IN THE SUPREME COURT OF FLORIDA

84,029

ARTHUR LEVINE, et al.,

Petitioners,

v.

UNITED COMPANIES LIFE INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

ON PETITION FOR REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES (continued) **Page**

FLORIDA CONSTITUTION

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

To finance their purchase of an office complex/shopping center, the petitioners -- essentially a group investing on behalf of their individual pension or profit-sharing trusts -- borrowed $1,300,000 at 10.25% interest from the respondent, United Companies Life Insurance Company ("United Companies"). When the petitioners defaulted on their loan, United Companies sued (A1).[1] After more than a year and the entry of two partial summary judgments against them, these borrowers, awaiting only the adjudication of the respondent's pending application for final summary judgment of foreclosure, moved to amend their answer to interpose the afterthought defense of usury.[2] Although this claimed usury defense was staring them in the face from the first moment they looked at the complaint, the imminency of foreclosure made them finally see that the default interest of the "highest lawful rate" (25%) added to the prepayment penalty of 1% resulted in an effective interest rate of 26%, 1% over the legal rate. The trial court rejected the amendment, and in its Summary Final Judgment of Foreclosure and For Damages, awarded the default interest but not the prepayment penalty (A1).

The petitioners appealed and asserted, among other things, that the trial court abused its discretion in denying their motion to amend their answer to include the affirmative defense of

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[1]For the Court's convenience, we have included in an appendix to this brief a copy of the district court's decision as well as a copy of Jersey Palm - Gross, Inc. v. Paper, 19 Fla. L. Weekly D1455 (Fla. 4th DCA July 6, 1994), the decision asserted to be in conflict. We will refer to the appendix as "(A_)."

[2]Although the details of the petitioners' delay are not set out in the Third District's opinion, the petitioners' jurisdictional brief goes outside of the four corners of the decision to tell this Court that their motion for leave to amend and the trial court's denial of it came "prior to *fully* adjudicating Respondent's *pending summary judgment application*" (Petitioner's Brief at 3 n.2) (emphasis supplied). We have simply given content to the words "fully" and "pending summary judgment application."

usury (A1).[3] The district court affirmed the denial of the motion to amend (A1-A2). The petitioners have now sought discretionary review of the district court's decision.

JURISDICTIONAL ISSUE

Whether, as the petitioners assert, there is an express and direct conflict between the decision below and the decision of the Fourth District Court of Appeal in Jersey Palm - Gross, Inc. v. Paper, 19 Fla L. Weekly D1455 (Fla. 4th DCA July 6, 1994).

SUMMARY OF THE ARGUMENT

Petitioners urge this Court to take jurisdiction over this case based on conflict of decisions. But there is no conflict. In this case, the district court found that the trial court did not abuse its discretion in denying the petitioners' motion to amend their pleadings to assert an affirmative defense of usury. This was its essential holding and it does not conflict with the decision of the Fourth District in Jersey Palm - Gross, Inc. v. Paper, 19 Fla. L. Weekly D1455 (Fla. 4th DCA July 6, 1994), which found that under all the facts and circumstances of the case the trial court's finding of usury after a bench trial was supported by the evidence. Moreover, the denial of the petitioners' motion to amend was entirely in harmony with the decision in Jersey Palm - Gross. This Court therefore lacks jurisdiction, and the petition should be denied.

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[3]The borrowers also claimed the final judgment permitted United Companies to execute against the guarantors for the full amount of the judgment before a deficiency had been determined, and that United Companies was not entitled to recoup the appraisal fee or environmental assessment fee under the terms of the loan documents. United Companies confessed error as to these points and responded to the third point only. The district court accepted the confession of error and reversed the trial court on these two points.

ARGUMENT

THIS COURT LACKS JURISDICTION TO REVIEW THIS CASE BECAUSE THE DECISION BELOW DOES NOT, AS ASSERTED, EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT IN JERSEY PALM - GROSS, INC. V. PAPER

Article V, Section 3(b)(3) of the Florida Constitution gives the Supreme Court of Florida discretionary jurisdiction over decisions of district courts of appeal which expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. This Court explained the meaning of conflict in Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962):

> [J]urisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, . . . such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. .

The decision of the district court in the present case was "that the trial court did not abuse its discretion in denying appellants' motion to amend their pleadings to state an affirmative defense of usury" (A1). Patently, this decision does not expressly and directly conflict with the decision of the Fourth District in Jersey Palm - Gross, Inc. v. Paper "that the insertion of a usury savings clause in a single document does not save *this* lender under *these* circumstances from the usury penalties, nor preclude the trial court's finding of usurious intent." Jersey Palm - Gross at D1457 (A5) (emphasis added).

The petitioners would have this Court believe otherwise. They seize upon -- indeed make the focal point of their brief -- an additional, but not essential, reason the district court gave for its decision:

> In addition, the mortgage note expressly stated that interest was to be charged only at a lawful percentage. The inclusion of this language in loan documents has been held to warrant dismissal of a usury claim. Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So. 2d 356, 357 (Fla. 5th DCA 1988), review denied, 541 So. 2d 1172 (Fla. 1989).[4]

Levine v. United Cos. Life Ins. Co., 19 Fla. L. Weekly D1293 (Fla. 3d DCA June 14, 1994) (A1). Because the district court cited Forest Creek, and because the Fourth District's later decision in Jersey Palm - Gross, Inc. v. Paper, 19 Fla. L. Weekly D1455 (Fla. 4th DCA July 6, 1994), certified conflict with Forest Creek, the petitioners say that ipso facto the district court's decision in this case conflicts with Jersey Palm - Gross. But the petitioners' assertion of conflict is flawed because it is based not on the district court's essential and principal holding -- which the petitioners relegate to a footnote -- but rather on this ancillary reference to Forest Creek. As we have said, and as we demonstrate further below, this reference by the district court was not the basis of its decision, and therefore cannot be the basis for a conflict of decisions.

A.

The Difference in the Cases and the Holdings.

In Jersey Palm - Gross the trial court had conducted a bench trial in which the defense of usury was raised and fully litigated. It determined that the transaction between the parties, taken as a whole, was usurious. On appeal, the appellant had the burden of showing that the trial court's finding of usury was not supported by the evidence.[5] In contrast, in the present

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[4]A copy of Forest Creek is included in our appendix at A9.

[5]To prevail on a claim of usury, a defendant must prove, among other things, a corrupt intent to take more than the legal rate of interest for the use of the money loaned. Clark v.

case, on the eve of the entry of a final summary judgment of foreclosure, the borrowers moved to amend their answer to raise the affirmative defense of usury. When that motion was denied, their burden on appeal was to demonstrate that the trial court's ruling was an abuse of its discretion. See Feldman v. Feldman, 324 So. 2d 117, 118 (Fla. 3d DCA 1975).

In determining whether a trial court abuses its discretion in ruling on motions to amend, an appellate court looks to several well-established principles. First, "[t]he amendment of pleadings is a matter within the sound judicial discretion of the trial court. . . ." 2765 South Bayshore Drive Corp. v. Fred Howland, Inc., 212 So. 2d 911, 914 (Fla. 3d DCA 1968). Second, there is a presumption in favor of a trial court's proper exercise of discretion and the burden is on the appellant to clearly show that there was a palpable abuse of discretion. Feldman v. Feldman, 324 So. 2d 117, 118 (Fla. 3d DCA 1975). See also Estate of Lieber, 103 So. 2d 192, 196 (Fla. 1958) (appellant has burden to show error or abuse of discretion, which must be made to appear from the record); Costa Bella Dev. Corp. v. Costa Dev. Corp., 445 So. 2d 1090 (Fla. 3d DCA 1984) ("a trial court's ruling permitting or denying further amendments to pleadings will not be disturbed on appeal in the absence of an abuse of discretion"), cited in Levine v. United Cos. Life Ins. Co., 19 Fla. L. Weekly D1293 (Fla. 3d DCA June 14, 1994) (A1). Third, whether or not discretion has been abused is a question to be evaluated under the totality of the circumstances. Sekot Labs., Inc. v. Gleason, 585 So. 2d 286, 289 (Fla. 3d DCA 1990). Fourth, to be ruled an abuse, the trial court's judicial action must be arbitrary, fanciful

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Grey, 101 Fla. 1058, 132 So. 832, 834 (1931). The dispute in Jersey Palm - Gross was whether or not, under the circumstances of that case and in light of the usury savings provision in the loan document, the defendants had sufficiently proven this element. See Jersey Palm - Gross, at D1455 (A3).

or unreasonable. Roberto v. Allstate Ins. Co., 457 So. 2d 1148, 1150 (Fla. 3d DCA 1984). And finally, as the Third District itself made clear, "a trial judge in the exercise of sound discretion may deny an amendment . . . where a case has progressed to a point that the liberality ordinarily to be indulged has diminished." Ruden v. Medalie, 294 So. 2d 403, 406 (Fla. 3d DCA 1974), cited in Levine at D1293 (A1). Finding that the trial court had committed no abuse of discretion in denying the petitioners' proposed amendment, the district court affirmed.[6]

B.

The Third District's Reference to Forest Creek Was At Most an Additional, Not an Essential, Reason for Its Holding

Despite their own dilatoriness -- the petitioners' motion to amend came after two partial summary judgments in favor of United Companies and on the eve of a foreclosure sale[7] -- the petitioners insist that the *only* reason the district court found that the trial court had not abused its discretion was that, since the note contained a usury savings clause, the defense of usury would have been futile. (See Petitioners' Brief at 3 n.2.) That contention of course flies in the face of the district court's reliance on Ruden v. Medalie, 294 So.2d 403, in support of its conclusion that there was no abuse of discretion in denying the motion to amend. Ruden has nothing whatsoever to do with usury or the force of a usury savings clause. Its subject instead

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[6]Of course, any contention that the district court ruled incorrectly is not a basis for invoking this Court's jurisdiction. See Jenkins v. State, 385 So. 2d 1356 at 1357-58 (Fla. 1980); Kyle v. Kyle, 139 So. 2d at 887; and Nielsen v. City of Sarasota, 117 So. 2d 731, 734-35 (Fla. 1960).

[7]The district court's reliance on Ruden v. Medalie, 294 So. 2d 403 (Fla. 3d DCA 1974), indicates that it considered the lateness of the proposed amendment in reaching its decision.

is late amendments. Its holding is simply that the liberality ordinarily indulged in allowing amendments diminishes as the case moves towards it conclusion. Because the usury the petitioners wanted to assert as a defense was apparent on the face of the loan documents attached to the complaint and thus could have been raised as a defense at the beginning of the case, and because the motion was first made late in the proceedings, the nature and meritoriousness of the proposed amendment were immaterial.

Concededly the district court garnished its holding with this reference to Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n: "*In addition*, the mortgage note expressly stated that interest was to be charged only at a lawful percentage. The inclusion of this language in loan documents has been held to warrant dismissal of a usury claim." Levine, 19 Fla. L. Weekly at D1293 (A1) (emphasis added). This buttressing observation was not, however, essential to the district court's conclusion that the trial court had not abused its discretion, and falls far short of creating an express and direct conflict with Forest Creek.

> A judge may often give additional reasons for his decisions without wishing to make them part of the *ratio decidendi*; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance.

Rupert Cross, Ratio Decidendi and Obiter Dictum, in The Judicial Process at 800 (Ruggero J. Aldisert, ed., 1976) (quoting Devlin, J.).[8]

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[8]It is arguable that the casual observation about Forest Creek made by the Third District to buttress its *essential* holding is dictum. A fortiori, dictum provides no basis for conflict jurisdiction. See Ciongoli v. State, 337 So. 2d 780, 781 (Fla. 1976) (writ of certiorari based on supposed conflict of decisions discharged where conflicting language was mere obiter dicta). Accord Hillsborough County Aviation Auth. v. Hillsborough County Governmental Employees Ass'n, Inc., 482 So. 2d 505, 509 (Fla. 2d DCA 1986).

C.

The Decision Does Not Conflict with Jersey Palm - Gross Because the Alleged Usurious Rate Was 1% Above the Legal Rate of Interest and Was, Therefore, "Close to the Legal Rate" So As to Make the Usury Savings Clause Determinative

Finally, even if, arguendo, the district court's reference to Forest Creek *were* a basis upon which it concluded that the trial court had not abused its discretion, the decision below would still not conflict with Jersey Palm - Gross. There, the Fourth District reasoned:

> A usury savings clause is one factor to which the finder of fact should look in determining whether all of the circumstances surrounding the transaction support a finding of intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned. *Where the actual interest charged is close to the legal rate, . . . the clause may be determinative on the issue of intent.*

Jersey Palm - Gross, 19 Fla. L. Weekly at D1457 (A5) (emphasis added).

As the petitioners note in their jurisdictional brief, the loan documents in the present case called for a default interest rate equal to the highest rate allowed by law, 25%. (See Petitioners' Brief at 1.) The petitioners did not, however, mention that the prepayment penalty was 1% of the loan and that the usurious rate upon which they base their complaint was thus 26% -- just 1% over the legal rate.[9] Therefore, even under Jersey Palm - Gross the usury savings clause in the note could have been "determinative on the issue of intent" because the "actual interest charged [was] close to the legal rate." Jersey Palm - Gross at D1457 (A5). Thus, the district court's observation that "[t]he inclusion of [a savings clause] in loan documents has been held to warrant dismissal of a usury claim," can hardly be said to conflict with -- and indeed under

[9]As the district court noted in its opinion, the trial court denied the award of the prepayment penalty.

the facts of this case is in complete harmony with -- the Fourth District's holding in Jersey Palm - Gross that a savings clause "may be determinative on the issue of intent."

CONCLUSION

For the reasons set forth above, the district court's decision in this case does not expressly and directly conflict with the Fourth District's decision in Jersey Palm - Gross. Therefore, this Court has no jurisdiction to review this case, and it should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was mailed to: Paul D. Friedman, Esq. and A. Margaret Hesford, Esq., Friedman, Rodriguez, & Ferraro, P.A., 2300 Miami Center, 201 South Biscayne Blvd., Miami, Florida 33131-4329, this 12th day of August 1994.

Daniel S. Pearson

Daniel S. Pearson

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CONTENTS OF APPENDIX

DUI with serious bodily injury. We affirm.

Warner raised six points in his appeal; none constitutes reversible error. First, the prosecutor's cross-examination of Warner and comments during closing argument did not deny Warner a fair trial and do not require a mistrial. *See Johnson v. State*, 380 So. 2d 1024 (Fla. 1979) (once defendant chooses to take stand he may be examined as other witnesses on matters which illuminate the quality of testimony); *Cobb v. State*, 376 So. 2d 230 (Fla. 1979) (mistrial motion appropriate only when error committed was so prejudicial as to vitiate entire trial).

Second, the trial court did not err in refusing to give a circumstantial evidence jury instruction where the court gave a reasonable doubt instruction. *See In re Standard Jury Instructions*, 431 So. 2d 594 (Fla. 1981) (giving of reasonable doubt instruction renders instruction on circumstantial evidence unnecessary).

Third, the trial court held an adequate evidentiary hearing and properly determined that Warner did not show good cause for striking two jurors who had been sworn. *See State v. Williams*, 465 So. 2d 1229 (Fla. 1985) (trial court has broad discretion regarding juror bias and its finding will not be disturbed unless error is manifest).

Fourth, the trial court correctly allowed a state witness to testify as an expert in accident reconstruction. *See Ramirez v. State*, 542 So. 2d 352 (Fla. 1989) (determination of whether witness is qualified to give expert opinion is peculiarly within discretion of trial court and its decision will not be reversed absent clear showing of error).

Fifth, the trial court properly admitted a gruesome photograph as it was relevant to the issues presented at trial. *See Swan v. State*, 322 So. 2d 485 (Fla. 1975) (gruesome and gory photographs may be admitted if proper depiction of factual conditions relating to the crime and if relevant in aiding court and jury).

Sixth, the trial court properly denied Warner's motion for mistrial which was based on the arresting officer's testimony regarding Warner's weight. *See Allred v. State*, 622 So. 2d 984 (Fla. 1993) (routine booking questions such as height, weight, and eye color not designed to lead to incriminating response and do not require *Miranda* warnings).

Having found no merit in any of Warner's points on appeal, the judgments of conviction are affirmed in all respects.

Affirmed.

* * *

Civil procedure—Service of process—Medical malpractice—Dismissal of medical malpractice complaint reversed and remanded for evidentiary hearing on issues of whether parties agreed that plaintiffs could serve process on defendant's counsel, whether process was served within 120 days of filing, and if it was not, whether plaintiffs had good cause for failure to serve process within 120 days

DENNIS BUDREAU and MARCIA BUDREAU, his wife, Appellants, vs. EFRAIN MENDOZA, M.D., et al., Appellees. 3rd District. Case No. 93-1582. Opinion filed June 14, 1994. An appeal from the Circuit Court of Dade County, Jon I. Gordon, Judge. Counsel: Stanley M. Rosenblatt and Susan Rosenblatt and Mary Margaret Schneider, for appellants. Hickey & Jones and John H. Hickey and Yadira R. Cole, for appellees.

(Before SCHWARTZ, C.J. and HUBBART and NESBITT, JJ.)

(PER CURIAM.) This is an appeal by the plaintiffs Dennis and Marcia Budreau from a final order dismissing a medical malpractice complaint against the defendant Efrain Mendoza, M.D. We reverse the final order under review and remand the cause for an evidentiary hearing so that the trial court may determine: (1) whether (a) an agreement was entered into by the parties that the plaintiffs could serve process on the defendant's counsel in this case, instead of the defendant, and (b) if so, whether the defendant's counsel was served with process within 120 days after the filing of the complaint in this case; and (2) whether good cause is shown by the plaintiffs for failure to serve process on the defendant or, pursuant to agreement, the defendant's counsel within 120 days after the filing of the complaint, if such be the case.

If, upon remand, the trial court concludes that: (1) no such agreement, as stated above, was entered into by the parties, or that the defendant's counsel was not served with process within 120 days after the filing of the complaint, if such an agreement was reached, and (2) the plaintiffs have failed to show good cause for the failure to serve process on the defendant or, pursuant to agreement, on the defendant's counsel within 120 days after the filing of the complaint herein, the plaintiffs' complaint should be dismissed, without prejudice, pursuant to Fla.R.Civ.P. 1.070(i). Otherwise, the defendant's motion to dismiss the plaintiffs' complaint should be denied, as there is no merit to the remaining grounds asserted in the defendant's motion to dismiss. *See Patry v. Capps*, 633 So. 2d 9 (Fla. 1994); *Stebilla v. Mussallem*, 595 So. 2d 136 (Fla. 5th DCA), *rev. denied*, 604 So. 2d 486, 487 (Fla. 1992); *Stebnicki v. Wolfson*, 584 So. 2d 177, 179 (Fla. 3d DCA 1991).

Reversed and remanded.

* * *

Mortgages—Foreclosure—Guarantors of purchase mortgage loan may not be held liable for full amount of foreclosure judgment prior to determination of deficiency—Mortgagee not entitled to award for appraisal and environmental assessment fees where loan documents do not provide for either fee—Trial court did not abuse its discretion in denying mortgagors' motion to amend their pleadings to state affirmative defense of usury—Mortgage note's provision that interest was to be charged only at lawful percentage warrants dismissal of a usury claim—Trial court's denial of award of prepayment penalty rendered refusal to permit amendment harmless where mortgagors had asserted that penalty in combination with default interest rate constituted usury

ARTHUR LEVINE, et al., Appellants, vs. UNITED COMPANIES LIFE INSURANCE COMPANY, Appellee. 3rd District. Case No. 93-1404. Opinion filed June 14, 1994. An Appeal from the Circuit Court for Dade County, Harvey Goldstein, Judge. Counsel: Friedman, Rodriguez & Ferraro, and Paul D. Friedman, and A. Margaret Hesford, for appellants. Holland & Knight, and Daniel S. Pearson, and Lucinda A. Hofmann, for appellee.

(Before JORGENSON, LEVY, and GERSTEN, JJ.)

(PER CURIAM.) Appellants, Arthur Levine, et al., appeal from a judgment of foreclosure and money damages. We reverse in part and affirm in part.

Appellee, United Companies Life Insurance Co., correctly concedes the first two points on appeal. First, guarantors of a purchase mortgage loan should be liable only for the amount of a deficiency if established subsequent to a foreclosure. *See Hatton v. Barnett Bank of Palm Beach County*, 550 So. 2d 65, 66-68 (Fla. 2d DCA 1989). Therefore, the guarantors here may not be held liable for the full amount of the judgment prior to a determination of a deficiency. Second, appellee is not entitled to an award for appraisal and environmental assessment fees where the loan documents do not provide for either fee.

Turning to the contested issue on appeal, we conclude that the trial court did not abuse its discretion in denying appellants' motion to amend their pleadings to state an affirmative defense of usury. *See Costa Bella Dev. Corp. v. Costa Dev. Corp.*, 445 So. 2d 1090 (Fla. 3d DCA 1984). While the trial court has discretion to grant amendments to pleadings even during trial, this liberality diminishes as the case progresses. *Ruden v. Medalie*, 294 So. 2d 403, 406 (Fla. 3d DCA 1974).

In addition, the mortgage note expressly stated that interest was to be charged only at a lawful percentage. The inclusion of this language in loan documents has been held to warrant dismissal of a usury claim. *Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n*, 531 So. 2d 356, 357 (Fla. 5th DCA 1988), *review denied*, 541 So. 2d 1172 (Fla. 1989).

Finally, the trial court did not award the prepayment penalty. Appellants had asserted that this penalty in combination with the default interest rate constituted usury. Thus, the court's refusal to

permit the amendment was harmless since the court effectuated the parties' expressed intent that a usurious rate not be charged or received. Accordingly, we reverse the trial court on the issues to which appellee confessed error while, at the same time, affirming the trial court's denial to amend the pleadings.

Reversed in part; affirmed in part.

* * *

Dissolution of marriage—Equitable distribution—Portion of final judgment awarding wife one-half interest in marital home did not conflict with oral pronouncement of trial judge—Any ambiguity in oral pronouncement was resolved through entry of subsequent written final judgment that was very clear

OFELIA DE ARMAS, Appellant/Cross-Appellee, vs. OMAR DE ARMAS, Appellee/Cross-Appellant. 3rd District. Case No. 92-1103. Opinion filed June 14, 1994. An Appeal from the Circuit Court of Dade County, Alan R. Schwartz, Acting Circuit Judge. Counsel: Edward C. Vining, Jr., for appellant. Elser, Greene & Hodor and Cynthia Greene, for appellee.

(Before BASKIN, JORGENSON, and LEVY, JJ.)

(PER CURIAM.) The primary contention of the former wife in filing this appeal is that the portion of the final judgment that awards her a one-half interest in the marital home is inconsistent with the oral pronouncement of the trial judge, concerning that subject, made at the conclusion of the trial.

After a careful examination of the trial transcript, we conclude that there is no conflict.

Specifically, although the final judgment awards the wife a one-half interest in the marital home, the wife seeks to be awarded the entire marital home based upon an oblique comment made by the court during a transitory portion of the judge's comments made at the conclusion of the trial. The former wife's contention, however, ignores the fact that the court orally articulated a very detailed and specific recitation of the manner in which all of the marital property was to be divided between the parties. Included within that pronouncement, was the provision that the husband was to be awarded one-half of the marital home. In fact, that portion of the judge's ruling was so specific that it even made reference to the dollar value of the asset (the marital home) that was being divided between the parties. The written final judgment entered by the court is totally consistent with the oral pronouncement made by the trial court, at the end of the final hearing, regarding the marital home. It clearly awards one-half of the marital home to the former wife and one-half to the former husband. Furthermore, to the extent that the former wife feels that the trial court's pronouncement may have contained a slight ambiguity, such a question was completely resolved by the court through the entry of a subsequent written final judgment that is very clear. *See Suburban Disposal Service of Pasco, Inc. v. Central Carting, Inc.*, 465 So. 2d 623, 624 (Fla. 2d DCA 1985). Lastly, regarding the other points raised by the parties herein, the record reflects no error.

Affirmed. (JORGENSON and LEVY, JJ., concur.)

(BASKIN, J., concurring in part; dissenting in part.) I concur with the majority holding that the trial court did not abuse its discretion in entering the attorney's fee award. I agree as well, with the court's determination as to the ownership and valuation of the businesses. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *Mann v. Mann*, 578 So. 2d 395 (Fla. 3d DCA 1991); I would, however, reverse the portions of the judgment awarding the marital home, distributing the marital assets, and denying the wife permanent alimony. On remand, I would require clarification regarding the award of the marital home, the basis for the disproportionate asset distribution, and denial of permanent alimony.

The first impediment to affirmance is the record. It reflects a conflict in the judge's statements distributing the marital home. At the final hearing, the court orally awarded the husband "half of the marital home which is $240,000, . . . half of the marital home [to the wife]," and then stated that the wife "is awarded the marital home, which is incidentally assessed at $480,000 as it appears in the affidavit of the husband." R. 462-463. The final judgment awarded each party one half of the marital home. The inconsistencies in the oral pronouncement and the conflict between the oral pronouncement and the written judgment concerning the marital home mandate clarification.[1] *See Leonard v. Leonard*, 613 So. 2d 1339 (Fla. 3d DCA 1993); *Krstic v. Krstic*, 604 So. 2d 1244 (Fla. 3d DCA 1992).

The next irregularity is the court's award to the husband of approximately 63% of the marital assets without explaining the basis for its inequitable distribution. Section 61.075(3)(d), Florida Statutes (1991), requires the trial court to make specific written findings of fact as to "[a]ny other findings necessary to advise the parties or the reviewing court of the trial court's rationale for the distribution of marital assets and allocation of liabilities." The record presents no discernible reasoning for the inequitable distribution. Under the facts of this case, the trial court should provide a rationale for a disproportionate distribution. *Lavelle v. Lavelle*, 19 Fla. L. Weekly D801 (Fla. 2d DCA April 6, 1994).

In view of the foregoing irregularities, the court's denial of permanent alimony to the wife is also a departure from applicable law.

> Permanent periodic alimony is used to provide the needs and necessities of life to a former spouse as they have been established by the marriage of the parties. The two primary elements to be considered when determining permanent periodic alimony are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds. The criteria to be used in establishing this need include the parties' earning ability, age, health, education, the duration of the marriage, the standard of living during its course and the value of the parties' estates.

Canakaris, 382 So. 2d at 1201-1202. The parties enjoyed a lavish life-style during their approximately seventeen-year marriage. The wife is 50 years of age, but has limited earning ability; the husband enjoys the ability to earn a far greater income. The husband had voluntarily paid the wife $725 a month in support during the separation. Under these circumstances, an alimony award was appropriate. In *Leonard*, 613 So. 2d at 1339, this court held that the trial court erred in reducing the alimony payments of $900 to $600 per month in the dissolution of a long-term marriage where the husband, who had a greater earning capacity, had voluntarily paid the 50 year old wife $900 per month in temporary support. The trial court may have intended to award the wife the marital home to equalize the parties' financial positions and obviate the need for permanent periodic alimony; its effort is vitiated by the flawed record before us.

I would reverse the indicated portions of the final judgment.

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[1]Contrary to the majority's position, *Suburban Disposal Serv. of Pasco, Inc. v. Central Carting, Inc.*, 465 So. 2d 623 (Fla. 2d DCA 1985), which precludes the trial court from construing a clear and unambiguous federal court order, does not mandate affirmance. The ambiguity, vel non, of the order in this case is not at issue. At issue in this case is the failure of the written judgment to conform to the court's oral pronouncement. It is well-settled law that the trial court's oral pronouncement must conform to the written judgment. *Ulano v. Anderson*, 626 So. 2d 1112 (Fla. 3d DCA 1993), and cited cases. In this case, it does not.

* * *

Criminal law—Judges—Disqualification—Writ of prohibition issued to disqualify trial judge in criminal prosecution where motion for disqualification alleged reasonable fear that criminal defendant would not receive impartial treatment because of trial judge's prior request of Florida Bar to institute grievance proceedings against defense counsel, and defense counsel's related request for Bar to refer the matter to Judicial Qualifications Commission—Motion to disqualify, filed one day after assignment of trial judge, was timely filed—Motion was legally sufficient under Rule of Judicial Administration and statute

SIGMUND FEUERMAN, Petitioner, vs. HONORABLE J. JEFFERSON

Interest—Usury—Real estate developer's suit against partnership for failure to repay loan developer made to partnership—Trial court's statement that lender did not harbor ill will or malevolent intent was not inconsistent with its finding that lender willfully charged a usurious rate of interest—Lender's intent was established by proving his knowledge of amount of interest to be received and intent to receive amount charged—Lender's claimed ignorance of specifics of usury laws does not preclude finding of intent—Contractual disclaimer of intent to violate usury laws in loan documents does not conclusively prove as matter of law that lender could not have willfully or knowingly charged or accepted excessive interest rate—Where amount charged for loan exceeded lawful interest rate by 27%, usurious amount did not depend on occurrence of future contingency, borrowers were in desperate need of money, and lender had full knowledge of borrower's financial situation and took full advantage of the situation by overreaching, insertion of usury savings clause in loan document did not save lender from usury penalties and finding of usurious intent—Conflict certified

JERSEY PALM - GROSS, INC., Appellant, v. HENRY PAPER and ANTHONY V. PUGLIESE, III, Appellees. 4th District. Case No. 93-0732. L.T. Case No. 92-1085 AO. Opinion filed July 6, 1994. Appeal from the Circuit Court for Palm Beach County; Richard B. Burk, Judge. Counsel: Daniel S. Pearson and Lucinda A. Hofmann of Holland & Knight, Miami, for appellant. Robert M. Weinberger of Cohen, Chernay, Norris, Morici, Weinberger & Harris, North Palm Beach, for Appellee-Pugliese.

(PARIENTE, J.) The plaintiff (lender) appeals the trial court's determination of usury in connection with a loan of $200,000 to defendants' (borrowers') real estate partnership. The lender limits its challenge to the trial court's finding of usurious intent. From our review of the record, the trial court's order entered after a non-jury trial is supported by substantial competent evidence. The existence of a "usury savings clause" did not preclude, as a matter of law, a finding of usury. We affirm.

The borrowers were partners in a real estate partnership which required capital to build a multi-tenant office building. The partnership owned land consisting of three prime lots in West Palm Beach worth $1,700,000, subject to a purchase money mortgage of $1,100,000 that was due shortly. To satisfy the purchase money mortgage and construct an office building on the land, the borrowers went to a bank to secure a loan. After obtaining an appraisal of the partnership assets and the project, the bank agreed to lend the partnership most of the needed capital. The loan amount, however, was $200,000 short of the estimated partnership needs. The borrowers needed a "bridge-the-gap loan."

The borrowers approached Walter Gross (Gross), a real estate developer, and suggested that he become an equity partner in the partnership for an investment of $200,000. Gross reviewed the partnership assets and appraisal. Fully aware of the partnership's financial picture and needs, he refused to become an investor, but agreed to lend the partnership $200,000 and charge an interest rate of 15% for eighteen months, amounting to $45,000 in interest charges. By the time of closing, Gross had formed the appellant corporation, Jersey Palm - Gross, Inc., for the purpose of making the loan.

Shortly before closing, Gross presented the borrowers with loan documents which included a demand for a 15% equity interest in the partnership as additional consideration for making the loan. Gross did not attempt to hide his motives for exacting an interest in the partnership. He testified that the partnership interest was an inducement to make the loan, even though he had previously agreed to loan the money at a 15% interest rate. Gross knew the value of the partnership based on the borrowers' disclosures and was aware of the borrowers' urgent need for funds. The borrowers were in desperate financial straits. With closing imminent, they were in no position to bargain or to seek another source of the money.

The lender brought suit when the borrowers failed to repay the loan. The borrowers' defense was that the loan was usurious from its inception, and therefore, an unenforceable debt because the consideration for the loan, which included the partnership interest and the 15% interest rate, totaled 45% per annum in interest.

The four requirements necessary to establish a usurious transaction are:

1. A loan, either express or implied.
2. An understanding that the money must be repaid.
3. In consideration of the loan, a greater rate of interest than is allowed by law is paid or agreed to be paid by the borrower.
4. Intent to charge a usurious rate, sometimes referred to as corrupt intent.

Dixon v. Sharp, 276 So. 2d 817 (Fla. 1973); *Rollins v. Odom*, 519 So. 2d 652 (Fla. 1st DCA 1988), *rev. denied*, 529 So. 2d 695 (Fla. 1988); *Rebman v. Flagship First Nat'l Bank*, 472 So. 2d 1360 (Fla. 2d DCA 1985).

Under Florida law, sections 687.04 and 687.071, Florida Statutes (1993) provide statutory causes of action which allow a borrower to seek affirmative relief against a lender who has made a usurious loan. Civil usury involves loans of $500,000 or less and an interest rate of greater than 18% and less than 25%. *See* § 687.03, Fla. Stat. (1993). Criminal usury involves any loan amount with a rate of interest greater than 25% but not in excess of 45%. *See* § 687.071, Fla. Stat. (1993). The penalties for civil usury include forfeiture of all interest charged; the civil penalties for criminal usury are forfeiture of the right to collect the debt. *See* § 687.04, Fla. Stat. (1993). In the case of either criminal or civil usury, the lender's willfulness to charge an excessive interest rate is determined by considering all of the circumstances surrounding the transaction. *Dixon*; *Rollins*. This might involve looking beyond the terms of the loan documents. *Antonelli v. Neumann*, 537 So. 2d 1027 (Fla. 3d DCA 1988). If a borrower promises or is otherwise required to pay a bonus or other consideration as an inducement to the lender to make the loan, such added obligations may be considered interest and can render a loan usurious. *See Cooper v. Rothman*, 63 Fla. 394, 57 So. 985 (1917).

The trial court here made factual findings, on the evidence presented, that the net equity value of the partnership at the time the loan was made, based on partnership assets of $1,700,000 and debts of $1,100,000, was $600,000. The lender does not challenge those findings on appeal. The lender also does not dispute the trial court's finding that the lender charged usurious interest when it exacted a 15% interest in the partnership as an additional condition of making the loan. The trial court correctly calculated the effective interest rate at 45% per annum over the eighteen month loan period, with the partnership interest of $90,000 (15% interest in partnership valued at $600,000) added to the $45,000 in interest charges (15% interest rate on loan of $200,000). The cost of the loan totaled $135,000, which was an effective interest rate of 45% on a loan of $200,000 for the eighteen month period of the loan.[1]

While the lender does not dispute the mathematical calculations on appeal, it contends it lacked the requisite intent. It asserts that knowledge of the amount received as consideration for the loan does not equate with corrupt intent to receive more than a legal rate of interest. The lender points to the trial court's findings of fact as negating the element of intent, partly because of the inclusion of the following statement:

> Though *the court does not believe that Jersey Palm-Gross, Inc. harbored ill will or malevolent intent* in making the loan to Jersey Palm Associated in consideration of receiving both a 15% interest in the partnership and payments of interest at the rate of 15% per annum on the principal amount of the loan, the court finds that plaintiff was aware of the value of the consideration which it was receiving or had a right to receive pursuant to the Loan Documents, and that the value of this consideration, when spread over the 18 month term of the loan exceeded 25% of the amount of the loan (emphasis added).

Within the same written order the court also made the additional

finding:

> As Plaintiff knew the value of the consideration which it received in consideration for making the $200,000.00 loan and further, the Plaintiff knowingly and willingly charged and accepted this consideration, the Court concludes that Plaintiff possessed the requisite intent to render the $200,000.00 loan transaction usurious.

The determination of intent is the responsibility of the trier of fact. *Szenay v. Schaub*, 496 So. 2d 883 (Fla. 2d DCA 1986); *Rebman*. The trial court clearly found that the lender purposefully charged a usurious interest rate, and therefore, possessed the requisite intent. Its statement that "the lender did not harbor ill will or malevolent intent" is not inconsistent with its finding of willfulness. The criminal usury statute uses the terms willfully and knowingly, not "ill will or malevolent intent."[2] The supreme court in *Dixon* cited with approval the definition of willfully and knowingly set forth in *Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933):

> A thing is willfully done when it proceeds from a conscious motion of the will, intending the result which actually comes to pass. It must be designed or intentional, and may be malicious, though not necessarily so.

We agree that mathematical calculations alone do not equate with usurious intent. *Dixon*. However, here the lender knew at the outset the total value of the amount he was receiving in consideration for making the loan. Gross, the lender's president and sole stockholder, is a developer with 40 years experience and not an unsophisticated lender. He knew that the borrowers had an urgent need for the money. He dictated the terms of the loan. The fact that the borrowers were "in distress" or "necessitous" when the loan was made is as significant as the fact that the lender dictated the terms of the loan. *Compare Dixon*, 276 So. 2d at 819. Our supreme court explained the purpose of Florida's usury statute:

> The very purpose of statutes prohibiting usury is to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of the loans.

Dixon, 276 So. 2d at 820, citing *Chandler*, 146 So. at 551.

The lender's claimed ignorance of the specifics of Florida's usury laws does not preclude a finding of intent. *Shorr v. Skafte*, 90 So. 2d 604, 607 (Fla. 1956); *Rollins*; *Ross v. Whitman*, 181 So. 2d 701 (Fla. 3d DCA), *cert. denied*, 194 So. 2d 624 (Fla. 1966). Gross' testimony that he did not intend to charge an unlawful rate of interest is also not determinative. *Rollins*. Obviously, such testimony is self-serving.

Despite the lender's assertions to the contrary, the requisite intent was established by proving the lender's knowledge of the amount of interest to be received and intent to receive the amount charged. *North American Mortg. Investors v. Cape San Blas Joint Venture*, 378 So. 2d 287, 291 (Fla. 1979); *Dixon*; *Shorr*; *Rollins*; *Curtiss Nat'l Bank of Miami Springs v. Solomon*, 243 So. 2d 475, 477 (Fla. 3d DCA 1971); *River Hills, Inc. v. Edwards*, 190 So. 2d 415, 424 (Fla. 2d DCA 1966). The evidence thus fully supports the trial court's conclusion that the lending scheme resulted in interest in excess of 25% per annum and that such result was intended by the lender.

A more troublesome question is whether the existence of a contractual disclaimer of intent to violate the usury laws commonly known as a "usury savings clause" in the loan documents in this case removes the determination of usurious intent from a factual inquiry and conclusively proves as a matter of law that the lender could not have "willfully" or knowingly charged or accepted an excessive interest rate.[3] The trial court held that "the exculpatory language [usury savings clause] inserted into the $200,000.00 Promissory Note does not negate Plaintiff's knowledge that it was charging and intended to charge consideration for making the loan in excess of 25% of the value thereof."

The lender relies on *Forest Creek Dev. Co. v. Liberty Savings & Loan Ass'n*, 531 So. 2d 356 (Fla. 5th DCA 1988), *rev. denied*, 541 So. 2d 1172 (Fla. 1989), which affirmed the trial court's dismissal of a usury count where the mortgage note contained a savings clause providing that interest would not exceed the maximum rate allowable by law. If it did exceed the maximum rate, the provision added that the excess sum would be credited as a payment of interest. The fifth district does not discuss the underlying facts concerning the loan transaction, including whether the mortgage note was an adjustable mortgage rate. *Forest Creek* cites no authority for holding that the usury count was properly dismissed because of the usury savings clause. No other Florida case goes as far, and we expressly disagree with the blanket holding in *Forest Creek*. We note, however, that there is a distinction between transactions which are usurious at the outset as in the case before us and transactions which over the course of the loan may become usurious as a result of a variable interest rate.

In *Szenay v. Schaub*, 496 So. 2d at 885, the second district approved the trial court's application of the usury savings clause in the mortgage note and the trial court's conclusion that "even though the mortgage and the note called for a usurious rate of interest, appellees had no intent to charge appellants such a rate." Thus, the court found no abuse of discretion on the part of the trial judge in making a *factual* finding of no usury. The opinion does not discuss whether any other facts influenced the trial court's decision, but treats the issue of the usury savings clause as *evidence* relating to the issue of intent.[4] Similarly, the trial court here considered the usury savings clause on the factual issue of intent.

First American Bank and Trust v. International Medical Ctrs., Inc., 565 So. 2d 1369 (Fla. 1st DCA), *rev. denied*, 576 So. 2d 286 (Fla. 1990) discusses usury savings clauses, but only in dicta. The first district had reversed the trial court's finding of usury on other grounds, and therefore, stated that it was unnecessary to review the sufficiency of the record supporting the trial court's ruling. In commenting on the usury savings clause in the loan document, the court noted:

> In a case such as this, where the effective interest rate found to be usurious is so near the allowable maximum depending on disputed legal principles of valuation, a strong showing indeed must be made to invalidate such provisions in the loan document.

Id. at 1374. Certainly, this statement is a tacit acknowledgment that the determination of usury by the finder of fact would not be legally precluded merely by the insertion of a usury savings clause. Indeed, the court's comments could be interpreted as authority for the proposition that where the interest rate charged is far in excess of the legal rate (versus close to the allowable maximum), such clauses need not be given effect. The appellate court's role is limited to a sufficiency of the evidence under review.

In the most recent Florida case to discuss usury savings provisions, the second district expressly rejected the notion that a disclaimer clause in a promissory note precluded a finding of usury and held that a factual dispute remained whether the alleged illegal interest was usurious. *Plantation Village Ltd. v. Aycock*, 617 So. 2d 729 (Fla. 2d DCA 1993). The lender argued that the disclaimer clause was credible evidence of lack of corrupt intent. The second district also questioned, but did not decide, whether a disclaimer clause can ever save the lender from criminal usury pursuant to section 687.01, because the "savings" provisions of Florida's usury laws, section 687.04(2), apply only to civil usury.

Section 687.04(2) allows a lender a complete defense to civil usury if *prior* to the institution of an action by a borrower or the filing of a defense, the lender notifies the borrowers of any allegedly usurious overcharge and refunds the amount of any overcharge. Thus, Florida's usury law affords lenders a method to avoid a claim of usury by taking the affirmative action of notification and refund *before* the borrower raises the claim of usury in litigation. On the other hand, a usury savings clause is an expres-

sion of the lender's intent to refund the usurious charges only *after* a claim of usury is raised and challenged by the borrower. We find the blanket application of a usury savings clause to defeat a usury claim as a matter of law to be inconsistent with section 687.04(2). The fact that the legislature has created certain exceptions to the application of the usury laws and a procedure for avoiding a claim of usury does not in our view require us to interpret usury savings clauses to grant commercial lenders *automatic* immunity from the reach of our state's usury statute so as to nullify its effect.

A review of the decisions nationwide reveals that only North Carolina, Texas and Connecticut have discussed the effect of usury savings clauses on otherwise usurious transactions.[5] The North Carolina Supreme Court has invalidated usury savings clauses as against the public policy of the state.[6] The North Carolina Supreme Court explained its rationale in *Swindell v. Federal Nat'l Mortg. Ass'n*, 330 N.C. 153, 160, 409 S.E.2d 892, 896 (1991):

> The [usury] statute relieves the borrower of the necessity for expertise and vigilance regarding the legality of rates he must pay. That onus is placed instead on the lender, whose business it is to lend money for profit and who is thus in a better position than the borrower to know the law. A 'usury savings clause,' if valid, would shift the onus back onto the borrower, contravening statutory policy and depriving the borrower of the benefit of the statute's protection and penalties. . . . A lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower.

Texas courts since 1937 have repeatedly acknowledged the validity of the usury savings clauses, but still hold that a usury savings clause will not necessarily relieve the lender from the consequences of the usury laws when the transaction is clearly usurious at the outset. *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937); *Woodcrest Assocs., Ltd. v. Commonwealth Mortg. Corp.*, 775 S.W.2d 434 (Tex. Ct. App. 1989). In *Nevels*, the Texas Supreme Court, in acknowledging the validity of usury savings clauses, gave the following strongly worded caveat:

> Of course we do not mean to hold that a person may exact from a borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done.

102 S.W.2d at 1050. In explaining this caveat, the Texas appellate court in *First State Bank v. Dorst*, 843 S.W.2d 790 (Tex. Ct. App. 1992) gave the following example:

> As a simple example, a creditor may not specifically contract for a 30% interest rate and then avoid the imposition of usury penalties by relying on a savings clause that declares an intention not to collect usurious interest.

Id. at 793. In contrast, "a savings clause may cure an open-ended contingency provision the operation of which may or may not result in a charge of usurious interest." *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 340-41 (Tex. 1980); *First State Bank*. Despite acknowledging the validity of usury savings clauses, the Texas courts are quick to point out that:

> The effect of such clauses in a particular case is largely a question of construing the terms of the savings clauses as a whole and in light of the circumstances surrounding the transaction.

Woodcrest, 775 S.W.2d at 438; *Nevels*, 129 Tex. at 197-98, 102 S.W.2d at 1049-50. The inquiry is thus fact based.

While we are unwilling to hold that usury savings clauses are unenforceable as against this state's public policy, neither are we willing to hold that the insertion of a usury savings clause in one of several documents to a loan transaction will shield the lender from the reach of Florida's usury laws as a matter of law. A usury savings clause is one factor to which the finder of fact should look in determining whether all of the circumstances surrounding the transaction support a finding of intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned. Where the actual interest charged is close to the legal rate, or where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent.

Here, the amount charged for the loan *exceeded* the lawful rate of interest by 27%. The usurious amount was exacted at the outset, and did not depend on the occurrence of a future contingency, which might or might not have made the loan usurious. The borrowers were in desperate need of money. The lender had full knowledge of the borrower's financial situation and took full advantage of the situation by overreaching. The usurious charges did not occur by happenstance, but through the lender's purposeful actions. We find that the insertion of a usury savings clause in a single document does not save this lender under these circumstances from the usury penalties, nor preclude the trial court's finding of usurious intent. We will not substitute our judgment for that of the trial court.

Accordingly, the judgment of the trial court is affirmed. We certify conflict with *Forest Creek*. (GLICKSTEIN, J., concurs. FARMER, J., dissents with opinion.)

(FARMER, J., dissenting.) The majority upholds the decision of a trial judge finding a criminal usury violation in this commercial loan transaction, notwithstanding a specific provision in the loan documents disavowing any intent to violate the usury statutes and automatically amending the transaction to remove the offending provisions and credit any adjustments necessary if the court should so construe them. I disagree with the finding of a usury violation.

After asserting that the "borrowers were in desperate need of money," and that the "lender had full knowledge of the borrower's financial situation," the majority concludes that the lender was guilty of taking "full advantage of the situation by over reaching." Not only is there no factual finding by the trial judge to this effect, but as the majority tacitly recognizes, he actually absolved the lender of any improper motive.[7]

The traditional essence of a Florida usury violation is a "corrupt intent to take more than the legal rate for the use of the money" lent. *Stewart v. Nangle*, 103 So. 2d 649 (Fla. 2d DCA 1958); *Clark v. Grey*, 101 Fla. 1058, 132 So. 832 (1931). Even assuming there were evidence, which is lacking here, to support a finding that the partnership value taken for the loan was $90,000, mere knowledge of that value, coupled with a knowing and willful acceptance of that value, in my opinion would not alone amount to the required "corrupt intent to take more than the legal rate for the use of money."

The majority's contrary conclusion represents an attempt to shoehorn this case into the "necessitous borrower" class, *see Chandler v. Kendrick*, 108 Fla. 450, 146 So. 551, 552 (1933), for whose benefit the usury statutes were designed "to bind the power of creditors * * * and prevent them from extorting harsh and undue terms in the making of loans." *Id.* As I will attempt to show, however, the economic realities of the marketplace facing commercial borrowers bear no relation to the "necessitous borrower" that the legislature or court envisioned.

The facts show that the borrower was a developer who sought a bridge-the-gap loan to cover interim cash needs between land acquisition and the closing of the construction loan for a multiple tenant office building. When the partnership was ready for the construction loan, the land was valued at $1,700,000 and the partnership already had debts of $1,100,000. The construction lender was given a first mortgage on the land to secure payment of a $2,123,000 construction loan, however. Thus developer was forced to seek second mortgage or unsecured financing for this loan. Unable to find such financing from any other source, bor-

rower turned to this lender.

In agreeing to make the loan at an interest rate of 15%, the lender insisted on being given a 15% share of the partnership developing the project.[8] The trial judge and the majority engage in some "creative accounting" to arrive at a conclusion that the "net equity" value of the partnership share was $600,000. They accomplish this result by subtracting the partnership's debts ($1,100,000) before the construction loan from the value of the land ($1,700,000). It may be homespun logic on my part, but I do not see how the construction loan can be so advantageously left out of the accounting equation. When the $2,123,000 loan is considered, the partnership has no "net equity", and the value of any individual partner's share was at best a mere expectancy. As events later proved, the dreams of profits never materialized.

The agreements between borrower and lender contained a specific provision, which the court calls a "usury savings clause." This clause provided that, if borrower's grant to the lender of the partnership share should be deemed to be in the nature of a time charge for the use of money and as so construed ultimately result in a violation of Florida's usury laws, then the transaction would be recalculated and restructured so as to eliminate any usury violation and to return to the borrower any excessive charges already paid. If, as I have concluded, the partnership share had no value, there is nothing to aggregate with the stated interest to make the loan usurious, and therefore the savings clause would be unnecessarily applied.

Both courts have concluded that the partnership grant violated the usury laws and that the violation cannot be avoided by the savings clause. They base this conclusion on the theory that the parties' savings clause is merely "some evidence" of an intent not to violate the usury laws, which the finder of fact is free to give such weight as the finder deems desirable. With an implicit sweep of the public policy broom, they reject the notion that this provision should be treated with any greater import, short of conclusive effect, than the impotent interpretation of "some evidence". I believe that this court's decision fails to give the operative provision the categorical effect that these commercial parties themselves intended it have when contracting.

In *Continental Mortgage Investors v. Sailboat Key Inc.*, 395 So. 2d 507 (Fla. 1981) [*CMI*], which involved a usury issue not unlike the one found in this case, Justice Sundberg wrote the following about Florida's statutory usury laws:

> "The usury statute itself, fraught as it is with exceptions, belies the imputation of a strong public policy. See § 687.031, Fla. Stat. (1975). In 1975 The Florida Consumer Finance Act allowed interest on small loans as high as 30% per annum, in contrast to the general usury ceiling of 10% per annum. § 516.031, Fla. Stat. (1975). The Savings Association Act made usury limits simply inapplicable to building and loan associations. §§ 665.395, 687.031, Fla. Stat. (1975). Under the Banking Code, banks could charge up to 18% per annum on certain loans. § 659.181, Fla. Stat. (1975). Florida has long recognized the general exception to usury laws of the time-price doctrine. See Davidson v. Davis, 59 Fla. 476, 52 So. 139 (1910). The usury law does not apply to the sale of bonds, or mortgages on those bonds, section 687.031(1), Florida Statutes (1975), or to the transfers of negotiable paper in certain cases, section 687.04, Florida Statutes (1975).
>
> The legislature recently raised the maximum interest rates allowable under the usury laws, demonstrating that this public policy is at very least relatively flexible in a confrontation with commercial reality. See Ch. 79-274, § 13, Laws of Florida. Nor do we consider usury protections fundamental to a legal system. The defense of usury is a creature entirely of statutory regulation, and is not founded upon any common-law right, either legal or equitable. Matlack Properties, Inc. v. Citizen & Southern National Bank, 120 Fla. 77, 162 So. 148 (1935). Finally, we note the limited effect of the usury laws upon a contract. '[T]he usury statutes in this jurisdiction do not have the effect of invalidating contracts for [usurious] interest . . . but only accord to the obligor the personal privilege of setting up . . . affirmative defenses of usury in respect to such contracts.' Yaffee v. International Co., 80 So. 2d 910, 912 (Fla. 1955)." [e.o.]

395 So. 2d at 509. Nothing that Justice Sundberg said in 1981 would be any different today, except for some of the digits.

There is nothing in the statutes, whence all public policy on the subject of usury originates, that expressly condemns the kind of provision used here or that limits its effect to an empty evidential consequence. On the contrary, one statutory provision that is more directly applicable to this case implies that the savings clause should be wholly efficacious to its obvious purpose: section 687.04(2), Florida Statutes (1993), expressly allows a post facto purge of any simple usury violation. To achieve the statutory purge, section 687.04(2) simply requires that, before any civil action has been filed, the lender must give the borrower notice of the amount of any usurious overcharge and tender a refund of the overcharge already collected, along with an "adjustment" of the loan documents to memorialize that the borrower "will not be required to pay further interest in excess of the amount permitted by s. 687.03." The majority does not explain why under anything found in chapter 687 such a purge could not be built ab origine like this savings clause into the loan documents themselves and achieve the same effect. They do not seem to consider whether if usury can be purged ex post facto, as the statute clearly allows, it can also be avoided anticipatorily, which the statute does not clearly prohibit.

Frankly, without a statutory prohibition on usury savings clauses, I am quite unwilling to impose a judge-made gloss denying commercial[9] parties the right to contract around Florida's usury statutes. As Justice Sundberg so convincingly showed in *CMI*, certainly commercial parties already have considerable leeway to avoid usury violations under the current scheme. In addition to the above statutory purge, sections 687.12 and 687.13 still exempt most institutional lenders from the usury laws altogether; and subsections (2), (3), (4) and (5) of section 687.03 exempt a huge number of commercial loan transactions from the chapter's provisions.

It is even more interesting to contemplate that, as to loans greater than $500,000, section 687.03(4) actually exempts stock options, interests in profits, receipts, or residual values which have been charged, reserved or taken as an advance or forbearance for the loan, so long as the value of such property interest is dependent on the success of the venture in which the loan proceeds are used. It is undeniable that the grant of the 15% share in the partnership was nothing if not dependent on the future success of the real estate venture in which the proceeds were used. Hence, under this statute, partnership shares taken as consideration for making the loan are plainly permissible in some loans, so there is nothing especially pernicious about lenders taking shares of the borrower's venture for their loan. If the amount here exceeded $500,000, we would not even be talking about a usury violation, because the entire transaction would have been exempted from this defense.

Equally important, if those statutory exemptions are not enough, there is always the right of commercial parties to an interstate loan with an interest rate that would be deemed usurious under Florida law to contract for the application of the governing law of a different though relevant state. In *CMI*, Florida adopted the generally held view that "usury laws are not so distinctive a part of a forum's public policy that a court, for public policy reasons, will not look to another jurisdiction's law which is sufficiently connected with a contract and will uphold the contract."[10] 395 So. 2d at 509.

The principal rationale for adopting this choice of law rule was the "rule of validation;" i.e., in the absence of a choice of law provision in the parties' contract, the court will apply the law of the related jurisdiction that favors the agreement. *CMI*, 395 So. 2d at 513. Indeed, if the foreign jurisdiction has a normal relation to the transaction, the good faith of the parties in so

choosing is irrelevant. 395 So. 2d at 512-13. It is perhaps supremely ironical that, if the parties' agreements here had contained no provision choosing Florida law, the court almost surely would have used the conflict of laws calculus commonly applied, *see, e.g., OFS Equities Inc. v. Conde*, 421 So. 2d 651 (Fla. 3d DCA 1982), and thus found a validating jurisdiction in the place of the lender's home office, where the payments on the notes were to have been made.

The critical idea underlying the rule of validation is that it is absurd to think that contracting parties would choose, or have chosen, the law of a forum that would frustrate what they have undertaken to do. Commercial law does not indulge the assumption, a priori, that contracting parties have wasted their time and thus intend to achieve nothing by their bargain. Rather the law proceeds, or should, on the presumption that the parties intended a valid agreement; the mission of the court must be to save their bargain if it can be done. Judge-made rules should not be crafted to invalidate contractual provisions that statutory law has not prohibited. Here, this court has stretched to uphold an invalidation, rather than the contrary.

The majority brushes aside the decision in *Forest Creek Development Co. v. Liberty Savings & Loan Ass'n*, 531 So. 2d 356 (Fla. 5th DCA 1988), *rev. denied*, 541 So. 2d 1172 (Fla. 1989), in which because of a savings clause, the fifth district did not even permit a usury defense to survive a mere motion to dismiss. *Forest Creek* thus appears to stand for the proposition that the savings clause may bar a usury defense as a matter of law. I do not think, however, that this precedent can be discounted to the point of oblivion merely because one district court thought the rationale for its decision so obvious as not to require any belaboring.[11]

The loan transaction in question was made in March 1990. The fifth district released its decision in *Forest Creek* in 1988. It is not farfetched to contemplate that when this out-of-state lender was asked to consider this highly risky loan, its lawyer relied on *Forest Creek* in approving the structure of the transaction and the use of the savings clause without a choice of foreign law provision.[12] I should have thought that reliance on unambiguous case authority from a Florida district court of appeal upholding a particular form of agreement against a usury attack would be dispositive. The majority does not explain why this lender's reliance on *Forest Creek* should not result in validation of the parties' precise agreement.

As I have already stressed, the commercial realities were stacked against the kind of financing sought by this borrower from the very beginning. The unavailability of a commercial loan in certain kinds of circumstances like these is evidence not of a "necessitous borrower," as the court intended that term in *Chandler*, but of economic decisions in the marketplace. Second mortgage or unsecured financing for as yet undeveloped property is highly risky and quite unattractive to lenders in times, as here, of economic slowdown.

Such lending for this kind of commercial use, when it is even available, is reserved for only the most creditworthy borrowers, who have the independent financial resources to pay the loan if the venture fails. No one suggests that this partnership had either the credit reputation or the unencumbered assets to measure up to that standard. For this kind of commercial credit the marketplace is all but nonexistent, and the ultimate terms when available will surely be unique and costly. But this is a function of the commercial risk; it is not the working of "harshness or undue terms." In any case it simply has no semblance to the person who seeks a consumer loan for purely household purposes.

Having said all of the foregoing, I hasten to add that ascribing to savings clauses a categorical avoidance of usury, as in *Forest Creek*, might be too sweeping. To carry out the obvious statutory purpose in commercial cases, I would give the savings clause a slightly less far-reaching effect. In my opinion, these clauses should be treated as creating a strong presumption of avoidance of any usury violation, subject to being overcome only by clear and convincing evidence of criminal loan-sharking in its classic sense. The lender must be shown clearly and convincingly to have intended a criminal violation of the usury laws and to charge purely for interest above the criminal limit, and that the savings clause merely represents a bad faith attempt to mask the criminal violation.

The sage advice of Polonius was never more true than here.

"Neither a borrower nor a lender be;
For loan oft loses both itself and friend,
And borrowing dulls the edge of husbandry."

Hamlet, act I, scene iii. In this instance, the borrower has failed on the subject real estate project and gone bankrupt, while—with our affirmance of the final judgment—the hapless lender has lost all interest due for the loan, the principal has been forfeited, and the lender must now pay his borrower's attorney's fees. Borrower and loan are gone, and husbandry (meaning commercial lending) has been flattened in the process. All this, mores the pity, without any cluster of words from our usury statutes unmistakably requiring this result.

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[1]The dissent asserts the trial court and this court engaged in creative accounting in the calculations of the partnership's value because it did not consider the effect that the newly acquired loans from the bank and the lender would have on the partnership balance sheet. We note that the lender does not on appeal question the trial court's calculations in valuing the partnership interest or in arriving at an usurious interest rate. It is clear from the record that the appraisal of the land at $1,700,000 was based on the unimproved land.

The dissent engages in speculation outside the record as to what effect the receipt of the loan amount from the bank would have on the net value of the partnership interest. However, part of the loan proceeds were to be used to pay off the existing liability of $1,100,000. The remaining proceeds were to be used to construct an office building which would enhance the value of the partnership by a comparable asset. Therefore, the loan monies received would most likely be offset by the reductions in preexisting liabilities and increases in assets.

[2]"Malevolent is defined as 1: having, showing or indicative of intense often vicious ill will: filled with or marked by deep-seated spite or rancor or hatred . . . 2: productive of harm or evil. . . ." Webster's Third New International Dictionary (unabridged) 1367 (3d 1986).

[3]The "usury savings clause" contained in the promissory note states:

> Nothing herein contained, nor in any instrument or transaction related hereto, shall be construed or so operate as to require the maker, or any person liable for the payment of the loan made pursuant to this note, to pay interest in an amount or at a rate greater than the highest rate permissible under applicable law. Should any interest or other charges paid by the maker, or any parties liable for the payment of the loan made pursuant to this note, result in the computation or earning of interest in excess of the highest rate permissible under applicable law, then any and all such excess shall be and the same is hereby waived by the holder hereof, and all such excess shall be automatically credited against and in reduction of the principal balance, and any portion of said excess which exceeds the principal balance shall be paid by the holder hereof to the maker and any parties liable for the payment of the loan made pursuant to this note, it being the intent of the parties hereto that under no circumstances shall the maker, or any parties liable for the payment of the loan hereunder, be required to pay interest in excess of the highest rate permissible under applicable law.

[4]Without discussing the law concerning usury savings clauses, in the case of *In re Concrete Express, Inc.*, 87 B.R. 718, 719 (S.D. Fla. 1988), the bankruptcy court held that while a usury savings provision "by itself is insufficient to avoid an adjudication of usury, it is credible evidence of the parties' intention that usurious interest not be present in the agreement."

[5]Thirty-nine states have usury laws, including Florida.

[6]A Connecticut appellate court recently followed the North Carolina rationale. *Countrywide Funding v. Kapinos*, Case No. 91-0504817 (Conn. Super. Ct. April 2, 1993) (unpublished).

[7]The trial court's final judgment contains the following finding of fact:

> "16. Though the Court does not believe that [lender] harbored ill will or malevolent intent in making the loan to [borrower] in consideration of receiving both a 15% interest in the Partnership and payments of interest at the rate of 15% per annum on the principal amount of the loan, the Court finds that [lender] was aware of the value of the consideration which it was receiving or had a right to receive pursuant to the Loan Documents, and that the value of this consideration, when spread over the 18 month term of the loan exceeded 25% of the amount of the loan."

Final Judgment, at 3-4. In its conclusions of law, the court ex-plained:

> "6. As [lender] knew the value of the consideration which it received in consideration for making the $200,000.00 loan and further, the [lender] knowingly and willingly charged and accepted this consideration, the Court

concludes that [lender] possessed the requisite intent to render the $200,000.00 loan transaction usurious." [c.o.]

Final Judgment, at 6.

[8]It goes without saying that an interest in a partnership is worth only what assets and profits the partnership can generate, less its debts and obligations. § 620.645, Fla. Stat. (1993). Here the partnership owned the undeveloped land, but the land was subject to the first mortgage of the construction lender. Hence the value of the interest in this partnership was ultimately dependent on the partnership turning a profit in the development of the land and the ultimate sales of completed units. A partner has a corresponding obligation to share pro rata in the payment of partnership debts or losses. § 620.63, Fla. Stat. (1993).

[9]I stress the purely commercial setting of this case. I express no opinion as to what my views would be if the "necessitous borrower" here were a consumer and the loan were entirely for household purposes.

[10]As Justice Sundberg pointedly noted in his opinion for the court in *CMI*, the "few courts that do rely on a public policy ex-ception in a usury-choice of law situation invariably are dealing with the individual, and often consumer, borrower." 395 So. 2d at 509. To repeat, this case concerns only commercial parties.

[11]I also recognize that both *Szenay v. Schaub*, 496 So. 2d 883 (Fla. 2d DCA 1986), and *First Am. Bank & Trust v. Int'l Medical Ctrs. Inc.*, 565 So. 2d 1369 (Fla. 1st DCA 1990), *rev. denied*, 576 So. 2d 286 (Fla. 1991), can be thought to have employed the "some evidence" standard used by the majority. In my opinion, however, the proper effect of these usury savings clauses lies somewhere between the conflicting cases but closer to *Forest Creek*. I agree that this court's decision today, along with *Szenay* and *First American Bank*, are in obvious conflict with the fifth district's decision in *Forest Creek* and that this conflict should be certified.

[12]When the law cuts against a party, we are not hesitant to say that ignorance of the law is no excuse. Should not a healthy equitable symmetry require us to indulge the presumption that everyone knows the law when extant precedent would validate a commercial transaction?

* * *

SHAPIRO v. HERNDON. 4th District. #s 93-1890 and 93-1891. July 6, 1994. Appeal from the Circuit Court for Palm Beach County. AFFIRMED. *See* § 718.106(1), Fla. Stat. (1991); § 718.120(1), Fla. Stat. (1991).

STATE v. BENTON. 4th District. #92-3179. July 6, 1994. Appeal from the Circuit Court for Broward County. Affirmed. *Metcalf v. State*, 635 So. 2d 11 (Fla. 1994).

POWELL v. STATE. 4th District. #93-1988. July 6, 1994. Appeal from the Circuit Court for Broward County. Affirmed. *Munoz v. State*, 629 So. 2d 90 (Fla. 1993).

TEJADA v. STATE. 4th District. #94-0581. July 6, 1994. Appeal of order denying rule 3.850 motion from the Circuit Court for Broward County. AFFIRMED. *See Jones v. State*, 591 So. 2d 911 (Fla. 1991).

* * *

Bonds—Receivership—Receivership by Department of Insurance of insolvent insurance companies which had issued payment and performance bonds in favor of contractor guaranteeing performance of subcontractors which later defaulted under their subcontracts—Trial court's award of 12 percent statutory interest on amount awarded to contractor in its claim of right against receiver was error—Evidence did not support finding that contractor met its burden of proving its entitlement to set-off for overtime payment it made to a subcontractor which took over defaulting subcontractor's work—Receiver failed to establish that per diem for meals and certain sum for staff salaries were necessary to recovery of property or funds—Jurisdiction—Trial court had subject matter jurisdiction over receiver's claim against contractor where receiver established that contract funds claimed on both subcontracts were property of insolvent insurer, and therefore those funds could properly be characterized as property belonging to insurer in possession of another, and funds were liquidated amounts when trial court ordered amount in dispute deposited in special account

In re: the Receiverships of Southeastern Reinsurance Company, Inc. and Southeastern Casualty and Indemnity Insurance Co., Inc.: THE FLORIDA DEPARTMENT OF INSURANCE, AS RECEIVER, Appellant, v. CENTEX-GREAT SOUTHWEST CORPORATION, Appellee. 1st District. Case Nos. 93-761/958/1941. Opinion filed July 5, 1994. An appeal from the Circuit Court for Leon County. P. Kevin Davey, Judge. Counsel: Michael Berry, Senior Attorney, Florida Department of Insurance, Division of Rehabilitation and Liquidation, Tallahassee; Helen Ann Hauser, of Dittmar & Hauser, P.A., Miami, for Appellant. Linda Dickhaus Agnant of James E. Glass Associates, Miami, for Appellee.

(DAVIS, J.) The Florida Department of Insurance, as receiver for Southeastern Reinsurance Company, Inc. and Southeastern Casualty and Indemnity Insurance Company, Inc. appeals the trial court's order on claim of right filed by Centex-Great Southwest Corporation ("GSW") as that order was modified by order on the receiver's motion for rehearing, and an order on the receiver's motion to tax costs and assess attorney's fees. This case arises out of a demand by the receiver pursuant to section 631.154, Florida Statutes, for return of funds of the receivership estate, which funds were being held by GSW. The trial court awarded GSW certain sums which GSW claimed as set-offs from funds belonging to the receivership estate. On appeal, the receiver challenges the trial court's finding that GSW had a claim of right to funds claimed by GSW as set-offs and the court's award of statutory prejudgment interest on the set-off funds. The receiver also asserts as error the trial court's failure to award the receiver full reimbursement for the costs of collection of the receivership funds. GSW cross-appeals and asserts that the trial court lacked subject matter jurisdiction, under section 631.154, over the dispute between the receiver and GSW, a claimant in the receivership, as to the receiver's entitlement to payment of funds assigned to its predecessor and the amount of set-off to which GSW was entitled. GSW also cross-appeals the partial summary judgment holding that GSW's parent corporation's claims could not be set-off against funds due and owing from GSW. Because we find that the trial court erred in awarding statutory interest on the set-off in the course of a receivership proceeding conducted under Chapter 631, we reverse that award. Because we find a lack of evidence to support the set-off of $29,516.28 allowed by the trial court, we reverse that award. The trial court did not err in disallowance of certain costs. We find no merit to the other issues raised by the receiver nor to the issues raised on cross-appeal by GSW, and therefore affirm as to those issues.

Insolvent insurers, Southeastern Reinsurance Company, Inc. and Southeastern Casualty and Indemnity Insurance Company, Inc. ("Southeastern") were liquidated by orders of the Leon County Circuit Court on September 1, 1989. The Florida Department of Insurance was appointed as statutory receiver pursuant to Chapter 631. The companies were treated as one and the cases were consolidated. Prior to their liquidation, the Southeastern companies had been in the insurance and surety business, issuing payment and performance bonds for contractors engaged in the construction business in Florida. Two of the companies' surety bonds were issued in favor of GSW guaranteeing the performance of subcontractors Peerless Electric, Inc. ("Peerless") and Bloomingdale Landscape Nursery, Inc. ("Bloomingdale") in relation to subcontracts for work on the Orlando International Airport. GSW was the general contractor.

Both Peerless and Bloomingdale defaulted under their subcontracts. Peerless defaulted in June 1988; Bloomingdale defaulted in July 1988. Southeastern, as the surety, undertook the completion of the subcontracts. Southeastern used an affiliated entity, Contractors Performance Corporation ("CPC"), to supervise the two contracts. Peerless executed an assignment of the "proceeds of contract number 115" to Southeastern. After entry of the liquidation order, the receiver entered into a formal settlement agreement with Peerless by which the funds due to Peerless under the bonded subcontract were to be formally assigned to the receiver. The settlement agreement was approved by the receivership court by order dated November 27, 1989. Bloomingdale's principal also assigned all of the proceeds from the Bloomingdale subcontract to Southeastern. The Bloomingdale assignment occurred on July 7, 1988, prior to the liquidation of Southeastern. When Southeastern was liquidated, the Peerless and Bloomingdale subcontracts were not yet completed. The receiver monitored the completion of the subcontracts.

The subcontract between GSW and Bloomingdale required Bloomingdale to furnish all the landscaping work in connection with two parking structures referred to as "A" side parking garage and "B" side parking garage. After Southeastern failed

FOREST CREEK DEVELOPMENT COMPANY, etc., et al., Appellants,

v.

LIBERTY SAVINGS & LOAN ASSOCIATION, Appellee.

No. 87-804.

District Court of Appeal of Florida, Fifth District.

Aug. 18, 1988.

Rehearing Denied Sept. 26, 1988.

Mortgagor brought action against mortgagee concerning mortgagee's alleged failure to honor loan commitment and allegations that a loan was usurious. The Circuit Court, Seminole County, Kenneth M. Leffler, J., granted mortgagee's motion to dismiss. Mortgagor appealed. The District Court of Appeal, Sharp, C.J., held that: (1) defense to usury count appeared on face of complaint and attachments, and thus, count was properly dismissed, and (2) mortgagor failed to state breach of contract cause of action.

Affirmed in part, reversed in part and remanded.

1. Usury ⇐111(1)

A defense to mortgagor's usury claim against mortgagee appeared on face of complaint and attachments which set forth mortgage note, providing that in no event would interest exceed maximum rate of interest allowed by applicable law, and

thus, count dealing with usury was properly dismissed.

2. Mortgages ⇐216

Mortgagor's breach of contract allegation asserted against mortgagee was insufficient to state cause of action; there were no specifics alleged regarding amount of interest, terms of repayment, or funding; however, trial court should have given mortgagor a second chance to amend complaint in the interest of justice.

3. Estoppel ⇐118

When waiver is to be implied from conduct, acts, conduct, or circumstances relied upon to show waiver must make out a clear case.

4. Estoppel ⇐107
Mortgages ⇐216

Mortgagor's counts against mortgagee regarding misrepresentation and promissory estoppel sufficiently stated cause of action.

Thomas F. Neal, and David H. Simmons, of Drage, deBeaubien, Knight & Simmons, Orlando, for appellants.

Robert L. Young and Pascal DeBoeck, of Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., Orlando, for appellee.

SHARP, Chief Judge.

Forest Creek Development Company, *et al.*, appeals from an order granting Liberty Savings and Loan Association's motion to dismiss Forest Creek's amended complaint with prejudice. Forest Creek's causes of action concern Liberty's failure to honor a $250,000 loan commitment, and allegations that a $150,000 loan made by Liberty to Forest Creek was usurious. We reverse in part.

[1] We agree with the trial judge that the count dealing with usury was properly dismissed. A defense to this count appears on the face of the complaint and its attachments. The mortgage note provides:

> In no event shall the amount of interest due or payment in the nature of interest payable hereunder exceed the maximum rate of interest allowed by applicable law, as amended from time to time, and in the event any such payment is paid by the undersigned or received by the Holder, then such excess sum shall be credited as a payment of principal, unless the undersigned shall notify the Holder, in writing, that the undersigned elects to have such excess sum returned to it forthwith.

[2] With regard to the breach of contract count, we find that the allegations are insufficient to state a cause of action. There are no specifics alleged regarding the amount of interest, terms of repayment, or funding. However, we think the trial court should have given Forest Creek a second chance to amend its complaint in the interest of justice. *See Dingess v. Florida Aircraft Sales and Leasing, Inc.*, 442 So.2d 431 (Fla. 5th DCA 1983).

[3, 4] We find that the counts regarding misrepresentation and promissory estoppel do sufficiently state a cause of action, and that it was erroneous to have dismissed them. *See Fontainbleau Hotel Corp. v. Walters*, 246 So.2d 563 (Fla.1971). Liberty appears to agree that the elements of both were well pled, but it contends Forest Creek waived its complaint as to Liberty's failure to honor its claimed $250,000 additional loan commitment by subsequently accepting a $150,000 loan from Forest Creek. Normally waiver is a defense not raised on the face of a complaint. As in this case, a waiver defense depends upon allegations of facts and their subsequent proof.[1] This issue cannot be determined on the basis of Forest's amended complaint. *See, e.g., Ehmann v. Florida National*

1. "Waiver" is an intentional or voluntary relinquishment of a known right or conduct which infers such relinquishment. The essential elements of waiver are (1) existence of right at time of waiver; (2) privilege, advantage, or benefit which may be waived; (3) actual or constructive knowledge or right; and (4) intent to relinquish right. When waiver is to be implied from conduct, the acts, conduct, or circumstances relied upon to show waiver must make out a clear case. *Taylor v. Kenco Chemical & Mfg. Corp.*, 465 So.2d 581, 587 (Fla. 1st DCA 1985).

Bank at Ocala, 515 So.2d 1063 (Fla. 5th DCA 1987).

AFFIRMED in part, REVERSED in part, REMANDED.

DAUKSCH and COWART, JJ., concur.