Rel: June 30, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1180945

Brett/Robinson Gulf Corporation; Claudette Brett, as personal representative of the Estate of Tillis M. Brett; Thomas Brett; William T. Robinson, Jr.; and Brett Real Estate and Robinson Development Company, Inc.

v.

Phoenix on the Bay II Owners Association, Inc., and Pamela A. Montgomery

Appeal from Baldwin Circuit Court
(CV-15-900942)

PER CURIAM.

Brett/Robinson Gulf Corporation ("Brett/Robinson"); Claudette Brett, as the personal representative of the estate of Tillis M. Brett; Thomas Brett; William T. Robinson, Jr.; and Brett Real Estate and Robinson Development Company, Inc. ("Brett Real Estate") (collectively referred to as "the developer parties"), appeal from the Baldwin Circuit Court's judgment in favor of Phoenix on the Bay II Owners Association, Inc. ("the Association"), and Pamela A. Montgomery.

Facts

The following facts from the stipulation of facts entered into by the parties will be helpful to an understanding of this case:

> "1. Phoenix on the Bay II ('POB II') ... is a condominium project created pursuant to the Alabama Uniform Condominium Act of 1991 (the 'Act'), situated south of Canal Road and adjacent to Terry Cove in Orange Beach consisting of a free standing house and one eight-story building with an attached parking garage, marina, and other amenities common in a coastal condominium.
>
> "2. Declarant, as that term is defined in the Act[2], of POB II is three individuals: William T. 'Tommy' Robinson, Jr., Thomas E. 'Gene' Brett, and Tillis M. Brett (collectively hereafter referred to as the 'Developer').

"3. William T. 'Tommy' Robinson, Jr., Thomas E. 'Gene' Brett, and Tillis M. Brett were at all times relevant to these proceedings one-third shareholders in Brett Real Estate, Robinson Development Company, Inc. ('Brett Real Estate') and Bret/Robinson Gulf Corporation ('Bret/Robinson').

"4. Brett Real Estate and Brett/Robinson are each Affiliates of the Developer as those terms are defined in the Act.

"5. Through Brett Real Estate, Developer developed and sold Units in POB II pre and post construction. Brett Real Estate agents are not employees of Brett/Robinson.

"6. Brett/Robinson provided condominium management services to the Association from the inception of the condominium until termination in 2015.

"7. There are four areas of POB II in dispute in this case: (a) that portion of the first floor reception/lobby area encompassing two offices and an open-air counter claimed by Developer to be a commercial Unit 'Type Check-in'; (2) that portion of the first floor reception/lobby encompassing a glass enclosed, open-air cubicle claimed by Developer to be a commercial Unit 'Type Sales Office'; (3) that portion of the first floor of the parking deck encompassing two handicapped parking spaces claimed by Developer to be a commercial Unit 'Type Housekeeping'; and (4) an enclosed area under the first floor foundation of the building claimed by Developer to be a commercial Unit 'Type Maintenance.' Developer contends that the four areas referenced in this Paragraph 7 are commercial condominium units created pursuant to the Act. The Association and Montgomery contend that the four disputed areas were not lawfully created Units and that the same constitute common areas of the condominium.

"8. The initial declaration of condominium of POB II is styled, 'Declaration of Condominium of Phoenix on the Bay II, A Condominium Phase One' (the 'First Declaration'), and was recorded on July 5, 2001[3] at Instrument No. 604761.

"9. The First Declaration created only one condominium Unit -- the single family home which was already located on the site.

"10. All remaining Units and common amenities were to be created in a second phase of the project.

"11. On November 11, 2003, Developer, through Brett Real Estate, applied for a building permit to construct the second phase of POB II as 104 Units.

"12. Developer and Brett/Robinson maintain that from inception of the project, Developer intended to create 'commercial Units' within the Condominium Property for its Affiliate Brett/Robinson to operate its condominium rental management business in perpetuity.

"13. Sales efforts were initiated on POB II, Phase Two, and the Offering Statement for Phase Two was executed by the developer on November 26, 2003 (the 'Offering Statement'). The documents attached to the Offering Statement and provided to prospective purchasers were:

"a. First Declaration;

"b. Draft Phasing Amendment One to Phoenix on the Bay II, Phase Two (the 'Proposed Second Declaration'), together with the proposed plans and exhibits thereto;

"c. Proposed Articles, By-Laws, Rules and Regulations of

the POB II Owners' Association; and

"d. Proposed Articles of POB II Boat Slip Owners' Association.

"14. On December 5, 2003, the City of Orange Beach issued zoning approval for the development of the second phase of POB II (hereafter the 'Condominium') based upon plans submitted by Developer depicting 104 Units.

"15. On January 13, 2004, The City of Orange Beach issued a building permit for the construction of the Condominium. Construction drawings stored on the property state that Condominium is a 104-unit condominium development.

"16. The Proposed Second Declaration provided at:

"a. Section 5.01 that the Condominium shall consist of 104 residential Units.

"b. Section 5.04 that '... Developer, its successors and assigns, reserves a perpetual nonexclusive easement for access, ingress and egress over and through all access routes, parking areas, and other common areas for its guests, licensees, lessees, customers and employees for the purpose of real estate sales or any other business operated by the Developer on such property, including all areas reserved by the Developer. Further, the Developer, its successors and assigns, retains the exclusive right to use and control the cheek-in area, sales office, housekeeping, custodial areas, workshops, storage areas, as are indicated on the plans.'

"c. Section 6.03 that the Condominium common elements shall include all parts of the Condominium Property not

located within the perimeter boundaries of the Units, as described on the plans, which included, but were not limited to, lobby and reception area, all utility and mechanical equipment, parking area, buildings and spaces not used or reserved to the exclusive use of certain Units, and walls, roofs, floors, and ceilings not located within the Units.

"d. Section 15.01 that POB II shall be used only for single family residences and that each Unit shall be occupied only by a single family and its guests as a residence and for no other purpose.

"e. Section 7.01, that the common elements are owned by the Unit owners and that common expenses shall be paid by Unit owners as their interests appear on Exhibits C and C-1 which are incorporated into the declaration by reference.

"f. Exhibit B, the form of Certificate of Completion and a schedule of the seven residential Unit types and layout for each.

"g. Exhibit C setting out the fractional interest ownership of the common elements amongst the seven residential Unit types.

"h. Exhibit C-1 setting forth the formula for dues and assessments to be allocated amongst the seven residential Unit types.

"17. The plans attached to the Proposed Second Declaration and the permitted construction drawings do not:

"a. Depict any areas as being 'reserved' for the exclusive use of the Developer.

"b. Contain the words 'Check-in,' 'Maintenance,' 'Housekeeping,' and 'Sales Office.'

"c. Contain dimensions of the areas claimed as commercial Units.

"18. In the summer of 2004, the Developer and Brett Real Estate provided Defendant Pamela A. Montgomery ('Montgomery') with a copy of the Offering Statement, which included the proposed Second Declaration and plans.

"19. On June 30, 2004 Montgomery, along with her spouse, contracted with Developer to buy Unit 2G1 prior to construction of the Condominium.

"20. At no time was Montgomery ever in default of her obligations under her preconstruction purchase agreement. She has owned Unit 2G1 since shortly after completion of the Condominium. She has been President of the Phoenix On The Bay II Owners Association, Inc. (the 'Association') since May of 2015.

"21. The City of Orange Beach issued a certificate of occupancy for the Condominium on January 18, 2007. 104 residential Units were constructed at that time.

22. A phasing amendment to POB II was executed on February 13, 2007 and recorded on February 14, 2007 at Instrument No. 1031379, effecting amendment of the First Declaration (the 'Second Declaration').

"23. The Second Declaration is not the same as the Proposed Second Declaration.

"24. The Second Declaration includes the following

provisions:

"a. Section 1.13 defining the 'Condominium Property' as being '...all property both real, personal or mixed, which is submitted to the Condominium form of Ownership as provided for herein and includes the Real Property and all improvements now existing or hereafter placed thereon and all easements, rights, interests or appurtenances thereto, and all personal property now or hereafter used in connection therewith.'

"b. Preamble and Section 5.01 stating that the Condominium consists of a total of 104 residential Units.

"c. Section 5.04 stating that easements are reserved to the Developer and/or the Developer's heirs and assigns, the Association, and individual Unit owners. Specifically, the second and third sentences of said Section provide that

> " '...the Developer, and/or the Developer's heirs and assigns, reserves a perpetual nonexclusive easement for access, ingress and egress over and through all access routes, parking areas, and other common areas for its guests, licensees, lessees, customers and employees for the purpose of real estate sales or any other business operated by the Developer on such property, including all areas reserved by the Developer. Further, the Developer, and/or the Developer's heirs and assigns, retains the exclusive right to use and control the check-in area, sales office, housekeeping, maintenance areas, workshops, storage areas, as are indicated on the plans.'

"d. Section 5.04 also contains the following as a new

fourth sentence: 'Type Check-in, Type Maintenance, Type Housekeeping, and Type Sales Office, are commercial Units and are assigned a portion of the common elements, the others are limited common elements assigned to the maintenance Units.' The foregoing sentence referencing commercial Units was not in the Offering Statement documents.

"e. Section 7.01 reflecting that the Developer reduced the amount of each residential Unit's fractional interest ownership of the common elements in order to allocate a percentage ownership of the common elements to the four commercial units referenced in the new fourth sentence of in Section 5.04 quoted above.

"f. Section 15.01 stating that the Condominium Property '... shall be used only for single family residences' and that '[e]ach of the Units shall be occupied only by a single family and its guests as a residence and for no other purpose.'

"g. There are no limitations or other descriptions set forth concerning the nature of any commercial ... use of the Condominium Property.

"h. Exhibit B which was revised to delete the Unit schedule and layouts and add 'Exhibit B-1, Elevations of Phoenix on the Bay II at Orange Beach, Alabama,' containing various elevations of the building which reference the four areas at issue as 'Maint. Room', 'Check-In', 'Sales Office' and 'Housekeeping'.

"i. Exhibit C allocating ownership of the common elements amongst the seven residential Units types and four commercial Units types.

"j. Exhibit C-1 was revised to reflect that the formula for

dues and assessments to be allocated amongst the seven residential Unit types and four commercial Unit types.

"25. Neither the words 'Check-in,' 'Maintenance,' 'Housekeeping,' and 'Sales Office' nor the dimensions of the disputed areas appear on the plans provided with the Offering Statement nor the permitted construction drawings.

"26. Simultaneously with the recordation of the Second Declaration, the Developer recorded As-Built plans of POB II, Phase Two, at Apartment Book 25, pages 92-101.

"These plans contain the following references in the areas in dispute: 'Check-In', Maintenance', 'Sales Office' and 'Housekeeping'.

"27. According to the face of the Second Declaration, the changes made to create the four additional units reduced the common area by 3,325 square feet.

"28. The addition of four commercial Units to the Condominium would have increased the total number of units in the Condominium ... from 104 Units to 108 Units.

"29. The Developer did not furnish pre-construction purchasers of Units at POB II, Phase Two, with an Amended Offering Statement identifying the four commercial Units.

"30. No pre-construction purchaser of any unit at POB II, Phase Two, demanded rescission of their purchase agreement, nor did any such purchaser seek the recovery of the statutory penalty permitted by § 35-8A-408 of the Code of Alabama (1975).

"31. Developer never assigned any of its Developer Rights

or Special Declarant Rights in POB II.

"32. The 'Type Check In' unit has no wall on the eastern boundary. There is no plumbing in the purported commercial unit designated as Type Check In.

"33. The 'Type Housekeeping' unit was never constructed and said space has at all times been utilized as part of the parking garage. Brett/Robinson has never utilized the space labeled Type Housekeeping. No utilities are stubbed out in the parking garage for sewer, water or electrical for the purported Type Housekeeping unit.

"34. The 'Type Sales Office' consists of glass panels attached to the rear wall of the elevator shaft in the lobby and does not have a ceiling separate from the lobby ceiling. No plumbing is located in the purported commercial unit designated as Type Sales Office.

"35. Common element infrastructure is located within the interior of two of the claimed commercial units, to-wit:

"a. Within the 'Type Check-In' are elevator control panel, security control equipment, fire suppression control equipment, standby generator annunciator panel, house lights controls, and emergency telephone equipment, which serve the Common Elements and all residential Units.

"b. Within the 'Type Maintenance' are water pipes, sewer pipes, fire standpipes serving the entire fire suppression system, and irrigation system controls.

"36. The Association was created by recording of Articles of Incorporation therefor executed on February 13, 2007 and recorded on February 14, 2007 as Instrument Number 1031377

to maintain, operate, and manage the Condominium to own, trade, or otherwise deal with such property, real or personal, a[s] may be necessary or convenient in the administration of the Condominium.

"37. Upon completion of the Condominium, the Association, through the Developer, engaged Brett/Robinson to manage the Condominium. Brett/Robinson needed access to all areas of POB II to carry out its obligations under the management agreement. Brett/Robinson's services continued after the Developer released control of POB II in 2008. Under the management agreement, Brett/Robinson provided on-site security, maintenance, pool, custodial, front desk staffing and services; off-site administrative services; contract negotiations, including, but not limited to utility service and insurance for the Condominium; all assessment and bill pay functions for the Association; proctoring board and owner meetings; and all record keeping functions.

"38. Brett/Robinson employee Keith Jiskra served as Association Manager from inception of the Association through termination [of] the management agreement. His Association Manager duties included setting up board of directors meetings; meetings with contractors, the board and Brett/Robinson facility director related to building projects; negotiating contracts related to the building; responding to phone calls from owners asking questions about assessments; serving as liaison between Association and Brett/Robinson and vendors, informing the board of significant events that occurred on property; making sure that the Board was informed about the exercise of any developer rights; and completing applications for insurance. The Association paid for Brett/Robinson's business license to operate on the Condominium Property under the management agreement.

"39. Custodial and maintenance services under the management agreement were performed by Brett/Robinson employees located in areas throughout the Condominium including, but not limited to, the disputed areas denominated 'Check In' and 'Maintenance.'

"40. Unlike the 104 residential Units, none of the purported commercial Units have separately metered utilities. All utilities serving the purported commercial units are on meters charged to the Association for Common Element utility service. The Association pays for all utilities serving the purported commercial Units.

"41. Brett/Robinson obtained appraisals for the benefit of the Association in insuring the Condominium Property, which appraisals described the Condominium as 104 Units.

"42. The Condominium was always insured as a 104 Unit residential condominium.

"43. Brett/Robinson participated in generating financial statements for the Association annually.

"44. In June of 2015, the Association notified Brett/Robinson that the Association would be utilizing third party vendors for custodial and pool services instead [of] utilizing Brett/Robinson therefor.

"45. On July 2, 2015, Developer executed a Warranty Deed to Brett/Robinson describing as the property conveyed thereby as 'Units Check-In, Maintenance, Housekeeping, and Sales Office, Phoenix on the Bay II, Phase Two, a condominium,' which was recorded on July 13, 2015 at Instrument No. 1524088.

"46. The Developer did not receive any money or other remuneration for the execution or delivery of deed described in the preceding paragraph.

"47. By letter dated July 17, 2015, Brett/Robinson gave notice of the above referenced deed to the Association and made a demand for sole and exclusive possession of 'Units Check-In, Maintenance, Housekeeping, and Sales Office, Phoenix on the Bay II, Phase Two, a condominium' as purportedly commercial Units created under the Second Declaration.

"48. The Association gave Brett/Robinson notice that it was terminating the remainder of the existing Management Agreement on July 20, 2015.

"49. The parties have agreed to defer the proof and award of claims of attorney's fees until after the Court makes a determination on the equitable claims.

"50. Over the years, some dues and assessments attributable to the 'Check-In', 'Maintenance', 'Housekeeping' and 'Sales Office' have been paid or caused to be paid by Developer or Affiliates.

"_____

" [2]All capitalized terms not defined herein shall have the meaning ascribed to them in the declaration of condominium of POB II or the Act as applicable.

" [3]All recording references are to instruments in the Office of the Judge of Probate of Baldwin County, Alabama."

Procedural History

On August 4, 2015, Brett/Robinson sued the Association and Montgomery in the Baldwin Circuit Court. In its complaint, Brett/Robinson asserted a trespass claim, alleging that the Association and Montgomery had willfully and intentionally trespassed on the "check-in unit" and the "maintenance unit." It also asserted claims that the Association and Montgomery had interfered with its business relationships and contractual relationships with condominium unit owners who rent out their units at Phoenix on the Bay II ("POB II") through Brett/Robinson.

On September 9, 2015, the Association and Montgomery each filed an answer, a counterclaim, and a third-party complaint. They listed Brett/Robinson as the counterclaim defendant and Tillis M. Brett,[1] Thomas Brett, William T. Robinson, Jr. (collectively referred to as "the developers"), and Brett Real Estate as third-party defendants.[2] The Association and Montgomery sought declaratory and injunctive relief.

[1]Tillis died on May 8, 2017, and Claudette Brett, as the personal representative of Tillis's estate, was subsequently substituted as a party.

[2]The third-party defendants filed a motion to dismiss the third-party complaint. The trial court denied the motion to dismiss the third-party complaint but stated that "[t]he Third Parties are realigned as additional [counterclaim] Defendants under Rule 20[, Ala. R. Civ. P.]"

Specifically, they sought a judgment declaring that the commercial units did not exist. Both the Association and Montgomery sought alternative relief in the event that the trial court found that the commercial units did exist.

On December 8, 2015, Brett/Robinson filed its first amended complaint in which it added a claim for a judgment declaring that "the Units were lawfully created and dedicated to the condominium form of ownership" and that the Association and Montgomery were estopped from denying that Brett/Robinson owned the commercial units. It also requested alternative relief in the event that the trial court found that one or more of the commercial units were not lawfully created or dedicated to the condominium form of ownership.

The trial court bifurcated the action and conducted a bench trial on the parties' claims seeking equitable relief. On May 28, 2019, the trial court entered an order in which it found that the Association and Montgomery were entitled to the equitable relief they had requested. In its order, the trial court stated:

"1. This Court determines and declares that Phoenix on

> the Bay II, Phase Two (hereafter the 'Condominium') contains only 104 Units[1] restricted to residential use as set forth in Article 15 of the Phasing Amendment One to Phoenix on the Bay II, Phase Two, a condominium recorded at Instrument Number 1031379 in the Office of the Judge of Probate of Baldwin County, Alabama (hereafter the 'Second Declaration') and any provisions therein and exhibits thereto along with the 'As-Built' plans recorded at Apartment Book 25, Pages 92-101 in the Office of the Judge of Probate of Baldwin County, Alabama which purport to identify or create four (4) commercial Units in said Condominium are invalid and of no force or effect. Further, any area in the Condominium identified, expressly or impliedly, in the Second Declaration or on the 'As-Built' plans as being a commercial Unit is hereby determined and declared to be a Common Element of the Condominium to be operated and maintained as a Common Element under the terms of the Second Declaration effective as [of] the date of recording of the Second Declaration on February 14, 2007.
>
> "_____
>
> " [1]Capitalized terms not expressly defined herein shall have the meaning ascribed hereto in the Alabama Condominium Act of 1991 (the 'Act') or Second Declaration, as applicable."

It further found that the use restrictions set forth in § 15.01 of the Second Declaration were valid and enforceable and that the units within POB II could be used only as single family residences. It further found that the easements set forth in § 5.04 of the Second Declaration were either invalid

or had terminated by the terms of the Second Declaration and any rights or special declarant rights reserved in POB II by the developers had expired on February 14, 2017. The trial court then stated:

> "5. In furtherance of the foregoing determinations of the Court, the Second Declaration and 'As-Built' plans are hereby reformed and amended as follows:
>
> > "A. Sentence four of Section 5.04 of the Second Declaration is stricken and deleted; and
> >
> > "B. That portion of the 'As-Built' plans incorporated into the Second Declaration as Exhibit B indicating the existence of a 'housekeeping' closet in the parking garage has never existed and is hereby stricken and deleted; and
> >
> > "C. That portion of Exhibit B-1 to the Second Declaration entitled 'Elevations of Phoenix on the Bay II at Orange Beach, Alabama' referring or otherwise indicating that there are Units in the Condominium identified as 'MAINT ROOM,' 'CHECK-IN,' 'SALES OFFICE,' and 'HOUSE KEEPING' is hereby stricken and deleted; and
> >
> > "D. That the allocation of fractional interest ownership in the Common Elements of the Condominium contained within Exhibit C to the Second Declaration is hereby stricken, deleted, and shall hereafter read as follows:
> >
> > "Respective undivided ownership interest in common and limited common elements are Per Unit

of each Unit Type ...."

(Capitalization in original.) The trial court then set forth the revised ownership interest in the common elements for each unit type; struck the formula included in exhibit C-1 to the Second Declaration for determining each unit percentage share of the common expenses, which had included the commercial units; and set forth a revised formula for determining the percentage of each unit's share of the common expenses, without including the commercial units. That resulted in increasing the ownership interest in the common elements for the owners of each of the remaining units and increasing each remaining unit owner's percentage share of the common expenses. The trial court also deleted the second and third sentences of § 5.04 of the Second Declaration that had purported to create easements in POB II. Additionally, the trial court found that the July 2, 2015, warranty deed purporting to convey the commercial units to Brett/Robinson was a nullity based on its determination that no commercial units had been validly created. Finally, the trial court reserved ruling on the issue of attorneys' fees and held that any equitable claims that were not disposed of by the order were denied.

On June 25, 2019, the Association and Montgomery filed a motion for a summary judgment regarding Brett/Robinson's claims of trespass, intentional interference with contractual relationships, and intentional interference with business relationships against them. In their motion, the Association and Montgomery first argued that there was no basis for Brett/Robinson's trespass claim because the trial court had found that no commercial units existed. They also presented additional arguments, supported by evidence, as to why Brett/Robinson was not entitled to a summary judgment as to that claim. With regard to the intentional-interference claims, the Association and Montgomery asserted that, during depositions, Brett/Robinson had identified only three specific unit owners who had purportedly ended their business or contractual relationships with Brett/Robinson based on the actions of the Association. The Association and Montgomery attached affidavits from those unit owners and asserted that the affidavits demonstrated that those unit owners had not terminated their relationships with Brett/Robinson based on any actions of the Association. Additionally, the Association and Montgomery argued that they were not strangers to the contracts and relationships at

issue. Brett/Robinson filed a response in which it argued that the trial court had incorrectly found that the four commercial units did not exist and asked the trial court to revisit its ruling in that regard. However, it did not address the alternative grounds for a summary judgment that the Association and Montgomery had presented regarding the trespass claim. Additionally, Brett/Robinson did not respond to the Association and Montgomery's specific arguments regarding the intentional-interference claims. Rather, it merely asserted that those claims were intertwined with the issue of the validity of the commercial units. The trial court granted the Association and Montgomery's motion for a summary judgment.

The Association and Montgomery also filed a "Motion for Award of Fees and Expenses." The trial granted that motion and directed the developer parties to pay the Association and Montgomery $233,083.68 in attorneys' fees and $60,019.57 in expenses. This appeal followed.

Standard of Review

> "The trial court heard ore tenus evidence during a bench trial. Ordinarily, ' " '[w]hen a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on

> that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error.' " ' Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67-68 (Ala. 2010) (quoting Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003), quoting in turn Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)). In this case, however, the trial court's judgment relied on its interpretation of the [Alabama Uniform Condominium Act], not upon a disputed question of fact. ' "This court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented." ' Continental Nat'l Indem. Co. v. Fields, 926 So. 2d 1033, 1034-35 (Ala. 2005) (quoting Scott Bridge Co. v. Wright, 883 So. 2d 1221, 1223 (Ala. 2003)). Furthermore, 'no presumption of correctness exists as to a trial court's judgment when the trial court misapplies the law to the facts.' Brown v. Childress, 898 So. 2d 786, 788 (Ala. Civ. App. 2004). The trial court's assessment of damages was made following the submission of conflicting evidence; therefore, ' "[t]he ore tenus standard of review extends to the trial court's assessment of damages." ' Kennedy, 53 So. 3d at 68 (quoting Edwards v. Valentine, 926 So. 2d 315, 325 (Ala. 2005))."

Wilcox Inv. Grp., LLC v. P & D, LLC, 223 So. 3d 903 (Ala. 2016).

Discussion

This case involves a condominium that was created pursuant to the provisions of the Alabama Uniform Condominium Act ("the Act"), § 35-8A-101 et seq., Ala. Code 1975. The following provisions of the Act will be helpful to an understanding of this case:

> "The principles of law and equity, including the law of

> corporations, the law of real property and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of [the Act], except to the extent inconsistent with [the Act].

§ 35-8A-108, Ala. Code 1975. Section 35-8A-110(a), Ala. Code 1975, provides:

> "Notwithstanding a finding that [the Act] is in derogation of the common law, it should be liberally construed to effectuate its purpose of encouraging development and construction of condominium property under the provisions of [the Act]. The remedies provided by [the Act] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed."

Former § 35-8A-201, Ala. Code 1975, which was in effect at the times relevant to this case,[3] provided:

> "(a) A condominium may be created pursuant to [the Act] only by filing a declaration executed in the same manner as a deed with the judge of probate in every county in which any portion of the condominium is located. A duplicate of the declaration may be presented to the filing officer simultaneously for proper validation as to the date filed. Said

[3]Many provisions of the Act were amended effective January 1, 2019. See Act No. 2018-403, Ala. Acts 2018. When applicable, we cite and quote from the former provisions of the Act that were relevant to the parties' dispute.

duplicate shall be returned to the person who presented it.

"....

"(c) A declaration or an amendment to a declaration adding units to a condominium may not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of substantial completion executed by an independent registered engineer or independent registered architect."

Section 35-8A-205, Ala. Code 1975, provides, in pertinent part:

"(a) The declaration for a condominium must contain:

"....

"(4) A statement of the maximum number of units which the declarant reserves the right to create;

"(5) A description of the boundaries of each unit created by the declaration, including the unit's identifying number." [4]

I.

The developer parties argue that the trial court erroneously found

[4]Although § 35-8A-205 was amended by Act No. 2018-403, Ala. Acts 2018, see note 3, supra, the quoted portions of that Code section, which are relevant to this case, remain unchanged.

that the provisions of the Second Declaration, and its exhibits (including the as-built plans), that purported to create and identify the four commercial units were invalid and of no force and effect and that the trial court erroneously reformed the Second Declaration in accordance with that finding.

A.

In their counterclaims and third-party complaints, the Association and Montgomery argued that the language in the Second Declaration and its exhibits that purported to create the commercial units did not comply with the requirements in the Act for the creation of a unit. Thus, they sought a judgment declaring that no commercial units existed and that the areas designated as commercial units were part of the common elements of POB II.

Section 35-8A-205 provides that a declaration for a condominium must contain "[a] statement of the maximum number of units which the declarant reserves the right to create." The introductory provisions of the Second Declaration include the following:

"WHEREAS, Phase Two of the project consists of one (1)

> building containing a total of One hundred Four (104) Residential Units, and One Hundred Four (104) Storage Units together with access, an outdoor pool, parking and appurtenant facilities herein described. There are various areas within the building which are reserved to the Developer as shown on the Plans or stated in the Declaration."

(Emphasis added.) Further, § 5.04 of the Second Declaration includes the following provision:

> "Type Check-in, Type Maintenance, Type Housekeeping, and Type Sales Office, are commercial Units and are assigned a portion of the common elements, the others are limited common elements assigned to the maintenance Units."

The exhibits attached to the Second Declaration referenced each of the commercial units by name, designated the square footage for each of the commercial units, and designated the ownership interest of the four commercial units. Thus, the Second Declaration and its exhibits, when read as a whole, make it clear that POB II would consist of 104 residential units and the 4 commercial units. Accordingly, the Second Declaration appears to satisfy the requirements of § 35-8A-205(a)(4).

Section 35-8A-205(a)(5) provides that a declaration must include "[a] description of the boundaries of each unit created by the declaration." Former § 35-8A-209(a), Ala. Code 1975, provided that "[p]lats and plans

are part of the declaration." The as-built plans depicted each of the commercial units and showed boundary lines for each of those units. Thus, on its face, the Second Declaration satisfies the requirements of § 35-8A-205(a)(5).

This case does not involve a complete failure to comply with the requirements of § 35-8A-205(a)(4) and (5) with regard to the commercial units. At most, the matters the Association and Montgomery complain of are nothing more than defects in the Second Declaration. However, nothing in the Act provides, or even suggests, that declaring that an individual unit was not validly created is an appropriate remedy for any errors in a recorded declaration. In fact, § 35-8A-203(d), Ala. Code 1975, provides:

> "Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with [the Act]. The determination of whether a substantial failure impairs marketability is not governed by [the Act]."

Also, as noted earlier, § 35-8A-110(a) provides that the Act "should be liberally construed to effectuate its purpose of encouraging development and construction of condominium property under the provisions of [the

Act]." To hold that a defect in the statement of the maximum number of units in a condominium or any defect in the description of a particular unit would result in a holding that such a unit was not validly created would not be consistent with encouraging the development and construction of condominium property.

For these reasons, any defects in the Second Declaration regarding the maximum number of units or in describing the boundaries of the commercial units did not provide a basis for declaring that those units were not validly created.

B.

The Association and Montgomery also assert:

> "In addition to the defects and ambiguities in the Second Declaration, three of the four claimed 'commercial Units' were not even sufficiently completed enough to be Units when the Second Declaration was recorded. To become a Unit, the structural and mechanical systems of the Unit must be complete at the time of recording the declaration. Ala. Code § 35-8A-201(c). ... Alabama Comment 3 recognizes that the completion requirement of Section 201(c) applied to Units. It observes that the substantial completion requirement 'is one of the major legal changes made by the [Uniform Condominium Act], as contrasted with the prior law both in Alabama and elsewhere.' "

Association and Montgomery's brief at pp. 47-48.

> As noted earlier, former § 35-8A-201(c) provided:
>
> " A declaration or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent registered engineer or independent registered architect."

(Emphasis added.) Further, paragraph 3 of the Alabama Commentary to former § 35-8A-201 provided:

> "3. The requirement in (c) that a declaration may not be recorded, thus creating a legal condominium, until all the units are substantially completed is one of the major legal changes made by the [Uniform Condominium Act], as contrasted with the prior law both in Alabama and elsewhere. As the Official Comment explains, this requirement is an important element in the overall consumer protection portions of the act. While the units may be pre-sold, that is, a contract of sale may be executed before completion, and even prior to the time that construction begins, and a deposit given by the purchaser, under [former] § 35-8A-417[, Ala. Code 1975,] no unit may be conveyed until it has been substantially completed, and the declarant may not receive the major portion of the purchase price from buyers until that time."

(Emphasis added.) Additionally, the current version of § 35-8A-201(c), Ala. Code 1975, provides:

> " A declaration or an amendment to a declaration adding units to a condominium is not effective unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially complete, as evidenced by a recorded certificate of substantial completion of structural and mechanical systems executed by an independent registered engineer or independent registered architect."

(Emphasis added.)

It is clear that this section deals with the effectiveness of the declaration as a whole, not the issue whether any particular units are validly created. Thus, the Association and Montgomery's argument that three of the four commercial units were not substantially complete at the time the Second Declaration was filed does not support the trial court's determination that those commercial units were not validly created.

Based on the foregoing, the trial court could not have properly relied on any alleged failure to comply with the Act as a basis for finding that the provisions in the Second Declaration and it exhibits relating to the commercial units were invalid and of no force and effect.

II.

The trial court found that the "housekeeping unit" has never existed.

It is undisputed that the housekeeping unit has not been built. However, the housekeeping unit was specifically created by the Second Declaration. Additionally, the Act does not provide a time limit within which the construction of an individual unit that has been created in a declaration must be completed. Section 18.06 of the Second Declaration provides:

> "The Developer may make such use of the unsold Units and of the common areas and facilities as may facilitate such completion and sale, including but not limited to showing of the Property and the display of signs. The Developer may maintain sales offices, management offices, leasing and operations offices, and models in any Unit of the Condominium or on Common Elements in the Condominium without restriction as to the number, size or location of said sales offices, management offices, leasing and operations offices and models. The Developer shall be permitted to relocate said sales offices, management offices, leasing and operations offices and models from one Unit location to another or from one area of the Common Elements to another area of the Common Elements in the Condominium. The Developer may maintain signs on the Common Elements advertising the Condominium. The rights of the Developer as provided for in this paragraph shall cease and terminate ten (10) years from the date of the recording of this Declaration in the Office of the Judge of Probate of Baldwin County, Alabama."

Although this section provides a time limit on a developer's right to use unsold units, common areas, and facilities, it does not impose a time limit within which the construction of an individual unit must be completed.

Therefore, the fact that the housekeeping unit had not yet been constructed does not affect the validity of that unit. Accordingly, the trial court erroneously found that the housekeeping unit never existed.

III.

The developer parties also argue that fraud-based claims raised by the Association and Montgomery in their counterclaim and third-party complaint did not provide a proper ground for holding that the commercial units were not validly created and that reformation was not a proper remedy for any fraud-based claims. In response, the Association and Montgomery argue that reformation was the only viable remedy under the facts of this case. Specifically, they assert:

> "Equitable remedies were required to adequately redress the wrongs committed by [the developer parties]. Through [the developer parties'] illegal and fraudulent conduct, POB II was materially changed to the ongoing detriment of the [Association] and Unit owners. Despite that, [the developer parties'] claim that instead of reformation, each Unit owner must file a separate action for damages is contrary to the purpose and express provisions of the Act. The Act was designed to avoid such a scenario."

Association and Montgomery's brief at p. 69. They also assert:

> "A simple reformation is the only practical solution, especially

> under the unique facts of a case like this, to remedy the fraud and fulfill the Act's purpose of ensuring that the buyers receive what they were promised.
>
> "There was no obstacle to reformation of the Second Declaration given the unique facts of this case. Section 8-1-2[, Ala. Code 1975,] clearly provides that
>
> > " '[w]hen, through fraud, a mutual mistake of the parties or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised by a court on the application of the party aggrieved so as to express that intention, so far as it can be done without prejudice to the rights acquired by third persons in good faith and for value.'
>
> "(Emphasis added.) The reformation granted in this case clearly did not prejudice any rights acquired by third persons in good faith and for value. At a minimum, there were no other parties who could rely in good faith on any expectation that [Brett/Robinson] would become the permanent owner of commercial Units in POB II."

Association and Montgomery's Brief at pp. 70-71.

The appellees' arguments in this regard are based on the assertions that Brett/Robinson admitted that, from the inception of POB II, the developers intended to create the four commercial units; that the offering statement and its exhibits did not disclose the existence of the commercial

units; and that the developers did not issue an amended offering statement disclosing the existence of the four commercial units. They further assert:

> "There was no notice to buyers of that change or the significance of it; buyers were never told Common Elements were being taken to create 'commercial Units.' ... There was ample evidence before the trial court demonstrating that there was no disclosure of the possibility commercial Units could exist. If [the developer parties'] 'suppressed intent' testimony -- that there was an intent to create commercial Units from inception -- is accepted, then the evidence would amply support a conclusion by the trial court, that [the developer parties] defrauded buyers in the Offering Statement and violated the affirmative disclosure requirements of Article 4[of the Act]. In other words, [the developer parties] admitted to fraud and violating the Act.

Association and Montgomery's brief at p. 44.

Former § 35-8A-402, Ala. Code 1975, provided, in pertinent part:

> "(a) Except as provided in subsection (b), a declarant, prior to the offering of any interest in a unit to the public, shall prepare an offering statement conforming to the requirements of [former] Sections 35-8A-403 through 35-8A-406[, Ala. Code 1975].
>
> "(b) A declarant may transfer responsibility for preparation of all or a part of the offering statement to a successor declarant specified in [former] Section 35-8A-304[, Ala. Code 1975,] or to a person in the business of selling real estate who intends to offer units in the condominium for his

> own account. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).
>
> "(c) Any declarant or other person in the business of selling real estate who offers a unit for his own account to a purchaser shall deliver an offering statement in the manner prescribed in [former] Section 35-8A-408(a)[, Ala. Code 1975,] and is liable under [former] Sections 35-8A-408 and 35-8A-417[, Ala. Code 1975,] for any false or misleading statement set forth therein or for any omission of material fact."

Former § 35-8A-403, Ala. Code 1975, provided, in pertinent part:

> "(a) Except as provided in subsection (b), an offering statement must contain or fully and accurately disclose:
>
> "(1) The name and principal address of the declarant and of the condominium;
>
> "(2) A general description of the condominium, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that declarant anticipates including in the condominium;
>
> "(3) The number of units in the condominium;
>
> "(4) Copies of the declaration, other than the plats and plans, as well as any other recorded covenants, conditions, restrictions and reservations affecting the condominium; the bylaws, and any

> rules or regulations of the association; copies of any contracts or leases to be signed by purchasers at closing, and copies of any contracts or leases that will or may be subject to cancellation by the association under [former] Section 35-8A-305[, Ala. Code 1975];
>
> "....
>
> "(14) Any restraints on sale or lease of any units in the condominium and any restrictions:
>
> "a. On use, occupancy or alienation of the units ....
>
> "....
>
> "....
>
> "(b) If a condominium composed of not more than 12 units is not subject to any development rights, and no power is reserved to a declarant to make the condominium part of a larger condominium, group of condominiums, or other real estate, an offering statement may but need not include the information otherwise required by subdivisions (9), (10), (15), (16), (17), and (18) of subsection (a).
>
> "(c) A declarant shall promptly amend the offering statement to report any material change in the information required by this section."

Further, former § 35-8A-408, Ala. Code 1975, provided, in pertinent part:

> "(a) A person required to deliver an offering statement pursuant to [former] Section 35-8A-402(c)[, Ala. Code 1975,]

> shall provide a purchaser of a unit with a copy of the offering statement and all amendments thereto before conveyance of that unit, and not later than the date of any contract of sale. Unless a purchaser is given the offering statement more than seven days before execution of a contract for the purchase of a unit, the purchaser may cancel the contract, or rescind the conveyance if a conveyance has already occurred, within seven days after first receiving the offering statement.
>
> "....
>
> "(c) If a person required to deliver an offering statement pursuant to [former] Section 35-8A-402(c) fails to provide a purchaser to whom a unit is conveyed with that offering statement and all amendments thereto, as required by subsection (a), the purchaser, at the purchaser's option and in lieu of any rights to damages or other relief, is entitled to receive from that person an amount equal to five percent of the sales price of the unit at anytime prior to the expiration of six months from the date of conveyance of the unit, plus five percent of the share proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the condominium."

Finally, § 35-8A-414, Ala. Code 1975, provides:

> "If a declarant or any other person subject to [the Act] fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for actual damages or appropriate equitable relief. The court, in an appropriate case, may award reasonable attorney's fees to either party."

Nothing in these Code sections suggests that misrepresentations in

an offering statement or failure to fully comply with the provisions of former §§ 35-8A-402 and -403 are valid grounds for finding that units designated in a declaration of condominium were not validly created units. Rather, the penalties in these provisions of the Act appear to be personal to the aggrieved party or parties. This is highlighted by the provision in § 35-8A-110, which provides, in part: "The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." (Emphasis added.) In this case, the Association and Montgomery's fraud-based arguments are based on their assertion that the developers did not disclose their intent to create the four commercial units in POB II, either in the original offering statement or in an amended offering statement. If the developers had disclosed their intent to create the commercial units in the original offering statement, Montgomery could have then used that information to determine whether she wanted to purchase a residential unit in POB II. Additionally, if the developers had issued an amended offering statement after they had filed the Second Declaration that added the commercial units, Montgomery might have had the opportunity to

cancel her purchase agreement before closing on the unit. However, in no event would the developers' full performance have resulted in the invalidation of the commercial units.

Moreover, the Association and Montgomery's fraud claims are based on the developers' alleged "suppressed intent."

> " 'The elements of a suppression claim are "(1) a duty on the part of the defendant to disclose facts; (2) concealment or nondisclosure of material facts by the defendant; (3) inducement of the plaintiff to act; (4) action by the plaintiff to his or her injury." ' Freightliner, L.L.C. v. Whatley Contract Carriers, L.L.C., 932 So. 2d 883, 891 (Ala. 2005) (quoting Lambert v. Mail Handlers Benefit Plan, 682 So. 2d 61, 63 (Ala. 1996)).' "

Aliant Bank v. Four Star Invs., Inc., 244 So. 3d 896, 930 (Ala. 2017).

In this case, the Association and Montgomery assert that the developers defrauded purchasers and that they changed the nature of the condominium to the detriment of those purchasers. However, Montgomery was the only POB II residential-unit owner who brought a fraud claim in this case and the only residential unit owner who testified at trial. Essentially, the Association and Montgomery are asking this Court to affirm the reformation of the Second Declaration to meet the expectations

of a single residential-unit owner without any evidence as to the expectations or understandings of any of the owners of the remaining 103 residential units. Additionally, they appear to ignore the fact that any reformation of the Second Declaration so that it reflected Montgomery's understanding and intent at the time she purchased her unit could effectively change the Second Declaration so that it no longer reflected the understanding and intent of other owners, particularly those who purchased their units after the Second Declaration was filed.

For these reasons, the reformation of the Second Declaration was not an appropriate remedy to address any fraud-based claims.

Conclusion

Based on the foregoing, the trial court erred when it found that the commercial units were not validly created and when it amended and reformed the Second Declaration in accordance with that finding. Additionally, that finding was the basis the for the trial court's holding that the July 2015 warranty deed conveying the commercial units to Brett/Robinson was void and for the trial court's order awarding costs and attorneys' fees to the Association and Montgomery. Accordingly, we

reverse the trial court's judgment and remand this case for proceedings consistent with this opinion. We note that, in their counterclaims and third-party complaints, the Association and Montgomery both requested alternative relief in the event the trial court determined that the commercial units exist. In her counterclaim and third-party complaint, Montgomery requested the following:

> "g. in the alternative that the Court declares that the claimed commercial units exist, an award of damages for the loss of value to her unit and loss of ownership interest in the common elements."

In its counterclaim and third-party complaint, the Association requested the following:

> "h. in the alternative that the Court declares that the claimed commercial units exist, to determine and declare the parties respective use rights, ordering immediate modifications of said commercial units to meter all utilities separately at the cost of [Brett/Robinson], and awarding damages in favor of the Association for costs paid by it for the benefit of said commercial units for utilities, maintenance, and upkeep."

On remand, the trial court should address those requests for alternative relief. With regard to the Association's request for a judgment declaring the parties' respective use rights, we note that the stipulated facts

establish that common-element infrastructure was located in the purported check-in and maintenance units. Specifically:

> "a. Within the 'Type Check-In' are elevator control panel, security control equipment, fire suppression control equipment, standby generator annunciator panel, house lights controls, and emergency telephone equipment, which serve the Common Elements and all residential Units.
>
> "b. Within the 'Type Maintenance' are water pipes, sewer pipes, fire standpipes serving the entire fire suppression system, and irrigation system controls."

Thus, the trial court's judgment on remand should specifically address the Association's right to access the common-element infrastructure that is located in the check-in unit and the maintenance unit.[5]

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[5]In a footnote in their brief, the developer parties assert:

> "Additionally, the circuit court entered summary judgment on Brett/Robinson's claims of trespass and intentional interference after Brett/Robinson acknowledged that these claims were 'based on or intertwined with' the issue of the ownership of the commercial units. ... Accordingly, if this Court reverses the circuit court's ruling on the ownership issue, it should naturally reverse the summary judgment on these claims."

Developer parties' brief at p. 57 n. 19. However, they do not cite any authority in support of this assertion. Additionally, they do not address the fact that the Association and Montgomery presented arguments in

REVERSED AND REMANDED WITH INSTRUCTIONS.

Bolin, Wise, Bryan, Sellers, and Mitchell, JJ., concur specially.

Mendheim and Stewart, JJ., concur in the result.

Parker, C.J., dissents.

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support of their motion for a summary judgment that were not based on the trial court's holding that the four commercial units were not validly created. Accordingly, Brett/Robinson has not established that it is entitled to relief as to this claim.

WISE, Justice (concurring specially)

Although I concur with the majority opinion, I write specially to address concerns I have in this case. First and foremost, I do not wish to be understood as approving the condominium developers' actions in this case or implying that Pamela Montgomery and the Phoenix on the Bay II Owners Association, Inc. ("the Association"), are not entitled to any form of relief. Rather, I simply believe that the relief granted by the trial court was not appropriate under the specific facts of this case and that, on remand, the trial court should consider the Association and Montgomery's remaining claims for relief.

The fact that the developers never issued an amended offering statement, as required by former § 35-8A-403(c), Ala. Code 1975, disclosing the addition of the four commercial units to Phoenix on the Bay II ("POB II"), and the fact that, as a result, each unit's percentage of ownership in the common elements was decreasing is troubling. However, I do not believe that amending and reforming the second declaration in a manner that will affect all current residential-units owners is an appropriate remedy for such a failure when Montgomery was the only POB

II residential-unit owner who brought a fraud claim in this case and the only residential-unit owner who testified at trial. Rather, I believe that, if Montgomery can adequately prove her fraud claim and that she was damaged by the failure to issue an amended offering statement, she will be limited to remedies that will put her in as good of a position as if the developers had fully complied with the provisions of former § 35-8A-403(c), as discussed in Part III of the majority opinion.

I also write to express my concerns regarding the way in which the developers added the commercial units in the second declaration. Brett/Robinson Gulf Corporation ("Brett/Robinson") presented evidence indicating that the developers had intended to create the four commercial units from the inception of the condominium project. However, the addition of the language regarding the commercial units in the body of the second declaration looks more like it was added as a mere afterthought. The developers inserted a single sentence regarding the commercial units in a section titled "Easements -- Developer's Retained and Association's." Although the description section of the second declaration provides descriptions for "Features," "Private Residential Elements," "Common

Elements," "Limited Common Elements," "Unit Boundaries," "Surfaces," "Balconies," and "Developer's Limited Warranty," it does not include any description of commercial units. Additionally, the section dealing with use descriptions provides:

> "15.01 Single Family Residences. The condominium property shall be used only for single family residences and for the furnishing of services and facilities herein provided for the enjoyment of such residence. Each of the Units shall be occupied only by a single family and its guests as a residence and for no other purpose."

However, there is no similar provision discussing the commercial units and addressing whether there are any limitations on the type of commercial uses for which those units may be used. This lack of details regarding the commercial units could lead to future disputes between Brett/Robinson, the Association, and residential-unit owners. The better practice for developers who wish to develop condominiums that include commercial units would be to fully define and describe such commercial units and fully detail whether there are any limitations on the types of commercial uses for which those units may be used. This would allow purchasers to make informed decisions when they purchase units in a condominium that

includes commercial units.

I also find it troubling that the developers located crucial common-element infrastructure within the check-in and maintenance units. The location of this critical infrastructure in commercial units that the developers retained for their exclusive use and control is particularly interesting in light of the Association and Montgomery's argument that the developers were attempting to permanently embed Brett/Robinson as the provider of condominium-management services to the Association. Regardless of the developers' motivations, it appears that locating critical common-element infrastructure in commercial units has done nothing more than lead to conflict between the parties once the Association terminated its management agreement with Brett/Robinson. On remand, the trial court must address the serious issue of the Association's ability to access that critical common-element infrastructure.

I am further troubled by the fact that the developers did not separately meter the utilities for the commercial units, even though they intended to retain exclusive use and control over those commercial units, and by the fact that the Association had been paying utilities for those

commercial units. The issue of utilities is further complicated by the fact that the check-in unit includes an open-air area in the middle of the lobby and the fact that the glass walls enclosing the sales unit do not extend to the ceiling and the top of that unit is open to the lobby. On remand, this is yet another issue that must be addressed and resolved by the trial court.

I believe that the poorly executed manner in which the developers added the commercial units in the second declaration, their failure to provide preconstruction purchasers with an amended offering statement disclosing the addition of the commercial units, and the manner in which the developers constructed the check-in, maintenance, and sales-office units have created unnecessary problems and issues in this case. However, I do not believe that these issues affect the validity of the commercial units themselves. Rather, I believe that these issues raise questions regarding whether the Association and Montgomery are entitled to the alternative relief they requested in their counterclaims and third-party complaints. Also, I believe that condominium developers should use more care when creating commercial units within a condominium. Finally, condominium developers should be sure to comply with the requirements

of § 35-8A-403(c), regarding amended offering statements when there are material changes to information provided in the initial offering statement. The failure to do so will leave developers open to claims by individual preconstruction purchasers who were not provided with such amended offering statements. See § 35-8A-402(c), Ala. Code 1975 (providing that "[a]ny declarant or other person in the business of selling real estate who offers to a purchaser a unit for the offeror's own account to whom such responsibility for preparation and delivery of an offering statement has been transferred shall deliver an offering statement in the manner prescribed in Section 35-8A-408(a)[, Ala. Code 1975,] and is liable under Sections 35-8A-408 and 35-8A-414[, Ala. Code 1975,] for any false or misleading statement set forth therein or for any omission of material fact" (emphasis added)).

SELLERS, Justice (concurring specially).

By reforming the February 14, 2007, Phoenix on the Bay II, Phase Two ("POB II"), condominium declaration, the trial court exceeded its discretion. The act of abolishing the four commercial units identified in that declaration on the basis that those units were never validly created pursuant to the Alabama Uniform Condominium Act ("the Act") , § 35-8A-101 et seq., Ala. Code 1975, amounted to judicial overreaching.

A condominium is created solely by filing a declaration in the probate court. § 35-8A-201, Ala. Code 1975. The declaration is the instrument that "creates and defines the units and common elements" of a condominium. Paragraph 2 to Commissioner's Commentary to former § 35-8A-203, Ala. Code 1975. Any person or class of persons adversely affected by a declarant's failure to comply with the Act has a claim for "actual damages or appropriate equitable relief." § 35-8A-414, Ala. Code 1975 (emphasis added). I write to express my opinion that reformation of the declaration to provide for the abolishment of the commercial units was not an appropriate remedy in this case. "A party seeking to have an instrument reformed must produce clear and convincing evidence that the instrument

does not express the intent of the parties." Pullum v. Pullum, 58 So. 3d 752, 756 (Ala. 2010) (emphasis added). It is undisputed that the developers of POB II unilaterally drafted and filed the declaration that created the POB II condominium; it is further undisputed that the developers intended to create the commercial units. Moreover, from February 2007 until 2015 (when this litigation commenced), the developers took actions consistent with owning the commercial units by paying to the Phoenix on the Bay II Owners Association, Inc. ("the Association"), approximately $230,000 in dues and assessments, paying property taxes to the Baldwin County tax assessor, and voting at Association meetings. Notably, Pamela Montgomery, the only unit holder who challenged the validity of the commercial units, testified that she discovered the units had been designated as commercial in 2011; yet she raised no legal challenge to that discovery until July 2015, when she became president of the Association. There are ample statutory and common-law legal and equitable remedies available to unit owners who claim to have been misled in prepurchase marketing materials such as offering statements. Those remedies, tailored to a particular owner's specific situation, could include

rescission of the purchase contract and/or damages for breach of contract or fraud. I am concerned that the trial court's action of reforming the declaration would not only abolish the developers and their successors long-standing ownership rights in the commercial units, but also affect the property rights of all other unit owners, many of whom may not be similarly situated to Montgomery, by altering their ownership interests in the common elements. Reformation of the condominium declaration under these circumstances is inappropriate, both as a matter of law and as a matter of public policy.

Bolin, Bryan, and Mitchell, JJ., concur.

PARKER, Chief Justice (dissenting).

Today's result makes one thing clear: Law has swallowed Equity.

Pamela Montgomery and Phoenix on the Bay II Owners Association, Inc. ("the Association"), asserted claims against Brett Real Estate and Robinson Development Company, Inc., Tillis M. Brett,[6] Thomas Brett, William T. Robinson, Jr. ("the developers"), and Brett/Robinson Gulf Corporation ("Brett/Robinson") (Brett/Robinson and the developers are referred to collectively as "the appellants"). Montgomery and the Association sought primarily a declaratory judgment and secondarily reformation of the recorded Phoenix on the Bay II condominium declaration. The crux of the controversy was that the developers had recorded a declaration of condominium for Phoenix on the Bay II that purported to create commercial units, even though the proposed declaration that the developers had provided to preconstruction purchasers like Montgomery promised a purely residential development.[7]

[6]As noted in the main opinion, Tillis died during the litigation, and Claudette Brett, the personal representative of Tillis's estate, was substituted.

[7]Seventy percent of the unit owners were preconstruction purchasers.

Among other arguments, Montgomery and the Association contended that the recorded declaration did not validly create commercial units. After a bench trial, the Baldwin Circuit Court declared (without stating reasons) that the condominium's units were restricted to residential use and could be used for no other purpose. Consistent with that declaratory judgment, the court reformed the recorded declaration by striking its references to commercial units and by revising its exhibits accordingly.

As framed by the main opinion, the two core issues in this case are (1) whether the recorded declaration complied with the Alabama Uniform Condominium Act ("the AUCA"), § 35-8A-101 et seq., Ala. Code 1975, when the declaration purportedly created commercial units and (2) whether reformation of the recorded declaration was a proper remedy for Montgomery and the Association's fraud claims. As I will explain, I believe that this is not the right analytical framework for deciding this case. More importantly, however, this Court's misgivings about the propriety of reformation reflect what I believe is a more fundamental problem: the over-legalization of equity. Therefore, I begin my discussion with the latter point.

I. The "lawification" of equity

Courts of equity were originally created so that there would be an institution empowered to do justice by providing a remedy that courts of law, because of the law's strictures and inevitable over-generality, could not. See T. Leigh Anenson, Treating Equity Like Law: A Post-Merger Justification of Unclean Hands, 45 Am. Bus. L.J. 455, 501 n.288 (2008); Thomas O. Main, Traditional Equity and Contemporary Procedure, 78 Wash. L. Rev. 429, 429-30, 441-42 (2003); Leonard J. Emmerglick, A Century of the New Equity, 23 Tex. L. Rev. 244, 245, 254 (1945). Unsurprisingly, this ideal proved hard to achieve. In their early days, equity courts responded nimbly to each new factual scenario they faced. Ally Windsor Howell, Tilley's Alabama Equity § 1:5 (5th ed. 2012). But the flaws of a "lawless" equity were (and are) readily apparent; common sense and experience have shown that some principled framework and a degree of adherence to precedent are needed to consistently build relief in the general shape of justice.

However, the reaction against an equity limited only by the chancellor's variable conscience was not merely to give the chancellor's

conscience more parameters but to remove the chancellor's conscience from the equation. Over time, equitable precepts were crystalized to such a degree that equity became "as legalistic as law," Calvin Woodard, Joseph Story and American Equity, 45 Wash. & Lee L. Rev. 623, 639 (1988). See Main, supra, at 448 ("[O]ne commentator's crystallization is another's ossification. As the jurisdiction of equity lost its youthful exuberance, so also its freedom, elasticity and luminance."). It is generally thought that that trend culminated in the early 19th century during the chancellorship of Lord Eldon, who famously remarked:

> "The doctrines of th[e] Court [of Chancery] ought to be as well settled and made as uniform almost as those of the common law .... Nothing would inflict on me greater pain ... than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot."

Gee v. Prichard, 2 Swans. 402, 414, 36 Eng. Rep. 670, 674 (1818); cf. Michelle Johnson & James Oldham, Law Versus Equity - As Reflected in Lord Eldon's Manuscripts, 58 Am. J. Legal Hist. 208 (2018) (discussing Lord Eldon's more comprehensive views on equity). By the beginning of the 20th century, the one-time "keeper of the king's conscience" made it clear: "This court is not a Court of Conscience." Emmerglick, supra, at 253

(quoting In re Telescriptor Syndicate, 2 Ch. 174, 195 (1903)); see Main, supra, at 441.

This "lawification" of equity came to America, too. The merger of law and equity courts, beginning in the mid-19th century and concluding in the mid- to late 20th century, exacerbated the problem.[8] The utilitarian and "scientific" legal theorists of that age were just as affronted by equity's independence as they and their predecessors had been by its unpredictability. Equity had to be straightjacketed in law's rules. Merger quickly "blur[red] the distinction between doing what the law says and doing what the law permits." Kelly D. Hine, Comment, The Rule of Law Is Dead, Long Live the Rule: An Essay on Legal Rules, Equitable Standards,

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[8]In Alabama, the circuit courts have equity jurisdiction, see § 12-11-31, and the Legislature has expressly made equitable relief available in certain contexts, see, e.g., § 35-8A-414 of the AUCA. However, in 1973, the Alabama Rules of Civil Procedure merged law and equity by providing that "[t]here shall be one form of action to be known as 'civil action,' " governed by a uniform set of procedural rules. See Rule 2, Ala. R. Civ. P., and Committee Comments on the 1973 Adoption. See generally Frank W. Donaldson & Michael Walls, Merger of Law and Equity in Alabama - Some Considerations, 33 Ala. Law. 134 (1972). Consistent with the national trend that I outline here, merger seems to have now resulted in both kinds of claims being administered with similar inflexibility.

and the Debate over Judicial Discretion, 50 SMU L. Rev. 1769, 1786 (1997). That is, merged courts tend to administer equitable claims according to the proverbial letter of the law and to assume, without further reflection, that they are neither permitted nor required to do more to achieve the goal of equity. All along, scholars and jurists have been concerned that, "in merged systems[,] ... '[t]he tendency ... has plainly and steadily been towards the giving [of] an undue prominence and superiority to purely legal rules, and the ignoring, forgetting, or suppression of equitable notions.' " Main, supra, at 496 (quoting 1 John Norton Pomeroy, A Treatise on Equity Jurisprudence ix (2d ed. 1892)); see also Roscoe Pound, The Decadence of Equity, 5 Colum. L. Rev. 20 (1905).

Unsurprisingly, by the middle of the 20th century, "[t]he unified procedure ha[d] not attained the preoccupation with conscience which was responsible for the process whereby morals formerly were converted into rules of law." Emmerglick, supra, at 253. Merger accomplished its goal of simplifying the administration of justice -- a positive development -- but arguably hampered the quality of justice by implementing a uniform approach to both systems, id. at 248, and conflating the systems'

distinctive roles. Hine, supra. And at the turn of this century, scholars continued to argue that "the tradition of equity is impaired in a merged system [when] the trial judge cannot escape the rigors of that infrastructure in the exercise of [his or] her magisterial good sense." Main, supra, at 437.

The case before us is an example of this ossification of equity defeating magisterial good sense. Typically, the remedy of reformation applies to bilateral instruments such as contracts or conveyances when, because of fraud or mistake, they fail to express the mutual intent of the parties. Thus, today's Court is uncomfortable with the remedy's fit in this case, where the unilateral intent of the drafter-developers to create commercial units seems undisputed. But there were no condominiums in the common-law world at the time traditional principles of reformation took shape. Indeed, condominium law did not exist in the United States until the mid-20th century. See Donna S. Bennett, Condominium Homeownership in the United States: A Selected Annotated Bibliography of Legal Sources, 103 Law Libr. J. 249, 250-54 (2011) (describing migration of condominium law from continental Europe to the United States via

Puerto Rico); William K. Kerr, Condominium - Statutory Implementation, 38 St. John's L. Rev. 1, 1-5 (1963) (similar). Thus, the novelty of this case calls for the kind of creative thinking that characterized equity in its early days, each time it faced a new situation. And this case presents the perfect opportunity, as no one, not even the appellants, seriously contends that the appellants were in the right.

Given the flexibility that equity historically has provided, this Court ought to confirm that the circuit court provided Montgomery and the Association with reasonable and proper relief. That court reached a sensible resolution of the case -- the only judicial solution that could actually resolve Montgomery and the Association's problem and correct the irreconcilable inconsistencies in the recorded declaration (which I will discuss below). Yet because this Court cannot find this specific remedy in the AUCA, the Court concludes that no such remedy is available. ___ So. 3d at ___. The Court gives no consideration at all to whether the circuit court's power to grant such relief might derive from its more fundamental equitable powers -- which are nowhere expressly limited by the AUCA. If this Court had embraced the essential character of equitable power

instead of treating equity as merely a subsidiary set of rigid rules, it would not have been so quick to conclude that the circuit court exceeded its considerable discretion by awarding reformation.[9]

To be clear, I am not advocating a radical departure from existing norms of equity jurisprudence. I recognize, as do all responsible thinkers on the subject, that a judge administering equity always walks " 'a fine line between ... exercis[ing] the full scope of his powers to do justice and ... combin[ing] ideological perversity with tyrannical license.' " Hine, supra, at 1774 (quoting Peter C. Hoffer, The Law's Conscience 20 (1990)).

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[9]Importantly, the reformation's impact on the ownership interests of nonparty unit owners was negligible. The reformed declaration increased each owner's interest by a fraction of a percent. Moreover, those owners were free to intervene to oppose that negligible impact; unsurprisingly, none did so. Therefore, unlike the main opinion and the special concurrences, I do not consider the other unit owners' interests a reason for concluding that the circuit court exceeded its discretion.

As for the other unit owners' not having joined with Montgomery as claimants, the Association did so. And a condominium association is empowered to "[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." § 35-8A-302(a)(4) (emphasis added). Thus, the Association represented all affected unit owners; it was not necessary for each owner to join. And neither the circuit court nor this Court has ruled otherwise in this case.

Without question, circumspection is appropriate when reviewing any seemingly expansive exercise of judicial power.

Moreover, the principles of true justice have been ultimately established by the Supreme Lawgiver. As the Creator of mankind and the universe in which we live, he has revealed those principles in the creation and, more importantly, in his written Word; they are knowable. See 1 William Blackstone, Commentaries on the Laws of England *39-42; Thomas Aquinas, Summa Theologica, Treatise on Law, Q. 91, arts. 1, 2, 4; John Calvin, Institutes of the Christian Religion 2.2.13 (p. 160), 2.2.22-.24 (p. 160), 2.8.1 (p. 226), 4.20.14-.16 (p. 898) (Christian Classics Ethereal Library 2002); Romans 2:12-16. Yet the capacity of mankind -- including judges -- to reason from those principles of justice is fallen and thus imperfect, such that even the most enlightened minds may disagree on how best to apply them to particular situations. So I am not suggesting that there will be an easy answer to what justice looks like in each case. However, I am advocating a heightened awareness -- and reconsideration -- of historical and structural factors that tend to impair the ability of equity to do equity, and tend to destroy its complementary role in ensuring

the availability of justice.

II. The proper framework for deciding this case

Even under existing jurisprudence, I believe that the main opinion employs an unsound analytical framework that has led it to an incorrect conclusion. The principal issues in this case are not whether the recorded declaration complied with the AUCA and whether reformation is available to remedy a violation of the AUCA. Rather, the principal issues are whether the recorded declaration, objectively interpreted, created commercial units and, if not, whether reformation is available to make the declaration reflect that interpretation. I believe that the judgment should be affirmed because the declaration, read as a whole, does not create commercial units and because the circuit court had discretion to reform the declaration to conform to this interpretation.

At issue is a single, isolated sentence that the developers haphazardly inserted into an article of the declaration entitled "Easements":

> "5.04 Easements -- Developer's Retained and the Association's. Easements are reserved to the Developer, and/or the Developer's heirs and assigns, throughout the Common

> Elements as may be reasonably necessary for the purpose of discharging the Developer's or Building Manager's obligations.... [T]he Developer, and/or the Developer's heirs and assigns, retains the exclusive right to use and control the check-in area, sales office, housekeeping, maintenance areas, workshops, storage areas, as are indicated on the plans. Type Check-in, Type Maintenance, Type Housekeeping, and Type Sales Office, are commercial Units and are assigned a portion of the common elements ...."

(Emphasis added.) There is no other reference in the body of the recorded declaration to any of those purported commercial units, although they are referenced in the declaration's exhibits. In fact, no other provision in the body of the declaration appears to contemplate the existence of commercial units.

More importantly, this scanty commercial-units language conflicts directly or implicitly with numerous other provisions of the declaration that reflect an understanding that the condominium was to be purely residential:

Subsection	Topic	Provision	Inconsistency
5.01	Development Plan: General Description of Improvements	"The Building contains eight (8) levels, one through eight. Each level also contains a storage Unit assigned to each condominium Unit for a total of one hundred four (104) storage Units. Each level contains thirteen (13) CONDOMINIUM RESIDENTIAL UNITS. There are six (6) types of condominium residential Units. There are a total of one hundred four (104) condominium residential Units as shown on the Plans."	The general description does not mention commercial units or any units beyond the 104 residential units and their associated storage units.
6.01-6.07	Descriptions	"Features," "Private Residential Elements," "Common Elements," "Limited Common Elements," "Unit Boundaries," "Surfaces," and "Balconies" are described.	No commercial units are described or even mentioned in this otherwise comprehensive and highly detailed section.
6.05	Descriptions: Unit Boundaries	"The vertical boundaries of each Unit shall be the plane of the inside surfaces of the studs which are the component parts of the exterior walls and of interior walls separating a Unit from another Unit ...."	The purported Check-in and Housekeeping units were not enclosed, and the glass walls of the Sales Office unit did not have studs. The declaration contains no boundaries description for such units.

15.01	Use Restrictions: Single Family Residences	"The condominium property shall be used only for single family residences, and for the furnishing of services and facilities herein provided for the enjoyment of such residences. Each of the Units shall be occupied only by a single family and its guests as a residence and for no other purpose."	Brett/Robinson was not a single family and was not using the purported commercial units as a residence.
18.06[10]	Amendment: Provisions Pertaining to the Developer	"The Developer may make such use of the unsold Units and of the common areas and facilities as may facilitate ... completion [of the condominium development] and sale [of Units] .... The Developer may maintain sales offices, management offices, leasing and operations offices, and models in any Unit of the Condominium or on the Common Elements in the Condominium without restriction as to the number, size or location of said [offices and models]. The Developer shall be permitted to relocate said [offices and models] from one Unit location to another or from one area of the Common Elements to another area of the Common Elements in the Condominium.... The rights of the Developer as provided for in this paragraph shall cease and terminate ten (10) years from the date of the recording of this Declaration ...." (Emphasis added.)	This provision contemplates that the developers will use unsold units and common areas for sales, management, leasing, and operations offices, for a limited time. This provision does not contemplate that the developers (or the developers' property-management company) will purchase any units or occupy units in perpetuity.

[10]Subsection 18.06 was cited in Montgomery and the Association's oral-argument exhibit in this Court, without objection from the appellants. Therefore, this subsection is properly before us.

Condominium declarations must be interpreted according to contract-law principles. 15B Am. Jur. 2d Condominiums, Etc. § 8 (2011). "A condominium declaration must be construed as a whole, and the general intent of the contract should prevail, such as when the contract contains contradictory or inconsistent provisions." 10 Fla. Jur. 2d Condominiums, Etc. § 9 (2021); see Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000) ("Under general Alabama rules of contract interpretation, the intent of the contracting parties is discerned from the whole of the contract."). "The parties' intent in a condominium's declaration ... is to be ascertained from the writing alone if possible." Elizabeth Williams, "Cause of Action to Enforce, or Declare Invalid, Restriction on Use of Condominium Property," 14 Causes of Action 2d 315, § 13 (2000) (Supplement). Moreover, "[i]t is elementary that it is the terms of the written contract, not the mental operations of one of the parties, that control its interpretation. Stated another way, the law of contracts is premised upon an objective rather than a subjective manifestation of intent approach." Harbison v. Strickland, 900 So. 2d 385, 391 (Ala. 2004) (quotation marks and citations omitted).

Thus, here the first interpretive question is an objective one about whether the declaration's meaning is plain: Would an ordinary reader of the declaration, having been reasonably well informed about the structure of condominium property rights, believe that the declaration plainly created four commercial units? Based on the above irreconcilable inconsistencies in the declaration, the answer is no; the reader would at least be confused. To put it in contract-interpretation terms, the declaration was ambiguous.

Just like ambiguities in a contract, ambiguities in a condominium declaration must be construed against the drafter. See Homes of Legend, 776 So. 2d at 746 ("[I]f all other rules of contract construction fail to resolve the ambiguity, then, under the rule of contra proferentem, any ambiguity must be construed against the drafter of the contract."); 10 Fla. Jur. 2d Condominiums, Etc. § 9 ("Any ambiguity in a declaration of condominium is construed against the author of the declaration."); 15B Am. Jur. 2d Condominiums, Etc. § 8, Practice Tip ("Any ambiguity in a declaration must be construed against the developer who authored the declaration."). Here, it is not clear that any other rule of construction

would resolve the ambiguity,[11] and the declaration's pervasive ambiguity about commercial units must be construed against the developers. Specifically, the purported commercial units were for the benefit of the developers or entities closely associated with the developers. Thus, the declaration must be construed as not creating those units. Therefore, the circuit court correctly declared that no commercial units existed.[12]

The next question is therefore whether reformation was an appropriate remedy in tandem with the declaratory judgment: specifically, whether the circuit court exceeded its discretion by reforming the declaration to correspond to the court's judgment that the declaration did not create commercial units. Although a declaratory judgment construing

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[11]It could be argued that the general/specific canon of construction, see Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 28 (Thomson/West 2012), applies because the declaration purports to create specific commercial units and the declaration's exhibits include specific calculations and drawings that account for those purported units. That canon does not apply, however, because the language of the declaration is equally specific in excluding commercial units.

[12]In light of this interpretation of the recorded declaration itself, it is unnecessary to determine whether the prepurchase documents provided to Montgomery complied with the AUCA, a question that raises various collateral concerns.

an instrument is subject to de novo review (if confined to the four corners of the instrument) and ore tenus deference (if based on parol evidence), a trial court's award of an equitable remedy such as reformation is generally reviewed for an exceeding of discretion, see Patterson v. Robinson, 620 So. 2d 609, 612 (Ala. 1993) ("[Trial c]ourts traditionally ... enjoy[] considerable discretion in fashioning equitable remedies."). "A court exceeds its discretion ... when it ... has exceeded the bounds of reason in view of all circumstances ...." Edwards v. Allied Home Mortg. Cap. Corp., 962 So. 2d 194, 213 (Ala. 2007).

This Court has held that condominium declarations are subject to reformation. See Cedar Bend Ass'n v. Owens, 628 So. 2d 506 (Ala. 1993). And this remedy is not novel; it has been endorsed by other states for at least four decades. See, e.g., Dickey v. Barnes, 268 Or. 226, 231, 519 P.2d 1252, 1254 (1974) ("[W]e see no impediment to reforming [the condominium declaration] to conform to the requirement of the statute."); Providence Square Ass'n v. Biancardi, 507 So. 2d 1366 (Fla. 1987) (allowing reformation of declaration when statutory process for amending declaration did not provide adequate relief).

Moreover, recorded instruments that create property interests may be reformed in a manner that diminishes a party's purported interest. See, e.g., Taylor v. Burns, 250 Ala. 218, 34 So. 2d 5 (1948) (affirming reformation of deed to diminish defendant's claimed interest in property and to convey the smaller portion intended). See generally Tilley's Alabama Equity § 9:3; 66 Am. Jur. 2d Reformation of Instruments §§ 48-49 (2011). And there is no substantive difference between diminishing a purported interest and eliminating one; these are different degrees of the same remedy. See, e.g., Dalrymple v. White, 402 So. 2d 968 (Ala. 1981) (affirming reformation that eliminated purchaser's claimed interest in house because evidence showed intent to convey different house); Monroe v. Martin, 726 So. 2d 701 (Ala. Civ. App. 1998) (affirming reformation that eliminated husband's purported interest in property).

Further, the appellants are incorrect in arguing that the declaration was not subject to reformation because its commercial-units language accurately reflected the developers' intent. The reformation here was permissible not based on the subjective intent of the developers, but based on the above objective construction of the declaration itself.

As explained above, the declaration, properly interpreted, did not create commercial units. Therefore, the circuit court did not "exceed[] the bounds of reason," Edwards, 962 So. 2d at 213, by reforming the declaration to conform to this interpretation and to eliminate the ambiguity for future readers of the declaration. Accordingly, the court did not exceed its discretion by awarding reformation.

In my view, the circuit court interpreted the declaration properly and acted within its equitable powers to provide a reasonable form of relief under the facts of this case. If a developer wants to add a completely different kind of unit to a condominium plan, it must do a much better job of making that change clear and consistent throughout the document that creates the condominium. I would affirm the judgment.