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 REPLY BRIEF ON THE MERITS

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

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THE CONFLICT BETWEEN HOLDING THAT A USURY SAVINGS CLAUSE ABSOLUTELY PRECLUDES A FINDING OF USURY AND HOLDING THAT A USURY SAVINGS CLAUSE PRECLUDES A FINDING OF USURY IN THE LIMITED CIRCUMSTANCES DESCRIBED BY THE DISTRICT COURT BELOW SHOULD BE RESOLVED BY DECIDING THAT A USURY SAVINGS CLAUSE RAISES A PRESUMPTION THAT USURY WAS NOT INTENDED, WHICH MUST BE OVERCOME BY THE BORROWER'S SHOWING THAT THE CLAUSE WAS A BAD FAITH ATTEMPT TO MASK A CRIMINAL VIOLATION OF THE USURY STATUTE

Usury savings clauses are commonly included in loan documents by the parties to loan agreements. These clauses state not only that the parties do not intend that a usurious rate of interest be charged or accepted but also that in the event that interest on the loan is deemed excessive the lender will relinquish any overcharge.

In 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), decided before the loan transaction in the present case, the Fifth District approved the dismissal of a claim of usury because the loan documents included a usury savings clause, holding necessarily that a usury savings clause is to be given full effect as a matter of law. In contrast, in the present case,[1] the Fourth District has decided that a usury savings clause is merely evidence of intent and may be conclusive evidence in only two instances: when the interest charged is only slightly above the legal rate or when the interest rate become excessive on the happening of a contingency. Thus, although the respondents suggest otherwise, these two decisions concerning the effect to be given usury

[1]Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664 (Fla. 4th DCA 1994).

savings clauses are in stark conflict. This conflict was certified by the majority below and recognized by Judge Farmer in his dissent.

We have asked this Court to resolve this conflict. We have urged that the most appropriate and considered resolution is not arrived at by choosing between the two announced views, but instead by concluding that Judge Farmer's dissent is the course to follow. If Forest Creek gives too much weight to the usury savings clause, the Jersey Palm - Gross majority gives too little.

In this case, the loan was not excessive on its face. The trial court found it excessive by adding to the loan transaction a separate transaction, namely, the transfer of an ownership interest in the partnership. We have never argued, as the respondents suggest, that Gross did not know the relative value of the partnership at the time of the loan closing. Rather, our argument is that if, as this Court has held, the decision as to whether a loan is usurious calls for the weighing and balancing of all the surrounding facts and circumstances, not merely an assessment that the interest rate exceeds the legal limit, see Dixon v. Sharp, 276 So. 2d 817, 822 (Fla. 1973) ("[c]orrupt intent should be determined from all of the circumstances surrounding the transaction"), then the courts below erred in determining that the loan in this case was usurious because significant and compelling circumstances were disregarded.

First, contrary to the respondents' assertions and the panel majority's observation, the trial court did *not* consider the usury savings clause as a factor on the issue of the requisite intent. To the contrary, the trial court said "[t]here's no way, as I read this statute and these cases, that you can disclaim usury. And that's in effect what I've determined under the statute - that there's usury notwithstanding any agreements to the contrary by these parties" (Tr. 209).

Thus, the trial court never considered the usury savings clause in its determination of whether Gross had the required "corrupt intent" to take more than the legal rate of interest.

Second, the trial court expressly found *no* corrupt intent; instead, it "determined that there was no *willful* or spiteful or malicious intent on [Gross'] part with regard to this" (Tr. 212; emphasis added). Although, the trial court found that Gross *knowingly* took more than the legal rate, it never found that he did so *willfully* as the statute requires. See §687.071, Fla. Stat. (1991). Third, when the trial court and the panel majority looked at the facts and circumstances surrounding the loan transaction, they overlooked completely that Gross' knowledge included not merely the value of the partnership's assets on the day of closing, but the imminent $2.1 million liability that the partnership was to incur two days later.[2] By not requiring that *all* of the facts and circumstances surrounding the loan transaction be considered on the issue of intent and that the parties' usury savings clause *always* be a factor to consider on the issue of intent, the Fourth District has rendered the usury savings clause virtually ineffective and unenforceable unless the interest rate is slightly above the legal rate or becomes usurious on the happening of a contingency -- a much too narrow application of this widely-used clause.

On the other hand, the approach of Forest Creek that a usury savings clause *always* saves a transaction from being declared usurious, arguably goes too far if it saves transactions where the usury savings clause is not bona fide. In such cases, the borrower should be allowed to show that the transaction between the parties included an "illogical or spurious" device or

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[2]Respondents quarrel that the fact that Gross knew that his loan was to be used to incur a $2.1 million obligation was never argued below. However, our argument below was that the trial court applied a "knowledge" standard rather than the required "corrupt intent" standard and Gross' knowledge of the use of his loan was a factor to be considered on the issue of corrupt intent -- an issue not reached by the trial court.

scheme intended to circumvent the usury statute[3] or, as Judge Farmer's dissent suggests, that the usury savings clause "merely represent[ed] a bad faith attempt to mask [a] criminal violation" of the usury statute. 639 So. 2d at 675.

In our view, the appropriate resolution of the effect to be given to a usury savings clause is the middle ground between Forest Creek and Jersey Palm-Gross, the course suggested by Judge Farmer. Under this view, the usury savings clause "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." 639 So. 2d at 675. It is plain that that presumption was not and could not be overcome in the present case and that the note sued upon should have been enforced to its full extent.

CONCLUSION

When a borrower signs a loan document that, on its face, is not usurious, which includes a usury savings clause providing that upon the discovery or recognition by either party that the amount of interest charged or accepted is above the legal rate the overage will be returned, the clause should be upheld unless the borrower can show that the usury savings clause was mere subterfuge. If the borrower does not intend to abide by the usury savings clause by accepting -- as the clause provides -- a refund in the event that the interest charged is over the legal rate, then the borrower should not agree to the inclusion of the clause. If, however, the borrower can

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[3]See e.g., Antonelli v. Neumann, 537 So. 2d 1027, 1029 (Fla. 3d DCA 1988) (where promissory notes require legal rate of interest, borrower has burden of proving that parties employed corrupt device to conceal usurious transaction "and that it was in the full contemplation of the parties"); Lee Constr. Corp. v. Newman, 143 So. 2d 222, 225 (Fla. 3d DCA), cert. denied, 148 So. 2d 280 (Fla. 1962) (where intent to charge excessive interest is *further* indicated by fact than illogical or spurious transaction is entered into for purpose of make usurious transaction appear otherwise, lender will not be excused).

show that the clause was not a bona fide agreement but merely an effort to circumvent the usury statute, then the borrower may do so. Since the borrowers here did not do so -- and indeed could not do so -- the decision of the district court should be quashed and the cause remanded with directions to reverse the decision of the trial court and enter judgment for Gross in accordance with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply 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 29th day of December, 1994.

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