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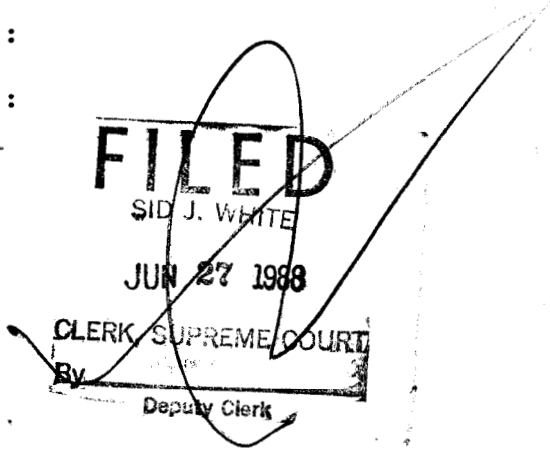
IN THE SUPREME COURT OF FLORIDA

PARKER TAMPA TWO, INC.,	:	
Petitioner/ Cross-Respondent,	:	CASE NO. 72,295
vs.	:	SECOND DISTRICT COURT OF APPEAL NO. 87-892
SOMERSET DEVELOPMENT CORPORATION,	:	87-1554
Respondent/ Cross-Petitioner.	:	



BRIEF OF RESPONDENT/CROSS-PETITIONER

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INTRODUCTION

This appeal stems from a complex multi-party, multi-claim case filed in the Circuit Court for Hillsborough County, Somerset Development Corporation vs. Hillsborough County, et al., Hillsborough Circuit Case No. 85-15202. In the early stages of the case, Somerset Development Corporation ("Somerset") had won a temporary injunction against Hillsborough County (the "County"), enjoining the County from furnishing sewer connections or building permits other than to specific developers with established contractual rights. Subsequently, Petitioner/Appellant Parker Tampa Two, Inc. ("Parker"), as an intervening plaintiff, had filed a wrongful injunction claim against Somerset. Parker appeals sub judice an opinion of the Second District Court of Appeal affirming a partial summary judgment limiting its wrongful injunction claim to a suit on Somerset's $10,000.00 injunction bond, which bond names only the County as a beneficiary. See Parker v. Somerset, 522 So.2d 502 (Fla. 2nd DCA 1988). Somerset cross-appeals from a final judgment entered against Somerset and its surety in the amount of the $10,000.00 injunction bond, plus interest and costs, which had also been affirmed by the Second District [Id.].

STATEMENT OF CASE AND FACTS

Somerset Sues the County:

In an amended complaint filed on September 26, 1985, Somerset sued the County for damages, specific performance and injunctive relief based upon the County's breach of a sewer connection agree-

ment entered into between the County and Somerset's predecessor, Intervest, Inc. ("Intervest") (R 183-192). According to Somerset's complaint, Intervest had paid the County approximately $2.5 million to guaranty a certain number of sewer connections for the Bayport Colony development projects from the River Oaks Wastewater Treatment Plant in Hillsborough County (R 183-184). Subsequently Intervest transferred its interest in the Bayport Colony areas to Colony Investments, Ltd. ("Colony") (R 183). In turn Somerset acquired interest in a portion of the Bayport Colony area from Colony (R 184). Although Somerset had complied with all necessary conditions precedent and other requirements of the building and zoning codes necessary to obtain wastewater treatment service, the County had failed to reserve the capacity required to provide such service or to make its best efforts to do so (R 185-186). Notwithstanding, Somerset alleged that the County was readily allowing many other third parties to obtain sewer hookups, who did not have contractual rights for such wastewater treatment services from the River Oaks Plant as did Somerset (R 186). As a result of the County's breach, Somerset maintained that it was unable to proceed with construction on its partially-developed project in northwest Hillsborough County, and requested a temporary injunction preventing the County from granting hookups to other third party developers that were not successors to Intervest or Colony (R 187-188, 186). Accordingly, Somerset maintained that it would be irreparably injured unless an immediate injunction were entered (R 188).

On October 7, 1985, the County filed an Answer, admitting the sewer connection agreement with Intervest and its allowance to third parties to hookup to the wastewater treatment services from the River Oaks Plant (R 193-194). The County further admitted that there was no wastewater treatment capacity available at the River Oaks Plant at that time. Otherwise, the County denied any liability to Somerset (R 193-197). It is important to note that the County did not raise the affirmative defense of Somerset's failure to join other "indispensible parties" (R 145-146).

A Temporary Injunction for Somerset:

Subsequently, on November 19, 1985, Somerset moved for a temporary injunction, alleging that its predecessors Intervest and Colony had paid for contractual rights for pre-paid sewer connections (R 199-200). Since Somerset is an assignee of Intervest and Colony, Somerset enjoys the rights of its predecessors under the sewer connection agreement with the County (R 200). According to Somerset, the County had breached the sewer connection agreement by failing to reserve the guaranteed connections under the Intervest contract, despite their obligation to reserve the proper capacity necessary to accommodate the wastewater treatment needs of Somerset (R 202). Alleging irreparable harm to Somerset, Somerset requested immediate entry of a temporary injunction, enjoining the permitting and hookup of connections to the River Oaks Wastewater Treatment Plant other than those guaranteed to assignees of Intervest (R 203-204). Those contracts and agreement

supporting Somerset's motion for temporary injunction are attached in the record as R 205-232.

The following month an evidentiary hearing was held on Somerset's motion for temporary injunction, which resulted in Honorable J. C. Cheatwood granting the motion on December 13, 1985 (R 246-248). In the trial court's temporary injunction, Judge Cheatwood found as follows: (1) that Somerset had a "clear legal right" to relief and a substantial likelihood of success on the merits in that the evidence presented at the hearing established a clear duty on the part of the County to reserve pre-paid guaranteed sewer connections to Somerset, which the County failed to do; (2) that Somerset performed all of its obligations under the sewer connection agreements with the County; and (3) that Somerset would suffer irreparable harm if an injunction would not be entered (R 246). Accordingly, Judge Cheatwood enjoined and restrained the County from connecting any applicants to the River Oaks Treatment Plant other than Somerset and other applicants that are assignees of Colony and those that enjoy the same priority as Somerset under the contractual agreements between Intervest and the County (R 247). The temporary injunction further enjoined the County from issuing any certifications for sewer treatment service and building permits to any third party other than Somerset and those applicants that are assignees of Colony that enjoy the same priority as Somerset (R 247). As soon as Somerset would obtain three hundred ninety-two (392) sewer connections to the River Oaks Treatment Plant or a comparable facility, the temporary injunction could be dissolved (R 248). Specifically delineated in the tempo-

rary injunction as having the same general priority as Somerset, as assignees of Colony, were other developers such as Lyons-Raffo Corporation, Pacific Guaranty Housing Corporation, U.S. Homes, Bill Wall Construction Corporation, and W.J.W. Corporation (R 248).

The temporary injunction required Somerset to post a sufficient bond in the amount of $10,000.00 (R 247). This bond was posted ten (10) days later on December 23, 1985, underwritten by Fidelity & Deposit Company of Maryland as surety, naming the Defendant County as the only beneficiary of the $10,000 obligation (R 250-252).

Parker Steps In:

On December 23, 1985 a letter was sent by counsel for Petitioner/Appellant Parker, introducing Parker as a developer who was in the process of constructing a residential development in the Bay Port Colony area. Parker's counsel was concerned that the temporary injunction against Hillsborough County was causing the County to refuse to issue any further building permits for his client's project (R 83-85). According to Parker's counsel, his client had not heard of Somerset, nor was Parker aware of Somerset's claimed denial of sewer connections (R 84). Parker's counsel further noted "to the extent, however, that Somerset Development is claiming a right based upon being a successor to intervest's title, as it appears from the pleadings, then our client [Parker] has the same right." (R 84).

Attached to the letter of December 23, 1985 for Somerset's signature was a proposed stipulation drafted by Parker's counsel, agreeing that Parker is an assignee of Colony and hence not enjoined or restrained from anything pursuant to the temporary injunction; also, that Parker enjoys the same priority status as Parker (R 84, 86). Hence, the stipulation proposed by Parker's counsel removed Parker from the injunction's prohibition of "connecting to the River Oaks Treatment Facility, obtaining certifications for DER Wastewater Collection System permits, or obtaining building permits for sewer service for the River Oaks Treatment facility." (R 86).

About 11 days later, on January 3, 1986, Parker's attorney sent a second letter to Somerset's counsel (R 87-88). Parker's letter noted a prior request by Somerset's counsel for "additional documentation" to verify Parker's rights concerning sewer connections:

> "Although I believe my letter to [Somerset's counsel] of December 23, 1985 sufficiently outlines the rights of our client, you had requested additional documentation. In light of the holidays, I have not yet had an opportunity to have the enclosed draft affidavit executed, but it outlines the factual basis for our client being in equal dignity with Somerset with respect to the 1972 sewer tap agreement, to the extent it has any legal affect." (R 87).

Parker's counsel demanded that Somerset's counsel immediately sign the aforedescribed Stipulation by January 6, 1986, and for failure to do so threatened to seek substantial damages (R 87-88). About two weeks later, on January 7, 1986, Parker made its first appearance and filed a motion to dissolve and/or modify the temporary injunction of December 13, 1985, as well as a motion to increase

the injunction bond (R 253, 48). Parker also filed that date a motion to intervene as a party, claiming that it had already been issued a building permit by the County for three hundred fifty-five (355) multi-family units, and hence started construction on these units (R 46-51). According to the supporting affidavit filed by Parker, it had spent $1,100,000.00 for the construction of these multi-family units, which was to eventually be a $4,000,000.00 project. In addition to the improvements already in place, Parker had obtained an $18,500,000.00 construction loan with substantial disbursements for construction of these units (R 50). The affidavit further noted that a Vice President of Parker had attempted to obtain other building permits from the County, but was informed of the temporary injunction at the County Building Department on December 20, 1985. Accordingly, the County refused to issue any further building permits to Parker (R 49-51). Parker's Motion to Intervene alleged that it would be immensely damaged if it is not permitted to intervene and assert it rights to sewer connections (R 47). The motion to increase injunction bond alleged that the injunction bond "is clearly inadequate to protect those parties that are adversely affected by the temporary injunction should it be determined that the temporary injunction was improvidently issued" (R 48).

To set forth its principal cause of action against Somerset, Parker filed a claim for "wrongful injunction" on January 7, 1986 (R 254-256). Therein, Parker requested compensatory damages in excess of $1,000,000.00 against Somerset, with punitive damages over $5,000,000.00 (R 256).

Two days later, on January 9, 1986, a hearing was held on Parker's motions to intervene and increase bond (R 257, 148-150). What evidence and testimony was presented by Parker at that January 9th hearing is unknown, since only two pages of unidentified dialogue had been included by Parker in the record on appeal (R 148-150). In any event Judge Cheatwood denied Parker's motion to intervene without prejudice, allowing Parker to file appropriate motions sufficiently establishing its status as an assignee of Colony or its predecessors (R 257). However, Judge Cheatwood that same day granted a similar motion to intervene as a party-plaintiff filed by Colony, another developer (R 258-259). Parker did not file an interlocutory appeal from the temporary injunction or the denial of the bond increase (See Index to Record).

Other Parties Get Permits:

Over the next month the County's attorney dispatched several letters to Judge Cheatwood, confirming several three-party telephone conferences between the County's attorney, Somerset's attorney and Judge Cheatwood, where it was agreed by all of these attorneys (including Somerset's) that certain other parties would be allowed to connect to the River Oaks treatment plant in exception to the injunction (R 260, 266, 267, 270). Accordingly, the County attorney's letter verified the Judge's ruling that it was permissible to hook up these parties (R 260, 266, 267, 270).

In the meantime, on January 17, 1986, Colony filed a similar motion for a temporary injunction against the County as Somerset has successfully obtained the previous month (R 261-265). Colony

noted that it also had a clear legal right under the Intervest agreement to 1,872 sewer connections to the River Oaks plant, and was irreparably injured by the County's breach (R 263-264).

Parkers's Second Attempt to Intervene:

On February 4, 1986, a hearing was held on the second motion filed by Parker to intervene in the cause (R 330,333). The second motion to intervene, following the denial of Parker's first motion to intervene, was premised on the grounds that Parker was "a substantially-affected party in this case" in view of (1) the County's issuance of a general permit in 1981, and (2) Parker being an indirect assignee of Intervest. (R 333-335). At that hearing Parker presented numerous deeds, agreements and other documents purporting to evidence that Intervest had been Parker's predecessor-in- interest (R 334-344). Based upon the documents presented by Parker's attorney, Judge Cheatwood held, "It appears to me that Parker Tampa Two based on these documents is in a position of priority equal to Somerset and Colony." (R 345).

At that February 4, 1986 hearing Parker presented the testimony of Roger Stewart, the Director of the Hillsborough County Environmental Protection Commission (EPC) (347-367). Regarding the situation at the River Oaks plant, Stewart testified that no developer would then be able to obtain a sewer connection permit since River Oaks is over-capacity:

> QUESTION: If a developer went to the Hillsborough County Environmental Protection Commission and asked for a general permit to hook into that plant today, would you grant that permit?

ANSWER: It would not be technically grantable because the facility is not meeting the standards required of sewage treatment plants.

QUESTION: Is that because there's no capacity there?

ANSWER: There is no capacity. It's in violation of several standards by which sewage treatment plants are evaluated. (R 351). (Emphasis added).

Stewart further stated that he would not grant any general permits for sewer connections at the time, since it would be contrary to state law to do so (R 351-352). Stewart described the River Oaks plant as a complex of two plants, one permanent and the other an interim facility to take part of the load, with a total capacity of processing six million gallons of sewage per day (R 354-355). EPC would not presently issue new permits to the River Oaks waste treatment plant because it's over capacity (R 355-356). During cross-examination, Stewart emphasized that the treatment facilities have no further capacity to connect those developers who are permitted but unconnected:

QUESTION: Taking that class of developers who have valid DER permits, would their inability to exercise those permits as per a temporary injunction enjoining them from doing so, have any affect on the additional capacity of the plant?

If you wipe out that whole category of people who are permitted but unconnected, does that free any capacity from your perspective?

ANSWER: No, it does not free any capacity. (R 362).

Judge Cheatwood questioned Mr. Stewart at the hearing, and concluded that to hook up any developer (including Parker) to the River Oaks plant would be unlawful:

THE COURT: And so I interpret your testimony as meaning to me that if the court permitted anyone, even those developers that you have previously issued permits to,

to tie into this facility, that it would simply be pouring more water into a glass that was already full of water?

THE WITNESS: That is correct, Your Honor.

THE COURT: So that even absent this Injunction that has been entered by this Court, you're telling me as I understand your testimony, that if the county connected any additional users to that River Oaks system, that it would be in violation of certain of certain standards of the Environmental Protection Commission?

THE WITNESS: Yes, Your Honor. (R 364).

Finally, Somerset's attorney noted that in view of the Court's indication that Parker enjoys equal standing as to Somerset, that the injunction by its terms would not apply to Parker (R 368). Judge Cheatwood responded to Somerset's notation, "I think he's right, Mr. Rains [Parker's attorney] (R 368). Parker's attorney stipulated to this fact (R 368).

Three days later, on February 7, 1986, Judge Cheatwood entered an order granting Parker and other developers leave to intervene as plaintiffs in the case against the County (R 68).

Dissolution of the Temporary Injunction:

A few weeks later, on February 28, 1986, a hearing was held on the motions of Hillsborough County, Pulte Homes and Parker on their motions to dissolve the temporary injunction (or a renewed motion in Parker's case) (R 478, 482). It was noted by one of the attorneys at the hearing that the arguments as to the County's motion to dissolve are substantially different from those of the intervenors such as Parker (R 485). Parker's attorney then requested that the injunction be modified.

Colony's attorney opposed dissolution of the injunction and stressed that it was elementary that the injunction had only been issued against Hillsborough County; there was no injunction against Parker (R 486). In any event, Colony maintained that "The injunction was clearly appropriate under the circumstances," and to dissolve or modify the bond is inappropriate. (R 488). Colony noted that the injunction does benefit Colony, since it preserves the right of Colony and its assignees. (R 500). According to Colony, it would suffer big losses if the injunction does not continue (R 501-502). Colony even suggested that to force Somerset to bring in all people that were permitted but not connected would be one of the "most gigantic lawsuits we have ever had." (R 589). Colony persistently argued against dissolution of the injunction (R 588- 601).

Based upon the testimony of the witnesses and the arguments of counsel for the respective parties, Judge Cheatwood granted the motion to dissolve the temporary injunction at the continued hearing of February 28, 1986, holding:

> THE COURT: All right. Based upon the -- primarily on the evidence at the hearing of February 4, 1986, where Mr. Stewart testified, I am going to grant the motion to dissolve the injunction.
>
> The basis for the ruling is that Mr. Stuart testified in response to a question asked him by the court that the facility was already over capacity.
>
> What the court was trying to do by entering the temporary injunction previously was hopefully to maintain a status quo out there at the disposal facility until such time as the court could make determination as to whether or not certain property owners were in a position of priority or preference or should be, and if so, to make an allocation to see that the priority or pref-

erence that had been contracted to by Hillsborough County were honored.

But I find now that Hillsborough County has already blown it in so far as that's concerned in that they have already permitted more users to connect to this facility than they can properly connect. So the court can't maintain a status quo and then straighten it out. The status quo is untenable. It's deplorable.

One of the attorneys made the point that the court should determine who is going to get the next available capacity, but that's not the issue of the temporary restraining order.

The temporary restraining order was to see that whoever was entitled to it got the existing capacity that was there.

And if you lawyers want to find out who was going to get the next available capacity, that's a different lawsuit that we will have to get involved in, I guess.

So I will grant the motion to dissolve the temporary restraining order.

Miss Young [the County's attorney], I direct that you prepare an appropriate order and submit it.

The following week, on March 4, 1986, Judge Cheatwood entered an order dissolving the temporary injunction on the motions of Parker, Pulte Homes and Hillsborough County (R 69).

Somerset Wins Summary Judgment Against County for Breach:

Two weeks later, on March 17, 1986, Somerset filed a motion for partial summary judgment of liability against Hillsborough County (R 276-277). According to Somerset, there was no genuine issues of material facts in that the county had a contractual duty to reserve sewer connections for Somerset; the County breached that duty by failing to reserve sewer connections; and that the County was therefore contractually liable to Somerset for damages, costs and attorney fees from its non-performance (R 277). Somer-

set's motion for partial summary judgment against the County was granted on May 15, 1986, finding that the County had clearly breached its duty to reserve sewer capacity for Somerset (R 310-311).

Limitation of Somerset's Liability for "Wrongful Injunction":

Several months later, on August 29, 1986, a hearing was held on Somerset's motion for partial summary judgment on Parker's wrongful injunction cross-claim (R 142). In the partial summary judgment entered September 26, 1986, Judge Cheatwood ruled that Parker's cross-claim is limited to solely an action on the $10,000 injunction bond previously posted by Somerset (R 142).

About six months later, on February 4, 1987, Somerset and Parker stipulated to the following facts:

1. That Parker would be able to prove at a trial of this cause that damages "would exceed $10,000." [Parker had filed an affidavit signed by its Vice-President estimating that their damages were $130,876.34," R 312];

2. That this stipulation is limited exclusively to the issue of damages and should not in any way be construed to apply to the issue of liability; and,

3. That Somerset does not admit any liability to Parker, nor does it admit that Parker has a legally recognizable cause of action for wrongful injunction;

4. That Somerset does not admit that the temporary injunction applies to Parker. (R 143).

The Final Award for Parker

A final hearing was held on February 4, 1987, on the cross-claim of Parker against Somerset (R 322). By memorandum, Parker argued that the trial court should enter a final judgment on its cross-claim against Somerset and its surety based upon "a substantial inference of bad motive" on Somerset's part (R 15). According to Parker, Somerset had been put on notice in December, 1985 and January, 1986 that it had equal rights to sewer connections derived from Intervest and Colony (R 16-17). Parker maintained in this memorandum that in January, 1986 Somerset denied that Parker enjoyed the same priority as Somerset for sewer connections (R 17-18). [But Parker did note in a January 3, 1986 letter to Somerset's counsel that Somerset's attorney had requested "additional documentation" to establish that Parker is in equal dignity with Somerset (R 87); and on January 9, 1987 Judge Cheatwood heard and denied Parker's motions to dissolve injunction and to intervene based upon its failure to establish its equal rights of priority to Somerset (R 17-18, 53)].

Somerset opposed Parker's cross-claim, maintaining that it is not liable to Parker in that (1) a non-enjoined third party does not have a cause of action for wrongful injunction under Florida law; (2) the temporary injunction by its own terms excluded Parker from its restraint; and, (3) the injunction entered and subsequently dissolved was not "wrongful". (R 315-320).

On March 2, 1987, Judge Cheatwood entered a final judgment in favor of Parker on its cross-claim against Somerset and Fidelity and Deposit Company of Maryland (R 322). The final judgment awarded Parker the principal bond amount of $10,000 for wrongful

injunction plus pre-judgment interest, totalling $11,433.40 (R 322).

Somerset filed a motion for rehearing of the final judgment on Parker's cross-claim on March 9, 1987 (R 323). On May 7, 1987 Judge Cheatwood entered an order denying Somerset's motion for rehearing on Parker's cross-claim (R 327).

On March 24, 1987, Parker had filed its notice of appeal to the Second District from the final judgment on the cross-claim (R 13). Somerset filed its timely notice of cross-appeal from the final judgment on Parker's cross-claim (R 328). On May 28, 1987 Parker file an (amended) notice of appeal on its cross-claim (R 329).

Before the Second District Parker argued that the trial judge improperly limited Parker's damages to the $10,000 penal sum of the injunction bond. Somerset presented two issues on cross-appeal: (1) that the trial judge erred in rendering a judgment on the bond in Parker's favor, since the temporary injunction had not been issued "wrongfully," nor was the injunction the "cause" of any damage that may have been suffered by Parker; (2) that the judgment was erroneous since a non-enjoined third party does not have a cause of action for wrongful injunction under Florida law.

Thereafter, the Second District Court of Appeal rendered a decision on March 18, 1988, therein affirming both the appeal and the cross-appeal. The decision held that the amount of damages for wrongfully obtaining an injunction is limited to the amount of the bond, but the Second District certified that question to this Court as one of great public importance [Parker, 522 So.2d at

502]. Regarding Somerset's points on cross-appeal, the Second District held that the evidence was sufficient to show wrongful issuance of the injunction and/or that the damages allegedly suffered by Parker were "caused" by the injunction, and the court would not re-weigh the evidence. Lastly, the Second District disagreed with Somerset's argument that Parker had no cause of action for wrongful issuance of the injunction since it was not by name enjoined, basing their decision exclusively on the language in the bond form. Parker, 522 So.2d at 503.

On April 13, 1988 Parker filed a timely notice to invoke this Court's discretionary jurisdiction for resolution of the question certified by the Second District. The next day, on April 14, 1988, Parker filed a timely cross-notice to invoke this Court's discretionary jurisdiction.

Areas of Factual Disagreement:

In this appeal Somerset takes exception to certain factual statements existing in Parker's initial brief sub judice, which appear contrary to or unsupported by the record, or otherwise do not give a complete picture of the facts. Specifically, Somerset would note disagreement with the following statements:

1. According to Parker's initial brief at page 2, it did not have the opportunity to be heard in December, 1985 on the sufficiency of the $10,000 amount of the bond. Notwithstanding, on January 7, 1986, just a few weeks after the temporary injunction was entered against the County, Parker filed a motion to increase the injunction bond, alleging that it is "clearly inadequate to

protect those parties that are adversely affected by the temporary injunction should it be determined that the temporary injunction was improvidently issued" (R 48). Two days later, on January 9, 1986, a hearing was held on Parker's Motion to Increase Bond, as well as its Motion to Intervene (R 257, 148-150). After the hearing was held Judge Cheatwood denied Parker's motion to increase the bond and continued the injunction (R 257). Parker did not file an interlocutory appeal from this order (See Index). While Parker had included only two pages out-of-context of the entire transcript of the January 9th hearing on Parker's motion to increase the injunction bond et al (R 148-150), those two pages reflect unidentified out-of-context dialogue which fails to indicate the nature of the evidence and documents that may have been (or not have been) presented by Parker (R 148-150).

2. On page 2 of its initial brief, Parker represents that "the condition of the bond (signed by Somerset and its surety) was that 'Somerset Development Corporation will pay all costs and damages that may be incurred or suffered by any party who may be found to be wrongfully restrained . . .'" This contention does not accurately reflect the substance of the injunction bond, attached in the record at R 250. The bond specifically notes that Somerset and its surety (Fidelity and Deposit Company of Maryland) are firmly bound to the Defendants (the lone defendant named as beneficiary in the bond is Hillsborough County), in the sum of $10,000 (R 250). The third paragraph of the bond specifically provides as follows:

> Now, therefore, if said Somerset Development Corporation will pay all costs and damages that may be incurred or suffered by any party who may be found to be wrongfully restrained thereby, then this obligation shall be void, otherwise to remain in full force and virtue. (R 250).

Thus, the plain terms of the bond are to benefit the only party-defendant then in the case, i.e. Hillsborough County. Moreover, a condition of the bond was not for Somerset to pay "all costs and damages . . . suffered by any party . . ."; rather, the third paragraph provides for the discharge of Somerset's liability to any party named in the bond if, and only if, Somerset pays all costs and damages up to the bond limits.

3. Parker erroneously states as "fact" that the September 26, 1986 partial summary judgment on the wrongful injunction crossclaim was "not immediately appealable." This assertion may not comport with Rule 9.10(k), which provides: "If a partial final judgment totally disposes of an entire case as to any party, it must be appealed within 30 days of rendition." See Medical Equipment v. Tarr, 467 So.2d 459 (Fla. 4th DCA 1985) (grant of partial summary judgment as to a count was final and subject to plenary appeal where count set forth cause of action separte, distinct and independent of other counts).

4. On page 5 of its brief Parker states that Somerset's counsel was notified in the December 23, 1985 letter "that Parker had rights arising out of the 1972 sewer tap agreement between Hillsborough County and Intervest. While in December, 1985 Parker's attorney may have made those bare-boned representations concerning Parker's rights (R 83-87), the record indicates that Parker's counsel submitted no evidence or documentation suffi-

ciently verifying Parker's purported rights until about six weeks later at the February 4, 1986 hearing when Parker finally presented a number of deeds, agreements and other documents (See R 334-345). And it was not until Parker's counsel submitted this documentary evidence on February 4, 1986 to the Court that Judge Cheatwood was convinced of Parker's priority (R 345).

5. Parker further represents on page 5 of its brief that Somerset did not execute the proposed Stipulation excluding Parker from the injunction following the December 23, 1985 letter. While this may be true, Parker's statement omits the important fact that Parker's counsel had failed at that time to provide the "additional documentation" as requested by Somerset's counsel, noting he (Parker's counsel) had not had the opportunity "in light of the holidays." (R 87).

6. On page 6 Parker states that at a hearing on Parker's motion to increase bond and to intervene that Somerset's counsel had argued that Parker was not a priority statusholder, and that Somerset could not get a permit because Parker got a permit. What the record shows in the cited pages of R 149-150 are two out-of-context pages which do not identify the speaker. The speaker noted that the County had admitted at the evidentiary hearing on the temporary injunction that the client couldn't get a permit because the County did not reserve the capacity that it was supposed to reserve since Parker got a permit. Thus, Parker's quotes in the second paragraph of page 6 are out-of-context, unidentified and only reflect a brief portion of an evidentiary hearing. Most importantly, since Parker's attorney only included two pages of

that transcript in the record, the record is silent as to just what evidence Parker's counsel may have presented or not presented. Thus, Somerset would request that the second paragraph of page 6 in Parker's brief be entirely stricken and disregarded due to a lack of a complete record of that January 9, 1986 hearing as well as misconstruction of those few existing portions.

7. Throughout page 7 of its brief, Parker repeatedly states without proper citation of the record: "Somerset continued to resist Parker's intervention . . . Somerset continued to oppose intervention . . . Somerset continued its opposition to the motion to modify or dissolve the temporary injunction." While Somerset did not initially recognize Parker's status, it is evidenced throughout the record that this reluctance was only due to the failure of Parker's counsel to provide complete documentary verification as to their contractual right (see R 87, 345-346). And when Parker's counsel had finally made a complete sufficient showing, Somerset's counsel no longer contested Parker's contractual rights to sewer connections, as it had agreed for numerous other developers (See R 260,266, 267, 270).

SUMMARY OF ARGUMENTS

1. The Second District and the trial court properly held that Parker's wrongful injunction damages are limited to the $10,000 bond amount. This ruling clearly comports with the federal and majority rules, as well as the apparent legislative intent of §60.07, Fla. Stat. The Petitioner neither alleged nor proved a claim for malicious prosecution by substantial competent evidence, and the record is replete with abundant, sufficient evidence of Respondent's good faith. Accordingly, public policy dictates that this Court approve the Second District's decision limiting wrongful injunction damages to the bond amount.

2. The record is devoid of evidence or facts indicating that the temporary injunction was "wrongful" when issued. Rather, it was properly issued but eventually dissolved since it had become ineffectual and inconsequential. Nor did the temporary injunction arguably "cause" any damage to Parker, in view of unrefuted evidence that the County would not have issued any permits to Parker anyway, or allowed them to use existing permits.

3. A cause of action for wrongful injunction does not lie in Florida to a non-enjoined third party who is not a named beneficiary of an injunction bond. It is against the public policy of this state to expand a wrongful injunction cause of action to non-enjoined third parties who are indirectly or tenuously affected by an injunction, since it will discourage or halt applications for injunctive relief.

ARGUMENT RESPONDING TO PARKER'S APPEAL

THE TRIAL JUDGE PROPERLY GRANTED SOMERSET'S MOTION FOR PARTIAL SUMMARY JUDGMENT, LIMITING WRONGFUL INJUNCTION DAMAGES TO THE AMOUNT OF THE $10,000 BOND, FOLLOWING THE FEDERAL AND MAJORITY RULE.

Florida law recognizes a limited cause of action for wrongful injunction under Florida Statues, Section 60.07. That section prescribes, "In injunction actions, on dissolution [of the injunction], the court may hear evidence and assess damages to which a defendant may be entitled under any injunction bond, eliminating the necessity for an action on the injunction bond if no party has requested a jury trial on damages."

The few appellate court decisions that exist in Florida concerning wrongful injunction claims appear to limit such claims to one on the bond. See Lane v. Clein, 151 So.2d 677, 678 (Fla. 3rd DCA, 1963), where the Third District concluded that "the only way that a claim for damages can be asserted for the wrongful, but good faith, suing out of an injunction is by way of a separate action at law and the bond." In reversing an order setting a jury trial date for the determination of damages suffered by the Defendants as a result of the wrongful issuance of a temporary injunction, the Third District in Lane merely allowed the Defendants to institute an action against the Plaintiffs on the injunction bond. 151 So.2d at 678. And in Calder v. Gaitan, 430 So.2d 975, 976 (Fla. 3rd DCA, 1983), the court held:

> Appellant argues that damages should be awarded when a party successfully obtains the dissolution of a tempo-

> rary injunction. However, the award of damages after dissolution of a wrongfully issued injunction is controlled by section 60.07, Florida Statues (1979). (Emphasis added.)

See also: Lake Worth v. Hispanic, 495 So.2d 1234 (Fla. 3rd DCA 1986) ("indeed, the required bond posted as a condition for the issuance of the temporary injunction was intended to cover just such damages."). C.f.: Carpenter v. Waybright, 282 So.2d 193 (Fla. 1st DCA, 1973); Braun v. Intercontinental Bank, 452 So.2d 998 (Fla. 3rd DCA, 1984); Roger v. Painters, 155 So.2d 422 (Fla. 2nd DCA, 1963).

And with repect to wrongful attachment claims, the Florida courts have likewise limited such damages to the bond amounts. See Florida Transportation v. Dixie, 139 So.2d 175, 176 (Fla. 3rd DCA 1962) (in suit to recover damages on attachment bonds, amount recoverable is limited by amounts of bonds).

Similary, federal law clearly limits wrongful injunction damages to the amount of the injunction bond. As expressed in Phillips v. Executive, 744 F.2d 287, 290 (2nd Cir. 1984), "Under the injunction bond rule, the remedy for injuries suffered as a result of a wrongful injunction is limited to the amount of the security bond." The Second Circuit in Phillips cited a representative cross-section of federal court decisions for this principle, and accordingly affirmed the trial court's dismissal of a complaint seeking damages in excess of the amount of the injunction bond. 744 F.2d at 290-291. See also: Adolph Coors v. A & S Wholesalers, 561 F.2d 807, 814 (10th Cir., 1977), where the U.S. Court of Appeals held:

> The liability [for a wrongful injunction] may be imposed and the applicant for injunctive relief may be held liable within the limits of the amounts of the bonds for damages resulting from their wrongful or erroneous grant.

And in the absence of a bond, the federal courts have clearly expressed a "no bond, no damages" rule. For example, in Progressive Steelworkers v. International Harvester, 70 F.R.D. 691, 693 (N.D. Ill., 1976), the court ruled:

> The applicable federal law provides that in the absence of a bond, no damages may be recovered for the issuance of an interlocutory injunction, even though the injunction may have been granted without just cause.

See also, In Re: Ladner, 799 F.2d 1023, 1025 (5th Cir., 1986) ("without a bond . . . or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution.") The court in Ladner coined the phrase, "no bond, no damages," as expressing the position of federal law. 799 F.2d at 1025.

As cited in the Second District's opinion sub judice, an annotation was studied prior to the Second District's rendition of its decision limiting wrongful injunction damages to the amount of the bond. Parker, 522 So.2d at 502. See "Recovery of Damages Resulting From Wrongful Issuance of Injunction as Limited to Amount of Bond," 30 A.L.R. 4th 273. In summarizing, the foregoing A.L.R. annotation states:

> In the absence of statute, many courts have held that because a wrongfully issued injunction constitutes an error of the court, for which errors no recovery is generally permitted, there is no liability for the wrongful issuance of an injunction in the absence of

> proof of malicious prosecution on the part of the plaintiff.
>
> As a solution to this problem, statutes have frequently been enacted providing for injunction bonds, which are generally conditioned for the payment of such damages as the party enjoined may incur as a result of the injunction if it is finally determined that the injunction should not have been issued.

And, of course, the Florida legislature has addressed the problem by enacting Florida Statutes §60.07.

The annotation continues to note that a question has arisen on a number of cases as to whether the amount of the bond is the limit of recovery for wrongful injunction:

> Thus, in a large number of cases, the courts have held that the damages are limited to the face amount of the injunction bond doing action against the principal. . ., frequently reasoning that public policy encouraging access to courts outweighed concern for the party facing inadequate bonds, or that such party could have moved for an increase in the amount of the bond when he saw that his losses were mounting.
> -- A.L.R. 4th at 276.

It is even the majority rule that costs and interest are not recoverable in the majority of jurisdictions beyond the bond amount:

> Although there is some authority to the effect that an injunction bond carries with it interest in excess of the amount of the penalty stated therein, and that costs may sometimes be allowed in addition to the penalty, a large number of courts have ruled that nothing beyond the sum which has been designated in the bond as the penalty may be recovered, against the principal, either in an action on the bond or in a statutory proceeding for assessment of damages.

The "majority view" in the United States holds that wrongful injunction damages are typically limited to the amount of the bond; and it is the "minority view" for a court to allow actual damages in excess of the injunction bond. A nationwide study of

decisions on this point was outlined by the Supreme Court of Nevada in Tracy v. Capozzi, 642 P.2d 591 (Nev., 1982):

> Nonetheless, since an award for attorneys' fees was made in the amount of the bond, the crucial issue confronting us is not whether recovery for damages against the bond is permissible, but whether such recovery may exceed the limits of the bond, as respondents would have us rule.
>
> The rationale underlying respondents' view is that the application for a temporary restraining order is usually made ex parte; the amount of security for the defendant's protection often is arbitrarily set, and may be, at best, an estimate by the court based upon opinion or ex parte representations by the complainant or his counsel. This minority view holds that when the bond proves inadequate, the complainant is the logical party to respond to damages because he caused the injury by initiating the restraint. See Smith v. Coronado Foothills Estates Homeowner's Association, 177 Ariz. 171, 571 P.2d 668 (1977). See also Howard D. Johnson Co. v. Parkside Development Corp., 169 Ind. App. 379, 348 N.E.2d 656 (Ind. App., 1976); Johnson v. McMahan, 40 S.W.2d 920 (Tex. Civ. App., 1931).
>
> The majority rule, however, limits recover to the amount of the bond, absent a showing that the complainant obtained the temporary restraining order or preliminary injunction maliciously or in bad faith. See, e.g., Egge v. Lane County, 276 O. 889, 556 P.2d 1372 (1976); Venegas v. United Farm Workers Union, 15 Wash. App. 858, 552 P.2d 210 (1976); Weber v. Johnston Fuel Lines, Inc., 540 P.2d 535 (Wyo., 1975). A similar position is adopted by the federal courts. See, e.g., Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164 (9th Cir., 1976), cert. denied, 431 U.S. 903, 97 S.Ct. 1694, 52 L.Ed.2d 387 (1977); United Motor Service v. Tropic-Aire, Inc., 57 F.2d 479 (8th Cir., 1932); J. Moore Federal Practice, §65.10[1] (2d ed. 1980).
>
> The minority view, espoused by respondents, undeniably has common sense appeal, it insures an adequate award of damages resulting from wrongful restraint assessed against the one who made the mistake, albeit in good faith. However, we find the majority view more compatible with public policy encouraging ready access to our courts. On balance, we find this public policy principle outweighs our concern for defendants facing inadequate bonds at the termination of a wrongful restraint. We must zealously protect the good faith pursuit of legal and equitable remedies for the deterrent certain to be posed by unknown liability for mistake. See United

Construction Workers v. H. O. Canfield, Co., 19 Conn. Supp. 450, 116 A.2d 914 (1955).

The "majority view" limiting wrongful injunction damages to the amount of the bond was also followed by the Washington Court of Appeals in Jensen v. Torr, 721 P.2d 992, 994 (Wash., 1986). Acknowledging that this was the "majority rule," the court in Jensen pointed out that there are only five jurisdictions which follow the "minority rule" allowing damages in excess of the bond. 721 P.2d at 995.

In its brief, Parker repeatedly draws to the idea that it had neither received notice of the December, 1985 temporary injunction hearing nor had an opportunity to raise objections or be heard [Initial brief, page 11]. However, as was pointed out by the Supreme Court of Nevada in Tracy, supra, "the application for a temporary restraining order is usually set ex parte, the amount of the security for the defendant's protection is often arbitrarily set . . ."

While Parker may not have initially had an opportunity to be heard prior to entry of the temporary injunction on December 13, 1985, Parker did have a full opportunity to be heard a few weeks later in January, 1986, at the hearing on its (Parker's) motion to dissolve and/or modify the temporary injunction, or increase the injunction bond (R 48, 253, 257, 148-150). As already pointed out, Judge Cheatwood denied Parker's foregoing motions at the hearing on January 9, 1986, refusing to increase the bond (R 257).

It is noteworthy that Parker never timely sought immediate interlocutory appellate review of the order denying its motion for

increase of the bond. Thus, Parker's failure to immediately pursue a non-final appeal (Fla. R. App. P. 9.130) or a petition for writ of common law certiorari (Rule 9.100(c)), of the continuing temporary injunction and the denial of the bond increase may be deemed as a waiver of the right to contest the bond amount. C.f.: Minimatic Components v. Westinghouse, 494 So.2d 303, 304 (Fla. 4th DCA, 1986) (non-final appeal of temporary injunction reversed where "grossly inadequate" bond posted in amount of $1.00). Thus, Parker cannot come at this late time and complain to this Court of "due process violations" with regard to the bond amount, when it failed to diligently present a sufficient evidentiary case at the January 9, 1986 hearing and promptly appeal the denial of the bond increase and continuance of the temporary injunction. See also Jensen, 721 P.2d at 995 (where wrongful injunction plaintiff did not appeal denial of his request to raise the amount of a temporary injunction bond, plaintiff was colaterally estopped from contesting bond amount in wrongful injunction case); C.f.: Tracy, supra (wrongful injunction claimant failed to protect itself by moving for an increase of inadequate bond).

It is also important to point out that at the hearing the following month (February 4, 1986) on Parker's second motion to intervene, it had finally presented numerous deeds, documents and agreements purporting to evidence its contractual and priority rights as Intervest's successor (R 334-345). If Parker had made the same diligent showing at the first hearing in January, 1986, reason dictates that Judge Cheatwood would have readily granted the same relief a month earlier. And if Parker's counsel had

diligently provided the "additional documentation" verifying Parker's rights in the first instance in December, 1985 as requested by Somerset's counsel, Somerset would have entered into the stipulation. Thus, Parker should place the blame on itself rather than on other parties such as Somerset (or Colony).

Parker further maintains that it is not limited to one on the bond since Somerset "acted maliciously" and in bad faith. This allegation is without any record support, other than from bare-boned argument made by Parker's own counsel. Moreover, Parker's cross-claim (R 3-6) only alleged a cause of action for "wrongful injunction and declaratory relief," and did not set forth a proper claim for malicious prosecution (R 3). The record shows on this point that although Parker apparently was aware immediately of the injunction procured by Somerset, it demanded without sufficient evidentiary support that it be excepted by claiming equal priorty to Somerset, Colony and other assignees of Intervest (R 83-85). Parker readily admitted in its letter of January 3,1986, 21 days after the temporary injunction ws originally entered, that Somerset's attorneys had requested "additional documentation" from Parker to establish its contractual rights (R 87). In "light of the holidays," Parker's attorney did not have an opportunity to promptly respond to Somerset's request for such documentation (R 87). A few days later, on January 10, 1986, Judge Cheatwood denied Parker's motion to intervene and to increase the bond, citing Parker's failure to establish itself as an assignee of Colony or its predecessors (R 257). Notwithstanding, the trial court did grant another developer (Colony) permission at the same time to

intervene in the action (R 258-259). Obviously, Colony made a sufficient evidentiary showing of its contractual rights at that hearing and Parker did not. And the County's attorney noted in four separate letters furnished to Judge Cheatwood that Somerset's counsel had agreed that several other parties were not barred from obtaining wastewater connections to the River Oaks plant (R 260, 266, 267, 270, 275). The record is replete with evidence that Somerset exercised complete fairness and good faith by readily accommodating any party that would properly established its rights.

It was only after Parker's attorney finally made a diligent and sufficient showing at the hearing on Parker's second motion to intervene of Parker's entitlement to equal priority as Somerset and the others (R 333-345) that the trial court was sufficiently convinced of Parker's position equal to Somerset and Colony (R 345). Accordingly, on February 7, 1986, Judge Cheatwood granted Parker's second motion to intervene and acknowledged Parker's entitlement to equal priority (R 68). Thus, by no stretch of the imagination could Somerset be considered "malicious" or acting in bad faith by not immediately recognizing Parker's rights to sewer connections.

Rather, it was Parker's counsel's own untimely and insufficient evidentiary showing that resulted in Parker's failure to establish its equal priority. Any attorney that would promptly succumb to the threats and unverified demands as made by Parker's counsel without sufficient documentary support would be guilty of professional malfeasance, to say the least.

Somerset respectfully requests this Court to declare that Florida follows the national "majority rule" and the federal rule which limit wrongful injunction damages to the amount of an injunction bond. By enacting Florida Statutes §60.07, it is apparent that the Florida legislature has intended it to be the public policy of this State to so limit wrongful injunction damages, thus following the majority and federal rules. This Court should affirm Parker's appeal by answering the Second District's certified question in the negative, that wrongful injunction damages in Florida are limited to the amount of the injunction bond.

ARGUMENTS ON CROSS-APPEAL

POINT I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON THE BOND IN FAVOR OF PARKER, IN THAT THE RECORD IS DEVOID OF EVIDENCE THAT THE TEMPORARY INJUNCTION HAD BEEN ISSUED "WRONGFULLY", OR THAT SAID INJUNCTION WAS THE "CAUSE" OF ANY DAMAGE ENSUED BY PARKER.

The Second District affirmed Somerset's cross-appeal challenging the $10,000.00 final judgment on the bond, on the point argued that the record did not show "wrongful" issuance of the injunction or that any damages allegedly suffered by Parker were "caused" by the injunction. The Second District held that the evidence on this point was sufficient, which they would not "reweigh."

Where a wrongful injunction action is brought on an injunction bond by an enjoined party, dissolution of an injunction upon dismissal of an action does not necessarily entitle the enjoined party to damages unless it was an "adjudication on the merits." In Rice v. White, 147 So.2d 204 (Fla. 1st DCA, 1962), the Court held that enjoined defendants were not entitled to damages under an injunction bond if they failed to establish that they are "wrongfully" enjoined or restrained by a temporary restraining order. The Court in Rice affirmed the dismissal of a complaint for wrongful injunction damages, noting that dissolution of an injunction upon dismissal of an action without prejudice was not an adjudication on the merits.

Moreover, "the general rule that the right of the Defendant in an injunction suit to recover costs and damages for the wrongful issuance of the temporary injunction does not accrue until there is a final determination that said injunction was wrongfully issued." Roger v. Painters, 155 So.2d 422 (Fla. 2nd DCA, 1963). And in Oakwood Manor v. Eck, 358 So.2d 585, 587 (Fla. 2nd DCA, 1978), this Court stated:

> Obviously, there may be circumstances under which a temporary injunction is properly obtained but because it had accomplished its purpose, or due to changed conditions beyond the control of the Plaintiff, the injunction is later dissolved as moot.
>
> * * *
>
> To sustain an action for damages it must be made to appear that such injunction was wrongful in its inception, or at least was continued owing to some wrong on the part of the Plaintiff. If rightfully awarded, but afterwards properly dissolved because of matters done or arising subsequent to their issuance, there can be no recovery of damages.

The record in this cause clearly indicates that the temporary injunction when procured by Somerset was not arguably "wrongful." After hearings on February 4, 1986 and February 28, 1986 on the motions of Hillsborough County, Parker and another developer to dissolve the temporary injunction, several witnesses testified. Roger P. Stewart, the Director of EPC, testified that the capacity to connect Parker and other developers to sewer connections then didn't exist, notwithstanding the temporary injunction (R 360-361). Judge Cheatwood even questioned Mr. Stewart at the February 4th hearing:

> THE COURT: So that even absent this injunction that has been entered by the Court, you're telling me as I understand your testimony, that if the county connected any

additional users to that River Oaks system, that would be in violation of certain standards of the Environmental Protection Commission?

THE WITNESS: Yes, Your Honor. (R 364).

Judge Cheatwood granted the motion to dissolve the temporary injunction on February 28, 1986, holding:

> The basis for the ruling is that Mr. Stewart testified in response to a question asked him by the Court that the facility was already over capacity.
>
> * * *
>
> But I find now that Hillsborough County has already blown it insofar as that's concerned in that they have already permitted more users to connect to this facility than they can properly connect. (R 614-615).

Accordingly, EPC director Stewart testified several times at that February 4, 1986 hearing that the County would not be granting a developer any permits, or use of a general permit (R 351-352, 355-356).

The written order dissolving the temporary injunction contains no finding, inference or suggestion that the temporary injunction had been "wrongful" (See R 69). Nor does the record contain any verbally announced determination by Judge Cheatwood that the injunction was wrongful. The record is not reasonably susceptible of a suggestion that the injunction was wrongful. The temporary injunction in this cause was dissolved for only one reason: that although it had been properly issued, it had become ineffectual, moot and of no consequence since the River Oaks treatment plant couldn't accommodate Parker or any other developer regardless of the existence or nonexistence of the injunction. Permits would not be granted or used by developers (R 351-352,

355-356). Thus, the temporary injunction did not "cause" any damage that Parker may have suffered by not receiving or being able to use whatever permits it may have possessed. The County's inability to provide additional sewer hookups, and hence permits to construct those units needing the hookups, had "caused" that damage, notwithstanding the existence or dissolution of the temporary injunction. Accordingly, there is an insufficient record to support an award entered in Parker's favor for "wrongful" injunction against Somerset.

The trial judge erred in entering a final judgment on the bond for wrongful injunction in Parker's favor, and this Court should reverse and vacate said final judgment on Parker's cross-claim (R 322).

POINT II

THE TRIAL COURT ERRED IN GRANTING PARKER AN AWARD ON THE BOND FOR WRONGFUL INJUNCTION, SINCE A NON-ENJOINED THIRD PARTY DOES NOT HAVE A CAUSE OF ACTION FOR WRONGFUL INJUNCTION UNDER FLORIDA LAW.

The few Florida cases that exist on this subject indicate that a wrongful injunction claim will only lie for those specifically named and enjoined in the injunction, which in this case would be the County rather than a non-enjoined party such as Parker. For example, in Intertrack v. B & G Horse Transportation, 403 So.2d 1058, 1059 (Fla. 3rd DCA, 1981), the court held that the appellants/defendants were entitled to damages for a wrongfully issued temporary injunction enjoining them from providing transportation to Intertrack. In that case the Defendants were the actual Defendants named in the injunction. Similarly, in Cowart v. Gilson, 271 So.2d 821 (Fla. 1st DCA, 1973), the wrongful injunction claimants were also specifically named as the enjoined parties. And in the few other cases in which wrongful injunction damages have been authorized under a bond, it has consistently been held that only the party actually named in the injunction and enjoined, i.e. the County in this case, can claim damages. See also Lake Worth, 495 So.2d at 1234; Caulder, 430 So.2d at 976; Lane, 151 So.2d at 678; and Rice v. White, 147 So.2d 204, 205 (Fla. 1st DCA 1962). See also: Seaton v. Western Auto, 609 S.W. 2d 207, 210 (Missouri, 1980) (a person who is not a party to an

injunction proceeding is not entitled to damages from the improvident issuance of an injunction against the party).

Parker was never named as a Defendant in the temporary injunction of December 13, 1985 (R 246-248), nor was it specifically enjoined from doing anything. Hence, Florida law does not authorize a cause of action for wrongful injunction on the bond for Parker on these facts.

The Second District affirmed Somerset's argument on this point, relying exclusively on the language of the bond (See R 250). Parker, 522 So.2d at 503. According to the Second District opinion, the bond's reference to "any party who may be found to be wrongfully restrained thereby" indicates that the bond necessarily benefits any party in the world. However, the bond (R 250) cannot be reasonably interpreted as obligating Somerset and its surety to pay unlimited costs and damages suffered by any non-enjoined third party not named in the bond. The term "any party" was obviously referring to party-defendants in the litigation at the time, i.e. here only Hillsborough County. By no stretch of the imagination can Somerset's use of the standard bond form (Rules 1.960 and 1.961, Fla. R. Civ. P.) be construed as creating a right of unlimited damages to any living non-enjoined third parties.

More significantly, at the hearing on Somerset's motion to dismiss Parker's wrongful injunction claim, Parker's counsel expressly admitted that the injunction bond did not cover or encompass Parker:

> Well, I can point out to the court that we were not covered by the bond at the time the bond was issued. It did not encompass Parker Tampa Two, I think. But

> the case law is to the effect that that does not prevent us from bringing a lawsuit for wrongful injunction completely apart from the bond still as a part of this lawsuit" (R 656).

Thus, by Parker's own admissions, it is not the beneficiary of the injunction bond.

The trial judge erred in awarding Parker, as a non-enjoined third party, an award for damages on the bond for wrongful injunction. This Court should reverse and vacate the final judgment on Parker's cross-claim for wrongful injunction (R 322).

CONCLUSION

Based upon the foregoing arguments and authorities, Somerset respectfully requests this Honorable Court to reverse and vacate the final judgment in favor of Parker on its cross-claim for wrongful injunction. If this Court is not so inclined to vacate said final judgment, this Court should follow the national "majority rule" and federal rule and otherwise affirm the Second District's decision limiting Parker to wrongful injunction damages to the amount of the injunction bond, pursuant to Florida Statues section 60.07.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to John H. Rains, III, Esquire, Post Office Box 3433, Tampa, Florida 33601, this 24 day of June, 1988.

Samuel R. Mandelbaum

SAMUEL R. MANDELBAUM, ESQUIRE