23

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,158

JERSEY PALM - GROSS, INC.,

Petitioner,

v.

HENRY PAPER AND
ANTHONY V. PUGLIESE, III,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review from the District
Court of Appeal of Florida, Fourth District

Daniel S. Pearson
Lucinda A. Hofmann
HOLLAND & KNIGHT
701 Brickell Avenue
P. O. Box 015441
Miami, Florida 33101
(305) 374-8500

Counsel for the Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES (continued) **PAGE**

STATUTES

INTRODUCTION

In this case the trial court excused the borrowers of $200,000 from their obligation to repay the loan when they discovered a theory upon which they could contend that the loan was usurious. Two members of the Fourth District Court of Appeal found this result acceptable despite circumstances that moved even the trial court to conclude that the lender -- now the petitioner -- had not acted with corrupt intent and despite the existence of a usury savings clause in the loan documents that disavowed the lender's intent to charge a usurious rate and disclaimed his entitlement to receive usurious interest.[1]

Our petition asks this Court to decide for the first time what effect is to be given to the usury savings clause, a clause that parties often include in loan documents to avoid the harsh penalties prescribed by Florida statutory law, when, after default, an unintended usurious rate is found to exist.

Thus far, two district courts of appeal have addressed the effect of the usury savings clause. The Fifth District in Forest Creek,[2] dismissing a usury complaint where the mortgage note contained a savings clause, held that the clause is an absolute defense to a claim of usury. In contrast, the majority of the panel in the present case held that a usury savings clause is no more than a possible defense, that is, that it "may be determinative" on the issue of intent and then only "[w]here 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

---

[1]The lender was Jersey - Palm Gross, Inc., a corporation formed by Walter Gross to make the loan. We will, however, refer to the lender as if Gross had made the loan personally.

[2]Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So. 2d 356 (Fla. 5th DCA 1988), rev. denied, 541 So. 2d 1172 (Fla. 1989).

contingency." Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664, 671 (Fla. 4th DCA 1994).[3] It is the conflict between these two outcomes that the Fourth District certified to this Court.

The conflict of course requires resolution: lenders and their attorneys or other advisors must be able to conduct loan transactions with confidence in the seeming protection of the usury savings clause or, if it is deemed not to afford adequate protection, with knowledge of its specific limitations. The conflict, however, need not be resolved by choosing one or the other of the points of view expressed by the Fifth District or by the majority below; some other standard such as that urged by Judge Farmer in his dissent in this case may be the proper resolution. But the fashioning of *some* consistent rule capable of predictable use by lenders and predictable application by trial courts is essential.

STATEMENT OF THE FACTS

The respondents, Henry Paper and Anthony V. Pugliese, are partners of a general partnership, Jersey Palm Associates ("JPA"), formed to buy and develop commercial property in Palm Beach County (T. 37-38, 55). Paper is an attorney licensed to practice law in New Jersey (T. 125) and the managing general partner of JPA (T. 55). Pugliese is a real estate developer (T. 41).

JPA owned three lots which it planned to develop for commercial use (T. 20, 100, 144). This property, valued by an October 1989 appraisal at $1.7 million dollars (T. 142, 144-45; R. 153-57), was encumbered by a $1.1 million dollar purchase money mortgage (T. 99, 119-20, 137). To develop the property, JPA sought a development loan of $2.1 million (T. 118) and

[3]We have included in an appendix to this brief a copy of the district court's decision, Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664 (Fla. 4th DCA 1994).

obtained a loan commitment from Capital Bank (T. 96, 118). Part of the loan from Capital Bank was to be used to pay off the existing mortgage and the rest was to be used to construct an office building (T. 96). Short the $200,000 cash needed to pay property taxes, the brokerage commission, recording costs, and other closing expenses (T. 96), JPA, through Paper, contacted Walter Gross, a New York real estate developer (T. 92-93).

During the negotiations between Paper and Gross, Paper discussed the financial condition of JPA, its assets and liabilities (T. 97-100). Paper suggested that Gross become a partner of JPA and invest $200,000 in the partnership thereby providing the needed cash (T. 94, 104, 122). Although Gross rejected that proposal, Paper persuaded him to lend the partnership $200,000 on the condition that several of the partners of JPA personally guarantee the loan (T. 23, 69, 70). Gross knew that the $200,000 was to be used to close the $2.1 million loan from Capital Bank (R. 22, 79-80, 96, 101).

On March 9, 1990, Gross formed Jersey Palm - Gross, Inc. ("Gross") for the purpose of making the $200,000 loan (T. 24). A few days before the closing, Paper received loan documents from Gross' attorneys (T. 105). These documents included a promissory note for $200,000 at 15% interest for eighteen months and a purchase agreement calling for the transfer of a 15% share of JPA to Jersey Palm - Gross, Inc. (T. 106-07). Since the loan commitment with Capital Bank was soon to expire (T. 112), Paper did not believe he had time to seek the needed cash elsewhere (T. 110, 111). But Paper himself did not consider that the 15% interest in the JPA partnership given to Gross would be calculated as part of the interest on the loan (T. 125, 134)

The promissory note contained a usury savings clause, which reads:

> 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. (R. 119-20).

At trial Gross said that he was not familiar with the usury laws in Florida (T. 83), that he relied on his counsel, that he did not intend to charge a greater rate of interest than that allowed by law (T. 83, 85), and that the usury savings clause in the promissory note meant that "there was no intent to be usurious" (T. 84).

The loan of $200,000 at 15% interest between Gross and JPA closed on March 27, 1990 (T. 23; R. 118-20). At the closing, which Gross did not attend (T. 75-76), Gross received a 15% share of JPA (R. 132-36). Two days later on March 29, 1990, the loan of $2,123,000 to JPA from Capital Bank closed (T. 137; R. 150). While Paper said that he discussed with Gross what the values of JPA would be "if we were successful" (T. 97), there was never any guarantee that JPA would be successful. Indeed, as of March 29, 1990, *just two days after the closing on the Gross loan*, JPA had mortgaged all the equity in its $1.7 million property to secure the Capital Bank loan (R. 150). Thus, two days after he obtained a 15% share in JPA, Gross' share was worth no more than an expectancy and hope of future success. As it turned out, JPA was not successful and, by the time of trial, was insolvent (T. 62, 155).

During the loan period of eighteen months, JPA made interest payments totalling $45,250 (T. 14, 86-87). However, JPA did not repay the loan when it came due on October 1, 1991 and the guarantors did not make good on their unconditional guarantees (T. 18, R. 118, 122-30).

STATEMENT OF THE CASE

On January 30, 1992, Gross brought an action against the partners of JPA, including the guarantors (R. 1-23). Gross was able to serve only Paper and Pugliese, the respondents (R. 24-27). Almost a year later, in December of 1992, Pugliese sought and was given leave to add an affirmative defense of usury (R. 79-80, 82), claiming that, because Gross had received a 15% share of JPA at the time of making the loan, the loan was usurious (R. 79-80). The case went to trial in February of 1993 (T. 1).

The trial court found that the value of JPA on the day of the loan closing was $600,000, the difference between the appraised value of JPA's land ($1,700,000) and the existing purchase money mortgage encumbering it ($1,100,000) (R. 248). According to the trial court, it followed that since Gross was given 15% of JPA he had effectively received interest of $90,000, which, when added to the interest of 15% provided in the promissory note, made the effective interest rate on the $200,000 loan 45% (R. 248, 250-51). Despite the usury savings clause contained in the promissory note, Gross' testimony as to his intent, and the fact that he knew that the purpose of the $200,000 loan was to facilitate JPA's imminent mortgaging of all of its property to Capital Bank, the trial court found that Gross "knowingly and *willingly* charged and accepted this [usurious] consideration" (R. 251) (emphasis added). Consequently, the trial court deemed the $200,000 note and guarantee unenforceable and adjudged that Gross forfeit the entire principal pursuant to section 687.071(7) of the Florida Statutes (R. 251). Although the

promissory note included a very extensive usury savings clause, the trial court concluded that "there's no way . . . that you can disclaim usury," (T. 209), and refused to give the savings clause effect (R. 251).

Gross appealed to the Fourth District Court of Appeal asserting that the trial court did not find the requisite "corrupt" intent but instead concluded that mere knowledge and acceptance were sufficient to deem the loan and guarantee unenforceable. He also asserted that the trial court relied on a mathematical computation of the value of the partnership on the day of the loan closing without taking the entirety of the intended transaction into account, and that on the issue of intent it refused to consider the usury savings clause found in the parties' agreement.

In a divided opinion, the majority found: "[T]he 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." 639 So. 2d at 671. Judge Farmer, dissenting, expressed the view that these were the very kind of circumstances where a usury savings clause would preclude a finding of usurious intent. Neither the majority nor Judge Farmer shared the Fifth District's view 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" in every case. Id. The Fourth District certified conflict with Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So. 2d 356 (Fla. 5th DCA 1988), rev. denied, 541 So. 2d 1172 (Fla. 1989). Because the conflict is clear and its resolution essential, we urge the Court to accept jurisdiction.

SUMMARY OF THE ARGUMENT

Under Florida law a defendant seeking to avoid repayment of a loan under a usury defense must prove clearly and satisfactorily that the lender acted "wilfully" -- not simply willingly -- to take more than the legal rate of interest. Florida courts have interpreted this to mean that the lender must be found to have acted with a "corrupt intent" to take more than the law allows. The trial court in this case found only that the lender knew what he was receiving -- 15% on the loan and a 15% share of the partnership -- and accepted this "consideration." The trial court not only rejected as irrelevant Gross' testimony that he did not intend to charge a usurious rate for the loan, but held for naught the usury savings clause included in the parties' agreement.

The trial court relied instead on a simplistic computation: on the day of the closing of the loan from Gross, JPA's sole asset was worth $600,000 (the value of the land less the outstanding mortgage), and therefore Gross' 15% interest in JPA was worth $90,000. Even though the evidence showed without dispute that these ephemeral values were intended to evaporate in a mere 48 hours, the trial court apparently believed it was bound to treat them as real. It thus ignored that two days later, as part of the planned transaction, JPA mortgaged its entire sole asset to secure over $2,000,000 in debt and Gross' 15% share of JPA became at that moment mere speculation. The flaw in the trial court's logic was that it equated Gross' intent to receive a 15% share in a speculative undertaking with the intent to receive $90,000, which he never was to receive. Gross intended to and did receive a 15% share in JPA but knew that the purpose of his loan to JPA was to enable JPA to incur a debt *twice* the amount of its then existing one. This evidence, along with Gross' testimony that he did not intend to lend money

at a usurious rate and the inclusion of a usury savings clause in the promissory note, precluded any showing -- much less a clear and satisfactory one -- of the requisite corrupt intent to take more than the law allows.

Under Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, the very existence of the usury savings clause would have been enough to preclude a showing of the requisite corrupt intent to charge a usurious rate. In the present case, the trial court gave no effect to the usury savings clause in the promissory note because under its understanding of the law, "there is no way . . . that you can disclaim usury." While both Forest Creek and the present case hold that a lender surely can disclaim usury, the effect courts must give to the disclaimers is what is at issue here. If -- as the Fourth District believes -- Forest Creek wrongly elevates the usury savings clause to an absolute defense, the Fourth District majority, which relegates the clause to a mere factor in the calculus used to determine usury and allows the clause to be determinative only in cases where the interest is close to the legal rate or where the loan becomes usurious on the happening of a contingency, wrongly nullifies the defense.

In our view, a more realistic and useful standard is suggested by Judge Farmer in his dissent. Under his proposed standard, a savings clause would create a presumption that usury was not intended and the burden would be upon the borrower to prove true corrupt, that is criminal, intent to take more than the lawful rate. This burden to overcome the presumption would be satisfied by showing that the savings clause in effect was a ruse. But where, as here, the loan was not usurious on its face; where the loan was between experienced businessmen for the purpose of facilitating a speculative development endeavor; where the loan, instead of becoming excessive upon a contingency became, as the parties contemplated, nonexcessive

almost immediately; and where there was, in the trial court's own words, not the slightest reason to believe that the lender acted malevolently or with an evil intent to evade the law, a trial court should not be free to disregard the savings clause, and instead should be required to give it full effect. Florida's public policy against usury is simply not so strong that trial courts should be permitted to hold usury savings clauses for naught in the absence of compelling proof that the clause was inserted simply to disguise an intended usurious transaction.

ARGUMENT

I.

THE LAW OF USURY ACCORDING TO THE TRIAL COURT: A USURY SAVINGS CLAUSE MEANS NOTHING

To prevail on a claim of usury, a defendant must prove: (1) a loan, either express or implied; (2) an understanding between the lender and the borrower that the money must be repaid; (3) that for the loan a greater rate of interest than is allowed by law will be paid or agreed to be paid; and, most importantly for our purposes here, (4) *a corrupt intent to take more than the legal rate of interest* for the use of the money loaned. Dixon v. Sharp, 276 So. 2d 817, 819 (Fla. 1973); Clark v. Grey, 101 Fla. 1058, 132 So. 832, 834 (1931). At issue in this case was whether Paper and Pugliese proved clearly and satisfactorily that Gross had the requisite "corrupt intent" where the trial court failed to consider the surrounding circumstances, including the usury savings clause, that showed that Gross did not act with corrupt intent.

Under section 687.071(2) of the Florida Statutes, the criminal usury statute applicable in this case, a lender must "willfully and knowingly" charge or receive more than the interest rate allowed. § 687.071(2), Fla. Stat. (1991). Thus, the usury statute "imposes a penalty only on those lenders who 'willfully' violate it." Rebman v. Flagship First Nat'l Bank, 472 So. 2d

1360, 1364 (Fla. 2d DCA 1985). "A thing is willfully done when it proceeds from a conscious motion of the will, intending the result which actually comes to pass." Chandler v. Kendrick, 108 Fla. 450, 146 So. 551, 552 (1933). "To work a forfeiture under the statute the principal must *knowingly and willfully* charge or accept more than the amount of interest prohibited." Dixon, 276 So. 2d at 820 (emphasis added). While the word "willful" is often used to distinguish "intentional" from "accidental," when "willful" is used, as here, "in a statute *affixing a punishment*[4] to acts done willfully, it may be restricted to such acts as are done with an *unlawful* intent." Id. (emphasis added). Here, because the usury statute affixes a punishment on those who violate it, Paper and Pugliese had to prove by clear and satisfactory evidence that Gross had "a purpose in his mind to get more than legal interest for the use of his money." Chandler v. Kendrick, 146 So. at 552.

It is undisputed that the $200,000 loan to JPA was not usurious on its face -- the 15% interest on the loan was well below the 18% maximum allowed (R.9, 118).[5] According to the borrowers -- and later the trial court and panel majority -- the loan became usurious because at the closing on March 27, 1990 Gross received a 15% share of JPA (T. 176, R. 250, 639 So. 2d at 668). Since the promissory note itself was not usurious, the finding of excessive interest rested entirely on a mathematical computation of the value of 15% of JPA as of March 27, 1990 (R. 248). But that computation failed to take into account that Gross and the borrowers knew

---

[4]There is little doubt that the remedies provided by Florida's usury statutes are penal in nature. General Capital Corp. v. Tel Serv. Co., 212 So. 2d 369, 384 (Fla. 2d DCA 1968), aff'd in part, 227 So. 2d 667 (Fla. 1969).

[5]For loans up to $500,000, an interest rate in excess of 18% per annum simple interest is declared usurious. § 687.03(1), Fla. Stat. (1991).

that *two days* after the closing JPA would incur an indebtedness of $2,123,000, rendering Gross' 15% of JPA without real value, at least until and unless the development of the project became successful, an expectancy that never came to pass (T. 62, 155).

There has never been any dispute about whether Gross knew the relative value of the lots held by JPA, that the stated interest on the loan was 15%, or that he was to receive a 15% share in JPA at the loan closing (T. 71, 13, 75). But likewise, there was never any showing that Gross intended to receive $90,000 in addition to the 15% interest on the note. Instead the trial court computed Gross' 15% share in JPA on the day of closing to be a paper figure of $90,000, even though the parties contemplated that the value of JPA would change drastically as soon as the Capital Bank loan closed (T. 103). Thus, the value of the 15% share of JPA was highly speculative and no one was more aware of this than Gross, who had initially refused to rely on becoming a partner in JPA and who insisted that there be a loan and that it be personally guaranteed (T. 23, 69, 70). Had the trial court really considered *all* the circumstances surrounding the transaction including the evidence that showed that JPA was about to take on more than $2,000,000 of debt, it could not have concluded that Gross intended to receive 45% interest on his loan. See Dixon v. Sharp, 276 So. 2d at 822 ("Corrupt intent should be determined from all of the circumstances surrounding the transaction rather than being determined by an inflexible rule which measures the mathematical result.").

We are fully aware of the cases declaring that usury should be determined at the time of the loan closing.[6] But usury is not simply a calculation that the interest is at a greater rate than

---

[6]See e.g., Shorr v. Skafte, 90 So. 2d 604, 606 (Fla. 1956); Rollins v. Odom, 519 So. 2d 652, 658 (Fla. 1st DCA), rev. denied, 529 So. 2d 695 (Fla. 1988).

that allowed by law. Even if, arguendo, the March 27 calculation were correct, the trial court could not determine that the calculation meant usury unless it found that on March 27, Gross harbored the necessary corrupt intent to charge the excessive rate. See Dixon, 276 So. 2d at 819; Antonelli v. Neumann, 537 So. 2d 1027, 1028 (Fla. 3d DCA 1988); Rebman, 472 So. 2d at 1362. But no such corrupt intent existed and none was found.

We submit then that even if the transaction was found to involve an excessive rate of interest, it was surely one that should have been rescued from the fate of total forfeiture by the parties' savings clause. But the trial court did not consider the savings clause as evidence of the lack of intent because it believed that "[t]here's no way [as it read the statute and cases] that you can disclaim usury" (T. 209). Thus, the trial court's legal conclusion was that "[t]he exculpatory language inserted into the $200,000.00 Promissory Note [did] 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" (R. 251) (emphasis added).

II.

THE LAW OF USURY ACCORDING TO FOREST CREEK: A SAVINGS CLAUSE IS A COMPLETE DEFENSE TO A CLAIM OF USURY

Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So. 2d 356 (Fla. 5th DCA 1988), rev. denied, 541 So. 2d 1172 (Fla. 1989), tells us that a usury savings clause is a complete defense to a claim of usury. In that case, the trial court dismissed a count in the complaint asserting usury because the mortgage note attached to the complaint contained a savings clause. The Fifth District affirmed the dismissal because "[a] defense to this count appears on the face of the complaint and its attachments" id. at 357, thus holding that a usury savings clause prevents a finding of usury as a matter of law. It is this proposition that both the

majority and dissent rejected in the present case. If this Court were to adopt Forest Creek, it would follow, of course, that the Fourth District's decision must be quashed with directions that judgment be entered for Gross.

III.

THE LAW OF USURY ACCORDING TO THE PANEL MAJORITY OF THE FOURTH DISTRICT COURT OF APPEAL: A USURY SAVINGS CLAUSE IS A "FACTOR" TO BE CONSIDERED ON THE ISSUE OF INTENT AND "MAY BE DETERMINATIVE" WHERE THE INTEREST CHARGED IS "CLOSE TO THE LEGAL RATE" OR WHERE INTEREST BECOMES USURIOUS DUE TO THE OCCURRENCE OF A "CONTINGENCY"

Seeking to find a middle ground between declaring a usury savings clause an absolute defense as a matter of law and giving no meaning whatsoever to it, the majority ruled that a 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." 639 So. 2d at 671.[7] It then described the circumstances under which a usury savings clause "may be determinative on the issue of intent." It could be determinative, said the majority, "[w]here 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." Id.

---

[7]The majority looked to several Texas cases for guidance, see Smart v. Tower Land & Inv. Co., 597 S.W.2d 333 (Tex. 1980); Nevels v. Harris, 102 S.W.2d 1046 (Tex. 1937); First State Bank v. Dorst, 843 S.W.2d 790 (Tex. Ct. App. 1992); Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp., 775 S.W.2d 434 (Tex. Ct. App. 1989), and amalgamated them with some Florida cases, see Plantation Village Ltd. v. Aycock, 617 So. 2d 729 (Fla. 2d DCA 1993); First Am. Bank & Trust v. International Medical Ctrs., Inc., 565 So. 2d 1369 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 286 (Fla. 1991); Szenay v. Schaub, 496 So. 2d 883 (Fla. 2d DCA 1986); In re Concrete Express, Inc., 87 B.R. 718 (S.D. Fla. 1988).

But surely when, as in the present case, the transaction -- although arguably at an excessive rate at the moment of the loan closing -- is contemplated to be converted momentarily into little more than a speculative hope that a liability will become an asset, there is no greater corrupt intent than in the situation where the rate becomes excessive later. That being so there is no principled reason to limit, as the majority has done, the usury savings clause to transactions where the interest rate *becomes* excessive and not include transactions where the interest rate, seemingly excessive at the outset, is intended to imminently come within acceptable limits. This case illustrates the latter type of transaction, and the usury savings clause should have compelled the conclusion that Gross lack the required corrupt intent.

IV.

THE LAW OF USURY ACCORDING TO JUDGE FARMER IN HIS DISSENT: A USURY SAVINGS CLAUSE CREATES A PRESUMPTION THAT THERE WAS NO INTENT TO COMMIT USURY, WHICH THE BORROWER MUST OVERCOME BY CLEAR AND CONVINCING EVIDENCE OF "CLASSIC" LOAN-SHARKING

Finding Forest Creek "too sweeping," Judge Farmer suggests a different middle road. His middle road would favor commercial transactions and uphold parties' contracts[8] except in

---

[8]Unless a strong public policy forbids it, courts must give effect to all clauses of the parties' agreement if doing so would validate the contract. Bituminous Casualty Corp. v. Williams, 154 Fla. 191, 17 So. 2d 98, 101-02 (1944).

That Florida's public policy against usury is not strong enough to override usury savings clauses in all but a few cases (for example, where the instrument is usurious on its face, where a plan or scheme to circumvent the usury statute has been proved, or where the borrower is a consumer) is demonstrated by the holding in Continental Mortgage Invs. v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981). There this Court was asked to address the question of whether "the courts of this state will recognize a choice of law provision designating foreign law in an interstate loan contract which calls for interest prohibited as usury under Florida law but supportable under the chosen foreign law." Id. at 507-508. This Court concluded that the (continued...)

cases where a borrower can prove that the usury savings clause "merely represents a bad faith attempt to mask the criminal violation." 639 So. 2d at 675. Under his view, "[t]he lender must be shown clearly and convincingly to have intended a criminal violation of the usury laws." Id. This standard comports with other Florida cases and enforces the need to show criminal intent before criminal sanctions can be imposed. See e.g., Antonelli v. Neumann, 537 So. 2d at 1029 (where notes appeared to require legal rate of interest, borrower has burden of proving that parties employed a corrupt device to conceal a usurious transaction); Connecticut Mut. Life Ins. Co. v. Fisher, 165 So. 2d 182 (Fla. 3d DCA 1964) (actuarial computation did not prove usury in absence of showing that transaction was a scheme or device entered into with corrupt intent to charge more than rate of interest allowed by law); Lee Constr. Corp. v. Newman, 143 So. 2d 222, 225 (Fla. 3d DCA), cert. denied, 148 So. 2d 280 (Fla. 1962) (parties unlawfully relied on scheme they felt would prevent exaction of monies from constituting a violation of the usury law).

In the present case, no device or scheme was suggested by the defendants, let alone proved by them. There simply was no evidence that Gross "intended a criminal violation of the usury laws." In fact, Gross' contrary intent was clearly manifested in the usury savings clause

---

[8](...continued)
public policy against usury in Florida is not so strong as to invalidate a choice of law provision in a parties' agreement "so long as the jurisdiction chosen in the contract has a normal relationship with the transaction." Id. at 508. In reaching this conclusion the Court noted that the "invocation of strong public policy" was unwarranted. Id. at 509.

If the courts must give effect to parties' choice of law provisions even if they allow an unlimited rate of interest, then courts must give effect to a usury savings clause providing that if the transaction is found to be usurious, the remedy chosen by the parties, and not the draconian penalty provided under the usury laws, should be given effect, thereby validating the contract and fulfilling the parties' expectations.

included in the promissory note. Moreover, not only did the trial court not find criminal intent, it declared the contrary: "I determined that there was *no willful or spiteful or malicious intent* on [Gross'] part with regard to this" (T. 212) (emphasis added), and made the following finding of fact:

> 16. Though ***the Court does not believe that Jersey Palm-Gross, Inc. harbored ill will or malevolent intent in making the loan to Jersey Palm Associates*** 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. (R. 248-49; emphasis added.)

And in the Final Judgment, the court said

> 6. 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. (R. 251; emphasis added.)

The trial court thus mistakenly equated knowledge and acceptance with an "unlawful" intent to take more than the law allows. But "willfully" -- not "willingly" -- is the standard under section 687.071 of the Florida Statutes.

Likewise, under the standard proposed by Judge Farmer and consistent with the existing law, more than mere knowledge and acceptance of the amount are required before a lender is subjected to the onerous penalty of forfeiture of the entire loan principal -- the borrower must prove criminal intent before forfeiture results. Because the borrowers here did not carry this burden -- as the trial court's order reflects -- the judgment against Gross cannot stand.

CONCLUSION

The borrowers have received an undeserved windfall. They needed cash to close a multimillion dollar loan. They borrowed the needed cash and guaranteed its repayment. They defaulted. The loan was not usurious on its face, but because the lender received an interest in the speculative venture, the loan was deemed unenforceable and the borrowers were absolved of their obligation to repay it. The venture failed.

Gross should prevail in this case. Under the standard adopted by the Fourth District majority, a trial court is permitted to "factor" the usury savings clause into its finding of intent. But what the Fourth District majority giveth, it then taketh away when it declares that the clause may be determinative *only* if the interest rate charged was close to the legal rate or usury was a result of a later-occurring contingency. The Fourth District's restrictions are too limiting. The usury savings clause should be determinative here as well, where the transaction is not usurious on its face and where the apparent excessive interest is intended to disappear imminently as part of the transaction. Borrowers should be required to repay their loans unless they can clearly show, as the law requires, that the lender had a corrupt -- that is, unlawful -- intent to take more than the law allows. And intent is something that must be found from *all* the circumstances.

Were this Court to choose to adopt Forest Creek, then the usury savings clause is a complete defense as a matter of law and trumps all other evidence bearing on intent. Were this Court to adopt Judge Farmer's dissent then clearly the borrowers have not satisfied and could not satisfy their burden to show that the usury savings clause here was little more than an attempt to mask a criminal violation. Finally, were this Court to adopt the majority view, it

should do so only if that view is expanded to permit the trial court to consider the savings clause as potentially determinative in all cases, especially in cases such as this where a rate that is excessive for a moment is intended to vanish.

For the reasons stated, the district court's decision should be quashed, and the cause remanded to the district court with directions to reverse the decision of the trial court and enter judgment for Gross in accordance with this Court's opinion.

Respectfully submitted,

HOLLAND & KNIGHT
Attorneys for Jersey Palm - Gross, Inc.
701 Brickell Avenue
P.O. Box 015441
Miami, Florida 33101
(305) 374-8500

By: Daniel S. Pearson
Daniel S. Pearson
Florida Bar No. 062079

By: Lucinda A. Hofmann
Lucinda A. Hofmann
Florida Bar No. 882879

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief on the Merits was mailed to Robert M. Weinberger, Esq. 712 U.S. Highway One, 4th Floor, North Palm Beach, Florida 33408 and Henry Paper, 2500 Military Trail, Suite 200, West Palm Beach, Florida 33431, this 13th day of October 1994.

Lucinda A. Hofmann

Lucinda A. Hofmann

MIA-231328

14

INDEX TO APPENDIX

There, a suit was brought alleging that HRS was negligent in failing to adequately investigate and detect a case of child abuse, resulting in further abuse and injury to the child. The court held that in enacting chapter 827, Florida Statutes (1979), the legislature intended to create a special statutory duty of care on the part of HRS to prevent further harm of children when abuse reports are received. *Id.* The court noted that chapter 827 "designates children as a protected class of persons" and that the "relationship established between HRS and the abused child is a very special one." *Id.* Thus, the court found not only a specific legislative intention to create a duty of care, but also the existence of a special relationship between HRS and its charges—the children under its care. *Accord, Department of Health & Rehab. Serv. v. Whaley,* 531 So.2d 723 (Fla. 4th DCA 1988), *aff'd* 574 So.2d 100 (Fla.1991) (HRS may be liable for damages for sexual assault committed on juvenile by fellow detainee while in juvenile detention center).

[6] We cannot agree that the legislature intended to create a special statutory duty of care to individual citizens by enactment of the community control statute. In 1983, the Florida legislature enacted the Correctional Reform Act which created the present community control program. 1983 Fla.Laws ch. 83-131. In passing this Act, the legislature made the following findings, among others:

> (1) Prudent management of the growth of the state must include the reasonable containment of criminal justice expenditures.
>
> (2) State government can no longer afford an uncritical and continuing escalation in capital outlay for prison construction at the expense of other competing social and economic priorities.
>
> (3) The effectiveness of incarceration of offenders as a means to reduce the likelihood that they will return to criminal activities ... varies among individuals and types of offenders and is not conclusively positive.
>
> (4) The increased use of noncustodial alternatives and non-prison custodial alternatives can alleviate prison overcrowding while still providing a sufficient measure of public safety and assuring an element of punishment.

* * * *

1983 Fla. Laws ch. 83-131. Given these legislative findings, we believe that community control programs were borne out of a frustration with the rehabilitative benefits of incarceration for some offenders and a desire to minimize the cost of criminal punishment while at the same time providing a sufficient measure of safety to the public at large. Unlike the statute in *Yamuni,* the community control statute in no way evinces a specific legislative intent to create a duty of care and impart a sphere of protection over certain individual citizens who may be injured by a releasee who manages to evade surveillance.

Accordingly, in finding that DOC owes no statutory or common law duty of care to appellants under the facts sub judice, we affirm the final summary judgment. We hasten to add that our conclusion is compelled by, and confined to, the nature of the specific allegations made in the instant complaint.

AFFIRMED.

ANSTEAD and PARIENTE, JJ., concur.

JERSEY PALM-GROSS, INC., Appellant,

v.

Henry PAPER and Anthony V. Pugliese, III, Appellees.

No. 93-0732.

District Court of Appeal of Florida, Fourth District.

July 6, 1994.

Bridge the gap loan made to real estate partnership was determined to be usurious by the Circuit Court, Palm Beach County,

Richard B. Burk, Jr. Lender appealed. The District Court of Appeal, Pariente, J., held that: (1) evidence that amount charged for loan exceeded lawful interest rate by 27%, was exacted at outset, and made with knowledge of borrowers' desperate need supported finding of usurious intent, and (2) insertion of usury savings clause in loan documents did not preclude finding of usurious intent by lender.

Affirmed and conflict certified.

Farmer, J., dissented and filed opinion.

1. Usury ⇐11

Requirements needed to establish "usurious transaction" are: loan, either express or implied; understanding that money must be repaid; in consideration of loan, greater rate of interest than is allowed by law is paid or agreed to be paid by borrower; and intent to charge usurious rate.

See publication Words and Phrases for other judicial constructions and definitions.

2. Usury ⇐42

"Civil usury" involves loans of $500,000 or less and interest rate of greater than 18% and less than 25%. West's F.S.A. § 687.03.

See publication Words and Phrases for other judicial constructions and definitions.

3. Usury ⇐149

"Criminal usury" involves any loan amount with rate of interest greater than 25% but not in excess of 45%. West's F.S.A. § 687.071.

See publication Words and Phrases for other judicial constructions and definitions.

4. Usury ⇐145, 146

Penalties for civil usury include forfeiture of all interest charged while civil penalties for criminal usury include forfeiture of right to collect debt. West's F.S.A. §§ 687.04, 687.071.

5. Usury ⇐12

Lender's willfulness to charge excessive interest rate is determined in statutory usury proceeding by considering all circumstances surrounding transaction, including looking beyond terms of loan and documents. West's F.S.A. §§ 687.04, 687.071.

6. Usury ⇐52

Added obligations may be considered interest and can render loan usurious if borrower promises or is otherwise required to pay bonus or other consideration as inducement to lender to make loan. West's F.S.A. §§ 687.04, 687.071.

7. Usury ⇐12

Lender's "corrupt intent" to receive more than legal rate of interest was established in statutory usury action by evidence that lender demanded usurious consideration for making bridge the gap loan to real estate developers knowing that borrowers were in distress and with intent to receive amount of interest charged. West's F.S.A. § 687.071.

See publication Words and Phrases for other judicial constructions and definitions.

8. Usury ⇐12

Lender's claimed ignorance of specifics of state's usury laws does not preclude finding of usurious intent. West's F.S.A. §§ 687.04, 687.071.

9. Usury ⇐12

Existence of contractual disclaimer of intent to violate usury laws in loan documents is one factor which finder of fact should consider in determining whether lender intended to take more than legal rate of interest for use of money loaned; factor may be determinative when actual interest charge is close to legal rate or where transaction only becomes usurious upon happening of future contingency. West's F.S.A. §§ 687.04, 687.071.

10. Usury ⇐88

Lender is provided complete defense to civil usury if prior to institution of action by borrower or filing of defense, lender notifies borrowers of any allegedly usurious overcharge and refunds amount of any overcharge. West's F.S.A. § 687.04(2).

11. Usury ⇐88

Presence of usury savings clause in loan documents for bridge the gap loan made to

developers did not preclude finding of usurious intent given that amount charged for loan exceeded lawful rate of interest by 27%, usurious amount was exacted at outset of loan and did not depend upon occurrence of future contingency, and lender had full knowledge of borrower's desperate need of money. West's F.S.A. §§ 687.04, 687.071.

Daniel S. Pearson and Lucinda A. Hofmann, Holland & Knight, Miami, for appellant.

Robert M. Weinberger, Cohen, Chernay, Norris, Morici, Weinberger & Harris, North Palm Beach, for appellee Pugliese.

PARIENTE, Judge.

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.

[1] 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).

[2-6] 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 (1912).

[7] 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,

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.

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*, 108 Fla. 450, 146 So. 551, 552 (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.

[8] 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.

[9] 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

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

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 1990), *rev. denied*, 576 So.2d 286 (Fla.1991) 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 dis-

> 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."

pute 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.

[10] 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 expression 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

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, 1993 WL 118070 (Conn.Super.Ct. April 2, 1993) (unpublished).

> 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.

[11] 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, Judge, 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 overreaching." 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]

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 explained:

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, borrower 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

"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).

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 commer-

cial 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." 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

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 exception 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.

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

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?

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.

1

Marvin WOODS, Appellant,

v.

STATE of Florida, Appellee.

No. 93–1718.

District Court of Appeal of Florida, Fourth District.

July 6, 1994.

Juvenile was sentenced as adult, in the Circuit Court, Broward County, William P. Dimitrouleas, J., and juvenile appealed. The District Court of Appeal held that trial court's factual finding as to sophistication and maturity of juvenile was insufficient to comply with statute.

Reversed and remanded.

Infants ⇐69(6)

Trial court's factual finding when sentencing juvenile as an adult was insufficient to comply with statutory provision stating that suitability of determination shall be made by reference to criteria including sophistication and maturity of the child; factual finding stated: "The sophistication and maturity of the child." West's F.S.A. § 39.059(7)(c)4.

Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Georgina Jimenez-Orosa, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

In sentencing this juvenile as an adult, the trial court wrote a factual finding as to the sophistication and maturity of the defendant that stated as follows: "The sophistication and maturity of the child." The state concedes that under *Troutman v. State*, 630 So.2d 528 (Fla.1993), the factual finding was insufficient to comply with section 39.059(7)(c)4, Florida Statutes (1991). We reverse the sentence and remand for resentencing in compliance with section 39.059(7)(c) as explained in *Troutman*.

GUNTHER, FARMER and KLEIN, JJ., concur.

2

Eric J. SOUZA, a/k/a John Recca, Appellant,

v.

STATE of Florida, Appellee.

No. 94–0998.

District Court of Appeal of Florida, Fourth District.

July 6, 1994.

Following defendant's entry of guilty plea, the Circuit Court, Broward County, Charles M. Greene, J., denied defendant's motion to correct illegal sentence, and defendant appealed. The District Court of Appeal, Klein, J., held that defendant could not challenge sentence, on grounds that state did not serve written notice of intent to seek habitualization prior to entry of guilty plea, by filing motion to correct illegal sentence.

Affirmed.