IN THE SUPREME *COURT*
IN AND FOR THE STATE OF FLORIDA

CASE NO. 78,922

PALM BEACH SAVINGS AND LOAN ASSOCIATION, F.S.A

Petitioner,

vs.

DEBORAH FISHBEIN,

Respondent.

On Appeal from the District Court of Appeal,
Fourth District of Florida
(Case No. 90-01937)

INITIAL BRIEF OF AMICUS CURIAE ATTORNEY'S TITLE INSURANCE FUND, COMMONWEALTH LAND TITLE INSURANCE CORP., FIRST AMERICAN TITLE INSURANCE CO., AND CHICAGO TITLE INSURANCE CO.

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TABLE OF CONTENTS

TABLE OF CXTATIONS

Other Authorities

INTEREST OF THE AMICI

Preface

ATTORNEY'S TITLE INSURANCE FUND, COMMONWEALTH LAND TITLE INSURANCE CORP., FIRST AMERICAN TITLE INSURANCE CO., and CHICAGO TITLE INSURANCE CO. are each in the business of issuing and delivering policies of title insurance pursuant to §624, Fla. Stat. et seq (1982). They will be collectively referred to as "the AMICI". The Petitioner, PALM BEACH SAVINGS AND LOAN ASSOCIATION, F.S.A., will be referred to herein as "PALM". The Respondent will be called "Ms. Fishbein" and her ex-husband, "Mr. Fishbein". The AMICI will employ the same conventions to refer to the Record on Appeal, and the transcript of the proceedings in the trial court as are employed by PALM. Unless otherwise indicated, all emphasis in this Brief is the writers'.

This Brief is filed in accordance with Fla. R. App. P. 9.370, and pursuant to the written consent of PALM and Ms. Fishbein included in the Appendix to this Brief.

The Business of the AMICI

The AMICI issue and deliver title insurance policies, insuring both owners of property, and those who lend money and take back mortgages as collateral for the undertakings expressed in notes secured by those mortgages. In each instance, the AMICI and other companies performing like functions, insure the title insured from and against liens, defects, or encumbrances which impair that title.

The Interest of the AMICI

If a claim is made by a policyholder under a policy issued by the AMICI, the AMICI agree to defend and indemnify their policyholders from and against any damages arising out of the defect, lien or encumbrance which gave rise to the claim in the first place. In the event of a payment under the terms of the policies, the policies expressly provide for the right of subrogation, so that the AMICI may step into the shoes of their policyholders in an attempt to recoup all or a portion of the monies paid in protecting the policyholder's interests. See, *e.g.*, *First American Title Insurance Co. v. First Title Service Co. of the Florida Keys,* Inc., 457 So. 2d 467 (Fla. 1984). However, this right of subrogation is only as good as the remedies available to mitigate against the harsh effects of those difficult-to-detect, and distressingly frequent claims arising out of forgeries, misindexing by the clerk, and other defects or infirmities in documents appearing in the chain of title, or in the very instruments insured. See, *e.g.*, 19 Fla.Jur 2d *Deeds* §99. Those remedies have historically included equitable relief, such as the right to impress an equitable lien on property, to be equitably subrogated to prior rights, or to impress a constructive trust.

What the District Court did here is to truncate those rights, limiting the class of cases in which those rights might be available to those few cases where the beneficiary of a homestead has him/herself committed a fraud. As the AMICI discuss *infra*, that limitation is insupportable, because it ignores settled

precedent of this and other courts, and fails altogether to do justice between the parties. In simple terms, if the District Court's decision is allowed to stand, important rights of the AMICI will be lost, translating into a direct impact on the premiums to be charged for the purchase and delivery of policies of title insurance in this state.

STATEMENT OF TBE CASE AND FACTS

The AMICI adopt PALM's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal, Fourth District, declining to impose an equitable lien in favor of PALM on the homestead of Ms. Fishbein, solely because Ms. Fishbein had not participated in the fraud, and holding that equity has nothing to do with homestead must be reversed.

First, this Court and other courts have repeatedly recognized that an equitable lien may be based upon general considerations of right and justice, such as an unjust enrichment, apart from fraud. Accordingly, the Fourth District's conclusion that fraud is required before the lien can arise is incorrect. On at least two occasions, this Court has fashioned equitable liens, even in the absence of fraud, and imposed those liens on the homestead of the defendant.

Second, there was a fraud committed below, but it was not by Ms. Fishbein. But the District Court held this fraud to be unavailing in creating the lien because it was not committed by Ms. Fishbein. However, this Court has never required that fraud, as a basis apart from unjust enrichment for the creation of an equitable lien, be practiced by the beneficiary of the homestead in order for the equitable lien to exist.

In addition, the District Court improperly relied upon this Court's decision in *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988) to support its conclusion that a trial court is powerless to impress an equitable lien against the homestead in order to do equity. Rather, all this Court determined

in Lopez is that equity has nothing to do with the creation of the homestead. Once the parameters of the homestead protection have been determined, the courts can, and have in the past, employed equitable principles so as to avoid making the homestead an instrument of fraud or oppression.

Last, the decision of the trial court is eminently correct as a function of equitable subrogation. This doctrine, which is closely allied to the doctrine of equitable liens, has been employed by this, and other courts, in a variety of settings as a remedy against unjust enrichment. As the trial court determined, Ms. Fishbein's homestead would have been liable for the preexisting mortgages and taxes paid off with the proceeds of the PALM mortgage, and by subrogating PALM to the paid-off mortgages and taxes, Ms. Fishbein would stand in no worse position than she stood in prior to the fraudulent mortgage.

PALM was as much a victim of Mr. Fishbein's fraud as Mr. Fishbein's wife. It would be inequitable and unjust to permit Ms. Fishbein to garner a $1,000,000 windfall when commonly available remedies exist to prevent such a result.

ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT OF APPEAL MUST BE REVERSED, BECAUSE IT IS CONTRARY TO SETTLED PRECEDENT OF THIS COURT WHICH ALLOWS THE IMPOSITION OF AN EQUITABLE LIEN TO DO RIGHT AND JUSTICE IN ORDER TO AVOID AN UNJUST ENRICHMENT, AND BECAUSE IT MAKES THE HOMESTEAD EXEMPTION AN INSTRUMENT OF FRAUD

The District Court properly acknowledges that the fundamental purpose of an equitable lien is to "achieve right and justice." It then disposes right and justice to the waste basket by ignoring settled precedent of this Court in denying the imposition of an equitable lien on the homestead of Ms. Fishbein, solely because PALM had failed to "establish some fraudulent or otherwise egregious conduct" on the part of Ms. Fishbein. Fishbein *v. Palm Beach Savings and Loan Association*, F.S.A., 585 So. 2d 1052, 1055 (Fla. 4th DCA 1991) (hereinafter, "*Fishbein*"). To compound error, the Fourth District improperly made the homestead an instrument of fraud and oppression, for it allowed Ms. Fishbein to retain the fruits of her ex-husband's fraudulent scheme, thereby placing her in a substantially better ($1,000,000) position than she was in prior to the commission of the fraud. The homestead may be a shield, but it is not a sword to be used in derogation of equity, and to better the position of the homestead beneficiary.

All the trial court did was to subrogate PALM to the unimpeachably valid rights of the mortgages and tax liens paid off with PALM's money. Thus, PALM did not improve its position vis-

a-vis Ms. Fishbein, to the detriment of her rights. Likewise, Ms. Fishbein was not permitted to improve her position with respect to PALM, by improperly claiming an advantage through the use of PALM's money from which PALM was fraudulently parted.

The AMICI will first discuss the historical evolution of equitable liens in this state, together with an analysis of the cases reflecting upon that evolution. Second, the AMICI will discuss why fraud is not the only basis for the creation of an equitable lien to "achieve right and justice." Third, this Brief will address Ms. Fishbein's homestead rights, and why the District Court misconstrued those rights. Last, the AMICI will demonstrate how the trial court's decision must be affirmed based upon the companion doctrine of equitable subrogation; in truth, the remedy fashioned by the trial court in the first place.

A.

The District Court Ignored the Purpose of an Equitable Lien, Which is to Achieve Right and Justice in Consideration of the Totality of the Relations Between the Parties. Irrespective of Fraud

While the District Court properly recognized that "the purpose of an equitable lien is to achieve right and justice considering the relations of the parties and the circumstances of their dealings," Fishbein at 1055, the District Court abandoned this purpose, and ignored clear precedent of this Court by limiting the availability of an equitable lien to those few cases where there has been some fraud practiced by the person against whose interest the lien is to be imposed. This makes the equitable lien an

impotent remedy, because it has been historically recognized as a tool available to rectify injustice, such as where the failure to impose an equitable lien will result in an unjust enrichment.

The methuselah of equitable lien law in this state is Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925). In Jones, this Court recognized:

> [t]hat the doctrine of equitable liens is one of great importance and of wide application in administering the rights and remedies peculiar to equity jurisprudence. There is perhaps no doctrine which more strikingly shows the difference between the legal and the equitable conceptions of the juridical results which flow from the dealings of man with each other, from their express or implied undertakings.
>
> An equitable lien is not an estate or property in the thing itself nor a right to recover the thing; that is, a right which may be the basis of a possessory action. It is neither a jus ad rem nor a jus in re. It is simply a right of a special nature over the thing, which constitutes a charge or incumbrance (sic) upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists.

Id. at 129. Consistent with this Court's view that the doctrine of equitable liens is one of "great importance and of wide application," this Court did not limit the existence of such a lien to cases involving fraud. Rather, this Court found:

> [T]hat equitable liens arise from two sources, viz: (1) A written contract which shows an intention to charge some particular property with a debt or obligation; (2) is declared by a court of equity out of general consideration of right and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case. (citations omitted). Equitable liens are necessarily based on the doctrine of estoppel and usually arise in cases of expenditures by one joint owner on real or other property or in cases where a party innocently and in good faith makes improvements on the property of another. These last two, however, are by no means the only instances in which they may arise.

Id. at 129. See *also Sonneman* v. *Tuszynski*, 139 Fla. 824, 191 So. 18, 20 (1939); Ross v. *Gerung*, 69 So. 2d 650 (Fla. 1954); Crane Co. *v. Fine*, 221 So. 2d 145, 148 (Fla. 1969); *Plotch* v. Gregory, 463 So. 2d 432, 436 (Fla. 4th DCA 1985); *Wagner V. Roberts*, 320 *So.* 2d 408, 410 (Fla. 2d DCA 1975), *cert. denied*, 330 *So.* 2d 20 (Fla. 1976); *Tucker v. Prevatt Builders*, Inc., 116 *So.* 2d 437 (Fla. 1st DCA 1959).

Consistent with this Court's determination that the doctrine is "one of great importance and of wide application," Jones at 129, it is proper to say that "an equitable lien is a remedial device of considerable flexibility adaptable to a wide variety of circumstance." *Plotch* at 436 (citing Boyer and Katun, *The Equitable Lien in Florida*, *20* U.Miami L. Rev. 731 (1966)). Since the purpose of an equitable lien is to achieve right and justice, considering the totality of the relations between the parties and the circumstances of their dealings, *Fishbein* at 1052; *Isaacson* v. *Isaacson*, 504 So. 2d 1309, 1310 (Fla. 1st DCA 1987), the trial

court should have wide latitude in imposing such liens. *Isaacson* at 1310. This latitude is reflected by the variety of factual settings in which such liens have been imposed, including cases where there has been no fraud at all.

In La Mar *v. Lechlider*, 135 Fla. 703, 185 So. 833 (1939), this Court imposed an equitable lien on homestead despite a specific finding that there was no intention "to lay a foundation for defrauding plaintiffs or damaging them in any way." Id. at 834. Mr. La Mar owned a piece of property. while visiting La Mar and his wife, the Lechliders expressed a desire to live in Florida. To consummate this desire, the Lechliders paid for an addition to the La Mars' residence in exchange for the La Mars' agreement that the Lechliders could live there during their old age, and that they would receive an unspecified interest in the property. The Lechliders built the addition at a cost of $4,650.

For reasons not germane to this appeal, a dispute arose between the parties, culminating in fisticuffs aided by alcohol. The physical altercation lead to a lawsuit wherein the Lechliders sought the declaration of a lien on the property to the extent of any money expended for improvements. This Court decided to "enforce a lien on the premises involved for the amount of the damages or value of the improvements.** Id. at 835. The La Mars resisted the imposition of the lien arguing that there must be some direct, immediate or willful fraud for an equitable lien to be imposed. This Court disagreed, finding:

> This Court holds that the lien of plaintiffs is enforceable against the homestead of defendants, upon the theory that since the plaintiffs have innocently, and in the belief that they had the right to do so, with the consent of the holder of the legal title, placed on his land permanent and valuable improvements, it would be inequitable to permit the owner to retain the improvements without compensating the parties who placed them there far their reasonable value; that so to permit him to retain them would be unjustly to enrich him.

Id. at 836. So, here these was no fraud, but an equitable lien was fashioned in any event "out of general consideration of right and justice" to prevent an unjust enrichment.

In the same vein, is this Court's decision in Sonneman V. *Tuszynski*, 139 Fla. 824, 191 So. 18 (1939). In *Sonneman*, an elderly woman, came to live with a much younger man, in a relationship akin to mother and son. She and the younger man entered into an agreement whereby the man (in exchange for money and services) agreed to support this elderly woman for the rest of her natural life. And, she did indeed advance money, furnished services, and ultimately assisted the young man in buying a tourist camp. Upon the acquisition of the tourist camp, the elderly plaintiff continued furnishing services, including caring for the guests at the camp. She also planted shrubbery and engaged in other endeavors designed to beautify the camp. Then, the young man met a young guest more to his liking and age. when they married, the new wife immediately got into a dispute with the elderly plaintiff, resulting in the plaintiff being forced to leave the camp: At the time, she was 78 years of age and penniless. Again,

finding no fraud, this Court imposed an equitable lien on the camp (which was a homestead) for the monies advanced, and the work and labor performed by the elderly plaintiff which benefited the defendant.

In Ross v. *Gerung*, 69 So. 2d 650 (Fla. 1954), this Court again imposed an equitable lien despite the absence of fraud. The plaintiff had performed work and supplied materials for the repair of a church. Because the collection plate was insufficient to raise funds to pay the plaintiff, the church did not pay. The plaintiff sued, but the church defended on the basis that its agreement with the plaintiff was invalid since it was an unincorporated association. For the same reason, a mechanic's lien could not arise because the church was incapable of making a contract upon which a statutory lien could depend. Nonetheless, and so as to avoid an unjust enrichment, this Court imposed an equitable lien on the church's property. See *also Blumin v. Ellis*, 186 So. 2d 286 (Fla. 2d DCA 1966), *rev. denied*, 189 So. 2d 634 (Fla. 1966) (holding that an equitable lien may be based upon an estoppel or an unjust enrichment); *Tucker v. Prevatt* Builders, *Inc.*, 116 *So.* 2d 437 (Fla. 1st DCA 1959).

To this point, the cases had been faithful to the anodyne produced by this Court's decision in Jones, because equitable liens had been found and imposed, out of the general consideration of "right and justice," without regard to fraud. Then this Court decided *Merritt*. In *Unkefer v. Merritt, 207* So. 2d 726, 729 (Fla. 4th DCA 1968), the Fourth District held that the imposition of an

equitable lien does not require fraud or misrepresentation. This Court reversed. *Merritt v. Unkefer*, 223 So. 2d 723 (Fla. 1969). In *Unkefer*, the plaintiff sought to impose an equitable lien for architectural services. This Court held that to entitle one to such a lien, there must be a circumstance such as fraud or misrepresentation of essential facts upon which the lender or contractor relied in good faith. *Compare* Crane Co. *v. Fine*, 221 *So.* 2d 145 (Fla. 1969) (In *Crane*, this Court allowed a plumbing subcontractor to establish an equitable lien on undisbursed construction funds notwithstanding the absence of fraud.) What does *Merritt* mean? The answer may be found in this Court's decision in *Rinker Materials* Corp. *v. Palmer First National Bank & Trust Company of Sarasota*, 361 So. 2d 156 (Fla. 1978).

In *Rinker*, various subcontractors claimed they were duped by the mortgagee into furnishing funds to complete the project. The District Court held that since the bank made no statements which were fraudulent, the bank could not be held to have waived its priority. This Court agreed. In the course of its decision, this Court cited to cases such as *Merritt* for the proposition that an equitable lien based upon the doctrine of estoppel may arise only where there is some fraud or misrepresentation involved. However, this Court's precedent (Jones, La Mar, *Sonneman)* make clear that an equitable lien is not always based upon the doctrine of promissory estoppel. It may also justifiably be imposed as a remedy to avoid an unjust enrichment. *See Plotch* v. Gregory, 463 So. 2d 432, 436 n.1 (Fla. 4th DCA 1985) (the basis of equitable

lien may be an estoppel or unjust enrichment. In order to prevail upon an estoppel theory, as opposed to unjust enrichment, there must be evidence of fraud, misrepresentation or other affirmative deception).[1]

The continued validity of unjust enrichment as a basis for the imposition of an equitable lien distinct from fraud is illustrated by *Wagner* v. *Roberts*, 320 So. 2d 408 (Fla. 2d DCA 1975), *cert. denied*, 330 So. 2d 20 (Fla. 1976). The facts appear as follows:

A. On February 11, 1952, Cora Jones conveyed a piece of property to McQuarter by warranty deed.

B. In November, 1952, McQuarter died leaving as her heirs, Roberts, and his sister, Blonde Eva Jones.

C. Thereafter, Cora Jones executed a mortgage on the property to Sunniland securing a $6,000 promissory note.

D. Sunniland then assigned the mortgage to the Wagners.

E. Cora Jones then conveyed the property to Robert and Blonde Eva Jones. This warranty deed provided for the assumption of the mortgage given by Cora Jones to Sunniland.

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[1] There is a logical reason for requiring fraud as a precondition to impressing an equitable lien on property in favor of a contractor, subcontractor, laborer or materialman. The mechanic's lien law expressly provides for the creation of a lien in favor of certain classes of persons who do work or furnish services in improving real property. The mechanics lien law would become redundant to equitable liens, if equitable liens were allowed to be impressed because of unjust enrichment, as opposed to fraud or affirmative deception. That is because in every case where work is done upon realty, the owner would be unjustly enriched if the person or entity doing the work is not paid. Without the requirement of fraud, there would be little need for this statutory scheme.

The Wagners filed suit to foreclose the mortgage. Defaults were taken against Roberts and Blonde Eva Jones, and a final judgment of foreclosure was entered. The Wagners were the successful bidders at the foreclosure sale. Some years later, Roberts, as heir and administrator of the estate of McQuarter, filed suit to set aside the judgment of foreclosure. The trial court found that the mortgage from Cora Jones to Sunniland was ineffective because Cora Jones did not have title to the property (by virtue of the deed to McQuarter) at the time the mortgage was given.[2] Thus, the Wagners never acquired title to the property. But the Wagners were not left without some relief.

> [I]f the final judgment is left in its present form, Roberts will be unjustly enriched since some, if not all, of the proceeds of the mortgage went toward the erection of a new house on the property....
>
> Even though the mortgage now held by the appellants is not valid, equity dictates that the Wagners should have an equitable lien on the property to the extent they can prove that the property was benefitted from the proceeds of the mortgage (not to exceed $6,000) less an amount equal to all principal and interest payments made on the mortgage to date.. .. This amount which shall be determined on remand shall be a lien upon the property and shall be payable in the same installments and at the same rate of interest as the original mortgage note.

Id. at 410. Thus, notwithstanding there was no fraud, the District Court allowed the imposition of an equitable lien, and this Court denied certiorari.

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[2] This type of defect (lack of title in the mortgagor) is clearly ascertainable from the public records, in contrast to a forgery, which is not.

Accordingly, it is clear that unjust enrichment may give rise to the imposition of an equitable lien, without the necessity of fraud, in an appropriate case. This squares this Court's later decisions, based upon promissory estoppel (*Merritt* and *Rinker*) with this Court's precedent (Jones and its progeny), and maintains the purpose of the equitable lien as a remedial device of "'considerable flexibility adaptable to a wide variety of circumstances.'" *Plotch* at 436 (quoting Boyer and Katun, supra).

As a consequence of this analysis, the decision of the Fourth District is simply not supportable. Since a legitimate basis for the imposition of an equitable lien is unjust enrichment, the District Court clearly erred in requiring fraud on the part of the beneficiary of the homestead exemption (Ms. Fishbein) to prevent PALM from having any relief. Ms. Fishbein and PALM are both victims of Mr. Fishbein's fraud. As a result of Mr. Fishbein's fraud PALM paid off three mortgages, as well as tax liens which encumbered the homestead of Ms. Fishbein. (R. 666-671, 690-698, 699-703, 718). Yet, the District Court allows Ms. Fishbein to retain the fruits of her husband's fraud: the monies used to pay off the mortgages and the tax liens encumbering the homestead. This is odious and inequitable, and makes the homestead a partner in Mr. Fishbein's fraudulent scheme.

B.

Fraud is not an Essential Ingredient for the Imposition of an Equitable Lien, Even if the Property Sought to be Impressed with the Lien is Homestead

Fraud is not an essential integer to equitable relief, even if the property involved is homestead, and the District Court's decision requiring that the homestead beneficiary commit fraud is contrary to law. The District Court held, without citing any of this Court's prior decisions, that courts may only impose equitable liens against homestead property "where the plaintiff can establish some fraudulent or otherwise egregious conduct on the part of the beneficiary of the homestead protection." *Fishbein* at 1055.

The imposition of an equitable lien on homestead is not unknown in the annals of this Court's jurisprudence: Yet the *Fishbein* majority fails to discuss this Court's precedent at all.

In Jones v. Carpenter, supra, this Court recognized that:

> A homestead in this country is for the benefit of the family, where it can be sheltered and live beyond the reach of financial reverses. It is one of the issues of our republican government designed to encourage freeholders, those citizens who are the prop and mainstay of all free government. It is designed to keep sacred and inviolate the home for the family regardless of the amount of indebtedness or the number of creditors at the head of the family. It cannot be alienated except as the law directs, and when the parties are sui juris and dealing at arm's length it is notice to the world of all these facts and more; but it cannot be employed as a shield and defense after fraudulently imposing upon others.

Id. at 130.

In Jones, this Court determined that the homestead exemption "should be liberally construed in the interest of the family home.'' Id. Notwithstanding, this Court determined it should not be applied so as to make the homestead an instrument of fraud or imposition upon creditors. Id. This Court concluded by imposing an equitable lien on the homestead on the basis that the homestead beneficiary "cannot enjoy tortiously acquired property by claiming it as a part of his homestead exemptions." Id. While Ms. Fishbein may take solace in Jones because the homestead beneficiary in Jones may have committed a fraud on his company, that is not, however, the case in La Mar v. *Lechlider*, 135 Fla. 703, 185 So. 833 (1939).

The facts in La Mar are discussed above at pages 10-11 of this Brief. Again, this Court specifically found no fraud, but nonetheless found the case a proper one for the imposition of an equitable lien. Having determined the propriety of the imposition of such a lien, this Court turned to the question of "whether such a lien could be enforced against the homestead of the defendants." Id. at 836. It concluded that it could notwithstanding the absence of fraud. Id. In determining that the lien could be imposed against the interest of Mrs. La Mar, this Court reasoned that Mrs. La Mar should have "no higher or greater right than her husband under such circumstances. She, as much as her husband in this case, permitted the improvements and, whether they are compensated for or not, will have as much enjoyment of them as will he." Id. See *also Sonneman v. Tuszynski*, 139 Fla. 824, 191 So. 18 (1939), supra at page 12, (Imposing an equitable lien against the

homestead notwithstanding a lack of fraud).[3] Thus, the conclusion is inescapable that fraud is not an essential ingredient to the creation of an equitable lien which encumbers the homestead.

C.

Even if Fraud is an Essential Ingredient to the Imposition of an Equitable Lien on Homestead, the District Court's Decision Must be Reversed Because it is Contrary to Settled Precedent in Requiring that the Fraud Be Committed by the Beneficiary of the Homestead Exemption

Both the trial court and the District Court properly found that Mr. Fishbein committed a fraud. However, the District Court found that fraud unavailable as a basis for relief to PALM, because the majority in *Fishbein* cites to *Isaacson* v. *Isaacson,* 504 So. 2d 1309 (Fla. 1st DCA 1987) as standing for the proposition that the fraud must be on the part of the beneficiary of the homestead protection. *Fishbein* at 1055. It is true that *Isaacson* says this, but none of the cases *Isaacson* cites to as authority do.

In *Kitzinger v. Gulf Power Company,* 432 So. 2d 188, 195 (Fla. 1st DCA 1983), the First District found that an equitable lien cannot be imposed on homestead absent fraud or reprehensible conduct, citing to *Bessemer v. Gersten,* 381 So. 2d 1344, 1347 n.1 (Fla. 1980); Clutter *Construction Corporation v. Clutter,* 173 So. 2d 761 (Fla. 3d DCA 1965); and *Grass* v. Great *American Bank of North Miami Beach,* 414 So. 2d 561 (Fla. 3d DCA 1982). In *Bessemer,* this Court in a footnote cited *Clutter* for the proposition that a

[3] While these cases are utterly ignored by the majority in *Fishbein,* Judge Stone dissents, relying upon this Court's precedent.

lien can be enforced against homestead if it is imposed for fraud or material misrepresentation. See 381 So. 2d at 1347 n.1. It certainly is a circumstance, but this Court did not say it is the only circumstance, for it clearly is not.[4] *Clutter,* in turn, says that:

> [T]o recover an equitable lien against real property used as a homestead it is necessary for the plaintiff to establish fraud or "reprehensible conduct".

Id. at 761-62. What cases does *Clutter* cite in support of this proposition? This Court's prior decisions in *Jones* and *La Mar,* which do not require fraud on the part of anyone before the lien can be created. Clearly, the Third District's misinterpretation of the law in *Clutter,* has been repeated, without analysis, to the point that the court in *Isaaeson* accepted it as gospel without review of the precedent cited in *Clutter.* Never has fraud been the only basis for the imposition of an equitable lien on homestead. Never has this Court required that fraud, as a basis apart from unjust enrichment, be practiced by the beneficiary of the homestead in order for the equitable lien to exist. Indeed, the Fourth District itself has recognized that to strictly limit the existence of the lien to cases where fraud has been practiced by the beneficiary of the homestead, is unworkable. *Gepfrich v. Gepfrich, 582* So. 2d 743 (Fla. 4th DCA 1991).

In *Gepfrich,* a case not mentioned in *Fishbein,* (perhaps because *Gepfrich* implicitly departs from Isaacson), the Fourth

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[4] Grass simply cites Clutter, without analysis.

District held that the homestead exemption cannot protect the homestead of a former husband from forced sale in order to pay alimony arrearages. There was no express finding of fraud. Rather, as Judge Farmer says in his concurring opinion:

> The trial court's finding that appellant's defenses to the contempt charge "constitute a complete lack of clean hands" establish for me the functional equivalent of fraud or reprehensible conduct sufficient for an equitable lien.

Id. at 745.[5] *See also Radin V. Radin,* 593 So. 2d 1231 (Fla. 3d DCA 1992) (Impressing an equitable lien on homestead to assure payment of alimony, because the husband had engaged in an egregious pattern of non-payment, including criminal and civil contempt). "Functional equivalents" aside, it is clear that the Fourth District is simply doing what this Court's precedent counsels: applying the equitable lien so as to do right and justice between the parties.[6]

D.

The District Court Improperly Relied Upon this Court's Decision in *Lopez* in Order to Make the Homestead an Instrument of Fraud and Oppression

Last, the District Court erred in citing this Court's decision in *Public Health* Trust *of Dade County V. Lopez,* 531 So. 2d 946 (Fla. 1988), as a basis for concluding the trial court had no power

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[5] Judge Farmer, apparently finding no "functional equivalent", concurred in *Fishbein.*

[6] What if there were no divorce, but a desperate for cash, unemployed husband had defrauded a lender in the same manner as Mr. Fishbein. Would the parties be entitled to retain the fruits of the fraud solely because the wife did not know of her husband's deeds?

to impress an equitable lien against the homestead in order to do equity. As the District Court wrote:

> [T]he trial court also based its decision to impose the equitable lien on the fact that Mrs. Fishbein would have been liable for the three existing mortgages on the property if Mr. Fishbein had not paid them off with the fraudulent mortgage. In essence, the trial court imposed a lien against homestead property for an equitable reason. We hold that the trial court erred when it imposed the equitable lien on this basis. The plain language of the constitution cannot be ignored, homestead protection is not and never was based upon principles of equity.

Fishbein at 1056, citing *Lopez*. This pronouncement is wrong for several reasons.

First, as indicated above, this Court has previously recognized unjust enrichment as being a basis for the imposition of an equitable lien against property, including homestead property. See supra at pages 8 through 19. Second, the District Court misconstrues this Court's dicta in *Lopez*. This Court said that it is not "free to ignore the plain language of the Constitution.... The homestead protection has never been based upon principles of equity." Lopez at 950-51. That is true. The existence of the homestead does not depend upon equity. But this is not the same thing as saying that homestead cannot, in equity, be charged with a lien under appropriate circumstances.[7] Third, this Court and others have repeatedly held that the homestead

[7] And how would the Fourth District square its statement in Fishbein with *Gepfrich*? After all, unclean hands is an equitable doctrine, and can apparently serve as the "functional equivalent of fraud."

"should not be applied so as to make [it] an instrument of fraud or imposition upon creditors.** *Jones* at 130; *Gepfrich* at 744; *Hospital Affiliates of Florida, Inc. v. McElroy*, 393 So. 2d 25, 28 (Fla. 3d DCA 1981), *rev. denied*, 402 So. 2d 611 (Fla. 1981). It would be puerile, indeed, to say that the homestead does not lend itself to principles of equity. The two can peacefully coexist, as this Court's prior decisions reflect.

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL MUST BE REVERSED, BECAUSE THE TRIAL COURT, PROPERLY EMPLOYED THE REMEDY OF EQUITABLE SUBROGATION SO AS TO PREVENT A MANIFEST INJUSTICE

PALM and Ms. Fishbein have argued with vigor concerning the validity and propriety of the imposition of an equitable lien. But the relief actually fashioned by the trial court is equitable subrogation; a doctrine closely allied to the equitable lien, but not dependant upon fraud at all.

As this Court wrote in *Jones*, supra, "the doctrine of equitable lien follows the doctrine of subrogation. They both come under the maxim, 'Equality is equity,' and are applied only in cases where the law fails to give relief and justice would suffer without them." *Id.* at 129. At times, the two doctrines (equitable lien and subrogation) have been used interchangeably. See, *e.g.*, *Hollywood, Inc.* v. Clark, 153 Fla. 501, 15 So. 2d 175 (1943) (holding that a judgment creditor who pays taxes on property liened by the judgment in good faith is entitled to an equitable lien for the amounts so paid); *H.K.L. Realty* Corporation *v. Kirtley*, 74 So. 2d 876 (Fla. 1954) (holding that a mortgagee who pays taxes is entitled to be subrogated to the lien of the State). Equitable subrogation may be defined as follows:

> Subrogation is the substitution of one person to the position of another with reference to a legal claim or right. It is an equitable doctrine founded on the principles of equity and justice and is applied to prevent forfeiture and unjust enrichment. The doctrine of subrogation is generally invoked when one personhas satisfied the obligations of another and equity compels that the person discharging

> the debt stand in the shoes of the person whose claim has been discharged, thereby succeeding to the rights and priorities of the original creditor....
>
> Equitable subrogation arises when the person discharging the obligation is under a legal duty to do so or when the person discharges the obligation to protect an interest in, or a right to, the property.... It is governed by the operation of equitable principles rather than legal rules and will not be applied where it would work an injustice to innocent third parties.

Eastern National Bank v. Glendale Federal Savings and Loan Association, 508 So. 2d 1323, 1324 (Fla. 3d DCA 1987); *See, e.g., Trueman Fertilizer Co. v. Allison*, 81 So. 2d 734 (Fla. 1955); *Federal Land Bank of Columbia v. Godwin*, 107 Fla. 53, 145 So. 883 (1933); *Schilling v. Bank of Sulphur Springs*, 109 Fla. 181, 147 So. 218 (1933); *C.T.W., Co., Inc. v. Rivergrove Apartments, Inc.*, 582 So. 2d 18 (Fla. 2d DCA 1991), *rev. denied, Nairne v. C.T.W., Co., Inc.*, 591 So. 2d 183 (Fla. 1991); *Hornstein v. Guarantee Insurance Company*, 471 So. 2d 108 (Fla. 3d DCA 1985); *Southern Colonial Mortgage Company, Inc. v. Medeiros*, 347 So. 2d 736, 739 (Fla. 4th DCA 1977).

The doctrine of equitable subrogation has been applied in a wide variety of settings as a remedy against unjust enrichment. For example, it has been used in favor of a bank which pays off an earlier mortgage without discovering an intervening lien so as to protect the security of that mortgage. *See, e.g., Godwin, supra; Schilling, supra; Federal Land Bank of Columbia v. Dekle*, 108 Fla. 555, 148 So. 756 (1933); *C.T.W., supra; Eastern, supra; Washington Security Co. v. Tracy's Plumbing & Pumps, Inc.*, 166 So. 2d 680

(Fla. 2d DCA 1964). It has also been applied in instances where one mistakenly pays a tax lien on property. H.K.L., supra, at 878. It has further been used to adjust the rights of parties in an estate proceeding vis-a-vis a mortgage encumbering estate property. *Furlong v. Leybourne,* 138 So. 2d 352 (Fla. 3d DCA 1962). This wide variety of application reflects the nature of equitable subrogation, because

> [it] does not arise from statute or custom, but is peculiarly a creation of equity, grounded on the proposition of doing justice to the parties without regard to form. It rests on the maxim that no one shall be enriched by another's loss.... [T]here is no limit to the circumstances that may arise in which this doctrine may be applied.

Godwin at 885.

In this case, PALM concededly paid off a number of liens which properly encumbered the homestead prior to PALM's mortgage. PALM paid off a mortgage assumed at the time of the acquisition of the property, and before it became Ms. Fishbein's homestead; it paid off a purchase-money mortgage, which likewise encumbered the property prior to the property becoming homestead; it paid off a third mortgage, signed by Ms. Fishbein wherein she expressly acknowledgedthe existence and validity of the other two mortgages; and, it paid off tax liens, also valid encumbrances upon the homestead.[8] All told, PALM paid almost $1,000,000 to satisfy valid

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[8] Liens which encumber property prior to the property becoming homestead continue as valid liens after homestead rights arise. In re *Owen,* 6 F.L.W. Fed. C621 (11th Cir. 1992). The third (continued...)

liens, which Ms. Fishbein would admittedly have been obligated to pay, absent PALM's fraud-induced satisfaction of those liens.[9]

while equity will not apply the principle of subrogation where to do so would deprive a party of a legal right, *Godwin*, supra, no right of Ms. Fishbein would be impaired here. By allowing PALM to be equitably subrogated to the mortgages and liens paid off by PALM, Ms. Fishbein would be in no worse position than she would have been had Mr. Fishbein's fraud not occurred. This is precisely what the trial court determined.

> Lastly, the homestead would have been liable for these preexisting mortgages and taxes if the Palm Beach Savings' loan had not been procured. Thus, if an equitable lien attaches, Ms. Fishbein stands in no worse position than she stood in prior to the fraudulent mortgage.

(R. 717-18). This factual finding cannot be disturbed on appeal. Holland V. Gross, 89 So. 2d 255 (Fla. 1956); *First Atlantic National Bank of Daytona Beach v. Cobbett,* 82 So. 2d 870 (Fla. 1955). In fact, the trial court limited the amount of the lien to the functional equivalent of subrogation to the liens which have been paid off. See Eastern *National Bank v. Glendale Federal Savings and Loan Association, 508* So. 2d 1323 (Fla. 3d DCA 1987) (indicating that the doctrine of subrogation applies only to the amount of the original mortgage or indebtedness which was

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[8] (...continued)
mortgage, signed by Ms. Fishbein is also a valid encumbrance, Art. X, § 4(c), Fla. Const. (1984), as are the tax liens. Art. X, § 4(a), Fla. Const. (1984).

[9] One of the mortgages was in default, and PALM effectively rescued Ms. Fishbein from foreclosure.

satisfied); *Federal Land Bank of Columbia v. Dekle,* 108 Fla. *555,* 148 So. 756 (1933) (same).

PALM was as much a victim of Mr. Fishbein's fraud as Ms. Fishbein. It relied upon the forged and fraudulent signature of Ms. Fishbein on the loan commitment, together with similarly forged, albeit notarized and witnessed signature of Ms. Fishbein on the mortgage, in paying almost $1,000,000 to discharge liens encumbering Ms. Fishbein's homestead. The trial court's decision is correct under commonly accepted principles of equitable subrogation, and the failure to allow application of that doctrine would unjustly enrich Ms. Fishbein to the tune of $1,000,000. This would truly convert the homestead into an instrument of fraud.

CONCLUBION

The decision of the District Court of Appeals, Fourth District, must be reversed, and the decision of the trial court reinstated. As the AMICI have demonstrated in this Brief, the District Court of Appeals has effectively ignored this Court's precedent in limiting the ability to impose an equitable lien on homestead to only those cases where a fraud has been committed by the beneficiary of the homestead exemption. Under the District Court's construct of the law, the elderly plaintiff in *Sonneman* would have remained destitute and without a remedy; the Lechliders would likewise have no remedy for the addition that they paid for to the La Mars' home; and the worthy contractor in Ross would have received no recompense for the work done on the church.

In simple terms, Ms. Fishbein cannot be allowed to improve her position by having valid liens paid off on her homestead amounting to almost $1,000,000, solely because she did not participate in the fraud practiced by her then-husband on PALM. PALM is as much a victim of this fraud as she, and the trial court was correct in fashioning the remedy that it did,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of this Brief of Amicus Curiae was federal expressed to the Supreme Court of the State of Florida at 500 South Duvall Street, Tallahassee, Florida 32399-1927 and a copy was furnished by U.S. Mail to Allan L. Hoffman, Esq., at 1610 Southern Boulevard, West Palm Beach, Florida 33406 and to Neil B. Linden, Esq. at Rollnick, Rosen & Linden, P.A., 133 Sevilla, Coral Gables, Florida 33134 this 12th day of June, 1992.

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