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IN THE SUPREME COURT OF FLORIDA

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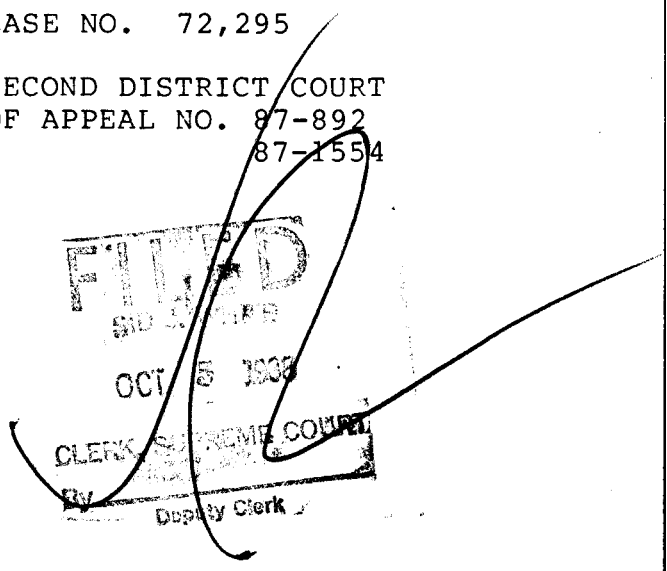
| PARKER TAMPA TWO, INC., | : | |
| Petitioner/ Cross-Respondent, | : | CASE NO. 72,295 |
| vs. | : | SECOND DISTRICT COURT OF APPEAL NO. 87-892 |
| SOMERSET DEVELOPMENT CORPORATION, | : | 87-1554 |
| Respondent/ Cross-Petitioner. | : | |




REPLY BRIEF OF CROSS-PETITIONER

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## STATEMENT OF CASE AND FACTS

Somerset would rely on its statement of case and facts appearing in its main Brief of Respondent/Cross-Petitioner. However, Somerset would offer some commentary on Parker's statement of facts in its Reply and Cross-Answer brief:

Most of the "facts" mentioned by Parker are largely irrelevant to the issues on appeal in this cause, and do little more than attempt to paint a derogatory picture of Somerset. The facts pertinent to this appeal are simple: A temporary injunction was entered since Hillsborough County breached a contract with Somerset to provide 392 sewer connections, and was dissolved after a few months since the injunction prohibiting other sewer hookups was no longer of effect. The trial judge and Somerset had not excepted Parker from the scope of the injunction in the first instance due to Parker's own failure to present sufficient evidence of its contractual right to those sewer connections. There are abundant sufficient facts in the record supporting the Second District's finding, as well as the trial court's implicit finding, that Somerset acted in good faith. See Parker v. Somerset, 522 So.2d 502 (Fla. 2nd DCA, 1988).

Notwithstanding, Parker insists in its brief at pages 6-7 that its Cross-claim did not merely allege claims for "wrongful injunction" and "declaratory relief." This Court can refer to the actual Cross-claim in the record (R 3-6), and plainly see that Parker had only set forth claims for "wrongful injunction" and "declaratory relief." Parker did not sufficiently set forth req-

uisite detailed facts and allegations for a malicious prosecution claim.

On page 9 of its brief Parker attempts to mischaracterize Somerset's procurement of the December 13, 1985 temporary injunction as an "ex parte application." To the contrary, the record indicates that an adversarial evidentiary hearing on the temporary injunction motion took place in December, 1985, with Somerset, Hillsborough County and their attorneys present (R 246-248). And on January 9, 1986, Parker and its attorneys participated in an adversarial hearing on its (Parker's) motion to dissolve and/or modify the injunction, or increase the injunction bond, which Judge Cheatwood denied due to Parker's failure to prove their contractual entitlement (R 48, 253, 257, 148-150).

Subsequent to the filing of Somerset's main brief in this Court, the Third District filed its decision in City National v. Centrust, 13 FLW 1527 (Opinion filed June 28, 1988), which held: "The amount of the bond **fixes** the amount of damages that can be recovered for wrongful injunction."

## REPLY 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.

At the onset Parker insists that its initial letter to Somerset dated December 23, 1985 supposedly "confirmed" facts describing in detail the basis of Parker's contractual rights to sewer connections. [Parker's reply brief, page 12]. According to Parker, "The facts contained in that letter were proved at the evidentiary hearings." [Id.].

To the contrary, the following month the trial judge expressly found that Parker did not sufficiently "prove" its contractual rights at the January, 1986 hearing when he **denied** Parker's motion to dissolve and/or modify the injunction and its motion to intervene (R 257). Parker was given a second try a month later at the hearing on Parker's renewed motions in February, 1986, and finally satisfied the trial court of Parker's right by producing sufficient evidence to prove these "facts" (R 68, 333-345).

The record shows that both Somerset's counsel and the trial judge required Parker to produce sufficient documentary evidence of its contractual entitlement to sewer connections before recognizing Parker's right. And it was certainly reasonable and responsible for them to impose this requirement and decline to pro-

vide Parker the relief it requested until this was done. Since Parker did not promptly and properly respond until February, 1986, Parker is estopped to claim delay damages during that two-month period of its own malfeasance. This is no different than an appellate court reversing a judgment based only on the bare-boned demands and representations of a party's attorney, if there was no record support of sufficient testimony, documents and evidence.

On page 13 of its reply brief Parker states with regard to this cross-point: "Somerset argues that there must be some evidence of malice or lack of good faith for the temporary injunction to be 'wrongful'." To the contrary, Somerset makes no such argument in its first cross-point. Rather, Somerset takes the position that the temporary injunction was not issued "wrongfully," nor dissolved subsequently because it was wrongful; it was dissolved only upon evidence that the County's sewer treatment plant had been taxed over capacity and could not offer any sewer connections to any other developers such as Parker. Thus, the evidence only supports a finding that the temporary injunction was dissolved since it became of no consequence and moot due to this new situation. See Oak Manor v. Eck, 358 So.2d 585, 587 (Fla. 2nd DCA, 1978). The judge never found, nor does the record support, a conclusion that the temporary injunction was wrongful from the start.

Much of Parker's argument on pages 13 and 14 of its reply brief contains irrelevant matters that have no bearing on the issues of this appeal, such as "assignments without recourse" and Somerset's "neglect" to tell Judge Cheatwood of the supposed non-

use of two-thirds of the hook-ups Somerset owned. These sort of statements are only susceptible of causing confusion on this point on appeal, i.e. whether the evidence sufficiently shows that the injunction was dissolved since it was "wrongfully" issued in the first instance. Parker's efforts to distort these realities should be disregarded.

It is also important to stress that Somerset ultimately **prevailed** in its claims against Hillsborough County, based upon breach of the sewer connection contract and the resulting injury to Somerset (R 276-277, 310-311).

Parker argues at page 14 that the "temporary injunction did not 'become' moot after being issued," claiming that the DER would not have revoked Parker's permits nor issued Somerset permits. This argument misrepresents the record at the cited pages of R 350-353, since EPC Director Roger Stewart actually testified to the contrary, that revocation of already-issued permits "**may** have occurred" because there was no longer capacity at the River Oaks plant, although he was "not personally familiar with a case of revocation." (R 350-351). While EPC director Roger Stewart confirmed at the February, 1986 hearings that further permits would **not** be granted, he also noted that existing permits could not be used by developers due to the non-availability of sewer connections (R 351-356). The fact that the County lacked further sewer hookup capacity, and the resulting inability to issue additional permits, was never presented by the County until the February, 1986 hearing (R 351-356). Since the record does not reflect that the County's hookup capacity had already been fully depleted by December, 1985 when the temporary injunction was

issued, Parker's suggestion that this situation had existed prior to even issuance of the injunction is without record support. Thus, since the record demonstrates that the injunction was dissolved because of circumstances arising or discovered subsequent to issuance of the temporary injunction, "there can be no recovery of damages." Oakwood Manor, 358 So.2d at 587.

Lastly, Parker argues the stipulation signed by Somerset, agreeing that Parker would be able to prove damages exceeding $10,000, is support for the fact that Somerset had "caused" the damage to Parker. [Parker's Reply Brief, page 15]. Somerset has never disputed that Parker may have suffered damage over $10,000; But it was always Somerset's position that the damage to Parker was caused by Hillsborough County's inability to provide sewer connections to Parker, **not** due to the 2-month pendency of the inconsequential temporary injunction.

One must emphasize that Parker is also a **plaintiff** that has sued Hillsborough County for breach in failing to provide the sewer connections (R 2-3). And the trial judge granted Parker and other similarly-injured parties leave to intervene as party-**plaintiffs** against the **County** (R 68).

Since the County was unable to comply with its contractual obligations to Parker in this regard, and hence liable to Parker for damages for breach as it was to Somerset (R 310-311), Parker would make a duplicitious recovery of damages stemming from the same injury, i.e., their delay in getting permits due to the County's inability to provide sewer connections for the units that Parker sought to build. Parker's attempt to get a double recovery

is prohibited by Florida law. See Hillsborough County v. Cone, 285 So.2d 619, 621 (Fla. 2nd DCA, 1973) (A party may not have a double recovery of damages and cannot recover twice for the same element of damages).

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.

In its reply brief at pages 18-19, Parker attempts to downplay the fact that its attorney, at the hearing on Somerset's motion to dismiss the wrongful injunction claim, had taken the completely opposite position that it takes in this appeal with regard to its status as beneficiary of the injunction bond. At that pre-trial hearing Parker's counsel admitted: "we were **not covered** by the bond at the time the bond was issued. It did **not** encompass Parker Tampa Two, I think." (R 656). Somerset certainly agrees with this statement, and for this reason among others the Second District was incorrect in finding that Parker was covered under the terms of the bond. Parker, 522 So.2d at 503.

Parker argues that the terms of the Injunction Bond do not limit beneficiaries to merely Hillsborough County. Rather, Parker suggests that a clause in the injunction bond obligates Somerset to pay unlimited damages to any entity that may suffer damage, including Parker. This argument mischaracterizes the true context of the bond (R 250-252).

The first paragraph of the Injunction Bond (R 250) clearly states that "Somerset Development Corporation of Florida, as principal, and Fidelity & Deposit Company of Maryland, as surety, are

held and firmly bound to the Defendants in the above-styled case in the sum of Ten Thousand ($10,000) Dollars . . . the payment of which well and truly to be made . . ." (R 250). Hillsborough County is of course listed as the lone defendant in the bond (R 250). Two paragraphs down from the afore-quoted first paragraph is the following clause setting forth the grounds for discharge of Somerset's liability:

> "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).

Contrary to Parker's contentions, Somerset and its surety had bound themselves to the only defendant existing in the case at any time, i.e. Hillsborough County, to an obligation of up to $10,000.00. Notwithstanding, Parker has never been a "defendant" in the case; just a plaintiff (R 68).

The provisions of the two paragraphs following the first paragraph are necessarily subsumed under the $10,000.00 limitation term set forth in the first paragraph (R 250). And it is readily apparent that the import of the third paragrph is to only discharge Somerset in the event that all costs and damages thereunder are paid to the County the extent of the limit of the $10,000.00 bond amount (R 250).

The Injunction Bond was patterned after the standard bond terms set forth in Fla. R. Civ. Pro. 1.960 and 1.961. Reviewing the first page of the Injunction Bond (R 250), Somerset did not obligate itself to pay unlimited costs and damages suffered by any

non-enjoined third party. The term "any party" was obviously referring to any party-defendant in the litigation, i.e. Hillsborough County. By no stretch of the imagination can the standard bond form (Rules 1.960 and 1.961) as used by Somerset and Fidelity & Deposit of Maryland be construed as creating a right of unlimited damages to non-enjoined third parties. Parker's argument based upon the bond form is unfounded.

On page 16 of its Reply Brief, Parker argues that those cases cited by Somerset concerning the wrongful injunction issue do not address this point. To the contrary, it appears that every Florida case authorizing wrongful injunction damages pertains only to the actual party-defendant named in the injunction. See Coward v. Gilson, 271 So.2d 821 (Fla. 1st DCA, 1973); Caulder v. Gaitan, 430 So.2d 975 (Fla. 3rd DCA, 1983; Lane v. Clein, 151 So.2d 677 (Fla. 3rd DCA, 1963); Rice v. White, 147 So.2d 204 (Fla. 1st DCA, 1962).

Lastly, Parker maintains that it became "a real party in interest" following its intervention in the cause, and its right to maintain an action for wrongful injunction damages is well established (Parker's Reply Brief, page 18). Parker fails to note a single Florida case to support this argument, and merely cites a brief sentence out of Corpus Juris Secundum, Volume 43A, Injunctions §322 at pages 717-718 (Id.). However, this sentence is derived from the lone case listed in Corpus Juris Secundum for this cite: a 76-year-old Illinois middle appellate court case, District 181 v. Mathis, 168 Ill. App. 174 (Ill., 1912). This citation is of most dubious value for this Court to create a wrong-

ful injunction cause of action for non-enjoined third parties that are not named beneficiaries of an injunction bond.

It would be against public policy for this Court to create a right of recovery for wrongful injunction damages that may be suffered by non-enjoined third parties that are indirectly or tenuously affected by injunctions against others. For example, could those contractors, subcontractors and third party purchasers who dealt with Parker also sue Somerset for damages if they suffered any injury or delay? Whenever an injunction is entered, non-enjoined third parties will typically feel some effect, either indirectly or tenuously. If this Court sustains the allowance of a wrongful injunction action by a non-enjoined party such as Parker, litigants would rarely take the risk of procurring an injunction, knowing that an improvidently issued injunction would create virtually unlimited and unpredictable exposure to damages. In any event, it is a question for the Florida legislature to resolve, since Florida Statutes Section 60.07 only allows wrongful injunction damages on an injunction bond to "a **defendant.**"

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 Statutes 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 3rd day of October, 1988.

SAMUEL R. MANDELBAUM, ESQUIRE