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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

DEBORAH FISHBEIN,

Respondent.
_____/

CASE NO. 78,922

DISTRICT COURT OF APPEAL
FOURTH DISTRICT - No. 90-1937

AMENDED

INITIAL BRIEF OF PETITIONER

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE

SCELLANEOU

PRELIMINARY STATEMENT

The Petitioner, Palm Beach Savings and Loan Association, FSA, ("Palm Beach Savings"), seeks reversal of a decision of the District Court of Appeal, Fourth District, (Deborah *Fishbein* v. *Palm Beach Savings and Loan*, 585 So.2d 1052 (Fla. 4th DCA 1991)) and reinstatement of a Final Judgment of the Circuit Court of the Fifteen Judicial Circuit of Florida, in and for Palm Beach County (the "trial court"), which awarded an equitable lien in favor of Palm Beach Savings. The lien was in the amount of three mortgages and real estate taxes paid off by Palm Beach Savings in connection with property on Palm Beach Island, Florida (the "Property" or the "house") where Deborah Fishbein claimed the statutory homestead exemption found in Article X, Section 4 of the Florida Constitution.

Palm Beach Savings was the Plaintiff in the trial court, the Appellee in the Fourth District and is the Petitioner herein and will be referred to by name or as the "Bank". Deborah Fishbein was the Defendant in the trial court, the Appellant in the Fourth District and is the Respondent herein and will be referred to by name or as "Mrs. Fishbein". Deborah Fishbein's ex-husband, Lawrence Fishbein, shall be referred to either by name or as "Mr. Fishbein".

The trial court's Final Judgment and the Opinion of the District Court of Appeal appear in the Appendix of Petitioner, bound and paginated separately, and are referred to by the designation (A.). The Record on Appeal is referred to by the

designation (R.). The transcript of the trial proceedings in the Circuit Court is referred to by the designation (T.) although it appears as part of the Record on Appeal in two volumes, pages 1-292. The transcript designations are by comparable pagination. All bolding is for emphasis, and all emphasis is added unless the contrary is indicated.

STATEMENT OF THE FACTS AND OF THE CASE

On October 15, 1984, Lawrence Fishbein, while married to Deborah Fishbein, acquired a mansion on Palm Beach Island, taking title in his sole name. **(A.1; R.710-712, 713)** Thereafter, in **March,** 1985, Mr. Fishbein executed a quit-claim deed to himself and Mrs. Fishbein, as tenants by the entireties. **(A.1; R.615-616, 713)** This deed was not recorded.[1] **(A.1; R.713)** Mr. and **Mrs.** Fishbein moved into the Palm Beach house, which became Mrs. Fishbein's homestead from October, 1985 to August, **1988. (T.122;** A.1; **R.713)**

In March, **1988,** Mr. Fishbein borrowed $1.2 million from Palm Beach Savings and secured the debt with a mortgage on the Property. (A.1-2; **R.713a-714)** At that time, Mr. and Mrs. Fishbein were involved in Dissolution of Marriage proceedings. Mr. Fishbein forged his wife's signature on the loan commitment letter and mortgage. **(T.124-125; A.2; R.714).** Notwithstanding the forgery, the purported signature of Mrs. Fishbein on the mortgage was both witnessed and notarized. (T.124-125; **A.5-6; R.717-718)**

The majority of the Palm Beach **Savings'** loan proceeds **($933,905.42)** was used to pay off three existing mortgages and several year's real estate taxes on the Property. (A.2; **R.714)** The three mortgages were: (i) a Barondess MacLean first mortgage, which was assumed by Mr. Fishbein when he **acquired** the house

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[1] The trial court's Final Judgment **states** that this quit **claim deed** was **"never recorded."** **(A.1;** R.713) However, the Record reflects that **it was** ultimately recorded on August 14, 1989, well after **the** institution of litigation and the filing of the **Lis** Pendens by Palm Beach Savings. **(R.293-308,** 594, 615-**616).**

(R.690-698); (ii) a Ridgeway second mortgage, which was a purchase money mortgage given by Mr. Fishbein at the time of purchase of the house **(R.699-703);** and (iii) **a** Florida National Bank third mortgage, which was executed by both Mr. and Mrs. Fishbein. **(T.194; R.672-675)** In this third mortgage to Florida National Bank, Mr. and Mrs. Fishbein specifically acknowledged the prior liens of the Barondess MacLean and Ridgeway mortgages as being valid first and second mortgage liens, respectively, on the house.' **(R.672)** The remainder of the loan proceeds (approximately $270,000) was utilized by Mr. Fishbein to alleviate an immediate cash problem. **(A.2;** R.714)

At trial, Mrs. Fishbein did not dispute the execution and/or delivery of the Florida National Bank third mortgage whereby **she** specifically acknowledged the priority and validity of the prior two mortgages on her homestead (T.194). Additionally, she did not dispute that she held no record ownership interest in the Property until August, **1988** (when she acquired the house as a result of the November 13, **1989** ***nunc pro tunc*** Order of Modification entered by the trial court in the Fishbein marital dissolution proceedings). **(R.592, 594, 610-612, 627-628)**

In August, **1988,** the Fishbeins' marriage was dissolved after they entered into a Property Settlement Agreement (the

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[2] **The three mortgages paid off by Palm Beach Savings were in the following sums: $205,722.07 on the Barondess MacLean first mortgage; $158,828.28 on the Ridgeway second mortgage; and $524,378.86 on the Florida National Bank third mortgage. Additionally, Palm Beach Savings' loan proceeds paid the 1986 real estate taxes of $16,051.53; 1987 real estate taxes of $14,464.80; and 1988 real estate taxes of $14,459.88. (A.6; R.666-671, 718)**

"Agreement"), which provided that Mr. Fishbein, within one year, would buy his wife a $275,000 home in Boca Raton and would pay her an additional $225,000 in cash. (A.2; R.640-641, 714) As security for his obligations under the Agreement, Mr. Fishbein executed a quit-claim deed conveying the Property to himself and his wife.[3] (A.2; R.641, 714) In return, Mrs. Fishbein gave up her interest in the Property and moved to Boca Raton where she was renting a house with an option to purchase.[4] (R.639-651) Thereafter, Mr. Fishbein neither purchased the Boca Raton house nor paid her the $225,000. (A.2; R.714)

Mr. Fishbein defaulted on the loan with Palm Beach Savings and, consequently, Palm Beach Savings filed its mortgage foreclosure action against the Property on December 5, 1988. (R.293-308) After being served with process, Mrs. Fishbein moved back to the Property in December, 1988.[5] (A.2; R.714; T.146-147) In defense

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[3] This quit-claim deed was to be held by Mrs. Fishbein's Dissolution attorney and was to be recorded only in the event Mr. Fishbein failed to meet his obligations under the Agreement. (A.2; R.641,714)

[4] During the negotiations for the Property Settlement Agreement, neither Mrs. Fishbein nor her divorce attorney undertook to do any financial investigation or inquiry as to the financial status of Mr. Fishbein. (T.16, 18-20, 22, 183-184 and 188) Mrs. Fishbein's divorce attorney requested and received an executed letter from her acknowledging that she had relieved her attorney of any responsibility for: (1) not pursuing such an investigation; (2) in the event she were to later determine that she could have obtained more than the Property Settlement Agreement provided for; or (3) if the monies collected in the Property Settlement Agreement were somehow of "no value because the security provisions of the Property Settlement Agreement are tenuous." (T.18-20; R.637-638)

[5] This occurred prior to the divorce court's nunc *pxo tunc* Order of Modification dated November 13, 1989, wherein Deborah Fishbein was awarded the house retroactive to the date of the divorce decree, August 22, 1988. (R.627-628) Palm Beach Savings was not a party to the proceeding to modify the divorce decree.

of the foreclosure, Mrs. Fishbein asserted the forgery and, since the Property was her homestead, her signature was necessary for a valid mortgage under Article X, Section 4 of the Florida Constitution. **(A.3**; R.309-310, **715)** Palm **Beach** Savings then filed an Amended Complaint asserting an additional count for the imposition of an equitable lien on the Property in the event the trial court deemed the mortgage to be invalid. (R.351-370)

Mrs. Fishbein's Answer to the Amended Complaint asserted the additional defense that Palm Beach Savings was not entitled to an equitable lien because of the forgery. **(R.371-373)** Thereafter, Mrs. Fishbein filed a Motion to Add Additional Affirmative Defenses. **(R.488-489)** The trial court granted the Motion. **(R.500-501)** The additional Affirmative Defense sought to defeat Palm Beach Savings' claims for foreclosure of the mortgage and/or equitable lien on the basis of Palm Beach Savings' negligence in closing the transaction. (R.488-489)

The trial court entered a Partial Summary Judgment in favor of Mrs. Fishbein on the issue of the validity of the mortgage, declaring it to be void. (R.498-499) Palm Beach Savings filed a Motion for Rehearing (R.525-531), which Motion was denied. **(R.540)** Thereafter, Palm Beach Savings filed a Motion for Reconsideration of the Order granting Partial Summary Judgment that had been entered in favor of Mrs. Fishbein.[6] **(R.556-570)** The trial court

[6] **The Motion for Reconsideration was based upon the then recent decision of *Pitts v. Pastore*, 561 So.2d 297, 300-302 (Fla. 2d DCA 1990), which decision distinguished void** mortgages from **those which** are **merely voidable.**

granted reconsideration and vacated its prior Partial Summary Judgment in favor of Mrs. Fishbein. (R.579)

The clerk of the circuit court additionally entered a default against Mr. Fishbein (R.313) and, subsequently, the trial court entered a Partial Summary Judgment in favor of Palm Beach Savings against Mr. Fishbein. (R.502-503)

Mrs. Fishbein and Palm Beach Savings entered into a Pre-trial Stipulation acknowledging that: (1) at the time of the execution of the Palm Beach Savings' mortgage, Mrs. Fishbein had no record ownership interest in the Property; and (2) her only interest in the house at the time Palm Beach Savings made the loan was a homestead interest. (R.592, 594)

The trial court entered Final Judgment after a non-jury trial in which the court heard the testimony of various witnesses and reviewed documentary evidence. (T.1-292; R.610-712) The trial court found: (1) that during the Dissolution settlement negotiations, Mr. Fishbein misrepresented to Mrs. Fishbein that the house "... was free and clear of any liens except one being asserted by his mother and sister" (A.1,4; R.713, 716); and (2) that Mr. Fishbein forged his wife's signature on the mortgage to Palm Beach Savings.[7] (A.2; R.714) The trial court determined that Mr. Fishbein's fraud vitiated any intent on Mrs. Fishbein's part

[7] The trial court made its findings of fact based upon disputed trial testimony. For example, Mr. Fishbein testified that: (1) he never made this statement (T.233-236); (2) that he had, in fact, signed Deborah Fishbein's name to the mortgage (T.124-125); and (3) that Deborah Fishbein had knowledge of the impending refinancing on the Property to pay off the prior liens. (T.233-236)

to abandon the homestead when she moved to Boca Raton as well as preventing title, unencumbered by her homestead, from vesting in Mr. Fishbein as of the date of the Dissolution decree. (A.4; R.716) Accordingly, the trial court held that the Palm Beach Savings' mortgage did not attach to the Property upon entry of the Dissolution decree and Mrs. Fishbein's leaving the marital residence.[8] (A.4,5; R.716-717)

The trial court then addressed Palm Beach Savings' claim for an equitable lien to the extent that its loan proceeds were used to satisfy pre-existing mortgages and tax liens on the Property:

> [Palm Beach Savings] has clearly shown fraud on the part of Mr. Fishbein in obtaining a loan although no fraud by Mrs. Fishbein has been shown....I find that the Plaintiff should have an equitable lien on the property to the extent that its loan proceeds were used to pay the pre-existing mortgages which had attached [to] the homestead and the unpaid taxes....Additionally, the signaturewhichthey relied upon was supported by the attestation of two witnesses and the seal of a notary. Lastly, the **homestead would have been liable for these pre-existing mortgages and taxes if the Palm Beach Savings' loan had not been**

[8] The court factually distinguished *Pitts v. Pastore*, 561 So.2d 297 (Fla. 2d DCA 1990) in its Final Judgment. (A.3-4; R.715-716) The trial court thus concluded that the Property remained Mrs. Fishbein's homestead and that Palm Beach Savings could not foreclose on its mortgage.

procured. Thus, if an equitable lien attaches, Mrs. Fishbein stands in no worse position than she stood in prior to the fraudulent mortgage.[9]

(A.5,6; R.717-718) As a result, the trial court enforced an equitable lien in favor of Palm Beach Savings in the amount of $1,182,298.09.[10]

Subsequent to the Final Judgment, Deborah Fishbein filed a Motion for Rehearing (R.720-725) which was denied by the trial court on June 25, 1990. (R.726) A timely Notice of Appeal was filed by Mrs. Fishbein on July 18, 1990 (R.727), and Palm Beach Savings filed a timely Notice of Cross-Appeal on July 27, 1990.[11] (R.729-730)

The Fourth District reversed the Final Judgment and disallowed the equitable lien, holding that Palm Beach Savings had not established fraud or other egregious conduct on Mrs. Fishbein's

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[9] During the trial, Mr. Fishbein testified that he had no available funds to pay off the Barondess MacLean first mortgage. He also testified that he attempted to sell certain assets, but that they were either encumbered by other liens, pledged as security for other loans and/or were unsaleable on an immediate basis. Furthermore, Mrs. Fishbein testified at trial that she did not have the financial ability to make the payments on the pre-existing mortgages. Additionally, one of the pre-existing mortgages had already matured. (T.116, 126, 128, 129, 210)

[10] This amount consists of the payments to satisfy the three mortgages and the 1986-1988 real estate taxes, plus interest, all of which were valid, pre-existing encumbrances upon Mrs. Fishbein's homestead. *See supra* Note 2.

[11] Mrs. Fishbein's appeal asserted that the equitable lien could not be imposed against her homestead. Palm Beach Savings cross-appealed the failure to impose the legal voidable mortgage once Mrs. Fishbein vacated the Property and moved to Boca Raton.

part.[12] While acknowledging that the trial court had imposed the lien on homestead property for "an equitable reason," the Fourth District concluded that the unjust result and/or windfall to Mrs. Fishbein was of no consequence since the homestead protection of the Florida Constitution is not based on principles of equity.[13] [14]

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[12] The Fourth District cited Isaacson v. *Isaacson*, 504 So.2d 1309, 1310-11 (Fla. 1st DCA 1987) for this proposition, which the District Court held was a mandatory requirement.

[13] The Fourth District cited this Court's decision of *Public Health Trust of Dade County v. Lopez*, 531 So.2d 946, 948 (Fla. 1988) for this concept.

[14] In its decision (See A.8-17), the Fourth District erroneously states that "the bank proceeded to execute on its judgment, but we stayed those proceedings pending the outcome of this appeal." (A.12)

To the contrary, Mrs. Fishbein filed a Motion for Stay in the trial court on July 18, 1990, simultaneous with her Notice of Appeal. After an evidentiary hearing, the trial court entered an Order on March 18, 1991 reflecting that Mrs. Fishbein could supersede the Final Judgment pursuant *Fla.* R. *App.* P. 9.310 provided she posted a bond in the amount of $445,529.00. In the event she failed to post the bond, the trial court would schedule a clerk's foreclosure sale of the Property.

On March *28*, 1991, Mrs. Fishbein then filed a Motion in the Fourth District pursuant to *Rule* 9.310(f) requesting the Fourth District to stay the sale pending review. Mrs. Fishbein supplemented the Motion for Stay on March 29, 1991. On April *22*, 1991, the Fourth District denied Mrs. Fishbein's Motion to Stay the sale pending review and further denied the Supplement to the Motion to Stay.

Based upon the failure to post a bond as required by its Order dated March 18, 1991, the trial court entered an Order on March 29, 1991, scheduling a clerk's foreclosure sale for May 20, 1991. On May 20, 1991, Palm Beach Savings was the successful bidder at the clerk's foreclosure sale.

On June 4, 1991, Mrs. Fishbein filed a Renewed Motion for Stay in the Fourth District. Prior to any ruling on that Motion by the Fourth District, the trial court entered an Order on June 13, 1991 denying Mrs. Fishbein's objections to the sale and directing the clerk to issue a Certificate of Title. On June 13, 1991, exactly one year from the date of the Final Judgment, a Certificate of Title was issued to Palm Beach Savings. On June 13, 1991, the trial court also ordered the clerk to issue a Writ of Possession. No stay was in effect at the time, a6 Mre. Fishbein had not posted the bond a3 required by the trial court and no stay relief had been granted by the Fourth District.

Thereafter, the Fourth District issued its Order dated June 19, 1991 granting Mrs. Fishbein's Renewed Motion for stay. Palm Beach Savings filed a Motion with the Fourth District to vacate its June 19, 1991 Order, or in the alternative, Motion for Reconsideration. On July 10, 1991, the Fourth District denied Palm Beach Savings' Motion.

On September 17, 1991, Palm Beach Savings filed a Motion for Rehearing, Motion for Rehearing En Bane and Alternative Motion for Certification with the Fourth District which was denied on October 24, 1991.

On November 7, 1991, Palm Beach Savings filed a Motion for Stay Pending Review with the Fourth District, along with a Notice to Invoke the Discretionary Jurisdiction of the Supreme Court of Florida. On November 21, 1991, the Fourth District denied the Motion for a Stay Pending Review.[15]

After the filing of jurisdictional briefs by Palm Beach Savings and Mrs. Fishbein on November 8, 1991 and November 21, 1991, respectively, this Court entered its Order on May 19, 1991 accepting jurisdiction and setting oral argument.

(Footnote Continued)

Mrs. Fishbein filed a Motion in the trial court on June 21, 1991 to Cancel the Certificate of Title and restore her to possession based upon the Fourth District's Order. On July 1, 1991, the trial court denied her Motion to Cancel the Certificate of Title and to restore her possession of the Property.

Accordingly, based upon this Court's order dated December 6, 1991 staying all proceedings in the trial court and in the Fourth District, the present status in regard to the Property is as follows: Palm Beach Savings is in title to and in possession of the Property pursuant to the Certificate of Title and Writ of Possession, both of which were issued on June 13, 1991 after a clerk's foreclosure sale. Neither Mrs. Fishbein nor her children have resided in the property since possession was given to the Bank.

[15] Palm Beach Savings also filed a Motion for Stay Pending Review with this Court on November 7, 1991, which Motion was granted by this Court on December 6, 1991. The Fourth District issued its Mandate on December 9, 1991; however, the Mandate was rendered moot by this Court's Order Granting Stay dated December 6, 1991.

SUMMARY OF ARGUMENT

In point 1 of its brief, Palm Beach Savings argues that since the turn of the century, courts in the State of Florida have recognized the validity and adaptability to a wide variety of circumstances of the use of equitable liens as a doctrine for remedying injustice. In Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925), the Florida Supreme Court defined the doctrine of equitable liens, indicating that the doctrine follows the doctrine of subrogation and is applied in cases where the law fails to give relief and justice would suffer without them. Palm Beach Savings argues that Article X, Section 4 of the Florida Constitution, which provides for protection from forced sale of homestead property, contains a common law exception for equitable liens.

By disregarding the fact that the equitable lien imposed by the trial court was in the exact amount of the benefit received by Mrs. Fishbein, and by ignoring the trial court's finding that Mrs. Fishbein was in no worse position than had the Palm Beach Savings' loan proceeds not satisfied three prior consensual mortgages and tax liens, the Fourth District used the homestead protection as a shield from just claims of creditors and not to ensure a home for a family. The trial court's imposition of an equitable lien was to avoid an unjust enrichment and windfall in excess of one million dollars in favor of Mrs. Fishbein. The Fourth District refused to recognize that an equitable lien can be imposed on homestead property to avoid unjust enrichment. The appellate court reasoned that such liens apply only to those circumstances where fraud or

other egregious conduct is displayed by the party who claims to be the beneficiary of the homestead.

Historically, equitable liens have been used as remedial devices in circumstances where fraud or other reprehensible conduct tainted a transaction (this transaction is a forgery based upon fraud), or to remedy an unjust result, even where there is no fraud. The Supreme Court in *Sonneman* v. *Tuszynski*, ***139 Fla. 24, 191*** So. 18 (1939) granted an equitable lien against homestead property in circumstances where no fraud or other reprehensible conduct was present, but where equity required the elimination of an **unjust** result. **The** Fourth District's opinion directly conflicts with that precedent.

By overlooking the Florida Supreme Court decisions cited in Judge Stone's dissenting opinion, the Fourth District prevents the trial courts of this state, sitting in equity, from doing right and justice as between parties. It usurps the traditional role of the trial court and instead requires rigidity and arbitrariness where, for more than one hundred years, there **was** flexibility and equality.

In point 2 of its Brief, Palm Beach Savings submits that instead of applying traditional rules of appellate review, the Fourth District conducted a tacit ***de*** *novo* review; and in so doing substituted its version of the facts for those which were uniquely before the trial court. **Rather** than searching the record for competent substantial evidence on which to support the trial court's findings of fact, the Fourth District erroneously fashioned

a rule of law which completely and without exception eliminates a trial court's discretion, regardless of the circumstances, to do equity between the parties, unless the party asserting the homestead protection committed fraud or other reprehensible conduct. By failing to place Mrs. Fishbein in the exact position she was in prior to the mortgage which was fraudulently procured by her husband, the proceeds of which paid off almost a million dollars of prior consensual mortgages and real estate taxes which were proper alienations of her homestead, the Fourth District elevated Mrs. Fishbein's homestead protection to a greater exemption than that provided by the Florida Constitution. Mrs. Fishbein received a one million dollar windfall because the Fourth District decided that equity has nothing to do with homestead!

ARGUMENT

I.

THE HOMESTEAD PROTECTION OF ART. X, § 4 OF THE FLORIDA CONSTITUTION DOES NOT PREVENT THE IMPOSITION OF *AN* EQUITABLE LIEN IN FAVOR OF A LENDER IN THE EXACT AMOUNT OF PRIOR CONSENSUAL MORTGAGE LIENS AND REAL ESTATE TAXES PAID OFF BY THE LENDER ON HOMESTEAD PROPERTY, WHERE THERE IS FRAUD IN THE LOAN TRANSACTION (ALTHOUGH NOT BY THE PARTY CLAIMING THE HOMESTEAD EXEMPTION NOR BY THE LENDER), AND SUCH FRAUD RESULTS IN A WINDFALL AND UNJUST ENRICHMENT TO THE PARTY CLAIMING THE EXEMPTION AND DEPRIVES THE LENDER OF ANY REMEDY.

A.

Equitable Liens Have Historical Validity And Are Adaptable To A Wide Variety Of Circumstances Including Unjust Enrichment

In Jones *v.* Carpenter, **90 Fla. 407, 106 *So.* 127, 129** (1925), this Court defined equitable liens:

> ...[T]he 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 men 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 encumbrance 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 demand of the creditor in whose favor the lien exists.
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> * * *
>
> [I]t **was** said that 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.**
>
> * * *
>
> ...[A]n equitable lien exists independently of any express agreement, and equity enforces it on the principle that a person having gotten an estate of another ought not in conscience to keep it as between them.... [Citations omitted]

As this Court stated in *Ross* v. *Gerung,* **69 So.2d 650,** ***652*** (Fla. **1954):**

> Such liens may arise from written contracts which show an intention to charge some particular property with a debt or obligation, or **they** may **be 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.**
>
> [Citations omitted]

See also Hullum v. Bre-Leu *Corp.,* **93** So.2d 727, 730 (Fla. **1957).**

There are a number of reported Florida cases where notes and mortgages were intended to be given as security for **debts,** and such instruments were later determined to be void. In those instances, Florida courts have imposed equitable liens to prevent unjust results. ***See, e.g.,*** *Wagner v.* ***Roberts,*** *320* **So.2d 408, 410 (Fla. 2d DCA 1975),** *cert. denied,* **330** So.2d ***20*** (Fla. 1976). (A mortgage was ruled to be invalid; however, the court held that equity dictated that an equitable lien on the property be imposed to the extent that the property was benefitted from the proceeds of the mortgage **up** to the amount of the original debt); and *Houston* ***v.*** *Mantellos,* 318 So.2d 427, 430 (Fla. 3d DCA 1975), overruled on other grounds, 382 So.2d 649 (Fla. 1978) (A warranty deed was

obtained through misrepresentation and fraud. The deed was held void. Therefore, no lien was acquired for the amount of the mortgage executed and delivered to the mortgagee by the defrauding defendant. Nevertheless, the court determined that **the mortgagee, having expended sums to satisfy liens and/or encumbrances on the property, was entitled to an equitable lien against the property).**[16]

In the instant case, there are written agreements (i.e. -- the Palm Beach Savings' commitment letter, promissory note and mortgage) which evidence Mr. Fishbein's intention to charge the Property with the debt and obligation referenced therein. Both Mr. Fishbein (the record title holder of the Property) and Mrs. Fishbein acknowledged the validity of the three prior mortgages on the Property. In fact, **without the loan, one of the prior mortgages would have been foreclosed as it had matured and Mr. Fishbein had no way to pay it off.**[17] The trial court, at a minimum, had the power to, and in equity and good conscience did, allow Palm Beach Savings to equitably subrogate to the position of the prior lienors and to enforce an equitable lien in those amounts as against the Property.

The doctrine of equitable lien has historical credibility to

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[16] Admittedly, *Houston* does not reveal whether the property was homestead property. The facts, however, are strikingly similar to this case, as is the remedy approved there. See *also Special Tax School Dist. No. 1 of Orange County v. Hillman*, 179 So.2d 805, 809 (Fla. 1938); and *Folsom v. Farmers' Bank of Vero Beach*, 102 Fla. 899, 136 So. 524, 526-527 (1931).

[17] *See supra* Note 9.

remedy an unjust enrichment. The unjust enrichment to Mrs. Fishbein in the event the equitable lien is not enforced is obvious. By virtue of the extinguishment of the valid, pre-existing liens, all of which attached to her homestead, Mrs. Fishbein seeks to obtain a windfall in excess of one million dollars. Thus, the equitable principle that one should not be unjustly enriched at the expense of another is clearly applicable to the instant case. *See Stone v. White*, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265 (1937); Federal Land *Bank* v. *Godwin*, 107 Fla. 537, 136 So. 513 (1931). Likewise, to assert the homestead exemption to shield the Property from the equitable lien is to use the homestead protection as a fraud on creditors.

B.

The History And Purpose Of The Constitutionally-Protected Homestead Exemption

Article X, Section 4 of the Florida Constitution[18] sets forth the constitutional homestead scheme applicable to this case, and by which both the trial court and Fourth District were **guided** (albeit **differently).**

For over a century, Florida has, by constitutional provision, made the homestead exempt from the claims of creditors. See Baker v. *State,* 17 Fla. 406 (1879)(construing homestead provisions of the Florida Constitution of 1868). The purpose of these protections is to preserve a home for the family, even at the sacrifice of just

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[18] **Art.** X, **§** 4, *Fla. Const.* in its entirety provides:

Homestead; exemptions.-

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of eubsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

demands, and to protect the family from destitution and want. *Hill* v. *First National Bank* of Marianna, 79 Fla. 391, 84 So.190 (1920); *Frase* v. *Branch*, 362 So.2d 317, 318 (Fla. 2d DCA 1978).

While the provisions of homestead law should be carried out in the liberal beneficent spirit in which they are enacted, *Milton* v. *Milton*, 63 Fla. 533, 58 So. 718 (1912); *Jetton* Lumber Co. v. Hall, 67 Fla. 61, 64 So. 440 (1914), great care should be taken to prevent homestead laws from becoming instruments of fraud, an imposition on creditors, or a means to escape honest debts. Id.[19]

C.

The Equitable Lien Imposed By The Trial Court Was Declared In Equity Based On The Relations Of The Parties And The Circumstances Of The Particular Case

Courts in Florida have also imposed equitable liens on homestead property, despite the fact that these "equitable liens" are not explicitly set forth in the constitutional provision concerning the alienation of homestead property. *See* Art. X, § 4, *Fla. Const.*

In *Jones* v. *Carpenter*, 90 Fla. 407, 106 So. 127 (1925), this Court held that an equitable lien existed against one's homestead for money of another used in the improvement of the homestead property. Jones also stands for the proposition that a lien may be enforced against the homestead, even though it is not, in specific terms, included in the constitutional provision. 106 So.

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[19] *See also Jones v. Carpenter*, 90 Fla. 407, 106 So. 127, 130 (1925); *Vandiver v. Vincent*, 139 So.2d 702, 708 (Fla. 2d DCA 1962); and *Hospital Affiliates of Florida, Inc. v. McElroy*, 393 So.2d 25, 28 (Fla. 3d DCA 1981).

at 130. The Jones court specifically balanced the organic and statutory provisions relating to homestead exemptions (and the liberal application in the interest of the family) with the fact that these should not be applied so as to make them an instrument of fraud or imposition upon creditors.

Thereafter, in *LaMar* v. *Lechlider*, 135 Fla. 703, 185 So. 833, 836 (1939), the Florida Supreme Court granted plaintiffs an equitable lien enforceable against the defendants' homestead exemption where the plaintiffs had constructed an addition to the defendants' homestead based on the understanding that they would acquire an interest in the homestead property:

> 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 for their reasonable value; that so to permit him to retain them would be unjustly to enrich him. This identical reasoning is equally applicable to the Defendant [spouse] as to her inchoate right of dower. Estoppel works against married women as well as against persons sui juris, especially when they must claim under another who is estopped, as must be the case with the Defendant [spouse]. The wife 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. The Court is therefore of the opinion that the lien should be effective as against the Defendant [spouse].
>
> * * *
>
> To say that a lien could not be decreed against **the** homestead under the facts in this case

> would be to make the homestead an instrument of fraud.
>
> [Citations omitted]

185 So. at **836-837.**

In *Sonneman* v. *Tuszynski*, **139** Fla. **24, 191** So. **18, 19-21 (1939),** the plaintiff advanced money to the defendant from time to time and rendered services to the defendant (as housekeeper and other domestic services), with the expectation that the defendant would observe and fully perform an agreement that the defendant support and maintain plaintiff for the remainder of her life. The plaintiff never demanded money or compensation for the labor or services while with the defendant, and she advanced monies to the defendant when necessary or when business or circumstances required, always relying upon their agreement or contract to the effect that the defendant would take care of her as long as she lived. Thereafter, the defendant married and problems arose between the plaintiff and the defendant's spouse. The plaintiff was forced to leave by the conduct of the defendant and his spouse. The Court in *Sonneman* granted the plaintiff an equitable lien enforceable against the defendant's and his wife's homestead property. In *Sonneman* there is no finding of nor even the mention of the word "fraud". *Sonneman* is a pure unjust enrichment or avoidance of unjust result case. The Sonneman court specifically recognized that one source from which equitable liens arise (absent a contract) is that they are "... declared by a court of equity * * * as applied to the relations of the parties and the

circumstances of their dealings in the particular case.... "[20]

[Citations omitted]

In ***Ryskind*** v. Robinson, ***302*** So.2d 427 (Fla. 4th DCA 1974), the Fourth District was faced with facts strikingly similar to those now before this Court. In ***Ryskind,*** a cross-defendant raised an affirmative defense seeking to have a lien established upon the homestead property contending that she was fraudulently induced to lend monies which were specifically used to pay off certain mortgage indebtedness on the property.[21] In ***Ryskind,*** the Fourth District held:

> There is authority for the proposition that the homestead exemption cannot be used as a shield against a fraudulent transaction and that under such circumstances an equitable lien might arise which may be enforced against homestead.[22]

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[20] If the Fourth District is correct, that only fraud or reprehensible conduct by the party claiming the homestead as a shield against creditor liens, will result in an equitable lien, then the plaintiff in ***Sonneman,*** who was "... 78 years of age, penniless, with no relatives or friends, and in need of the common necessities.." would be left with no remedy1 This Court saw the inequity of that and ordered that "... (T)he equitable lien hereby declared may be enforced as against the appellees' homestead exemption." ***Sonneman*** at 19, 21. Perhaps the Fourth District would not have been so charitable.

[21] This is the exact fact pattern of the instant case, wherein Palm Beach Savings was fraudulently induced to lend monies which were specifically used to pay off certainmortgage indebtedness and pre-existing tax liens on the Property, all of which were valid encumbrances upon and consensual alienations of Mrs. Fishbein's homestead.

[22] Interestingly, the three cases cited by the Fourth District in ***Ryskind*** to support this proposition are *Jones* v. ***Carpenter,*** 90 Fla. 407, 106 So. 127 (1925); *LaMar* ***v. Lechlider,*** 135 Fla. 703, 185 So. 833 (1939); and ***Sonneman v. Tuszynski,*** 139 Fla. 24, 191 So. 18 (1939), all of which were cited below by Judge Stone in his dissenting opinion and are cited in and relied upon by Palm Beach Savings in its briefs below and before this Court. These cases are in direct conflict with the Fourth District's opinion.

302 So.2d at 428.

In both *Sonneman* and *LaMar*, the Florida Supreme Court awarded equitable liens as against both the record title holders **and** their **spouses,** finding that the unjust enrichment would be equally applicable to the spouse who benefited from the monies advanced by the party attempting to enforce the equitable lien.

As in *LaMar* and *Sonneman,* Mrs. Fishbein was not involved in **the** fraud or misconduct. Nonetheless, since the loan proceeds **were** utilized to pay off pre-existing mortgages and tax liens on the Property which were proper alienations of her homestead, it would be a windfall to her in the event an equitable lien is not enforced. Additionally, her husband (the co-beneficiary of the homestead protection) did commit the fraud. Accordingly, the trial court properly enforced an equitable lien against Mrs. Fishbein's homestead in order to prevent her from using the homestead exemption to impose an unjust and inequitable result. The Fourth District's decision uses homestead as a shield against a creditor to impose an unjust result and deprives the trial court of discretion, in equity, to do justice.

D.

Lopez Does Not Restrict Trial Courts Sitting In Equity From Imposing Equitable Liens On Homestead Property To Remedy Unjust Results

The Fourth District mis-perceived the legal effect and impact of this Court's decision in Public ***Health*** *Trust* ***of Dade*** *County* ***v.*** Lopez, 531 So.2d **946** (Fla. 1988). The Fourth District **cites** to

Lopez for the proposition that homestead protection is not based upon and cannot take into account equitable principles. This is a rigid misapplication of the law in Florida and an inappropriate extension of the language in ***Lopez.*** In Lopez this Court dealt with a statutory hospital lien[23] and not with an equitable lien granted to the extent of prior, proper alienations of homestead, i.e.--to the extent that the prior valid mortgages and tax liens were paid off.

The sole issue in ***Lopez*** was the interpretation of Article X, Section 4(b) of the Florida Constitution and whether that provision, which extends the homestead exemption to the "surviving spouse or heirs" of the owner, was to be interpreted to apply only to minor or dependent heirs. The Fourth District takes totally out of context the concept that equitable principles have nothing to do with homestead protection.

In Lopez this Court stated:

> Lastly, we reject the creditors' argument that a literal interpretation of section 4(b) will provide a windfall for financially independent heirs at the expense of the just demands of creditors. Even if we were free to ignore the plain language of the constitution, we would not be persuaded by this argument. The homestead protection has never been based upon principles of equity, see *Bigelow,* but always has been extended to the homesteader and, after his or her death, to the heirs whether the homestead was a twenty-two room mansion or a two-room hut and whether the heirs were rich or poor.

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[23] The issue in *Lopez* was whether the 1985 amendment to Art. X, § 4 extended homestead protection to adult heirs of a decedent who were not "dependent". *Lopez* does not deal with prior consensual liens and/or liens which would, in effect, be equitably subrogated to the prior consensual liens. Rather, *Lopez* deals solely with statutory hospital liens which were attempted to be enforced against a decedent's homestead.

531 So.2d at 950-951.

These statements were in response to the creditors' claiming that to interpret the constitutional homestead provision, as amended, to protect financially independent adult heirs of a decedent from hospital type liens attaching to the homestead would confer a windfall on the heirs. Lopez does not address a historically accepted exception to the homestead provision in the form of equitable liens,[24] nor does Lopez address any facts akin to those now before the Court. In Lopez there was no extinguishment of consensual liens which previously alienated the homestead. While the heirs in Lopez would certainly be in a worse position if a lien which did not previously exist were imposed against their homestead, Mrs. Fishbein, conversely, is in no worse position by the imposition of an equitable lien because it is in the exact amount of her earlier voluntary alienation by mortgage of her homestead. The trial court determined this by its Final Judgment. (A.6; R.718)

E.

The Imposition Of Equitable Liens On Homestead Property Is Not Limited To Only Where There Is A Finding Of Fraud Or Other Reprehensible Conduct By The Beneficiary Of The Homestead; Here It Was To Prevent A Million Dollar Windfall

The Fourth District's opinion concludes that "the only basis

[24] See cases cited in Argument, Sections A, B and C. Since the early 1900's, this Court and, subsequently, the District Courts of Appeal, have recognized that common law "equitable liens" are additional exceptions to the constitutional listing of exemptions in section 4(a) of Article X.

upon which a court may impose an equitable lien [on homestead property] is where there is fraud or egregious conduct by the party claiming the homestead exemption." (A.16) This holding expressly conflicts with prior decisions of this Court which allow the imposition of an equitable lien where there is conduct or circumstances which, while not committed by the party claiming the homestead exemption, would otherwise create an unjust result or windfall to that party. See ***Sonneman v. Tuszynski*, 139 Fla. 24, 191 So. 18 (1939); *LaMar* V. *Lechlider*,** 135 Fla. 703, 185 So. **833 (1939); and *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925).**

The Fourth District relied upon ***Isaacson*** V. ***Isaacson*, 504** So.2d 1309 (Fla. 1st **DCA** 1987) for the proposition that the fraud must be on the part of the beneficiary (Mrs. Fishbein) of the homestead protection. Yet, the cases cited by the First District in ***Isaacson*** for this proposition, specifically ***Clutter Construction Corp. v. Clutter*, 173** So.2d **761 (Fla.** 3d DCA **1965)** do not support this position. None of the cases cited in ***Isaacson*** require that the fraud be on the part of the beneficiary of the constitutional protection; rather, those cases stand for the proposition that the plaintiff may be required to prove "fraud or other reprehensible conduct."[25]

Unfortunately, the ***clutter*** court may have engrafted a standard

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[25] The other cases cited are Bessemer V. Gersten, 381 So.2d 1344, 1347 n.1 (Fla. 1980) and ***Kitzinger v. Gulf Power* Co.,** 432 So.2d 188, 195 (Fla. 1st **DCA** 1983). In ***Bessemer,*** this Court, in a footnote, states, "A lien attaching after the homestead protection has been established can be enforced if it is imposed for fraud or material misrepresentation..." citing to ***Clutter***. There is no statement that these are the "only" bases for imposing equitable liens on homestead. In Kitzinger, the First District does use the "fraud or reprehensible conduct" language while citing to Bessemer and Clutter for such authority.

to suit the facts of that case, while citing to decisions which do not support the narrow principle and in fact allow much greater latitude to trial courts in utilizing equitable liens to remedy injustices.[26] From the *Clutter* concept to the *Isaacson* pronouncement (i.e. fraud must be by the party claiming the homestead protection), these courts and now the Fourth District seem willing to do away with the traditional powers of chancellors sitting in equity to eyeball claimants, weigh equities, evaluate the demeanor of witnesses and their credibility and then fashion a remedy to avoid injustice or unjust enrichment.

Furthermore, the Fourth District's decision reflects that the Clutter case provides no facts and does not discuss the law in detail. Interestingly, while Clutter is admittedly a short opinion without any express facts, the court in *Clutter* made its ruling in **light of the following authorities:** *Jones* v. Carpenter, 90 Fla. **407,** 106 So. **127 (1925);** and *LaMar v. Lechlider,* 135 Fla. 703, **185** So. **833 (1939).**

Finally, ***Isaacson*** is distinguishable on its facts. *Isaacson* involves a former wife seeking recovery of child support and/or alimony arrearages. The *Isaacson* court declined to hold that because a husband possesses qualified homestead real property which he refused to alienate or mortgage to meet support obligations, that he has acted "reprehensibly" as a matter of law so as to overcome the constitutional protection against the forced **sale** of

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[26] ***c.f. Jones v. Carpenter, supra*** and ***LaMar v. Lechlider, supra.***

such property.[27]

In contrast, this case involves homestead property which was expressly alienated prior to it becoming homestead property (to the extent of the first and second mortgages) and was expressly subject to the consensual third mortgage and tax liens. Accordingly, the facts of this case are contrary to the facts in Isaacson. The trial court below correctly determined that Mrs. Fishbein stands in no worse position than she stood in prior to the fraudulent mortgage. This determination was based upon general considerations of right and justice as applied to the relations of these parties and the circumstances of their dealings. See, e.g., ***Ross v. Gerung***, 69 So.2d 650, 652 (Fla. 1954); Jones v. Carpenter, 90 Fla. 407, 106 So 127, 129 (1925).

The fraud of Mr. Fishbein, a co-beneficiary of the homestead protection, should not and cannot inure to the benefit of, or provide an express windfall to Mrs. Fishbein. While she should not be penalized for his fraud, nor should she be entitled to directly benefit at the Bank's expense to the extent of one million dollars.[28]

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[27] *See Gepfrich* v. *Gepfrich*, 582 So.2d 143, 745 (Fla. 4th DCA 1991), (Farmer, J. concurring) ("complete lack of clean hands establishes the functional equivalent of fraud or reprehensible conduct"). The narrow corner into which the Fourth District painted itself now requires trial courts to envision "functional equivalents" to impress equitable liens. Could it be that the Fourth District just didn't feel as strongly committed to find an equitable position as did the trial court in this case, and so no functional equivalent or other semantic twist was used to simply balance equities between parties? It would appear that the Fourth District merely replaces its opinion for that of the trial court. This is improper appellate review. See Argument 2. infra.

[28] Using the following hypothetical, the error of the Fourth District's rationale is evidenced: If Lawrence Fishbein were to have brought an imposter using forged identification documents to the Bank to assist in the fraud and execute the mortgage as if she were Mrs. Fishbein alienating her homestead, and

The Fourth District's strict constructionist view of Article X, Section 4 of the Florida Constitution and of the issue of when equitable liens are enforced against homestead property is inconsistent with the cases cited by the dissent of Judge Stone, all of which are Florida Supreme Court equitable lien cases.[29] Those cases were not overruled by Lopez or *Isaacson* and they remain the law of Florida on the application of equitable liens to homestead property. The facts of this case, considered carefully by the trial court, give credence to the imposition of an equitable lien under principles long followed by this Court. There is no necessity to overreach to support the Fourth District's arbitrary rule restricting trial courts in equity to finding fraud or reprehensible conduct on the part of the party claiming the homestead shield.

F.

The Fourth District's Decision Grants A Greater Exemption For Mrs. Fishbein Than Is Provided For Under The Constitutionally-Created Homestead Exemption

The Fourth District decision states:

> To interpret *Clutter* as only requiring proof of fraud on someone's part rather than on the part of the person claiming homestead protection is to defeat the purpose of

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(Footnote Continued)
assuming the Bank was without knowledge that the person was an imposter, still, pursuant to the Fourth District's decision, Mrs. Fishbein would be entitled to receive the windfall of having had all of her prior acknowledged liens satisfied while the Bank would be left "holding the bag." Why should the Bank be penalized here for being trapped by a less artful, nonetheless equally effective fraudulent scheme?

[29] *See Sonneman v. Tuszynski*, 139 Fla. 24, 191 So. 18 (1939); *LaMar v. Lechlider*, 135 Fla. 703, 185 So. 833 (1939); and Jones *v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925).

> homestead protection. To allow one party's fraud to affect another party's homestead interest is exactly the same as allowing one party's debts to encumber homestead property. In this case, applying the rule in the manner that the trial court did resulted in depriving Mrs. Fishbein of the homestead exemption provided to her by the Florida Constitution.

(A.15-16)

The trial court's Final Judgment enforcing the equitable lien resulted in Mrs. Fishbein having the exact same homestead exemption provided to her by the Florida Constitution as she had prior to the fraudulent mortgage,[30] and so does not deprive her of her homestead protection. The Fourth District's decision, on the other hand, creates an absolute windfall of one million dollars and elevates her exemption to a greater level than allowed by the Constitution.[31] It is incongruous that this unconscionable result is being done in the name of family preservation and homestead protection.

II.

THE FOURTH DISTRICT IMPROPERLY ENGAGED IN A TACIT *DE NOVO* REVIEW OF THE TRIAL EVIDENCE AND TESTIMONY RATHER THAN SEEKING COMPETENT RECORD SUPPORT FOR THE TRIAL COURT'S RULING.

The trial court below clearly considered the "relations of

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[30] The trial court determined factually that Mrs. Fishbein stood "in no worse position than she stood in prior to the fraudulent mortgage." *See infra* Note 32.

[31] Had the forgery been discovered during the loan process and before the loan was funded, then the prior mortgages and tax liens would have remained valid encumbrances to Mrs. Fishbein's homestead. Neither she nor her husband were capable of paying their mortgages and taxes. (See *supra* Note 9) It took an arbitrary reading of *Lopez* for the Fourth District, in light of Mrs. Fishbein's prior, consensual alienations of her homestead, to fashion a result that allows the mortgage and tax liens to be satisfied with no equitable considerations to the party which provided the funds and was not a part of the fraud.

the parties and the circumstances of their dealings" in imposing an equitable lien. ***See,*** *e.g.,* Ross v. *Gerung,* 69 So.2d ***650,*** 652 (Fla. 1954). The trial court was not unmindful of the fact that the first and second mortgages were assumption and purchase money mortgages, respectively, and that the third mortgage (signed by Mrs. Fishbein and which acknowledged the first and second mortgages) was utilized to improve the Property. Nor was the trial court blind to the concept that Mrs. Fishbein had already **agreed** to the alienation of her homestead by virtue of those valid mortgages and tax liens.[32]

The trial court applied equitable principles in fashioning this remedy, having heard all of the testimony and taking into account the conduct of and the potential "windfall" or loss to each of the parties. The trial court did not impose the full principal balance of $1.2 million, which Palm Beach Savings did in fact disburse. Rather, the trial court enforced the equitable lien in the exact amount of the prior consensual mortgages and tax liens which the Palm Beach Savings' loan proceeds paid off and satisfied.

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[32] Specifically, **the trial court found:**

> **Under these circumstances, I find** that **[Palm Beach Savings] should have an equitable lien on the** property **to the extent that its loan proceeds were used to pay the pre-existing mortgages which had attached [to] the homestead and** the **unpaid** taxes.
>
> * * *
>
> **...[T]he homestead would have been liable for these pre-existing mortgages and taxes if the Palm Beach Savings' loan had not been procured. Thus, if an equitable lien attaches, Mrs. Fishbein stands in no worse position than she stood in prior to the fraudulent mortgage.**

(A.5-6; R.717-718)

The trial court didn't stop there, but also provided no less than six months before any foreclosure sale could occur to allow for a private sale of the property. (A.6) The result of the Fourth District's reversal of the trial court is to award the lottery jackpot to Mrs. Fishbein by wiping out almost one million dollars of valid debt, which existed at all material times. Because her husband committed fraud, Mrs. Fishbein gets the lottery's first prize--and she didn't even buy a ticket! This is the exact situation the trial court sought to prevent.[33]

The Fourth District went beyond the search for substantial competent record evidence to support the trial court's findings and conclusions; rather, it entertained a tacit *de novo* review of that evidence. The trial court was the trier of fact and its findings were clothed with a presumption of correctness. As there was competent and substantial evidence in the Record on Appeal to support the trial court's findings and conclusions, the Fourth District's impermissible factual "findings" run contrary to its

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[33] In dealing with this issue of unjust enrichment and the "windfall" which Mrs. Fishbein sought, the trial court announced:

> The reason that the Bank would have to assert an equitable lien...is that they paid off a debt that otherwise would have to be paid off on this house and that Mrs. Fishbein is going to be in effect winning the lottery if she walks off with the 2-million-dollar house with no lien on it, when it would have had at least an $850,000 debt on it.

(T.279-280) Mrs. Fishbein's response was announced by her counsel below wherein he stated:

> Then its [sic] our position, Judge, that the wife should win the lottery in this case, because it's not her unclean hands that started this....

(T.284)

role as an appellate tribunal.[34] The Fourth District is not the *de novo* trier of fact.[35]

Contrary to the Fourth District's observation, the trial court did not conclude that, as between the Bank and Mrs. Fishbein, the Bank was best able to avert the loss and least innocent.[36] Rather,

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[34] The trial court's findings are clothed with a presumption of correctness and, in testing the accuracy of such conclusions, an appellate tribunal must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. *Shapiro* v. State, 390 So.2d 344 (Fla. 1980). When evidence is heard by the trier of fact and the witnesses are before the trial court, findings of the trial court based upon conflicting evidence will not be disturbed upon appellate review absent a showing that they are clearly erroneous or totally without any substantial evidence in their support. ***Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976)**; ***Marloux v. Marloux*, 475 So.2d 972** (Fla. 4th DCA 1985); and *Rollins* v. ***Phillips*, 444 So.2d** 1160 (Fla. **3d** DCA **1984**). ***Contra*** the Fourth District opinion (A.14, Note 3).

[35] The Fourth District should not have reweighed the evidence and substituted its judgment for that of the trier of fact. ***Shaw*** v. ***Shaw*, 334 So.2d** 13, **16** (Fla. 1976); ***Cripe*** v. ***Atlantic First Nat. Bank,*** 422 So.2d 820 (Fla. 1982). The findings of fact by this trial court are presumed to be correct and are entitled to the same weight as a jury verdict. ***Marsh*** v. ***Marsh,*** 419 So.2d 629 (Fla. 1982). Even if the Fourth District disagreed with the trial court and would have reached a different conclusion, the Final Judgment of the trial court as the finder of fact should have been affirmed barring a lack of evidentiary support for its findings. *Herzog* ***v. Herzog,*** 346 So.2d 56 (Fla. 3d DCA 1977).

[36] In fact, Mrs. Fishbein executed the Dissolution Settlement Agreement without any financial investigation of Mr. Fishbein by her or her attorney; she relieved her attorney of any liability in this regard and she chose not to search the public records to determine the status of title and liens on her marital residence. (T.16, 18-20, 22, 183-184 and 188; R. 637-638).

A simple title search by Mrs. Fishbein or her divorce counsel would have revealed the Palm Beach Savings' mortgage on the Property. The alleged "negligence" of Palm Beach Savings in this loan transaction is not the only alleged "negligence" in this case. The actions and/or omissions of Mrs. Fishbein are likewise reflected in the record. The trial court was not unmindful of all of these facts. Yet, the Fourth District in its decision speaks only to the "negligence" of the Bank in closing the Loan "contrary to its closing procedures."

The Record on Appeal also reflects that this loan closing was ***not*** contrary to the Bank's closing procedures. The Bank officer testified that documents are required to be executed with attorneys, title companies or someone they know or are familiar with to be present at the time of the execution. The loan officer testified that the Bank was very familiar with Lawrence Fishbein and had numerous

the trial court, as the trier of fact, expressly found that Mrs. Fishbein stood in no worse position than she stood in prior to the fraudulent mortgage, as the homestead would have been liable for these pre-existing mortgages and taxes even if the Palm Beach Savings' loan had not been procured.

The Palm Beach Savings' loan satisfied and replaced these consensual liens which were proper alienations of homestead. While Mrs. Fishbein should not be harmed because *of* the fraud committed by her husband on her and the Bank, the trial court further found and concluded that she should not and cannot benefit from that

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(Footnote Continued)
other loans with him. The Bank relied upon the notary seal and the attestation of two witnesses to the execution. (T.64, 67) Furthermore, as reflected in the Record on Appeal, the Bank had no reason to be suspicious as to this loan because the parties had apparently reconciled. The Record reflects that the Bank had been told that the parties had reconciled at or about the time of the loan in March, 1988. In fact, an employee of Palm Beach Savings contacted the clerk of the Circuit Court to check the status of the Fishbeins' divorce proceedings and was told that a reconciliation hearing was scheduled for March 25, 1988, the same day set for the loan closing. (T.57-58)

On page 5 of its decision, the Fourth District states that "... the **trial court agreed with Mrs. Fishbein that the Bank was negligent...."** Yet, on page 5 of the trial court's Final Judgment, it merely states that "Palm Beach Savings' mistake, if *any*, was one of neglect not one of active misfeasance." The next sentence of the trial court's Final Judgment went on to state that the signature which Palm Beach Savings relied upon was supported by the attestation of two witnesses and the seal of a notary. Accordingly, the Fourth District's decision overlooks and/or misapprehends the actual wording of the trial court's Final Judgment and the other evidence which was taken into account by the trial court, sitting as the trier of fact.

As the trial court stated at the conclusion of the trial:

> You know on the other hand..the Bank had a mortgage where we got a notary and two witnesses who have both said, we saw both of these people sign this document in front of us. And the notary, you know, is an officer of the State of Florida, who has notarized that this signature took place in front of them.
>
> You know while it might have [been] in better procedure to do what you're suggesting because that - I mean, the Bank - I **frankly don't see the Bank as a big bad bear in this lawsuit.** They are out [money] in this as well. (T.276)

fraud. The trial court determined that she had no right to wipe out these prior encumbrances and, thus, could not use her homestead as a shield against a just creditor. By virtue of the Fourth District's decision, Mrs. Fishbein has been placed in a windfall position to the extent of approximately one million dollars and has, in fact, expressly benefited from this fraud. The trial court did not allow such an unjust result to occur. This Court should not and cannot sanction the Fourth District's de *novo* review of the evidence so as to reach a contrary result. Only the adherence to a rigid, unyielding, artificial rule dictates this unjust result.

CONCLUSION

The Fourth District's decision obliterated the equitable lien in the name of homestead, a homestead previously burdened with valid liens in that exact amount; thus, Mrs. Fishbein will live in a Palm Beach mansion free and clear of all pre-existing mortgages and tax liens because **equity has nothing to do with homestead!**

Furthermore, **the** Fourth District's decision, holding that the "only basis" upon which an equitable lien can be imposed against homestead is when there is fraud or egregious conduct by the **party claiming the homestead protection,** has broad and long-ranging implications. Courts of equity can no longer be such when equitable liens and homestead collide. Equitable liens have become, by the Fourth District's broad pen strokes, a misnomer. Equitable liens will neither do equity nor be liens; instead, they will be relegated to that area of the law given less consideration than the mythical peppercorn.

Finally, the Fourth District's decision conflicts with its own

prior decisions, with the prior decisions of this Court, and decisions of the other districts allowing equitable liens on homestead so as to prevent the homestead exemption from being used to create injustice. Upon general considerations of right and justice as applied to the relations of the parties herein and the circumstances in this case, an equitable lien should be imposed for the full amount of the prior liens and taxes paid by Palm Beach Savings. Based upon the foregoing reasons and citations of authority, Petitioner respectfully requests that this Court reverse the Fourth District's decision and reinstate the trial court's Final Judgment.

Respectfully submitted,

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By: _____
NEIL P. LINDEN
DAVID B. HABER

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 16th day of June, 1992, upon Alan L. Hoffman, Esquire, Attorney for Respondent, DEBORAH FISHBEIN, 1610 Southern Boulevard, West Palm Beach, Florida 33406.

_____
NEIL P. LINDEN