNDRIES cited a paragraph of the amendment which states:

> "...it is the intent of the legislature that this section applies to contracts for maintenance or management services for which the association pays compensation."

COMMERCIAL LAUNDRIES argued that this INTENT language was a "clear intent" of the legislature that the statute is to apply retroactively. Such an interpretation is totally without merit. The only INTENT expressed by the language cited above is the INTENT for the statute to apply to particular contracts, to-wit: contracts for management or maintenance services. NOWHERE is it remotely suggested that it is the INTENT of the legislature that

the amendment be "applied to all contracts in existence as of the effective date hereof" or that the amendment "is to apply retroactively". Absent that clear expression, the amendment operates prospectively only. Young vs. Altenhaus, supra.

The Second District Court of Appeal also made reference to the phrase "it is the intent of the legislature..." in its statement that "the legislature has now clarified by an amendment to that statute its intent with respect to the non-application of 718.3025 to these types of contracts." (A.22) However, it declined to address any of the case law regarding retroactive application of amendments or even whether such amendment did, in fact, contain a clear expression, by the legislature, of intent for the amendment to operate retroactively. Such an application, in this case, would result in an unconstitutional impairment of vested contract rights.

The rationale behind the necessity for a clear expression of retroactivity was best set forth in Fleeman vs. Case, 342 So.2d 815 (Fla. 1976)(A. 12-15). In Fleeman the Supreme Court held that:

> We decline to divine legislative intent for an issue as important as retroactive operation either from one ambiguous reference in a declaration of legislative purpose or from one attempt to amend the proposed law in one chamber of the Legislature. We can restrict the debate on a legislative "intent" for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislation under review. By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases whether the expressed retroactive application of the law collides with any overriding constitutional provision.

> There being no express and unequivocal statement in this legislation that it was intended to apply to leases and management contracts which antedate its enactment, we hold the state inapplicable to the contracts in these consolidated proceedings.

This unconstitutional impairment was recognized in several Supreme Court cases. In Fleeman vs. Case, supra, where the Supreme Court explained the importance of a clear legislative expression of the intent to apply a statute retroactively, the Court further held that:

> Even if we were to conclude that the Legislature intended retroactive application of this statute, we would be compelled to hold it invalid as impairing the obligation of contract under Article I, Section 10 of both the United States and Florida Constitutions. Fleeman vs. Case 342 So.2d at page 818.

This issue was further resolved in Rebholz vs. Metrocare, Inc., 397 So.2d 677 (Fla. 1981)(A.16-18). Ironically, this case dealt with the same Section 718.3025, Florida Statutes, as it existed in 1978. In the Rebholz case, Metrocare sued for monies due under a condominium maintenance agreement. Rebholz defended claiming that the agreement was void and unenforceable under Section 718.3025, Florida Statutes (1978 Supp.) That statute had been enacted AFTER the contract in question was entered into. However, unlike the present case, the legislature had EXPRESSLY declared its intent for 718.3025 to be applied retroactively when it enacted (in the same bill) Section 718.126, Florida Statutes, (1978 Supp.) which provided:

> The amendments to this Chapter by chapter 78-340, Laws of Florida, shall apply to all contracts in effect on the effective date of chapter 78-340 and to all contracts entered into after the effective date of chapter 78-340.

Rebholz argued that under Section 718.126, Florida Statutes, the new minimum requirements of Section 718.3025, Florida Statutes, applied retroactively and therefore the agreement was void and unenforceable. The lower court held such retroactive application unconstitutional. The Supreme Court agreed, holding:

> Section 718.126 is an attempt by the legislature to make the requirements of Section 718.3025 retroactively applicable. The retroactive application of the provisions requiring that maintenance agreements have certain provisions would invalidate many existing agreements. This impairs the obligations incurred under the pre-existing contracts and is unconstitutional. Rebolz vs. Metrocare, Inc., 397 So.2d at page 679.

The rationale of the Rebholz case is equally applicable to the case at bar. On August 1, 1983, when the subject contract was signed, the requirements of Section 718.3025, Florida Statutes (1983) applied to the contract. Those requirements created certain vested rights to the association by mandating the disclosure of certain minimum information. For the legislature to eliminate that vested right in 1986 is certainly well within the legislature's discretion. However, to attempt to retroactively apply such elimination of vested rights to contracts that predated such elimination would be an unconstitutional impairment of the association's vested contract rights.

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

SUMMARY OF ARGUMENT

Attorney's Fees are allowable only pursuant to contract, statute or a special fund brought into the Court. There exists no statute under which attorney's fees could be awarded to COMMERCIAL LAUNDRIES, since this was a Declaratory Action seeking a declaration of the rights and obligations of the parties under a written instrument. Additionally, there exists no contractual provision under which attorney's fees could be awarded under the facts of this case. Consequently, the Second District Court of Appeal erred in awarding attorney's fees to COMMERCIAL LAUNDRIES.

ARGUMENT

On May 11, 1990, the Second District Court of Appeal entered an Order awarding COMMERCIAL LAUNDRIES attorney's fees in an amount to be set by the trial court (A.24). The basis for COMMERCIAL LAUNDRIES' Motion for award of attorney's fees was pursuant to "the lease between the parties, Florida Statute, and pursuant to general law." However, no such authority exists for the awarding of attorney's fees and the Second District Court of Appeal departed from the essential requirements of the law by awarding attorney's fees to COMMERCIAL LAUNDRIES

Attorney's fees are only recoverable by statute, by contract or where a special fund is brought into the Court. State, Department of Health and Rehabilitative Services vs. Johnson, 485

So.2d 880 (Fla. 2d DCA 1986); In re: Forfeiture of 1978 Green Datsun Pickup truck, 475 So.2d 1007 (Fla. 2d DCA 1985). Since no "special fund" was created or brought into the Court, the only authority which COULD exist for the awarding of attorney's fees would be by contract or statute. No specific statutory basis was alleged by COMMERCIAL LAUNDRIES and, contrary to its assertions, no statutory basis for an award of attorney's fees exists in this case.

Statutes authorizing an award of attorney's fees are in derogation of the common law and, therefore, must be strictly construed. Glover vs. School Bd. of Hillsborough County, 462 So.2d 116 (Fla. 2d DCA 1985).

This action was brought under Chapter 86, Florida Statutes, seeking a Declaratory Judgment on the rights and obligations of the parties to a written instrument. No statutory right to attorney's fees exists in such an action, and no such right exists under Chapter 718, Florida Statutes. See: Saul vs. Basse, 399 So.2d 130 (Fla. 2nd DCA 1981).

Contrary to COMMERCIAL LAUNDRIES' further contention, no right to attorney's fees exists under any contractual provision between the parties hereto. The right to attorney's fees under any contractual provision is limited by the terms of such provision. Attorney's fees are not necessarily recoverable as to any and all litigation relating to a contract that provides for attorney's fees. Bowman vs. Kingsland Development, Inc., 432 So.2d 660 (Fla. 5th DCA 1983). The only portion of the lease agreement, which was

the subject of this action, which dealt with attorney's fees is set forth as follows:

> "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." [R. 5].

Since the instant action sought only declaratory relief of the rights and obligations of the parties hereto and did not involve enforcement of the lease or collection thereunder, no attorney's fees are allowable under the lease provision. Chesterfield Company vs. Ritzenheim, 350 So.2d 15 (Fla. 4th DCA 1977); Ocala Warehouse Investments, Ltd. vs. Bison Company, 416 So.2d 1269 (Fla. 2d DCA 1982); Siltzer vs. North First Bank, 445 So.2d 649 (Fla. 2d DCA 1984).

Allowance of attorney's fees on appeal is governed by the same considerations as those applicable in the court from whence the appeal emanates. Burns vs. Snedaker, 348 So.2d 597 (Fla. 1st DCA 1977). Since no right exists for an award of attorney's fees either by statute or by contract, the Second District Court of Appeal erred in granting COMMERCIAL LAUNDRIES' Motion for Award of Attorney's Fees.

CONCLUSION

Based on the foregoing argument and authorities, Petitioner, PALMA DEL MAR CONDOMINIUM ASSOCIATION #5 OF ST. PETERSBURG, INC., respectfully prays this Honorable Court to reverse the holding of the Second District Court of Appeal, affirm the trial court's original Final Summary Judgment and reverse the Second District Court of Appeal's award of attorney's fees to COMMERCIAL LAUNDRIES.

Respectfully submitted,

DEEB & BRAINARD, P.A.

BY: _____
BRIAN P. DEEB

BY: _____
C. SCOTT BRAINARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Mauro C. Santos, Esquire, 801 Brickell Avenue, Suite 1901, Miami, Florida 33131 and to Ainslee R. Ferdie, Esquire, 717 Ponce De Leon Boulevard, Suite 215, Coral Gables, Florida 33134 on this 4th day of August, 1990.

DEEB & BRAINARD, P.A.,

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