IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,295

PARKER TAMPA TWO, INC.

Petitioner,

vs.

SOMERSET DEVELOPMENT CORPORATION,

Respondent.

On Review From The Second District Court
Of Appeal Case Nos. 87-892 and 87-1554

DONALD SOFFER, AVENTURA COUNTRY CLUB, EBERHART LINKE, ROBERT JAMES AND DARLENE MARTEN'S AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Donald Soffer, Aventura Country Club, Eberhart Linke, Robert James and Darlene Marten are among several Defendants wrongfully enjoined in Leopold v. Soffer, (11th Jud.Cir.Ct. Case No. 88-26629-05) who now seek compensatory damages in excess of the nominal bond posted by the Plaintiff. They will be collectively referred to as "Amicus Curiae."

The designation (A. __) will refer to Amicus Curiae's appendix which is annexed to this brief. All emphasis is ours unless otherwise indicated.

INTEREST OF AMICUS CURIAE

Donald Soffer, Aventura Country Club, Eberhart Linke, Robert James and Darlene Marten stand before the Court in a legal position similar to Petitioner Parker Tampa Two, Inc. They were enjoined without notice from "[c]oming about, molesting, harming or annoying [an individual] at the complex known as the Turnberry Isle Yacht and Racquet Club and/or wherever else he may be found" by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida on June 23, 1988. The injunction was conditioned only on the posting of a nominal $100.00 bond. (A. 1). The trial court refused to entertain a motion to dissolve the injunction or a motion to increase the bond and an expedited interlocutory appeal was taken to the District Court of Appeal of Florida, Third District.

On August 30, 1988 the Third District, by Per Curiam opinion, reversed the Temporary Injunction (Without Notice) holding that it was issued "[i]n derogation of Florida Rule of Civil Procedure 1.610" for at least four reasons. Soffer v. Leopold, 531 So.2d 201 (Fla. 3d DCA 1988). Among the reasons for reversal was the lack of an attorney's certificate in writing setting forth any efforts to give notice or explaining why notice should not have been required and the failure of the injunction order itself to give reasons why the order was granted without notice. (A. 2). The Third District awarded appellate attorney's fees to Amicus Curiae and remanded to the trial court the issue of amount. (A. 3).

Amicus Curiae then moved the trial court for the entry of a judgment awarding damages, attorney's fees and costs. (A. 4). This motion has been met with the defense that the amount of damages cannot exceed the bond - $100.00. The motion will be heard shortly after this brief is filed.

SUMMARY OF THE ARGUMENT

The District Court of Appeal, Second District, has certified the following question to this Court as one of great public importance:

> ARE THE DAMAGES WHICH ARE RECOVERABLE FOR WRONGFULLY OBTAINING AN INJUNCTION LIMITED TO THE AMOUNT OF THE INJUNCTION BOND?

Amicus Curiae have limited their argument to this certified question and have not addressed several preliminary issues raised by Respondent and replied to by Petitioner.[1]

A majority of jurisdictions have answered the certified question in the affirmative. Florida intermediate appellate courts have aligned themselves with the majority. Amicus Curiae nevertheless submit that the majority rule is analytically unsound and totally unsupportable from a practical perspective. It is therefore urged that the minority rule be adopted, that the certified question be answered in the negative, and that individuals wrongfully enjoined be permitted to obtain compensation to the full extent of their actual damages with the injunction bond remaining as security for payment.

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[1] We do note, however, that Respondent has suggested that the dissolution of an injunction does not necessarily render the injunction wrongful. However, in *Tracy v. Capozzi*, 642 P.2d 591, 594 (Nev. 1982), the Court, although holding that damages are limited to the bond, held that "injunctive restraints are 'wrongful' and recovery on the bond permissible, if such restraints are later dissolved -- regardless of the good or bad faith of the complainant in seeking the restraint."

ARGUMENT

DAMAGES RECOVERABLE AGAINST A PARTY WHO WRONGFULLY OBTAINED AN INJUNCTION SHOULD NOT BE LIMITED TO THE AMOUNT OF THE INJUNCTION BOND.

Florida courts have long acknowledged that a party wrongfully enjoined is entitled to recover damages sustained as a result of the improper injunction:

> The law is clear that a defendant is entitled to any damages sustained by him as a result of a wrongfully issued temporary injunction after the trial court, as here, dissolves the temporary injunction based on the claim of wrongful issuance; such damages include reasonable attorney's fees incurred by the defendant to secure the dissolution of the wrongfully issued temporary injunction. *National Surety Co. v. Willys-Overland, Inc.*, 103 Fla. 738, 138 So. 24 (1931); *Braun v. Intercontinental Bank*, 452 So.2d 998 (Fla. 3d DCA 1984), *pet. for review denied*, 462 So.2d 1106 (Fla. 1985); *Knight v. Global Contact Lens, Inc.*, 319 So.2d 622 (Fla. 3d DCA 1975), *cert. denied*, 336 So.2d 1182 (Fla. 1976).

Lake Worth Broadcasting Corporation v. Hispanic Broadcasting, Inc., 495 So.2d 1234 (Fla. 3d DCA 1986).

For the past century, however, courts in most United States jurisdictions also acknowledging this premise have struggled with the question as to what extent a party who has been injured by the wrongful issuance of an injunction can recover damages against the party who procured the order. Out of this struggle has emerged two schools of thought, each ostensibly recognizing the appeal of certain aspects of the other, but each enjoying rigid application in its adoptive jurisdiction.

Undeniably, a majority of state courts have held that recoverable damages are limited to the amount of the injunction bond or undertaking. Mountain States

Telephone and Telegraph Company v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258 (Utah 1984); Tracy v. Capozzi, 642 P.2d 591 (Nev. 1982); Weber v. Johnston Fuel Lines, Inc., 540 P.2d 535 (Wyo. 1975); Broome v. Hattiesberg Building and Trades Council, 206 So.2d 184 (Miss. 1967); Hyler v. Wheeler, 126 S.E.2d 173 (S.C. 1962); Stevenson v. North Carolina Department of Insurance, 262 S.E.2d 378 (N.C. Ct. App. 1980); Venegas v. United Farm Workers Union, 15 Wash. App. 858, 552 P.2d 210 (Wash. Ct. App. 1976); R.A. Vorhof Construction Company v. Black Jack Fire Protection District, 454 S.W.2d 588 (Mo. Ct. App. 1970); see also Annot., 30 A.L.R. 4th 273. These courts strike a balance in favor of a litigant's right to ready access to courts as against a wrongfully enjoined party's right to redress by concluding that they must zealously protect the good faith pursuit of legal remedies by limiting damages to the amount of the bond set by the court. See e.g., Tracy, supra. The courts frequently address the concerns of defendants who have been wrongfully enjoined by suggesting that their protection is in moving to increase the amount of the bond. Tracy, supra.; Stevenson, supra.; Venegas, supra.; McAtee v. Faulkner Land & Livestock, Inc., 131 Idaho 393, 744 P.2d 121 (Idaho Ct. App. 1987); Jensen v. Torr, 721 P.2d 992 (Wash. Ct. App. 1986).

A significant minority of state courts have disagreed and have held that there is no logical reason for limiting the damages recoverable for a wrongful injunction. Smith v. Coronado Foothills Estates Homeowners Association, Inc., 117 Ariz. 171, 571 P.2d 668 (1977); Houghton v. Grimes, 151 A. 642 (Vt. 1930); Howard D. Johnson Co. v. Parkside Development Corp., 348 N.E. 2d 656 (Ind. Ct. App. 1976); Seattle Firefighters Union Local No. 27 v. Hollister, 48 Wash. App. 129, 737 P.2d 1302 (Wash. Ct. App. 1987); Davis v. Poitevant & Favre Lumber Co., 15 La. App. 657, 132 So. 790 (La. App. 1931); Johnson v. McMahan, 40 S.W. 2d 920 (Tex. Civ. App. 1931). These courts have expressly or implicity rejected the

majority rule which they have found legally unsound and unsupportable from a practical perspective.

The majority rule holds that the bond is a cap on actual damages incurred by the enjoined party. The minority finds no legal authority for this conclusion and holds that the bond is merely security for payment of actual damages which may be lesser or greater than the bond amount. The majority responds to the problem of inadequate bonds and thus inadequate recovery of damages by saying that the enjoined party should move to increase the bond. The minority finds this "remedy" to be illusory and unavailable.

Parker Tampa Two, Inc. v. Somerset Development Corporation, 522 So.2d 502 (Fla. 2d DCA 1988) was the first Florida reported appellate decision to directly wrestle with the issue. The court found that damages are limited to the injunction bond but stated that the minority rule was also "persuasive." Id. at 503. City National Bank of Miami v. Centrust Savings Bank, 530 So.2d 317 (Fla. 3d DCA 1988) has also approved the majority rule. Amicus Curiae believe that these cases were incorrectly decided and that the minority rule should be adopted by this Court.

A bond is designed not as a floor or ceiling but merely as security for the benefit of the enjoined. See e.g. Glenn v. 1050 Corporation, 445 So.2d 625 (Fla. 3d DCA 1984). The bond is only an estimate of potential damage since it is impossible to predict what actual damages may be sustained in the future. This is especially true when the amount of the bond is set based solely upon the plaintiff's representations of the potential damage to the defendant. Why should a party seeking an injunction be entitled to limit his own liability by suggesting a nominal bond to a trial judge on an ex parte basis? To give a party the right to limit his own damage in such a way is too great a temptation, although this will be the impact if the majority rule is adopted by this Court.

The Indiana Court of Appeals in Howard D. Johnson Co., supra. also found it illogical to limit a wrongfully enjoined party to actual damages when damages did not exceed the bond, but at the same time limit that party's actual damages to the bond if they were greater. To be logical and consistent, the principal's liability should not be dependent on the bond. Only the surety's liability should be capped by the bond amount. As a matter of suretyship law, Amicus Curiae should be permitted to recover actual damages to the extent they exist against the Plaintiff but admittedly should be limited to collection of the damages to the surety in the amount of its undertaking - $100.00. The majority rule ignores these principles of suretyship law.

The notion that the trial court will initially set an adequate bond is incorrect. The reporters are full of appellate decisions reversing injunctions for failing to require any bond or requiring only an insufficient nominal bond. See e.g., International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 390 v. Miami Retail Grocers, 76 So.2d 491 (Fla. 1954); Dixie Music Co. v. Pike, 135 Fla. 671, 185 So. 441 (Fla. 1938); Wasserman v. Gulf Health, Inc., 512 So.2d 234 (Fla. 2d DCA), rev. denied, 518 So.2d 1279 (1987); Minimatic Components, Inc. v. Westinghouse Elec. Corp., 494 So.2d 303 (Fla. 4th DCA 1986); Barnett v. Bacardi, 394 So.2d 1108 (Fla. 3d DCA 1981); Goldberger v. Regency Highland Condominium Ass'n, Inc., 383 So.2d 1173 (Fla. 4th DCA 1980); Tri-Plaza Corp. v. Field, 382 So.2d 330 (Fla. 4th DCA 1980); Seminole Park and Fairgrounds, Inc. v. Tropic Bank of Seminole, 380 So.2d 1335 (Fla. 5th DCA 1980); Muss v. Rosenberg, 353 So.2d 203 (Fla. 3d DCA 1977); Crow, Pope & Carter, Inc. v. James, 349 So.2d 827 (Fla. 3d DCA 1977); La Gran Familia, Inc. v. Cuba Pharmacy, Inc., 349 So.2d 769 (Fla. 3d DCA 1977); City of Hallandale v. Inglima, 346 So.2d 84 (Fla. 4th DCA 1977); Quadomain Condominium Ass'n, Inc. v.

Pomerantz, 341 So.2d 1041 (Fla. 4th DCA 1977); Byrne v. Rec Centers, Inc., 309 So.2d 177 (Fla. 4th DCA 1975); Babuschkin v. Royal Standard Corp., 305 So.2d 253 (Fla. 3d DCA 1974); Metropolitan Dade County v. Parkway Towers Condominium Ass'n, 281 So.2d 68 (Fla. 3d DCA 1973), cert. discharged, 295 So.2d 295 (1974); Carmel v. Lumidor Industries, Inc., 262 So.2d 911 (Fla. 3d 1972); Metropolitan Dade County v. Polk Pools, Inc., 124 So.2d 737 (Fla. 3d 1960); Belk's Dept. Store, Miami, Inc. v. Scherman, 117 So.2d 845 (Fla. 3d 1960).

The alternative presented by the majority viewpoint that an enjoined party can protect itself by moving to increase an initially defective injunction bond is impractical. In Howard D. Johnson Co., the court properly recognized that an enjoined defendant can hardly ignore the effects of the injunction while moving as suggested by the majority to increase the amount of the bond. Both avenues of relief (dissolution of the injunction and issuance of the bond) are usually pursued simultaneously. Yet a ruling that the injunction should not have been issued prior to or simultaneously with a ruling on a motion to increase the bond affords the enjoined party no effective remedy. If the bond was set too low an order dissolving the injunction would make it virtually impossible to obtain a higher bond because the giving of additional security would amount to a forfeiture. Id.

Therefore, in cases where an ex parte injunction is deemed wrongful prior to or contemporaneous with a hearing or ruling on a motion to increase the bond an enjoined party, under the majority rule, has no ability to recover just compensation if the bond was set at an amount lower than actual damages. The wrongfully enjoined defendant has had no meaningful opportunity to avail itself of the only protection afforded it by the majority, i.e., to move for a higher bond. Even if the court increases the bond it will never be posted in most instances. Justice is not served through this result.

And what if the trial court refuses to hear a motion to increase the bond? This is precisely what happened to Amicus Curiae. The majority rule would nonetheless limit them to damages equalling the injunction bond set upon ex parte representations of the plaintiff without any due process rights afforded to the defendant.

State of Florida v. Beeler, 13 F.L.W. 565 (Fla. September 22, 1988) further points out that the majority's advice to seek an increase of the bond is procedurally unavailable to an enjoined party. In Beeler this Court held that any attempt to dissolve an injunction will render any objection based upon lack of notice or other defects appearing on the face of the ex parte order moot. In addition, by approving the Third District's decision in Babuschkin v. Royal Standard Corp., 305 So.2d 253 (Fla. 3d DCA 1974), the Court approved the holding that an attempt to increase the bond is an attack on the merits causing a loss of procedural rights. Therefore, if an enjoined party were to seek an increase in the injunction bond, that party would lose the right to attack the procedural validity of the injunction. This would occur in spite of Fla.R.Civ.P. 1.610(b) which requires that a court condition an injunction on the posting of a bond sufficient for the "payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined." A wrongfully enjoined party would have to choose between enforcing the letter and spirit of Rule 1.610(b) and losing its right to appeal a wrongfully procured injunction.

Again this Court need look no further than Amicus Curiae to understand how the adoption of the majority rule would create a catch-22 for defendants. In Soffer, the Third District reversed a Temporary Injunction (Without Notice) for failure to comply with at least four material provisions of Rule 1.610. Under the ruling in Beeler, if the court had heard Amicus Curiae's motion to increase the

amount of the bond, the injunction order, although procured through a gross abuse of the rules of procedure, could not have been appealed and reversed. Amicus Curiae's choice would have been to either directly appeal the injunction and be limited to $100.00 damages or move to dissolve the injunction and increase the bond, in which case all defects relating to lack of notice and the failure of the court to articulate the basis for the injunction in the order would be waived. This dilemma is entirely unfair and unjust.

Public policy disfavors preliminary injunctive relief, which is considered a drastic and extraordinary remedy. Rule 1.610 codifies this policy by containing numerous stringent requirements to validly obtain a preliminary injunction. Yet adoption of the majority rule would encourage otherwise marginal applications for preliminary injunctions because the moving party would be able to hide behind the bond notwithstanding damages occasioned to enjoined parties as a result of a clearly wrongful injunction. Consider the facts and circumstances under which Amicus Curiae stand before the Court:

1. The fixing of the $100.00 bond was purely speculative and made upon ex parte representations of counsel without the opportunity for the trial judge to hear contrary argument.

2. Such nominal bonds have been determined to be per se invalid. See e.g. Wasserman, supra.

3. The trial court refused to entertain a motion to dissolve the injunction or motion to increase the bond.

4. The plaintiff refused to voluntarily dissolve the injunction or post additional security even when faced with a facially invalid and clearly unsupportable wrongful injunction.

5. The appellate court found a myriad of reasons to reverse the temporary injunction without notice.

6. The appellate court authorized the recovery of attorney's fees from the plaintiff.

The minority rule on the other hand, renders a party moving for such relief potentially liable to the enjoined party for damages actually incurred - nothing more and nothing less. No punishment of any sort is inherent in this rule as plaintiffs who decide to move for injunctive relief will not be precluded in any way from doing so, nor will their rights be affected in any way. Victims of wrongful injunctions will, however, be compensated. This is what justice requires.

CONCLUSION

For the foregoing reasons, the question certified to this Court by the Second District Court of Appeal should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of November, 1988 to: JOHN H. RAINS, III, ESQ., Annis, Mitchell, Cockey, Edwards and Roehn, P.A., Attorneys for Petitioner, One Tampa City Center, #2100, Tampa, Florida 33602; and SAMUEL R. MANDELBAUM, ESQ., Smith and Williams, P.A., Attorneys for Respondent, 100 South Ashley Drive, Suite 1170, Tampa, Florida 33602.

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