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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

FLORIDA BAR NOS.: 174589
435368

REPLY BRIEF OF PETITIONER

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

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STATEMENT OF THE FACTS AND OF THE CASE

The Bank relies upon its Statement of the **Facts** and of the Case contained in its Amended Initial Brief. Notwithstanding that Mrs. Fishbein accepts the Bank's Statement of the Facts and of the Case, she then attempts to controvert those facts and/or provides this Court with misstatements of fact allegedly contained in the Record.[1] The trial court had before it sufficient facts to support its finding that Mrs. **Fishbein** was in "no worse position" by virtue of the imposition of the equitable lien.[2]

SUMMARY OF THE ARGUMENT

The doctrine of equitable liens on homestead property, enunciated in the leading case of *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925), has again been ratified and approved by this Court in *Butterworth* v. Caggiano, Case No. 78,377 ____ So.2d ___

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[1]On the non-issue of the Bank's purported negligence, Mrs. Fishbein selectively includes certain facts to support her claims, yet excludes and/or misrepresents other facts. For example, on page 2 of her Answer Brief, Mrs. Fishbein asserts that all of the expert witnesses, including the Bank's expert, testified that the procedure used by the Bank wouldn't have been used by a prudent bank. This is a misstatement of the trial testimony of the Bank's expert, who testified that it was not uncommon to allow loan closing papers to be executed outside of a bank's presence, especially when dealing with a customer, such as Mr. Fishbein, who was known to the Bank; particularly where the documents were to be witnessed and executed in the presence of a notary. T.224, 227. See *also* the Bank's Amended Initial Brief, pp.31-36 and footnotes 30-36 for a detailed analysis of the facts before the trial court and Mrs. Fishbein's placing "blinders" on her divorce counsel's inquiry into the validity of her Property Settlement.

[2]The Record is replete with testimony that all of Mr. Fishbein's assets were encumbered at the time of the Palm Beach Savings' loan, that Mr. Fishbein waa already in default under the Barondess MacLean balloon mortgage on the Property, and that Mr. Fishbein had no other unencumbered assets with which to payoff the debts on the Property. T.16, 126, 129 and 242. Respondent's assertions as to the "uncontradicted testimony," i.e. -- that there were other assets available at the time of the Palm Beach Savings' loan transaction, is simply erroneous. The trial court chose not to accept Mrs. Fishbein's position in this regard.

(Fla. S.Ct., Opinion filed July 9, 1992) [17 FLW S448]. In *Butterworth*, this Court has indicated that homestead property is only subject to forced sale for an equitable lien when that lien expressly falls within one of the three constitutional exceptions contained in Article X, Section 4, or does so by "reasonable implication." The doctrine of equitable subrogation, which has its roots in the same equitable maxim as the doctrine of equitable lien, is exactly the type of "reasonable implication" this Court was suggesting as a vehicle for enforcement of liens against homestead property. The equitable lien remedy crafted by the trial court here falls squarely within the Article X, Section 4 exceptions, and fits within the concepts of right and justice enunciated in Jones.

Further, the traditional protections for the family, which have been the foundation of the constitutional homestead exemption, do not apply here where the party claiming the homestead protection as a shield previously alienated her homestead with the exact same liens for which subrogation is being applied. Under the doctrine of equitable subrogation, one lien is being substituted for another. Thus, Mrs. Fishbein is not losing her beneficial interest in the homestead. As the trial court concluded, Mrs. Fishbein stands "in no worse position" by virtue of the equitable lien.

Finally, the Bank argues that the Fourth District's opinion, which requires fraud or egregious conduct on the part of the beneficiary of the homestead protection as the "only" basis on which to impose an equitable lien against that party's homestead,

is erroneous. If fraud or other egregious conduct is even required, then it is sufficient that such conduct be in the transaction, without it being on the part of the beneficiary of the homestead, where that party unjustly benefits from such fraud. To adopt a contrary holding would allow the homestead protection to be wrongfully employed as a shield to perpetrate a fraud on creditors and to escape honest debts, neither of which **were** intended by the Constitution. Milton ***v.*** Milton, **63 Fla. 533, 58- So. 718 (1912).**

ARGUMENT

THE EQUITABLE LIEN GRANTED TO THE BANK ON MRS. FISHBEIN'S HOMESTEAD FALLS CLEARLY WITHIN THE GUIDELINES ESTABLISHED BY *JONES V. CARPENTER AND BUTTERWORTH V. CAGGIANO* EITHER EXPRESSLY, BY REASONABLE IMPLICATION OR ARISING OUT OF GENERAL CONSIDERATIONS OF RIGHT AND JUSTICE. THE LIEN IS FURTHER SUPPORTED BY THE COMPANION DOCTRINE OF EQUITABLE SUBROGATION.

Butterworth v. Caggiano, Case No. *78,377* ______ So.2d _____ (Fla. S.Ct., Opinion filed July 9, 1992) [17 FLW S448], reaffirms the viability of equitable liens on homestead in Florida. ***Butterworth*** reiterates that ***Jones v. Carpenter,*** **90** Fla. **407**, 106 So. 127 (1925) continues to be the guiding light of reason.

In Jones v. ***Carpenter,*** this Court stated:

> [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 anly in cases where the law fails to give relief and justice would suffer without them. [citations omitted]

106 So. at 129. Equitable liens are always remedial in nature, utilized by trial courts to right a wrong. But for the

imperfection in transactions (i.e. - fraud, mistake of fact, etc.), courts would merely enforce the valid lien or mortgage allowed by law. The remedy of an equitable lien is to achieve what is "right and just" under the circumstances, where the law fails to give relief and the equities of the particular case call out for **justice.**[3] The trial court's Final **Judgment** below was based upon principles of equitable subrogation combined with the remedy of equitable lien.[4]

In Butterworth, this Court stated that the homestead is **only** subject to forced sale where the lien **fits** within the three specified exceptions contained in Article X, Section 4 of the

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[3]An equitable lien arises at the time of the transaction from which it springs. *See Westburne Supply, Inc. v. Community Villas Partners, Ltd.*, 508 So.2d 431, 434 (Fla. 1st DCA 1987); *Blumin v. Ellis*, 186 So.2d 286, 295 (Fla. 2d DCA 1966); and *Craven v. Hartley*, 135 So. 899 (Fla. 1931). The Fourth District's holding that Mrs. Fishbein's homestead is not subject to forced sale for the equitable lien (because the lien is an unenforceable judgment, lien or decree under Article X, Section 4 of the Florida Constitution), is contradicted by the essence of what is an equitable lien. The lien here arose in March, 1988 when the loan was funded, not two years later when the trial court's Final Judgment was entered which merely acknowledges the lien's prior existence.

[4]In its Final Judgment, the trial court made specific findings that *Mrs.* Fishbein stood in "no worse position" by virtue of the Bank's equitable lien; that the Bank relied upon witnesses and a notary public, thus its mistake, *if any*, was not one of active misfeasance. See also footnotes 33 and 36 of the Bank's Amended Initial Brief setting forth the trial court's acknowledgement that the equitable lien prevents a windfall to Mrs. Fishbein of winning the lottery and that the Bank is not the "big bad bear" in this lawsuit. T.276, 279-280.

Respondent takes the position (Answer Brief, pp.16-17) and the Fourth District's Opinion apparently agrees (as reflected in footnote 3 of the Opinion), that pursuant to Jones *v.* Lally, 511 So.2d 1014 (Fla. 2d DCA 1987), the Bank must suffer the loss in the instant case (on the basis that it was best able to avert the loss and that it is the least innocent). To the contrary, the trial court specifically acknowledged that, by virtue of the unenforceability of the legal mortgage, the Bank suffers a loss of approximately $300,000, whereas Mrs. Fishbein is in "no worse position" by virtue of the imposition of the equitable lien in the exact amount of the prior valid alienations and/or encumbrances upon her homestead. Thus, the *Jones* v. *Lally* analysis *is* not applicable at all.

Florida Constitution.[5] While that portion of the holding in Butterworth relating to criminal activity is factually inapplicable to the instant **case**, footnote **5** of the Butterworth opinion expressly acknowledges the continuing validity of equitable liens on homestead property in Florida and apparently affirms the vitality of this Court's most famous pronouncement thereof in Jones v. ***Carpenter***.[6]

In *Butterworth*, this Court states that there are no cases where this Court has imposed an equitable lien on homestead property beyond one of the three stated exceptions in Article X,

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[5]In *Butterworth,* this Court stated:

> Most significantly, Article X, Section 4 expressly provides for three exceptions to the homestead exemption. Forfeiture is not one of them. According to the plain and unambiguous wording of Article X, Section 4, a homestead is *only* subject to forced sale for (1) the payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement or repair thereof; or (3) obligations contracted for house, field or other labor performed on the realty. Under the Rule "expressio unius est exclusio alterious" - the expression of one thing is the exclusion of another - forfeitures are not excluded from the homestead exemption because they are not mentioned, either expressly or by reasonable implication, in the three exceptions that are expressly stated. (Emphasis in original]

17 FLW at S449.

[6]In footnote 5 of *Butterworth,* the following appears:

> ....Virtually all of the relevant cases involve situations that fell within one of the three stated exceptions to the homestead provision. Moat of thoee cases involve equitable liens that were imposed where proceeds from fraud or reprehensible conduct were used to invest in, purchase, or improve the homeatead. Other relevant cases cited involve situations where an equitable lien was necessary to secure to an owner the benefit of his or her interest in the property.. . .In particular, *Tullis* involved a marital situation with joint homestead property. In no other cases has this Court imposed a lien on a homestead beyond one of the three stated exceptions in the constitutional provision. The court in Bessemer specifically did not address the issue of whether the lien came within one of the stated exceptions to the homestead exemption. 381 So.2d 1347 n.1. [Emphasisadded]

17 FLW at 5450.

Section 4.[7] The Bank respectfully submits that the Court overlooks two critical cases where this Court has allowed or has imposed an equitable lien on homestead property that did not directly and/or entirely fit within one of the three stated exceptions in the constitutional provision. ***See Sonneman* v. *Tuszynski*,** 139 Fla. **24**, **191 So. 18 (1939);** and ***Craven*** v. ***Hartley*,** 135 So. 899 (Fla. **1931).**

In ***Sonneman v. Tuszynski*,** this Court granted an equitable lien in favor of the plaintiff on the homestead of the defendants where monies were loaned and labor and services provided over a period of years. The lien included **$50.00** a week for labor and services performed (keeping house, laundering and cooking -- most of which was done prior to the acquisition of the homestead upon which the lien was imposed) and for loans of $1,700.[8] The equitable lien imposed in ***Sonneman*** for the loaning of funds, a majority of which do not fit within the three specifically **stated categories** contained in Article X, Section **4**, as well as for such services as

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[7]Again, looking to footnote 5 of Butterworth, this Court used the worde "Virtually all of the relevant cases..." in describing those which fell within the three stated exceptions to the homestead provision. The use of the word "virtually" suggests that there may be other cases which allowed equitable liens on homestead where they do not fall directly or entirely within one af the three stated exceptions to the homestead provision contained in Article X, Section 4. Further, this Court's use of the phrase "Moat of those cases..," with regard to equitable liens that were imposed upon homestead (where proceeds from the fraud or reprehensible conduct were used to invest in, purchase or improve the homestead), recognizes that there are cases that do not fall within these factual circumstances. However, at the conclusion of footnote 5, the Court appears to contradict the foregoing by the statement that: "In no other ease [presumably referring to *Tullis v. Tullis*, 360 So.2d 375, 377 (Fla. 1978)] has this Court imposed a lien on a homestead beyond one of the three stated exceptions in the constitution provision."

[8]The loans consisted of: an advance from the plaintiff to the defendant for the use and benefit of defendant's mother - $300; a loan by the plaintiff to the defendant which defendant used in paying €or an automobile - $300; an advancement used by the defendant in improving the property - $500; monies used in raising a cottage later sold - $300; and monies used by the defendant in buying supplies for a filling station -$300.

laundry, cooking and housekeeping on prior property, expressly contradicts and cannot be aligned with this Court's pronouncement at the end of footnote 5 in *Butterworth*. Rather, the equitable lien in *Sonneman* was based in part on the exceptions and in part upon general considerations of right and justice to prevent an unjust result where the law otherwise failed to give relief.

In ***Craven** v. Hartley*, 135 So. **899** (Fla. 1931), this Court approved the chancellor's imposition of an equitable lien which was not within one of the three specific exceptions to the constitutional homestead protection. Mrs. Craven entered into what appears to have been an $1,875 installment contract with a third party for the purchase of real property. $1,500 had already been paid, but the ***$625*** balance of principal and interest was in arrears. Mrs. Craven borrowed that sum from a third party, Hartley, and used it to make the final payment on the land and to obtain her deed. Hartley contended that Mrs. Craven orally promised to provide him with a mortgage on the land, as security for the **$625** as soon as she secured her deed. When she declined to execute the mortgage, Hartley brought suit to charge and sell the land.

On conflicting **evidence,** the chancellor agreed with Hartley that a mortgage had been promised by Mrs. Craven. Mrs. Craven then unsuccessfully attempted to have her land adjudicated homestead and exempt from forced sale under Article **X**, Section 1.[9] At the time of the transaction, Mrs. Craven **was** a married woman. When her

[9] **The predecessor to Article X, Section 4.**

husband died, she became the head of the family. The majority of this Court ruled that Hartley was within his rights in seeking to have an equitable lien impressed upon the lands under *Jones v. Carpenter.*[10]

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[10]As the Court in *Craven* stated:

> This holding is in harmony with [the] spirit and terms of Section 1 of Article X of the Constitution relating to homestead exemptions, as it is there provided that no property shall be exempt from any contract for the purchase price thereof, nor can the homestead exemption supersede prior judgments or liens.
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> *
>
> The doctrine of equitable liens does not depend on written instruments, but may arise from a variety of transactions to which equity will attach that character.... [Citations omitted]

135 So. at 901. In his concurring opinion, Justice Brown Stated:

> I doubt if this transaction falls within the class of obligations provided for in the cited section of the Constitution. However, that an equitable lien was created by that transaction has become settled in this case by our former decision. The decree declaring that such transaction created an equitable lien related back to the transaction out of which the equitable lien so declared arose....Does the item of $625 with interest thereon come within the exception relating to "obligations contracted for the purchase of said property"? The decree which has been heretofore affirmed said that Hartley had an equitable lien for this mount as "for money loaned by said complainant to said defendant to be used and applied on the purchase price of said land and which was so used and applied by said defendant." The decree impliedly holds that Hartley thereby became subrogated to the right of the vendor to a lien to secure this balance due on the purchase price of the property. I am inclined to the view, therefore, in harmony with that of [the majority opinion] on this point, that the effect of the chancellor's decree...was to give Hartley an equitable lien for the payment of an obligation "contracted for the purchase of said property" thus bringing it within one of the exceptions from exemption provided in the constitutional homestead provision referred to. **If Hartley was not equitably subrogated to the right of the vendor to enforce a lien for this amount, I cannot understand the force and effect of the chancellor's decree giving him an equitable lien for such amount.** *See Jones v. Carpenter,* 90 Fla. 407, 106 So. 127, 43 A.L.R. 1409. [Emphasis added]

135 So. at 901-02.

What is the impact here of Butterworth and this Court's use of the word "**only**"? Does this mean that equitable liens can **only** attach **to** a party's homestead property where the basis of the lien directly and totally fits within one of the three exceptions stated in Article X, Section 4? Alternatively, does the Court recognize that a party may be equitably subrogated **and** obtain an equitable lien in that same amount based upon a prior lien or encumbrance paid off, when that prior encumbrance or lien was expressly within one of the three exceptions contained in Article X, Section 4? This Court's statement in Butterworth that "forfeitures are not excluded from the homestead exemption because they are not mentioned, either expressly **or** by **reasonable implication,** in the three exceptions...." must have been intended to include the situation presented in the instant case where the equitable lien is for the payment of pre-existing mortgages and taxes, all of which fall within exceptions to the homestead exemption contained in Article X, Section **4.**[11]

What is this Court to do in a situation where a portion of the lien fits within an exception to the homestead exemption, such as

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[11]*Butterworth*, 17 FLW at S449. In the instant case, the Barondess MacLean mortgage was assumed by Mr. Fishbein when acquiring the Property; the Ridgeway second Mortgage was a purchase money mortgage. Both of these are valid exceptions to the constitutionally protected homestead exemption contained in Article X, Section 4(a), Fla. Const. and both liens validly encumbered the house prior to its becoming Mrs. Fishbein's homestead in October, 1985. See, e.g., *Bessemer v. Gersten*, 381 So.2d 1344, 1348 (Fla. 1980). The third mortgage to Florida National executed by Mrs. Fishbein and specifically acknowledging the first and second mortgages, was a consensual lien placed by Mrs. Fishbein and, thus, was a proper alienation of her homestead. See Article X, Section 4(c), *Fla.* Const. By virtue of the doctrine of equitable subrogation, also known as equitable assignment, the Bank stands in the shoes of those prior lienors, having the same rights to execute against the homestead property as those prior lienors. see Initial Brief of Amicus Curiae, pp.25-29 and the cases cited therein.

the payment of taxes, but where the remainder of the funds do not directly fit within one of the stated **exceptions?"**

This Court should allow a party to equitably subrogate its position to and obtain an equitable lien in that same amount of a prior lien or encumbrance **paid** off, when that prior encumbrance or lien was expressly within one of the three stated exceptions of Article X, Section 4(a) or if it was a consensual alienation under Article **X**, Section 4(c). The equitable lien in ***Craven*** was not expressly within one of the three exceptions; however, it was "by reasonable implication" through the doctrine of equitable subrogation. In contrast, *Sonneman* is a case where only a portion of the funds directly fit within one of the three stated exceptions. The remainder of the monies (in fact, a majority of the funds) did not fit into any of the three categories; yet an equitable lien was allowed for the full amount.

The facts now before this Court specifically fit within the equitable principles outlined in Jones, and by reasonable implication (through the concept of equitable subrogation) fit within the exceptions contained in Article X, Section 4(a) and (c). Accordingly, this case meets the requirements of the most **recent**

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[12]Will this court at some point draw arbitrary distinctions between equitable liens which have some percentage or portion of the lien for items contained within the specific three exceptions to the homestead exemption of Article X, section **4** based upon a mathematical formulation (i.e. -- sixty percent within the stated exceptions will be sufficient for the imposition of **an** equitable lien, but **forty** percent will not be sufficient)?

In the instant **case,** Palm Beach Savings contends that all of the items included within the equitable lien **were** within the exceptions to the homestead exemption of **Article X,** Section 4, either directly (by paying **the** taxes) or through equitable subrogation (paying off the three pre-existing mortgages), **and** by **a** logical and reasonable construction of the words "by reasonable implication" in ***Buttexworth.***

pronouncement in Butterworth.

The inquiry could stop here, but for the Fourth District's holding below that the fraud or egregious conduct must be on the part of the beneficiary of the homestead protection in order to allow an equitable lien on homestead property. The Court in Butterworth did not address this issue, nor does the Butterworth opinion support the Fourth District's holding. The argument contained in the Bank's Amended Initial Brief, i.e. - that *Isaacson v. Issacson,* **504** So.2d 1309 (Fla. 1st DCA 1982) is an improper extension of Clutter v. ***Clutter,*** 173 So.2d 761 (Fla. 3d DCA 1965) and that the **cases** cited in ***Isaacson*** do not stand for this **holding,**[13] was not addressed in Butterworth. The issue is now before this Court and must be resolved.

If this Court holds that the fraud or egregious conduct must be on the part of Mrs. Fishbein in order for an equitable lien to be placed on her homestead, then the Bank concedes that there was no such finding. However, the Bank contends that there is no such requirement (to find fraud or egregious conduct on the beneficiary's part); that an unjust enrichment to the beneficiary of the homestead protection, combined with general principles of right and justice as between the parties, is sufficient for the imposition of an equitable lien. If, however, there is a requirement of finding fraud or egregious conduct, then the Bank submits that fraud in the transaction is sufficient, when coupled

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[13]**Those other cases are set** forth **in footnote 25 on page 27 of the Bank's Amended Initial Brief.**

with an unjust result or windfall to the beneficiary of the homestead protection, regardless of whether **that** beneficiary perpetrated the fraud.[14] Accordingly, an equitable lien (through the vehicle of equitable subrogation or otherwise) is appropriate in this case under Jones ***v. Carpenter*** and the long-standing **principles** of equity reflected therein.[15]

The essence of this case is reflected in the following: (1) Mrs. Fishbein's homestead was validly encumbered with approximately

[14] See the Bank's Amended Initial Brief, pp.26-30.

[15] *Jones v. Carpenter* cited numerous cases from other jurisdictions since the turn of the century wherein equitable liens were properly used to prevent **unjust** enrichment. *Ryskind* v. *Robinson,* 302 So.2d 427 (Fla. 4th DCA 1974) is the only case in this jurisdiction which deals with a mortgagee who was defrauded into paying off prior existing and valid encumbrances upon a party's homestead. See *also Town of River Junction v. Maryland Casualty Co.*, 133 F.2d 57 (5th cir. 1943) (under Florida law, where a Lender is induced to make a loan for the very purpose of removing an encumbrance takes security believed good against the thing encumbered, and the security proves ineffectual, but the **money** loaned is actually used to remove the encumbrance, the lender is equitably subrogated to the encumbrance removed as against persons benefited). In *Ryskind,* the lender was entitled to raise an affirmative defense of fraud in order to impose an equitable lien upon homestead property, where it had been fraudulently induced to Lend monies which were specifically used to pay off certain mortgage indebtedness on the property. That decision is in keeping with decisions from other jurisdictions on this same factual setting.

Concepts of equitable subrogation are utilized in combination with the remedy of equitable liens to preclude a wife from having proper and valid encumbrances upon her homestead paid off by a lender in a mortgage transaction, where her husband commits a fraud by having the wife's name forged to the mortgage. See, *e.g.*, Serial *Building Loan & Savings Institution v. Ehrhardt,* 95 N.J. Eq. 607, 124 A.56 (1924) (where the husband forged the wife's name to a second mortgage to secure a larger loan, using part of the proceeds of the second mortgage to pay off the first mortgage - equitable subrogation was utilized to prevent the unjuet enrichment of the money paid off with the money loaned). See *also Homeowners Loan Corp. v. Collins,* 184 A.621 (Ct. Chancery N.J. 1936); *Gordon v. Stuart,* 4 Neb. Unof. 852, 96 N.W. 624 (1903); *Davies* v. Pugh, 81 Ark, 253, 99 S.W. 78 (1907); *Helm* v. *Linchberg Trust & Sav. Bank,* 106 Va.603, 56 S.E. 598 (1907); Johnson *v. Barrett*, 117 Ind. 551, 19 N.E. 199 (1888); *and Zinkeison v. Lewis,* 63 Kan. 590, 66 P. 644 (1901).

All of these decieione support the proposition that where a loan has been obtained by means of a forged mortgage and the proceeds are used to payoff existing encumbrances against the property, the courts have, without exception, held that the mortgagee of the void mortgage is entitled to be subrogated to the rights of the prior mortgages. The basis for those decisions is that there was fraud involved in the transaction, the mortgagee paid off valid encumbrances and, absent equitable subrogation and/or an equitable lien, it would result in an unjust enrichment to the party attempting to prevent enforcement.

one million dollars of debt (the three pre-existing mortgages and taxes); (2) all of the mortgage liens as well as the taxes paid by Palm Beach Savings are exceptions to the exemption from forced sale of the constitutionally-protected homestead, as reflected in Article X, Sections 4(a) and (c) of the Florida Constitution; (3) these were not debts solely of her husband; rather, they were valid liens and encumbrances for which Mrs. Fishbein's homestead was already alienated. Thus, the Respondent's concern of protecting the homestead for the family from the indebtedness of the "head of the family" is inapplicable.

For Mrs. Fishbein to avoid the debt she either placed on the homestead or which her homestead was subject to would wrongfully employ the homestead as a shield to perpetrate a fraud and to escape honest debts. This was not intended by this State's homestead protection embodied in Article X, Section 4. See Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912).

The Bank was defrauded by Mr. Fishbein. There was no fraud committed by any other party. Since Mrs. Fishbein was left in "no worse position" by virtue of the Palm Beach Savings' equitable lien, the trial court in the instant case properly applied principles of equitable subrogation combined with the remedy of equitable lien to prevent an unjust result and to do equity between the parties.

The trial court's imposition of an equitable lien should be affirmed by this Court and the Fourth District's opinion should be reversed, unless: (1) this Court affirms the Fourth District's

holding that the fraud or egregious conduct must be committed by the beneficiary of the homestead protection; and (2) this Court narrowly construes Article **X,** Sections 4(a) and (c) to require that all of the funds expressly and directly fit entirely within the stated exceptions.[16]

If this Court were to adopt such a rule, by painting equity jurisprudence into a narrow corner for the imposition of an equitable lien upon homestead property, then this Court can expect other courts to then circumvent such a holding when the facts cry out for an equitable remedy -- by substituting legal terms of art such as "functional equivalent" for the words "expressly" and "only." ***See,*** *e.g.*, ***Gepfrich*** v. ***Gepfrich,*** 582 So.2d 743 (Fla. 4th DCA 1991) (total lack of clean hands is functional equivalent of fraud or reprehensible conduct). The Bank submits that such linguistic exercises are unnecessary as the equitable principles set forth in Jones v. ***Carpenter*** were neither to be so overbroad that they could not be measured, nor so narrowly construed that they prevent the doing of right and justice between the parties, given the factual circumstances of each case.

[16] Such a ruling would contradict this Court's prior rulings in *Jones* v. *Carpenter; Sonneman v. Tuszynski; LaMar v. Lechlider*, 135 Fla. 703, 185 So. 833 (1939) and *Craven v. Hartley*, as well as render meaningless the words "by reasonable implication" set forth in *Butterworth.* Furthermore, such a narrow ruling would prevent a party from equitably subrogating into the stated exceptions, would prevent a party from obtaining an equitable lien unless all of the funds fit into the stated exceptions, and, finally, would render meaningless the term "out of general considerations of right and justice" in Jones v. Carpenter, 106 So. at 129.

CONCLUSION

Based upon the legal authorities and case precedents cited herein (as well as in the Amended Initial Brief and Briefs of the Amicus), whether by the doctrine of equitable lien, the vehicle of equitable subrogation, or out of general principles of right and justice given the relations of the parties and the equities of the cause, the trial court's Final Judgment reached the correct result. It requires Herculean effort to put shackles on long-standing equitable principles in order to use the homestead as a shield against valid creditor liens and as an imposition of fraud upon creditors. It is respectfully submitted that the Fourth District Court of Appeals' opinion should be reversed and the trial court's Final Judgment reinstated.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 24TH day of July, 1992, upon Alan L. Hoffman, Esquire, Attorney for Respondent, DEBORAH FISHBEIN, 1610 Southern Boulevard, West Palm Beach, Florida 33406.

Respectfully submitted,

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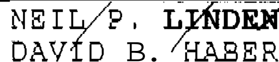

By: ______________________
NEIL P. **LINDEN**
DAVID B. HABER