SUPREME COURT OF FLORIDA

ELAINE FROHMAN, etc., et al.

Petitioners,

CASE NO. 84,038

vs.

JACOB BAR-OR,

Respondent,
_____/

RESPONDENT'S ANSWER BRIEF

CERTIORARI PROCEEDING FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT
(DISTRICT COURT CASE NO. 93-0109)

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INTRODUCTION

For the purposes of this Brief, unless otherwise named, all appellants herein shall be referred to as "Appellants" and occasionally, "plaintiffs". "Appellee" and "Respondent" shall refer to the sole appellee herein, Jacob Bar-or, and occasionally as "Defendant.

The following symbols will be used herein:

"R" for Record on Appeal.

"T" for Transcript of proceedings on October 28, 1992 in the trial court.

"A" for Respondent's Appendix unless otherwise noted.

"IB" for Appellant's Initial Brief.

STATEMENT OF THE FACTS AND OF THE CASE

The action below resulted from a mortgage foreclosure against Appellee under the terms of a second mortgage and note, which action arose from a transaction whereby Appellee, as the owner of real property and the owner of three mortgages (only two being in issue in this action), gave a second mortgage (A1) to Appellants (Plaintiffs below) and who, as additional collateral security for the repayment of the second mortgage, collaterally assigned his interest in the two mortgages ("collateralized mortgages" hereafter) (A2) owned by him. The trial court found that Appellee had defaulted on the second mortgage in March, 1987, by failing to make required payments.

As to the original loan transaction, Appellee signed the mortgage instrument and two separate instruments, an Assignment (A3), and a Repurchase Agreement (A4). Notwithstanding that the Assignment is, on its face, unconditional, the agreement of the parties and as found by the trial court below, and as stated in the Repurchase Agreement, was that the two mortgages were given as additional collateral security for the payment of the second mortgage, paragraph 1 of the Repurchase Agreement providing that:

> "The Notes and Mortgages above referenced shall be collateral for the full and prompt payment of the NOTE from BORROWER to LENDER. . ." etc. (A4).

Paragraph 3 of the Repurchase Agreement similarly references the mortgages as being assigned as "collateral".

Entry of Final Judgment in favor of Appellants occurred on April 10, 1989. In the Final Judgment: (1) the real property encumbered by the Appellants' second mortgage was foreclosed, (2) provision was made for the conditional foreclosure of the two

collateralized mortgages and, further, should a deficiency judgment not issue, the two mortgages would remain the property of Appellee free of any claim or lien of Appellants, (3) the amount found due and owing to Appellants was set, (4) the Receiver's duties were continued until further order of the Court, and (5) the Court reserved jurisdiction for various reasons, (including a possible deficiency judgment). Thereafter, the foreclosed real property was purchased at Clerk's sale by Appellants, and certificate of title was entered.

The record entry of the certificate of title was the last record act until, more than three years later, Appellee filed his Motion To Dismiss For Failure To Prosecute (R49) on October 8, 1992.

At issue in this appeal is entitlement to the two collateralized mortgages (A2), which the presiding trial judge specifically excepted from the immediate operation of the final judgment, finding and ordering that the two mortgages were foreclosed, but conditionally, and providing that, should no deficiency be adjudged, then the mortgages would remain the property of Appellee.

Of substantial importance to this appeal is the language contained in two paragraphs, 13 and 14, of the Final Judgment (R44-48) (description of mortgages and legals omitted for brevity):

> "13. That the Defendant, Jacob Bar-or's interest in the following described mortgages, and the interest of all persons claiming under him are hereby foreclosed subject to the following conditions: (descrip. and legals omitted; note also that the conditions were stated in a separate paragraph following).

> 14. Said foreclosure shall be conditioned upon a further determination that a deficiency exists between the Plaintiff herein and Defendant, Jacob Bar-or. In the event that no deficiency is adjudged then in that event the effect of this Order shall be that said mortgages shall be free of any liens or claims of Plaintiffs. If however if (sic) a deficiency judgment is later entered by this Court then the interest of the Defendant, Jacob Bar-or or anyone claiming under him in said mortgages will be sold by the Clerk of the Court at public auction to the highest bidder for cash to satisfy the amount of said deficiency judgment, said condition of sale, etc., being specified in the subsequent Order of Court." (Emphasis supplied).

Additionally, the Final Judgment contained language which retained jurisdiction, contemplating that, *inter alia*, a deficiency decree may be applied for by Appellant:

> "16. The Court retains jurisdiction for the purposes of making such orders as are just and equitable, including entry of a deficiency decree should such decree be required." (R44-48).

As to the final judgment language regarding the receiver, Appellants erroneously state that the Receiver was discharged ". . .by virtue of the Final Judgment being entered." (IB4, etc.). Quite the contrary, the Final Judgment adjudged, "That the Receiver is empowered to take all actions heretofore ordered by the Court until further Order of Court." (Emphasis supplied) (R44-48). Further order was neither sought by Appellants nor entered by the trial court. In fact, the Receiver, to this day, has neither filed a final accounting nor been discharged, a fact which becomes highly relevant when contrasted with the Appellants' post-judgment usurpation of the Receiver's authority without judicial knowledge or sanction, or knowledge by the Appellee, and when considering Appellants' request for equitable relief (IB48, etc.). The matter is discussed later in this brief.

The burden was upon the Appellants to proceed, post-judgment, to make timely application for deficiency and to prove their entitlement to it, thereby giving Appellee the opportunity to test Appellants' evidence and offer opposing evidence. Subsequent to the entry of the Final Judgment, after receiving payments (which should have been made to the Receiver) on the collateralized mortgages for approximately three years, and without application or notice to either the trial Court or Appellee and without authority, Appellants, in April, 1992, tendered satisfactions of the collateralized mortgages, thus permanently depriving Appellee of the record ownership of, and right of redemption in, the two collateralized mortgages, which rights cannot be restored. Appellants erroneously recite that the two collateralized mortgages were "prematurely" paid off. (IB5, etc.).

Over three years after the last record entry in the trial court, Appellee filed a Motion To Dismiss For Failure To Prosecute under Fla. R. Civ. P. 1.420(e). (R49). Appellants then filed an unsworn statement alleging "good cause" (R50-51), a Motion For Relief Pursuant To Fla. R. Civ. P. 1.540(b)(5) (R56-60), and a Motion For Deficiency Judgment (R61-62). Appellants allege (IB, variously) that they were justified in the delay of over three years in seeking a deficiency decree in that: (1) it was impossible to determine the amount of the deficiency until the two collateralized mortgages were paid off, and (2) the personal representative's (a previously substituted party plaintiff) estate was closed and the personal representative had to seek reinstatement before the Appellants could act.

As to the first of the two points immediately above, Appellants suggest that no value for the two collateralized mortgages could be determined until the mortgages were paid off, and that seeking a deficiency would have been, therefore, premature. The two collateralized mortgages are of a form common in south Florida, that is Ramco Form RE-6. (A6).

Appellants also assert that, (in addition to the valuation problem,) the several-year delay was caused by the cessation of estate administration, which case had to be reopened. The Appellant personal representative's estate administration (Estate of Anne a/k/a Anna Frohman, Case No. 88-5336, Circuit Court, Broward County) had been closed September 12, 1990. (A7). The Appellant Personal Representative did not seek to reopen the estate until March 31, 1992, less than one month prior to the due date of the balloon payments on the two collateralized mortgages, according to their terms. (A8; R52-54). The personal representative executed mortgage satisfactions (A5) of the two collateralized mortgages on March 25, 1992, six days before actually filing the motion to reopen the estate, and 19 days before the Order was signed reopening the estate (A9; R55). Although no accounting has been tendered, it is believed that approximately $38,000.00 was then paid to the Appellants. The Court-appointed Receiver, whose duties had been continued by the Final Judgment, had not been receiving mortgage payments on the two collateralized mortgages and did not receive the payoffs.

Thereafter, Appellants did not move for a deficiency against Appellee until six months later, and only then after the motion to dismiss for failure to prosecute was filed by Appellee.

Appellants acknowledge that they did not intend to pursue a deficiency, but were going to "leave Appellee alone" "until he came out of the woodwork" by filing his 1.420(e) motion. (T13).

Appellants recite that the Court below did not consider the "good cause" arguments presented by the Appellants to avoid dismissal, a factual inaccuracy in that, at the hearing before the trial Court on the motion to dismiss for failure to prosecute, the Court had before it the written "good cause" showing of plaintiffs below and heard argument of counsel for Appellants. (T-et seq.).

Additional Errors of Fact in Appellants' Brief

1) Referencing the final judgment, Appellants assert that the trial court must find "there was no deficiency" before the two collateralized mortgages would be free of liens or claims. (IB4,15, etc.), and that action was necessary by Appellee to "regain" his interest in the mortgages (IB17). Neither statement is true.

2) Appellants assert that the primary property secured by the second mortgage had a stated, or known, value, no such evidence of value appearing in the record, and Appellee having no notice nor opportunity to be heard regarding the same. (IB4).

3) Appellants assert that the receiver appointed by the trial court was "discharged by virtue of the final judgment", clearly erroneous since the final judgment specifically continued the receiver's duties. (IB4; A44-48).

4) Appellants state that the two collateralized mortgages were paid off prematurely, yet they ballooned, became payable, and were paid to Appellants in April, 1992. (IB5).

5) Appellants assert that the amounts due on the mortgages could not be determined until April, 1992 and, therefore, until then it was impossible to determine the amount of any deficiency judgment. (IB5). The sums due could be determined at any time during the life of the mortgages.

6) Appellants assert that the trial court "postponed" foreclosure of the collateralized mortgages. (IB15). Actually, the trial court simply foreclosed them conditionally.

7) Appellants assert that they suffered an "$80,000.00" deficiency (IB15), not a shred of evidence appearing nor having been submitted to the trial court nor Appellee to support such a statement, and, further, that "interest" was running on the amount of the ghostly "deficiency", post-judgment, to the tune of $28,000.00. (IB17).

The trial court granted Appellee's motion to dismiss for failure to prosecute and later denied Appellants' motion for rehearing (R70), from whence derived the appeal to the Fourth District Court of Appeal and, by subsequent appeal, to this Court.

SUMMARY OF ARGUMENT

Appellee would have this Court uphold the Fourth District Court of Appeal's affirmance of dismissal for failure to prosecute under Fla. R. Civ. P. 1.420(e), no record activity appearing for in excess of three years after Final Judgment below, no extra-judicial contact with Appellee having occurred, no sufficient showing by Appellants of good cause to avoid dismissal appearing, and the Final Judgment constituting full adjudication of the merits of the case below. The trial court was correct in refusing to grant relief to Appellants from the Final Judgment under Fla. R. Civ. P. 1.540(b)(5), for to do so would relieve Appellants of their own lack of diligence and inequitable conduct in usurping the benefits and duties of receivership and causing the property of Appellee (two collateralized mortgages) to be converted to their own use, permanently depriving Appellee thereof. The relief sought by Appellants should be denied for their failure to timely act, for their failure to establish good cause in non-compliance with applicable rules, for failing to comply with the time requirements of Fla. R. Civ. P. 1.420(e) and § 95.11 Fla. Stat., for failing to seek a stay of the operation of the quoted Rule, and for their failure to act equitably toward Appellee.

The post-Judgment conduct of Appellants should be critically reviewed by this Court through the application of time-tested equitable principles, made applicable herein due to the equitable relief sought by Appellants and their application for relief under Fla. R. Civ. P. 1.540(b)(5).

Substantial exception is taken by Appellee to the recitals of non-record "facts" in Appellants' brief, and the record before the Court is devoid of a large measure of the recitations made by Appellants upon which they base their appeal.

The Fourth District Court of Appeals was correct in its holding in this case, following its prior holding in Financial Security Savings & Loan Association v. Espana River Partnership, 537 So. 2d 683 (Fla. 4th DCA 1989) finding that Fla. R. Civ. P. 1.420(e) is applicable post-judgment and that the rule is applicable even prior to application for deficiencies in mortgage foreclosure cases, and is dispositive of the issues raised by Appellants.

If this matter is reversed by this Court, Appellee will suffer irreparable, inequitable harm, without recourse. Rather, to avoid further judicial labor, this Court should remand this case with directions to enter judgment for Appellee for damages (and interest) equal to the money received by Appellants on the collateralized mortgages and payments received by Appellants.

POINT I. RULE 1.420(e) APPLIES TO POST-JUDGMENT MATTERS EXISTING IN THE CASE BELOW, NOTWITHSTANDING APPELLANTS' ASSERTION THAT THE EFFECT OF THE DISMISSAL NULLIFIED PROVISIONS OF THE FINAL JUDGMENT

Appellants argue that the final judgment below was partially nullified by the dismissal for failure to prosecute. It should be observed that the final judgment was dispositive of the issues resolved in it, specific language being used to place the burden on Appellants (plaintiffs below) to move for the imposition of any perceived deficiency entitlement. The lower court made it quite clear that if Appellants did not so proceed, the language of the Final Judgment, itself, would become operative:

> "14. . . .In the event that no deficiency is adjudged . . ." (R44-48).

In order for Appellants to recover a deficiency, the foregoing language affirmatively required an adjudication that a deficiency existed---the language did not require, for benefits to remain with Appellee, an adjudication that a deficiency *did not* exist, for to have so required would *compel* further judicial labor, not consistent with desirable finality of judgments.

The trial court, after hearing the evidence, proceeded to enter the Final Judgment, thereby adjudicating the substantive rights of the parties. The language of the Final Judgment (continuing the above quoted material from paragraph 14) clearly stated what would happen to the collateralized mortgages if no affirmative adjudication of deficiency was sought and proved:

> ". . .then and in that event the effect of this Order shall be that said mortgages shall be free of any liens or claims of Plaintiffs." (Emphasis supplied). (R44-48).

Typically, the burden of proof is on the party who would enjoy affirmative relief which meeting that burden would grant. The trial court, correctly, placed the burden on Appellants by virtue of the Final Judgment by saying (to paraphrase): If you want and are otherwise entitled to relief, return to this forum and seek the relief, but move timely and do not suffer laches, a statute of limitations, nor rule of court to deprive you. Appellants neither heeded nor abided the explicit and implicit language of the Final Judgment and should not now be heard to complain.

Appellants' initial brief (at 37) recites:

> "What is important here to remember is that there was a mechanism in place, at the behest of the Plaintiffs, whereby the court (trial court) could determine, if necessary, the ultimate ownership rights in these mortgages, apart from the Repurchase Agreement. The Repurchase Agreement, however, required no judicial action in order for the Plaintiffs to retain their interest in these mortgages."

Appellants, through such recital, are attempting to opt themselves out of their obligation to keep "hands off" the two collateralized mortgages under the Final Judgment by urging that the Repurchase Agreement stood alone, that it did not form part of the foreclosure process, and was somehow exempt from the operation of the Final Judgment. Moreover, Appellants as Plaintiffs below, *knew* that the collateralized mortgages required foreclosure [See § 697.01(1) Fla. Stat.], notwithstanding the documentation of the original transaction with Appellee to make the transaction with respect to the collateralized mortgages appear to be an unconditional assignment to Appellants. If the collateral assignment and the "Repurchase Agreement" were self-

operating without judicial remedy, why, then, did Appellants institute the foreclosure proceeding below and seek to foreclose on the collateralized mortgages? It is because Appellants were not proceeding in an abundance of caution to claim foreclosure of the collateralized mortgages, but were proceeding consistent with the requirement to foreclose and in accordance with existing law, in fact submitting the collateralized mortgages to the jurisdiction of the trial court [§ 697.01(1), Fla. Stat.], and once having done so, were bound by the final judgment thus entered.

Appellants assert that Financial Security Savings & Loan Association v. Espana River Partnership, *supra*, is authority for the proposition that if a final judgment provides for the possibility of a deficiency, then the effect of a dismissal for failure to prosecute prior to a proceeding to obtain a deficiency judgment would nullify an otherwise valid final judgment. Quite the contrary, as determined by the Fourth District Court of Appeals in Financial Security, a foreclosure ". . .is simply an adjudication of the amount of the debt and a direction to sell the mortgaged property." (at 684). The Court then elaborated, stating:

> "It is not a personal judgment against the defendant; it is not a lien on any other property; nor can it be used for execution against any other property." *Id.*

Appellants have proved ingenious in their initial brief in an attempt to distinguish, in the above respects, the instant case from the holding by the Fourth District in both the instant case and in Financial Security.

First, Appellants contend that a personal judgment was contemplated below. Obviously, by Appellants' admissions, no such personal judgment was ever intended to be sought and it was only after discovery of their post-judgment conduct that a motion to dismiss was filed.

Second, Appellants further attempt to distinguish Financial Security by alleging (IB29, 30) that the final judgment here does constitute a lien against other property and that the final judgment could be used for executing against other property, the "other property" being the collateralized mortgages, and executing "against" them being the very process of which Appellants complained they never reached because they were dismissed below. That is, proof of deficiency and entitlement to and sale of the collateralized mortgages under the auspices of the court, at all times consistent with due process rights of the Appellee. Hardly an "execution" and hardly the contemplated "other property" found in the language of Financial Security.

Appellants assert that the Final Judgment constituted a lien against the collateralized mortgages. Yet, they allege that they could have proceeded under their "Repurchase Agreement" independent of, and repugnant to, the Final Judgment with respect to the collateralized mortgages, which presumptively meant with or without a lien. The law of Florida is clear, especially when jurisdiction of the matter in controversy is submitted to the trial court and is thus adjudicated, as here. An instrument of conveyance that is absolute in its terms can be shown to be given, not as an absolute conveyance, but as a mortgage, especially where there are separate writings, and which mortgage

must then be foreclosed---foreclosed before additional rights can arise in the mortgagee. 37 Fla Jur 2d, Mortgages and Deeds of Trust §76, *et seq*; § 697.01(1) Fla. Stat.

We must inescapably conclude that the trial court, responding to the pleadings of Appellants below seeking foreclosure of their second mortgage and their security interest in the collateralized mortgages, found that a lien existed against the collateralized mortgages, foreclosed them subject to conditions (which is tantamount, in this case, to no foreclosure at all), and contemplated that Appellants may later wish to pursue a deficiency against them. Appellants, post-judgment, were prohibited from proceeding unilaterally against the collateralized mortgages, having subjected themselves and their collateral interest in the mortgages to the jurisdiction of the court, receiving the benefits of the Final Judgment, and having sought the remedy of foreclosure.

Appellant asserts, without reference to any record or document below, that all parties and the court knew that there would be a deficiency resulting from the foreclosure and that there could be substantial amount of time lapsing before the value of the collateralized mortgages was known.

Appellee suggests that Appellants chose not to proceed with a deficiency determination during the several years as it was not in their best interests because: (1) no reliable evidence of value of the foreclosed real property was before the court to contrast with the amount of the Final Judgment; (2) after over three years, and upon satisfaction of the collateralized mortgages, they no longer existed; (3) Appellants <u>were</u> receiving

and did receive the monies payable thereunder, which should have been payable to the receiver to inure to the Appellee; and, (4) Appellants, again contrary to the equitable nature of mortgage foreclosure proceedings, had already placed satisfactions of the collateralized mortgages of record, which act was beyond the authority of Appellants and contrary to the Final Judgment of the court, subjecting Appellants to contempt or other adverse proceedings.

It is clear that the Appellants perceived, in this factual circumstance, that they would possibly risk more by pursuing a deficiency than by remaining silent. They chose to remain silent, but now complain vigorously that, because the greater risk of their inactivity matured, they should in this appellate process be relieved of the burden of it---much as they sought relief from the trial court through the Fla. R. Civ. P. 1.540(b)(5) motion to relieve them of the constraints of the judgment, which they had by then violated, discussed variously in this Brief. Hindsight of the Appellants is no justification for this Court to disturb the lower court decision and the clear language expressing it, nor to relieve the Appellants of the effects of the Final Judgment, and their post-judgment conduct and lack of it.

POINT II. THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY UPHELD THE TRIAL COURT IN DISMISSING THE CAUSE BELOW, POST-JUDGMENT, FOR FAILURE TO PROSECUTE.

A. NO RECORD ACTIVITY OCCURRED FOR OVER THREE YEAR FOLLOWING ENTRY OF FINAL JUDGMENT.

B. RULE 1.420(e) PROVIDES A REMEDY, UNSOUGHT BY APPELLANTS, OF A STAY OF PROCEEDINGS.

C. RULE 1.420(e) APPLIES, AND SHOULD APPLY, POST-JUDGMENT, WHETHER OR NOT RELIEF HAS BEEN APPLIED FOR.

A. NO RECORD ACTIVITY OCCURRED FOR OVER THREE YEARS FOLLOWING ENTRY OF FINAL JUDGMENT.

The Record of the trial court is devoid of activity from the date of filing of the certificate of title to the foreclosed real property on July 11, 1989, to the date of filing of Appellee's Motion To Dismiss For Failure To Prosecute on October 8, 1992. The application for a deficiency by Appellants, should they have felt so entitled, could have been made at any time during the one year following the last record activity, notwithstanding that Appellants now assert reasons for not doing so.

Appellants state, as the cause of their inactivity, that (1) the value of the collateralized mortgages could not be ascertained until the same were paid off in April, 1992; (2) that application had to be made for reinstatement of an estate's personal representative and until reinstatement, no pursuit of remedy could occur; and (3) they did not want to resort to further proceedings and spend money if it was found that no deficiency would arise after judgment.

In fact, the record of the hearing in the trial court below on the Appellee's Motion To Dismiss For Failure To Prosecute is

contradicted by statements of Appellants' counsel. As admitted by counsel for Appellants during the hearing on the pending motion to dismiss, counsel recited to the presiding judge that "We (Appellants) were going to leave him (Appellee) alone," (T13), but "he came out of the woodwork (presumably by filing the motion to dismiss) and accordingly, we're going to seek a deficiency against him." (T13).

As to the first of the two points immediately above, Appellants suggest that no value for the two collateralized mortgages could be determined until the mortgages were paid off, and that seeking a deficiency would have been, therefore, premature. The two collateralized mortgages are of a form common in south Florida, that is Ramco Form RE-6. (A6). Appellants do not offer reasons why the mortgages could not be valued at the date of Final Judgment or thereafter, merely asserting that, until they were paid off, it was impossible (IB *passim*) to determine value. Appellee concludes differently and asserts that, at the time of the Final Judgment and at all times thereafter, it was not only possible, but quite simple, to determine the value of the two collateralized mortgages. Probate judges, publicly-elected property appraisers, and myriads of others determine values of such intangible properties every day, giving due consideration to the factors applicable to such valuations.

Appellants also assert that, (in addition to the valuation problem,) the several-year delay was caused by the cessation of estate administration, which case had to be reopened. The Appellant personal representative's estate administration (Estate of Anne a/k/a Anna Frohman, Case No. 88-5336, Circuit Court,

Broward County) was originally closed September 12, 1990. (A7). The Appellant Personal Representative did not seek to reopen the estate until March 31, 1992, less than one month prior to the due date of the balloon payments on the two collateralized mortgages, according to their terms. (A8; R52-54). The personal representative executed satisfactions (A5) of the two collateralized mortgages on March 25, 1992, six days before actually filing the motion to reopen the estate, and 19 days before the Order was signed reopening the estate (A9; R55). Although no accounting was tendered, approximately $38,000.00 was then paid to the Appellants. The Court-appointed Receiver had neither been receiving mortgage payments on the two collateralized mortgages nor did the Receiver receive the payoffs. Thereafter, Appellants did not move for a deficiency against Appellee until six months later, and only then after the motion to dismiss for failure to prosecute was filed by Appellee.

One can only speculate as to why the personal representative, years prior, did not simply distribute the interest of the estate in the two collateralized mortgages to the beneficiaries of the estate and close the estate; however, one cogent reason could be as stated by counsel for Appellants: that the Appellants, as expressed to the trial court, had no intention of pursuing a deficiency against Appellee (T13), reflecting a clear intent that Appellants *intended* to sit on their now-perceived rights.

B. THE RULE, 1.420(e), PROVIDES A REMEDY, UNSOUGHT BY APPELLANTS, OF A STAY OF PROCEEDINGS

Although such remedy was available pursuant to 1.420(e) should Appellants have been acting in good faith post-judgment as asserted by them, Appellants made no application to the trial court for an order staying the running of the one-year limitation for dismissals for failure to prosecute.

Although the operative results of the application of 1.420(e) may, in a given case, seem harsh (as, indeed, may any statute or rule which terminates a possible right to proceed), the dismissed Appellants, at any time prior to the running of the time period under the rule, could have made application(s) to the trial court for a stay of the operation of the rule, a remedy provided in the rule for circumstances in which the operation of the rule may be suspended in the sound discretion of the trial court. The provision allowing for a stay of the operation of the rule is, arguably, to avoid the necessity of showing good cause after a motion to dismiss for failure to prosecute is filed or the court, upon its own motion, compels it.

Appellants chose not to proceed with a deficiency determination during the several years because it was not in their best interests: (1) no evidence of value of the foreclosed real property was before the court to contrast with the amount of the Final Judgment; (2) after over three years, and after Appellants had, without authority, received the payments under and satisfied the collateralized mortgages, they no longer existed; (3) Appellants <u>were</u> receiving <u>all</u> the monies payable thereunder, which should have been payable to the receiver to

inure, arguably, to the Appellee, subjecting Appellants to contempt or other adverse proceedings before the trial court.

It is clear that the Appellants perceived, in this factual circumstance, that they would risk more by pursuing a deficiency than by remaining silent. They chose to remain silent, but now complain vigorously that, because the greater risk of their inactivity matured, they should be relieved of the burden of it, much as they sought relief from the trial court through the Fla. R. Civ. P. 1.540(b)(5) motion to relieve them of the constraints of the judgment, which they had by then violated, discussed elsewhere in this Brief.

Hindsight of the Appellants, without clear and convincing evidence, is no justification to disturb the unambiguous language of the trial court's final judgment, the affirmance by the Fourth District, or to relieve the Appellants of the effects of the Final Judgment, and their post-judgment conduct and lack of it.

C. THE RULE, 1.420(e), APPLIES, AND SHOULD APPLY, POST-JUDGMENT, WHETHER OR NOT RELIEF HAS BEEN APPLIED FOR.

Appellants argue that until post-judgment relief has been sought through a post-judgment application, Fla. R. Civ. P. 1.420(e) is totally inapplicable. (IB19, et seq.). In support of this contention, Appellants suggest that the Fourth District Court of Appeal in Financial Security Savings & Loan Association, v. Espana River Partnership, 537 So. 2d 683 (4 DCA 1989), and in the instant case, wrongfully permitted dismissal of what Appellants imaginatively describe as "non-proceedings" and dismissed only a reservation of jurisdiction. The Fourth District

cited to several cases, including First and Second District cases, respectively, Barnes v. Escambia County Employees Credit Union, 488 So. 2d 879 (Fla. 1 DCA 1986), Withers vs. Flagship People's Bank of Tallahassee, 473 So. 2d 789 (Fla. 1 DCA 1985) and Colmes vs. Hoco, Inc., 152 So. 2d 524 (Fla. 3rd DCA 1963).

In the above cases cited in Financial Security, Appellants seek to distinguish each as containing language which is contrary to Appellants' position, but unjustified by the facts and, therefore, *dicta*.

The language of the Court in Colmes does not suggest that the court was not addressing real issues. Instead, the language verifies that the Third District dealt directly with the issues, including whether the trial court had jurisdiction to entertain a motion for deficiency. The Third District answered the question in the affirmative by stating that the trial court, having reserved jurisdiction to consider a deficiency:

> ". . .certainly had the jurisdiction if there was a timely application made for a deficiency. It appears from the authorities that a timely application for a deficiency would be either the period within the limitation statute for instituting a cause of action under the note and mortgage (citing authority), or the one-year period within which the cause could have been abated pursuant to § 45.19 Fla. Stat., F.S.A., whichever period occurred first." (Colmes, at 525).

Of course, the operative language in the above quoted material is "if there was a timely application made for a deficiency". The Third District then decided, under the facts of the case then before it, that neither the limitation statute nor §45.19 operated to bar the relief from dismissal. Thus, it is clear that the Third District, in its relatively short opinion, was not propounding *dicta*, but was deciding substantive issues before it,

i.e., whether a timely application for deficiency had been made in the trial court.

As to Barnes, *supra*, a close reading of the case confirms that the First District acknowledges that Rule 1.420(e) does apply post-judgment and that the only reason for not dismissing that case was that the Court deemed 1.420(e) to not be self-executing and, since no motion to dismiss for failure to prosecute was filed against the party by whom a deficiency could be sought, the cause was not dismissable.

Appellants seek the sympathy of this Court by asking the Court to ignore Appellants' post-judgment misconduct and their failure to act timely, and cite to this Court's recent decision in Kozel vs. Ostendorf, 629 So. 2d 817 (Fla. 1993) (IB45), in which dismissal was held to be an excessive sanction for litigants when their attorney, not themselves, were faulted. The numerous recitations to the flagrant misconduct, and lack of conduct, of Appellants in the instant case bear no relationship.

As an aside, Appellants have recited to many non-record facts in this (and the preceding) appeal to the Fourth District, and it is anticipated that such liberties will also be taken upon oral argument before this Court, preparation for which by Appellee is impossible.

Appellants argue, and Appellee concedes, that throughout this State numerous "work-outs" and stipulations for settlement occur every day in which matters are to be performed post-judgment. Appellants attach an actual copy of an order in another case to reinforce what is an otherwise unchallengeable assertion. However, suffice it to say that courts have inherent, continuing

jurisdiction to enforce the provisions of their judgments, but such jurisdiction exists only for the purpose of enforcing judgments over which the trial court has otherwise lost jurisdiction. Hopwood, et al. v. Revitz, et al., 312 So. 2d 516 (3 DCA 1975); Buckley Towers Condominium, v. Buchwald, (321 So. 2d 628 (3 DCA 1975); Broadband Engineering, Inc. v. Quality, etc., 450 So. 2d 600 (4 DCA 1984).

The fundamental rationale of Fla. R. Civ. P. 1.420(e) is to preserve the precious time of the court while imposing only a modicum of required attentiveness upon those who would seek affirmative relief as litigants. The Fourth District Court of Appeal should be affirmed.

POINT III. APPELLANTS FAILED TO MEET THE REQUISITE "GOOD CAUSE" STANDARD NECESSARY TO EXCUSE TOTAL LACK OF RECORD ACTIVITY; AND INEXCUSABLE NON-RECORD ACTIVITY.

This Court, in DelDuca v. Anthony, 587 So. 2d 1306 (Fla. 1989) found that even record activity, if merely passive activity to keep the case on the docket, is insufficient to avoid dismissal. Appellants admit that there was *no post-judgment record activity at all* in the instant case and it is thus a non-issue.

The Fourth District Court of Appeal has previously determined in Freeman v. Toney, 603 So. 2d 863 (Fla. 4 DCA 1992) (citing cases) that good cause to avoid dismissal in the absence of record activity under Fla. R. Civ. P. 1.420(e) is subject to a two-prong test which

> ". . .requires some contact with the opposing party and some form of excusable conduct or occurrence which arose other than through negligence or inattention to the pleading deadline." (Emphasis supplied). Freeman at 684.

Notwithstanding that other Districts (cited in Freeman v. Toney, *supra*) may vary in their immediate expression of what constitutes "good cause", the test is essentially the same. That test, firstly, requires some contact with the opposing party.

Appellants do not assert contact with the Appellee for the period of several years lapsing between Final Judgment and the filing of the Appellee's Motion To Dismiss For Failure To Prosecute. If, indeed, the test enunciated by the Court in Freeman v. Toney is the test of Appellants' conduct, this Court need go no further in this case, and must, accordingly, deny the appeal. However, due to Steketee v. Ballance Homes, Inc., 376 So.

2d 873 (2 DCA 1979) (vigorous non-record activity) and the plethora of assertions of non-record fact by Appellants, some rebuttal seems appropriate.

Appellants argue that they had no choice but to wait until the collateralized mortgages were paid off, because they allege that, until then, it was impossible (IB *passim*) to determine whether the collateralized mortgages were of sufficient value to avoid a deficiency application. As stated elsewhere in this brief, the valuation of intangible property, whether mortgages or otherwise, is not an esoteric science which makes such valuations indeterminable. Valuations of property, even property rights, is the day-to-day activity of all probate divisions of circuit courts in this state, assisted by experts, of course. Rather, it is clear that Appellants *did not want to move for a deficiency*, arguably because Appellants were receiving, during the years after judgment, all payments on the mortgages and did ultimately receive approximately $38,000.00 in pay-offs of those two mortgages, mortgages which were owned by Appellee and which were subject to the jurisdiction, flagrantly disregarded by Appellants, of the trial court. Appellants have stated that:

> ". . .until those mortgages were unexpectedly paid off in April, 1992, they (Appellants) had no way of being able to establish a deficiency which was fair to the Respondent (Appellee)." (IB42).

Such statement by Appellants of benevolence to Appellee, upon the facts of this case, prompts the following questions concerning the absence of contact with the Appellee:

1. Why was neither the trial court nor Appellee given notice that the Appellants, rather than the court-appointed receiver

(whose duties were continued by the court post-judgment), were receiving all payments on the collateralized mortgages?

2. Why was neither the trial court nor Appellee given notice that the payments, at least as alleged by Appellants, were being applied to the existing first mortgage on the foreclosed real property (or otherwise), then owned by Appellants by virtue of the clerk's foreclosure sale?

3. Why was neither the trial court nor Appellee given notice that the Appellants negotiated to receive tens of thousands of dollars for payoffs of the collateralized mortgages in April, 1992?

4. Why was neither the trial court nor Appellee given notice that the Appellants *did* receive the tens of thousands of dollars in payoffs?

5. Why did Appellants wait for six months, after Appellee had learned of the payoffs and filed a motion to dismiss for failure to prosecute, to disclose the aforesaid facts to the court and to the Appellee?

Appellants suggest, to shift the burden of lack of activity to Appellee, that they heard nothing from the Appellee during the same time period and thought he was abiding the terms of the Repurchase Agreement and allowing this course to take place. Appellee was abiding the terms of the Final Judgment, and had the right to assume that the Appellants were doing the same. Appellee was a non-lawyer who had, by acknowledgement of Appellant, several attorneys during the below litigation. Appellee's ingenuousness in legal matters is self-proving from the pro se appeal taken by him, also referenced by Appellant. He was under a

court order, was understandably unsure of the status of his two mortgages, was not entitled to receive payments from the mortgages which were ordered to be paid to the receiver, and was obviously concerned about the possibility of a deficiency being imposed against him. However, as wryly put in Hanson v. Poteet, 556 So. 2d 828 (Fla. 2d DCA 1990) (which case was also cited by Appellants), Appellee ". . .had little or no reason to ever seek a resolution of (his) opponent's claim" (at 829) simply because the collateralized mortgages belonged to him under the terms of the Final Judgment.

The second prong of the test enunciated by the Court in Freeman v. Toney, *supra*, requires ". . .some form of excusable conduct or occurrence which arose other than through negligence or inattention to the pleading deadline." (at 864). It is this portion of the test of Appellants' conduct under which Appellants seek relief from the dismissal below.

The Appellants recite to Steketee, *supra*, as having a "similar fact pattern to the case below". (IB43). Although there are some similarities to the instant case, such as the original pleading requesting a deficiency, it is clear that the Second and Fourth District Courts of Appeal differ in their approach to the question of dismissals under Fla. R. Civ. P. 1.420(e).

The approach by the court in Steketee reflects appreciation of the "good cause" non-record activity by the plaintiff in that case. In Steketee, the Court remarked that in the period of two or so years after final judgment was rendered in the trial court, the plaintiff therein was ". . .embroiled in several other lawsuits concerning the subject real property" (at 874) and that

the plaintiff had ". . .presented proper evidence of all the related litigation. . ." (at 875) to the trial court. The factual differences between the instant case and Steketee are therefore distinctive.

It is not possible that the meager acts of Appellants, wrongful and contrary to the Final Judgment and good conscience as they were, should constitute such non-record activity as to justify avoidance of the dismissal for failure to prosecute. Respectfully, the decision of the trial court, as affirmed by the Fourth District Court of Appeal, should not be disturbed.

POINT IV. APPELLANT SEEKS EQUITY, BUT THE FACE OF THE RECORD BELOW AND THE FACTUAL CIRCUMSTANCES POST-JUDGMENT AND ADMITTED BY APPELLANTS SHOULD DENY EQUITY HEREIN; MOREOVER, THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN REFUSING TO REVERSE DENIAL OF APPELLANTS' MOTION FOR RELIEF UNDER 1.540(b)(5).

The relief sought by Appellants pursuant to their Fla. R. Civ. P. 1.540(b)(5) motion for relief from judgment should be denied. The portion of the Rule under which Appellants sought relief and urged upon the trial court by motion is:

> ". . .the court may relieve a party . . . from a final judgment . . .for the following reasons: . . .(5). . .it is no longer equitable that the judgment or decree should have prospective application."

It is expedient to recite that, since the court below dismissed for failure to prosecute, the motion of Appellants under Fla. R. Civ. P. 1.540(b)(5) became, thereby, moot. However, more discussion is required to respond to Appellants.

Appellants filed their motion for relief from judgment after the Appellee's motion for dismissal was filed, and Appellants were thus painfully reminded that they must deal with circumstances which they no doubt hoped were past history. The prefatory Statement of Facts of this brief and the discussions in the preceding points in this brief reflect that the acts and omissions of the Appellants below do not justify the equitable relief from judgment sought by Appellants.

The Repurchase Agreement (A4) which was executed as a part of the entire mortgage loan transaction between the parties, and which was *in pari materia* to that transaction, specifically provides, as to the two collateralized mortgages that "1. The notes and mortgages referenced shall be collateral. . ." for the

obligation undertaken by Appellee for repayment. At the inception of the underlying transaction between the parties which ultimately gave rise to the litigation below, no separate, distinct, complete right of ownership in the two collateralized mortgages in question was transferred from Appellee to Appellants, merely a collateral interest, notwithstanding that the Appellants assert that they had total authority to deal with the mortgages after, and in derogation of, the Final Judgment. Appellants were required to foreclose the collateralized mortgages by § 697.01(1) Fla. Stat. and, even if it is construed that they were not required to foreclose to achieve a remedy, they nevertheless sought foreclosure by submitting to the jurisdiction of the trial court, and now complain about the exercise of that subject matter jurisdiction.

The Final Judgment, rendered as it was after a trial below in which all well-plead issues and causes of action by Appellants were adjudicated, is res judicata as to the issues presented by the Appellants at the trial level, as here, and the Appellants are estopped by that same Final Judgment to challenge its content or effect. 32 Fla Jur 2d, Judgments and Decrees § 96, *et seq.* Appellants are also estopped, years later, to claim that the Final Judgment did not embody the true intent of the Court in its adjudication of those issues, or that equity should dictate its modification to avoid "prospective" application. 32 Fla Jur 2d, Judgments and Decrees § 85, *et seq.*

The trial court correctly denied the Appellants' application for relief from judgment. It was pointed out to the trial court (T5, 15) that the Appellants had violated the Final Judgment by

usurping the receiver's duties, receiving payments in violation of the Final Judgment, satisfying the collateralized mortgages which were, essentially, *in custodia legis*, thereby permanently depriving Appellee of the benefits of and equity of redemption in the collateralized mortgages, and other matters. It was also pointed out that the Appellants, over three years after the Final Judgment was entered, were attempting to give validity to, and give retrospective indulgence to, their antecedent wrongful acts by seeking a modification of the Final Judgment to which their post-judgment conduct would, then, conform. The conduct of Appellants, who were not ingenuous mortgagees, was doubtlessly intentional.

The Appellants seem to be saying that their post-judgment acts and omissions might be deemed equitable, legal, and justified, notwithstanding the obvious rights determined and constraints imposed by the Final Judgment below, if only the trial court had granted them relief, *nunc pro tunc*, from the Final Judgment (which they sought by their 1.540(b)(5) motion below).

The Final Judgment, as elsewhere stated, determined the substantive rights, duties, benefits and liabilities of the parties in the matters before the trial court. Appellants, by seeking relief from the Final Judgment through elimination of important provisions in it, seek, without relitigation, to revise the trial court's determination of the substantive issues at trial by a retrospective revision of the Judgment.

Appellants have gone to great lengths, without providing a record, to assert facts of which the judge who presided at the

trial was "supposedly" aware. Astoundingly, Appellants are suggesting that the different judge who, in excess of three years after Final Judgment, dismissed the case upon motion, and who did not have intimate familiarity with the prior proceeding, for that same reason should have granted the relief from judgment sought by Appellants. Appellants should not complain that the judge who dismissed the case was not familiar with the background of the case and should not have dismissed it; yet, on the other hand, that the same judge who was without knowledge should have acted on Appellants' motion under 1.540(b)(5) to either "amend or remove" the provisions of paragraphs 13 and 14 (IB29).

A favored maxim in equity is ". . .that equity will not suffer a wrong to be without a remedy." 22 Fla Jur 2d, Equity § 60. This Court should not grant relief to Appellants when Appellee has suffered an irreversible wrong at the hands of Appellants. Were the Appellants diligent in the interim after Final Judgment to pursue their right to have the court decide whether or not a deficiency existed? Were the Appellants acting equitably upon usurpation of the receiver's authority? Were the Appellants' acts consonant with fairness in receiving payments on and satisfying mortgages which were, essentially, *in custodia legis*, by virtue of the constraints imposed by the trial court's Final Judgment, or were the acts contemptible?

Perhaps most importantly to Appellee, can Appellants return Appellee's equity in the collateralized mortgages?

The constraints of Fla. R. Civ. P. 1.540(b)(5) require that the Court should act out of equitable considerations. Should the lower court below be reversed, and Appellants' conduct below be

thereby validated, equity cannot demand that the collateralized mortgages be returned by the Appellants to the jurisdiction of the lower court---equity cannot demand an impossible performance--and the collateralized mortgages are, by virtue of having been paid Appellants and satisfied of record, unreturnable to Appellee.

The court below found no equity with Appellants and the ruling should not be disturbed in the absence of a clear showing of abuse of discretion by the trial court. Huertas v. Palm Beach County, 602 So. 2d 553 (Fla. 4 DCA 1992) (on rehearing).

The Final Judgment is clear in its finding and holding that Appellee is entitled to the two collateralized mortgages, free of any claim and claim to lien of Appellants. It is solely due to the misconduct of Appellants in usurping the authority of the receiver appointed by the trial court that Appellee has been deprived of the benefits of payments under the two collateralized mortgages and the benefit of the payoff of each of them.

This Court should cause to be done that which should have been done in the circumstances, that is, to remand this cause with directions to enter judgment in favor of Appellee for the amounts of the receipts from the two collateralized mortgages wrongfully received by Appellants, including regular or other payments and the balloon payment(s) received by Appellants, such amounts to be determined upon evidentiary hearing by the trial court.

POINT V. THE APPELLANTS' CASE IS MOOT SINCE EITHER OR BOTH OF RULE 1.420(e) OR STATUTE OF LIMITATIONS (§ 95.11 FLA. STAT.) BARS THE RELIEF SOUGHT BY APPELLANTS FOR DEFICIENCY.

§ 95.11 Fla. Stat. reads, in part, as follows:

> "Actions. . .shall be commenced. . .as follows: . . .(2)WITHIN FIVE YEARS--. . .(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument. (c) An action to foreclose a mortgage.

Appellants did pursue their original cause of action below within the time prescribed above and did pray for a deficiency, should the same be appropriate, in their second amended pleading, upon which the foreclosure below proceeded to trial. (R22-26).

The cause of action for breach of the payment obligation by Appellee arose not later than March 1, 1987, as stated by Appellants. The time for pursuit of a deficiency under § 95.11(2) Fla. Stat. expired five years later, prior to the filing of the Motion For Deficiency Judgment (R61-62) by Appellants. Appellants seek to reverse the lower court and permit pursuit of such deficiency although § 95.11 Fla. Stat. would bar the relief. In Colmes v. Hoco, Inc. of Dade County, 152 So 2d 524 (Fla. 3 DCA 1963), a mortgage foreclosure action in which the court, as in the instant case, had reserved jurisdiction for entry of a deficiency decree, the court addressed the issue of timeliness and found that:

> ". . .a timely application for a deficiency would be either the period within the limitation statute for instituting a cause of action under the note and mortgage (cite omitted) or the one-year period within which the cause could have been abated pursuant to § 45.19 Fla. Stat., FSA, whichever period occurred first." (at 525). [Note that Financial Security, at 684 recites that § 45.19 Fla. Stat. was repealed and replaced with Fla. R. Civ. P. 1.420(e)].

Even if this Court should return this cause to the lower court for further proceedings on the application of Appellants for a deficiency, the same is barred by § 95.11 Fla. Stat. Appellants failed to seek a deficiency within five years following the time that the cause of action arose below. Barnes v. Escambia County Employees Credit Union, 488 So. 2d 879 (Fla. 1st DCA 1986) (but finding that the statute had not run to preclude relief). The Fourth District Court of Appeals cited Barnes with approval in Financial Security, *supra*, at 685. A similar mortgage foreclosure case, also cited by the Fourth District Court of Appeals with approval, dealt with the issue of dismissal for failure to prosecute, but found that the trial court failed to hear (but should have) the "good cause" question to avoid dismissal. Withers v. Flagship Peoples Bank Of Tallahassee, 473 So. 2d 789 (Fla. 1 DCA 1985). The Withers case cited to the Court holding in F.M.C. Corp. v. Chatman, 368 So. 2d 1307 (Fla. 4 DCA 1979) as authority for the two-pronged test espoused by the Fourth District for the required showing of good cause to avoid dismissal for failure to prosecute, discussed elsewhere in this brief. Appellants' attempts to distinguish Barnes and Withers are without merit, as are the Appellants' efforts to suggest that the holdings in Reisgo v. Weinstein, 523 So. 2d 752 (Fla. 2 DCA 1988) and Ravel v. Ravel, 326 So. 2d 223 (Fla. 2 DCA 1976), both arising from the Second District Court of Appeal, are dispositive. Ravel was specifically rejected by the Fourth District and Reisgo was rejected by clear implication (as the holding was the same) in the Financial Security decision. The

request for this Court to overrule the Fourth District Court of Appeal should be denied.

Failure of the Appellants to act in response to ticking clocks, announcing in advance that the time-bar alarm would someday be heard, should preclude reversal and the holding below should be affirmed.

CONCLUSION

The Appellants have failed to act timely under Fla. R. Civ. P. 1.420(e) and § 95.11 Fla. Stat., either of which compels an affirmance. The rule, 1.420(e), requires record activity, or at the very least more substantial activity than present here, which advances the matter to conclusion within one year. The rule is applicable to the facts of this case, notwithstanding the argument of Appellants that the rule only applies pre-judgment or, if not, only applies after application for a deficiency.

Appellants, although they had the opportunity, chose not to avail themselves of the rule-provided stay of the operation of it, intending, by their own admission, to not proceed with application for a deficiency, which subjected Appellants to the operation of rule 1.420(e) and § 95.11 Fla. Stat. No record evidence exists to suggest that such a deficiency would have been granted even if timely application had been made for it. Appellants made a conscious, calculated choice not to seek a deficiency, being motivated by their own self-interest (and self-protection) in having achieved monetary gain through usurpation of the court-appointed receiver's duties and through the device of satisfaction of collateralized mortgages which were under the jurisdiction of the trial court.

Granting of the 1.420(e) motion below, in this mortgage foreclosure case, did not have the effect of nullifying an otherwise valid Final Judgment, as argued by Appellants. The Final Judgment was clear in its language and its operation, but it is equally clear why Appellants desired to be relieved of it.

Granting of the motion to dismiss for failure to prosecute was recognition of its appropriateness under the circumstances and not an abuse of discretion. The terms of the Final Judgment were not, and should not have been, affected. Appellee had no burden of going forward in the matter below (See Hanson v. Poteet) and filed the motion to dismiss for failure to prosecute more than three years after Final Judgment, during which time Appellants' conduct was contrary to the clear language of the Final Judgment relative to, and the rights of Appellee in, the collateralized mortgages. Appellants should not be heard to complain of the denial of the 1.540(b)(5) motion to relieve them of the constraints of the Final Judgment through which they seek judicial sanction and forgiveness of their conduct, *ab initio*. Recitation by Appellants to unsupported, non-record facts should be disregarded in this appeal.

This Court should affirm the Fourth District Court of Appeals and remand for entry of judgment against Appellants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellee's Answer Brief and a copy of the Appendix to Appellee's Answer Brief, were served by mail upon Michael B. Solomon, Esquire, 1150 East Hallandale Beach Blvd., Suite A, Hallandale, FL 33009, this 21 day of October, 1994.

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SUPREME COURT OF FLORIDA

ELAINE FROHMAN
etc., et al.

Appellant(s),

CASE NO. 84,038

vs.

JACOB BAR-OR and STELLA
BAR-OR

Appellee(s)
_____/

APPENDIX TO RESPONDENT'S ANSWER BRIEF

CERTIORARI PROCEEDING FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT
(DISTRICT COURT CASE NO. 93-0109)

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