IN THE SUPREME COURT
STATE OF FLORIDA

MEDICAL FACILITIES DEVELOPMENT, INC., a Florida corporation,

Petitioner,

v. CASE NO. 86,392

LITTLE ARCH CREEK PROPERTIES, INC., a Florida corporation,

Respondent.

APPLICATION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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PREFACE

This case is on discretionary review to this Court under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) based on an express and direct conflict between the decision of the Third District Court of Appeal and with decisions of this Court and the other Florida district courts of appeal on the same question of law.

Petitioner Medical Facilities Development, Inc., will be referred to as "MFDI."

Respondent Little Arch Creek Properties, Inc., will be referred to as "LACPI."

The Record will be cited as "R ___."

MFDI's Appendix, which provides cases and other materials cited in the Initial Brief on the Merits, will be cited as "A ___."

MFDI's Appendix to its Initial Brief submitted to the Third District, included in the Index to Record at page 15, will be cited as "R15-___."

The transcript of the June 10, 1994 Hearing on LACPI's Motion to Require Plaintiff to Post a Bond, included in MFDI's Appendix to its Initial Brief submitted to the Third District, will be cited as "R15-B."

CITATION OF AUTHORITIES

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STATEMENT OF THE CASE AND OF THE FACTS

Based on its Complaint for specific performance of a contract for the purchase and sale of a parcel of real property in Dade County, Florida ("Property"), MFDI recorded a Lis Pendens in Dade County's real property records to protect itself against loss of the Property to another purchaser before the conclusion of the litigation. R15-1, 2. The contract was unrecorded. After LACPI, the owner of the Property and the contract seller to MFDI, was unsuccessful in seeking discharge of the Lis Pendens under section 48.23(3), Florida Statutes 1993), it filed its Motion to Require Plaintiff to Post a Bond and Supporting Memorandum ("Bond Motion"), demanding that MFDI post a bond in excess of $2.5 million. R15-3-7.

On June 10, 1994, the trial court considered LACPI's Bond Motion. R15-B. LACPI presented evidence of the monetary damage it claimed it would suffer from the placement of the Lis Pendens on its Property but presented no evidence of irreparable harm. The alleged monetary damage consisted of the difference between MFDI's contract price and the contract price of another potential purchaser. MFDI, citing this Court's decision in *Chiusolo v. Kennedy,* 614 So. 2d 491, 492-93 (Fla. 1993), argued that it should not be required to post a bond because the controlling case law required a showing of irreparable harm before a lis pendens bond could be required and LACPI had not met its burden of proof. LACPI argued in part that such a requirement makes no sense.

On June 16, 1994, the trial court entered its Order Directing Plaintiff to Post a Bond. R15-8. In the Order, the trial court found that no showing of irreparable harm was necessary and that LACPI's potential monetary damage was $1 million, the difference between the prices offered by MFDI and its competitor for LACPI's

Property. R15-8. MFDI thereafter filed its Lis Pendens bond and appealed the Order to the Third District Court of Appeal. R01-05.

On appeal, MFDI again argued that *Chuisolo*, 614 So. 2d at 492-93, and various cases from Florida's intermediate appellate courts require that the opponent of a lis pendens show irreparable harm before the court may require the lis pendens proponent to post a bond. R14. LACPI again claimed no showing of irreparable harm is necessary. R16.

On March 15, 1995, the Third District filed its Opinion affirming the Bond Order. R34; *Medical Facilities Development, Inc. v. Little Arch Creek Properties, Inc.*, 656 S. 2d 1300 (Fla. 3d DCA 1995). The Opinion holds that a lis pendens bond is required in every case under section 48.23(3), where the action involving the lis pendens is not founded on a recorded instrument or mechanic's lien. However, the Opinion also recognizes that Florida's other district courts of appeal take different approaches on the issue and specifically delineates three distinct approaches. With respect to *Chuisolo,* the Opinion finds that this Court's language regarding the requirement of irreparable harm is dicta which it is not bound to follow. MFDI's Motions for Rehearing, Rehearing En Banc, and Suggestion of Questions of Great Public Importance were denied. R37-56, 57-69, 70-88, 101. The Mandate issued on August 18, 1995. R102.

MFDI sought this Court's discretionary review on the basis of the express and direct conflict recognized in the Opinion. R103-104. On January 9, 1996, this Court entered its Order Accepting Jurisdiction and Setting Oral Argument. R105.

QUESTIONS PRESENTED

Does section 48.23(3), Florida Statutes (1993), require a party who records a notice of lis pendens in an action not founded on a duly recorded instrument or a mechanics lien to post a bond in the absence of any showing of irreparable harm by the opponent of the notice of lis pendens?

If the answer to the first question presented is no, may a court require the party who records a notice under section 48.23(3) to post a bond in the absence of any showing of irreparable harm by the opponent of the notice of lis pendens?

SUMMARY OF ARGUMENT

"Control" of a notice of lis pendens pursuant to section 48.23(3) requires a balance of the interests of the courts, the public, innocent third parties, and of the proponent and opponent of the notice. The statutory reference to injunctions indicates a legislative intent that Florida trial courts exercise their equitable discretion to "control and discharge" notices of lis pendens by answering two questions: when, and under what circumstances, may notices of lis pendens remain of record in the absence of a pleading based on a recorded instrument or mechanics lien? The answer to the first question was provided by this Court in *Chiusolo*, 614 So. 2d at 491, where the Court held that the existence of the notice is dependent on a showing of "fair nexus" between the pleading and the property.

This case presents the second question: under what circumstances may a notice not based on a recorded instrument or mechanics lien remain of record once a "fair nexus" is shown? The Third District's answer to the question--that every notice under section 48.23(3) must be supported by a bond despite the absence of any showing of irreparable harm by the opponent of the notice--provides no balance of or protection for the various interests involved in lis pendens proceedings and fails entirely to fulfill the purposes of the statutory protection. The Third District's approach leads invariably to a conclusion, as a matter of law, that the balance of the equities and interests must favor the opponent over those of the public, third parties, and the proponent. Such a rule ignores the policy reasons for the notice of lis pendens, contradicts the language and intent of the statute, and conflicts with decisions of this Court and of the other district courts of appeal. Contrary to the conclusion of the Third District, irreparable harm is an integral part of the analysis.

Irreparable harm in the context of a notice of lis pendens means loss of property which is of unique value, loss of other property, or harm which is unreasonably disproportionate to a trivial claim. A showing of irreparable harm is possible by the proponent or by the opponent of the notice. Requiring such a showing by the opponent as a condition precedent to requiring the proponent to post a bond serves several of the purposes for which the doctrine exists. First, it protects third parties by ensuring that the notice will remain of record in the absence of a grave harm to the property owner. Second, it protects the proponent by ensuring that the property will likely not be lost during the litigation.

On the other hand, if the opponent cannot show irreparable harm, then it follows that the only potential damage to the property owner is monetary and no bond should be required. This is the usual situation where specific performance of a contract for purchase and sale is involved since the potential seller has already liquidated its damages by placing a sale price on the property. In that situation, the potential buyer is the party that may suffer the irreparable harm of losing the property during the litigation if the notice does not remain of record because of the requirement imposed by the Third District's decision.

Requiring a showing of irreparable harm by the proponent of the notice also serves a purpose. In the absence of such a showing, the lis pendens proponent's interest is just as easily protected by a bond to which the notice may be transferred--thereby freeing the property itself. This is the usual scenario in cases involving allegations of equitable lien and constructive trust, where the proponent seeks only recovery of money damages out of the property as opposed to the property itself. In

that situation, there is no reason to cloud title to the property if the opponent is willing to transfer the claim to a bond.

In a third scenario, neither proponent nor opponent may be able to show irreparable harm. In that case, the court should be free to exercise its greatest discretion in requiring or refusing to require a bond for either party. Nothing in the statutory history suggests a bond is required in all cases involving a lis pendens. Finally, if both parties make a showing of irreparable harm, the court also has broad discretion to require both parties, or neither, to post bonds.

ARGUMENT

I. THE PURPOSES OF THE DOCTRINE AND THE NOTICE.

A. The Doctrine and the Notice of Lis Pendens Allow for the Protection of the Power of the Courts, the Public Interest, Innocent Third Parties, and the Proponent and Opponent of the Notice.

1. The Doctrine Protects the Power of the Courts and the Public Interest.

The doctrine of lis pendens recognizes the court's control over property involved in a lawsuit.

> The term "lis pendens" literally implies a pending suit. The doctrine of lis pendens is defined as the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action and until final judgment therein.

DePass v. Chitty, 90 Fla. 77, 105 So. 148, 149 (1925); *accord, Intermediary Finance Corp. v. McKay*, 93 Fla. 101, 111 So. 531, 531-32 (1927); 35 FLA. JUR. 2D *Lis Pendens* § 1 (1995); 51 AM.JUR.2D *Lis Pendens* § 1 (1995). 54 C.J.S. *Lis Pendens* § 2 (1995).

The doctrine of lis pendens provides the legal system with the control and assurance that judgments may be carried out, and property in litigation be subjected to the judgment. "The doctrine of lis pendens is based on a practical need to bind third parties claiming an interest in property to the outcome of the pending litigation." Richard Powell and Patrick Rohan, 7 *Powell on Real Property* ¶ 907.1[1] (1995); *accord DePass*, 105 So. at 149.

This power of the courts serves an important public interest in ensuring that a court's decision regarding title to property is enforceable. In the absence of such a doctrine and the priority it provides in judicial proceedings, a court's decision would

be largely advisory if title to property changed hands to innocent third parties during the course of litigation. Moreover, enforcement of that decision would require further litigation regarding priority of interest.

2. The Notice Protects Innocent Third Parties.

Consistent with the power the doctrine gives the courts, the notice ameliorates the potentially harsh effect of the doctrine upon bona fide purchasers or encumbrancers who would otherwise be bound by the doctrine without effective notice. 51 AM.JUR.2D *Lis Pendens* § 7 (1995); 54 C.J.S. *Lis Pendens* § 6 (1995). As a result of the doctrine, "a person who deals with property while it is in litigation does so at his peril." 51 AM.JUR.2D *Lis Pendens* § 1 (1995).

Although the notice does not create the court's power over property pending litigation, it serves as warning to prospective purchasers and encumbrancers that any interest they may acquire in the property will be subject to the doctrine's effect on the judgment finally entered. *Intermediary Finance Corp.*, 111 So. at 532; Powell et al., 7 *Powell on Real Property* ¶ 907.6[1] (1995).

> When a suit is filed that could affect title in property, some notice should be given to future purchasers or encumbrances of that property. . . .

Chiusolo, 614 So. 2d at 492; s*ee also Commodore Plaza at Century 21 Condominium Association, Inc. v. Century 21 Commodore Plaza, Inc.*, 290 So. 2d 539, 540 (Fla. 3d DCA 1974) (protection of prospective purchasers is a primary purpose for the notice of lis pendens). The notice of lis pendens exists "at least in part to prevent third party purchasers from buying a lawsuit." *Chiusolo*, 614 So. 2d at 492 n. 1.

3. The Doctrine and the Notice Protect the Lis Pendens Proponent.

The doctrine is important to the lis pendens proponent: "[W]ithout such a rule, it would be possible to defeat the judgment by a conveyance to some stranger, and the plaintiff would be forced to commence a new action against him." Grant Nelson, Grant, and Whitman, Dale, *Real Estate Finance Law*, 3d Ed. (1993). Thus, "if the defendant alienated [the property subject to the lis pendens] during the pendency of the suit, the judgment in the real action overreached the alienation." *DePass*, 105 So. at 149.

> In sum, unlike a typical injunction, the lis pendens exists as much to warn third parties as to protect the plaintiff, and the procedural requirements associated with lis pendens should advance both of these important purposes.

Chiusolo, 614 So. 2d at 492. The notice is also important to the proponent, in lessening the chances that the proponent will face further litigation to effectuate a favorable judgment.

Neither the doctrine nor the notice of lis pendens, however, is equivalent to an injunction against the conveyance of the property. *Cacaro v. Swan*, 394 So. 2d 538, 539 (Fla. 4th DCA), *rev. dismissed*, 402 So. 2d 608 (Fla. 1981), *disapproved on other grounds*, *Chuisolo*, 614 So. 2d at 493; *see also Orange County v. Hongkong and Shanghai Banking Corporation, Ltd.*, 52 F.3d 821, 825 (9th Cir. 1995) (under California law, lis pendens is not an injunction, nor has it the "practical effect" of an injunction; lis pendens is neither directed to a party nor enforceable by contempt); *Whitney National Bank v. McCrossen*, 635 So. 2d 401, 403 (La. Ct. App.), *writ denied*, 639 So. 2d 1164 (La. 1994) (lis pendens is not attachment, injunction, execution, or pre-judgment seizure); *Whelan v. J.T.T. Contractors, Inc.*, 547 N.Y.S.2d

111, 112 (N.Y. App. Div. 1989); *Colombo v. Caiati*, 493 N.Y.S.2d 244, 246 (N.Y. Sup. Ct. 1985). *Compare Conservatory--City of Refuge v. Kinney,* 514 So. 2d 377, 378 (Fla. 2d DCA 1987) (temporary injunction against developing, alienating, conveying, or encumbering real property pending the outcome of a lawsuit determining title).

It has been observed that the doctrine and notice of lis pendens, although not equivalent to an injunction, may cloud the title to or constrain the alienability of property. *Cacaro*, 394 So. 2d at 539; *Mohican Valley, Inc. v. MacDonald*, 443 So. 2d 479, 481 (Fla. 5th DCA 1984). However, such constraint is one of the proper and salutary purposes of the statutory notice of lis pendens. A prudent prospective buyer or encumbrancer would, in most cases, be properly reluctant to acquire an interest in property, knowing that such interest will be subject to the outcome of the litigation. For example, it is a beneficial policy that the existence of a prior, specifically enforceable, contract to purchase property should "cloud" and constrain a conveyance to a subsequent prospect until title disputes have been resolved.

4. <u>The Doctrine Allows Protection for the Interests of the Property Owner.</u>

Although the purpose of the lis pendens is to protect the public, innocent third parties, and the proponent, the doctrine also permits consideration of the interests of the property owner. *Chiusolo,* 614 So. 2d at 493. In Florida, numerous protections are available for a court's use. For instance, if the judgment would not affect the owner's interest in the real property, this Court has recognized that the plaintiff cannot establish a "fair nexus" and has said that the lis pendens must be discharged as improper. *Id.* at 492. The protection is well-established. *See, e.g., Lennar Florida*

Holdings, Inc. v. First Family Bank, 660 So. 2d 1122, 1124 (Fla. 5th DCA 1995); *Lazzara v. Molins*, 504 So. 2d 13, 14 (Fla. 2d DCA 1987); *Bay Place Development Corporation v. Ellis First National Bank of West Pasco, N.A.*, 465 So. 2d 628, 629 (Fla. 2d DCA 1985); *Lake Placid Holding Co. v. Paparone*, 414 So. 2d 564, 566 (Fla. 2d DCA 1982); *Worldwide Development--Kendale Lakes West v. Lot Headquarters, Inc.*, 305 So. 2d 271, 272 (Fla. 3d DCA 1974); *Commodore Plaza*, 290 So. 2d at 540.

Attorneys fees may be recovered for expenses incurred in the removal of a lis pendens filed in bad faith. *Haisfield v. ACP Florida Holdings, Inc.*, 629 So. 2d 963, 967 (Fla. 4th DCA 1993). An intentional wrongful filing of a notice of lis pendens may support an action for slander of title or malicious prosecution. *Bothmann v. Harrington*, 458 So. 2d 1163, 1168 (Fla. 3d DCA 1984); *Palmer v. Shelby Plaza Motel, Inc.*, 443 So. 2d 285, 286 (Fla. 2d DCA 1983); *Atkinson v. Fundaro*, 400 So. 2d 1324, 1326 (Fla. 4th DCA 1981). Sanctions under section 57.105(a), Florida Statutes (1995), or grievance procedures under the Rules Regulating The Florida Bar, may be available. *McMurray v. U-Haul Co., Inc.*, 425 So. 2d 1208, 1210 (Fla. 4th DCA 1983). In *Chiusolo*, 614 So. 2d at 492 n. 3, the Court noted in dicta that the property owner might obtain discharge of the notice "where sufficient measures have been taken to protect the interests claimed by the plaintiff. . . ." *Cf. Gay v. Gay*, 604 So. 2d 904, 906 (Fla. 5th DCA 1992) (requiring opponent of notice to escrow sale proceeds for proponent's protection as a condition of partially canceling notice); *Commodore Plaza*, 290 So. 2d at 540 (requiring that opponent escrow sale proceeds sufficient to pay proponent's lien claims as a condition of canceling notice). The great expense to the plaintiff of maintaining a questionable lawsuit gives some practical protection.

In addition to the other protections recognized by Florida cases, a lis pendens proponent may be required to post a bond to protect the property owner from harm which might arise from the existence of the lis pendens. In *Chiusolo*, 614 So. 2d at 493, this Court noted in dicta that a bond was available under "appropriate circumstances" if the opponent of the lis pendens could establish "irreparable harm" should the lis pendens be allowed to remain. Florida district courts of appeal have taken various approaches to determining when a bond is appropriate. The approaches have ranged from always requiring a bond to allowing the trial court broad discretion even where irreparable harm is shown. *Medical Facilities*, 656 So. 2d at 1304; *Mohican Valley*, 443 So. 2d at 481.

B. The Third District's Erroneous Approach to the Bond Requirement Does Not Serve the Purposes of the Doctrine and the Notice.

The approach adopted by the Third District in this case, and now before this Court for review, is to require a lis pendens bond in every circumstance where the lis pendens is not founded on a recorded instrument or mechanics lien. *Medical Facilities*, 656 So. 2d at 1304. According to the Opinion, the Third District is of the view that no showing of irreparable harm is necessary and that the lis pendens proponent's inability to post a bond must result in cancellation of the notice with no regard for the harm to the proponent.

The approach of the Third District, to condition the existence of the notice upon the proponent's ability to post a bond, ignores and puts at risk the interests of third parties whose protection is one of the main purposes of the notice. Furthermore, contrary to the Third District's apparent conclusion, cancellation of a notice of lis pendens because of the proponent's inability to post a bond may not result in the

relief anticipated by the Third District or urged by the property owner. Just as merely filing a notice of lis pendens does not enjoin transfer of property, so merely canceling the notice on the proponent's inability to post a bond will not necessarily facilitate a sale or encumbrance, particularly if the operative pleading frames a claim against the property. A title examiner's search of the property records should reveal the existence of the canceled notice in any event and prompt investigation of the underlying lawsuit. A prospective purchaser or encumbrancer would then be on actual notice of, and be bound by, the outcome of the lawsuit regardless of the cancellation or expiration of the notice. *See Lassiter v. Curtiss-Bright Co.*, 129 Fla. 728, 177 So. 201, 203 (1937); *Crown Corporation v. Robinson,* 128 Fla. 249, 174 So. 737, 739 (1937); *Hough v. Stewart,* 543 So. 2d 1279, 1281 (Fla. 5th DCA 1989); *Chafetz v. Price,* 385 So. 2d 104, 106 (Fla. 3d DCA 1980). If the lawsuit giving rise to the lis pendens is still pending, a prudent potential buyer would be reluctant to acquire an interest in the property until the litigation has been resolved. A title insurance exception would be proper and defensible. *Fund Title Notes*, TN 12.05.05 (Attorney's Title Insurance Fund, Inc., 1994).

For a second reason, cancellation may not be effective to accomplish the property owner's goal. If a dispute involves competing purchasers, both are likely to have actual knowledge of, and therefore be bound by, the lawsuit. *E.g.*, *Coates v. Hall*, 429 So. 2d 761, 762 (Fla. 1st DCA 1983). The title insurance policy exception for a "contract known to exist though unrecorded" would then create a de facto notice and likely prevent closing. *Fund Title Notes*, TN 9.02.01 (Attorney's Title Insurance Fund, Inc., 1994). On the other hand, cancellation of the notice may deceive innocent or unsophisticated third parties, whose protection is a primary purpose for the notice,

Chuisolo, 614 So. 2d at 492, or engender a protracted series of lawsuits by persons claiming--either honestly or disingenuously--to be bona fide purchasers.

According to this Court, once it is established that a pleading states a "fair nexus" to property involved in litigation, the lis pendens proponent has met the burden to maintain a lis pendens on the affected property. *Chiusolo*, 614 So. 2d at 492. The issue before the Court now is the bond issue treated only by dicta in *Chiusolo*. The approach of the Third District on the second lis pendens issue ignores the purposes of the doctrine and the notice, and prejudices the lis pendens proponent.

II. CONDITIONING THE REQUIREMENT OF A LIS PENDENS BOND ON A SHOWING OF IRREPARABLE HARM IS EQUITABLE, LOGICAL, AND PRACTICAL.

A. "Control" of the Notice Under Section 48.23(3) Requires Balancing of the Equities and Interests Involved In The Proceedings.

In section 48.23, Florida Statutes (1993), the Florida Legislature established broad, general guidelines for use by the courts in determining when and under what circumstances to permit the recordation of notices of lis pendens. When a pleading is founded on a recorded instrument, the statute recognizes that the proponent is entitled to place and keep a lis pendens upon the property involved in the litigation. § 48.23(1), Fla. Stat. (1993). When the initial pleading is not founded on a recorded instrument, however, section 48.23(3) allows a court to "control and discharge the notice of lis pendens as the court may grant and dissolve injunctions." The meaning of the language was left to the courts to construe and enforce.

As the Third District recognized in *Medical Facilities,* 656 So. 2d at 1302-03, over the years Florida's intermediate appellate courts have expressed various views, often in dicta, on the inclusion of the injunction language in the statute. One approach requires the opponent to show the necessity of a bond to protect it from irreparable harm. *Sparks v. Charles Wayne Group*, 568 So. 2d 512, 517 (Fla. 5th DCA 1990); *Feinstein v. Dolene,* 455 So. 2d 1126, 1128 (Fla. 4th DCA 1984); *Florida Communities Hutchinson Island v. Arabia*, 452 So. 2d 1131, 1132(Fla. 4th DCA 1984); *Glusman v. Warren,* 413 So. 2d 857, 858 (Fla. 4th DCA 1982). A second approach has generally given the trial court discretion to require a bond "in case the lawsuit fails" and "if the lis pendens places a cloud on the title." *Mohican Valley, Inc.*, 443 So. 2d at 481; *Andre Pirio Associates v. Parkmount Properties, Inc., N.V.,*

453 So. 2d 1184, 1186 (Fla.2d DCA 1984); *CAM Corp. of Broward v. Goldberger,* 368 So. 2d 56, 57 (Fla. 4th DCA), *cert. denied,* 378 So. 2d 343 (Fla. 1979); *see also Bailey v. Rolling Meadow Ranch, Inc.,* 566 So.2d 63, 65 (Fla. 5th DCA 1990) (recognizing "cloud on title" criterion). A third approach, that adopted by the Third District, simply holds that a bond is always required. *Medical Facilities* , 656 So. 2d at 1304; *Porter Homes, Inc. v. Soda,* 540 So. 2d 195, 196 (Fla. 2d DCA 1989); *Machado v. Foreign Trade, Inc.*, 537 So. 2d 607, 607 n.1 (Fla. 3d DCA 1988); *Munilla v. Espinoza,* 533 So. 2d 895, 895 (Fla. 3d DCA 1988); *Nero v. Nero,* 475 So. 2d 1361, 1361-62 (Fla. 5th DCA 1985); *Sunrise Point, Inc. v. Foss,* 373 So. 2d 438, 493 (Fla. 3d DCA), *cert. denied,* 374 So. 2d 99 (Fla. 1979).

This Court has not decided the question directly. Analysis of the approaches of other jurisdictions on the issue, however, dictates that the Court's conclusion in *Chiusolo*, albeit dicta, was correct. A requirement of a showing of irreparable harm by the opponent of the lis pendens before requiring a bond from the proponent is the only equitable, logical, and practical approach. In combination with that approach, a bond may also be required of the opponent if the proponent of the notice makes a showing of irreparable harm. In the absence of any potential for irreparable harm, no bond should be required.

1. Section 48.23(3) Gives the Courts Equitable Jurisdiction To Control Notices of Lis Pendens.

Although the statute refers to injunctions in providing for a court's discretionary jurisdiction over notices of lis pendens, the statute does not state whether the proponent or the opponent of the lis pendens should be deemed a seeker of, or an opponent of, injunctive relief; nor whether a bond is required; nor which, if

either, party should post a bond; nor the circumstances under which a bond should be imposed. The only way to interpret the legislative intent behind the statute is to analyze the status of injunctive relief at the time the lis pendens statute was enacted.

The language of section 48.23(3) is substantially unchanged since its first enactment in 1927. CGL 4550 (1927). At that time, injunction proceedings were defined by Comprehensive General Laws of Florida 4967-75 (1927), formerly Revised General Statutes of Florida 3175-83 (1920). Pursuant to those statutes, injunctions might issue without bond where the complainant was unable to give a bond or other security. CGL 4969 (1927). A defendant might also move the court for dissolution of an injunction. CGL 4971 (1927). As now, the granting and continuing of injunctions was held to rest in the sound judicial discretion of the court; it was "not a matter of course" to dissolve an injunction even where all the equities of the bill were denied by the answer. *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597, 602 (1906); *Linton v. Denham*, 6 Fla. 533, 545 (1856). As now, within the court's discretion, the rights of the general public would be considered. *Suwanee & S.P.R. Co. v. West Coast Ry. Co.*, 50 Fla. 609, 39 So. 538, 538 (1905). Where the plaintiff might suffer irreparable injury, the injunction would be continued. *Linton v. Denham*, 6 Fla. at 546. Upon a motion to dissolve an injunction, either party had the right to introduce evidence. CGL 4970 (1927).

By its reference to granting and discharging injunctions, the legislature must have intended that the courts would exercise considerable discretion; would balance the equities of the parties, avoiding irreparable harm to either; would consider the interests of the public at large; would consider any evidence which either plaintiff or defendant chose to present; and might--or might not--require a bond. The legislature

could have required a prior hearing--but did not; could have specified conditions--but did not; and could have required a bond--but did not.

2. The Factors Involved in Controlling Notices of Lis Pendens Are Those Involved in Controlling Injunctions.

In determining the propriety of continuing an injunction, a court should look to the equities of each of the parties and consider the possibility of irreparable harm to each. *Columbia Casualty Co. v. Thomas*, 20 F. Supp. 251, 253 (N.D. Fla. 1937) (considering the interest of the plaintiff insurer, the insured, and the numerous claimants). Granting or dissolving an injunction involves the equitable doctrine of balancing. *Monell v. Golfview Road Association*, 359 So. 2d 2, 4 (Fla. 4th DCA 1978). A court must give consideration to the fact that irreparable injury may result to the defendant if the injunction is continued, or, on the other hand, to the complainant if a continuance is refused. 42 AM.JUR.2D *Injunctions* § 326 (1995). Thus, a court of equity may refuse to grant, or may dissolve, an injunction "where the harm to the person coerced is wholly disproportionate to the benefit to the other party." *Loeffler v. Roe*, 69 So. 2d 331, 340 (Fla. 1953); *accord Gibson v. City of Tampa*, 114 Fla. 619, 154 So. 842, 842 (1934); *Davis v. Joyner*, 409 So. 2d 1193, 1195 (Fla. 4th DCA 1982); *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735, 740 (Fla. 3d DCA 1982).

The parties' rights or interests may be outweighed by those of the public:

> Where it is readily apparent that it will result in confusion and disorder and produce an injury to the public that outweighs the individual right of the complainant . . . .

Florida Land Company v. Orange County, 418 So. 2d 370, 372 (Fla. 5th DCA 1982) (denying injunction against enforcement of sewage allocation ordinance).

In balancing the equities and interests, courts of equity have imposed the requirement of a bond for dissolution of an injunction where appropriate. *Campbell Co. v. Wentz*, 75 F. Supp. 952, 954 (E.D. Pa.), *aff'd*, 172 F.2d 80 (3d Cir.1948); *Cox v. Marsh*, 291 F. 97, 98 (S.D. Fla. 1923); *Davis v. Whittington*, 99 So. 377, 378 (Miss. 1924); 43A C.J.S. *Injunctions* § 258 (1995). Similarly, as noted in *Chiusolo*, 614 So. 2d at 492 n.3, the court's control of a lis pendens may include requiring the opponent to post a bond for removal of the notice. *Cf. Gay*, 604 So. 2d at 906 (requiring the opponent of the notice to escrow sale proceeds for the proponent's protection as a condition of partially canceling the notice); *Commodore Plaza*, 290 So. 2d at 540 (requiring that opponent escrow sale proceeds sufficient to pay proponent's lien claims as a condition of canceling the notice).

However, because a notice of lis pendens, and the doctrine of lis pendens, involve considerations beyond those typically present in controlling injunctions, the interests of the public and innocent third parties, it is especially important that the court be permitted to exercise the broadest discretion, as intended by the legislature, to balance those interests. To invariably require that the proponent post a bond ignores the importance of the court's discretion in considering and protecting the several interests involved.

The courts must strike a balance between always--and never--requiring the proponent to post a bond. Requiring a proponent's bond in all cases as the Third District has now done, *Medical Facilities Development*, 656 at 1304, or else absolving the proponent in all cases from posting a bond, would be equally simplistic and unreasonable misreadings of the statute. In *Chiusolo*, 614 So. 2d at 493, the Court determined a practical and principled criterion: whether the notice will cause

the owner irreparable harm. Correspondingly, the owner may obtain discharge of the notice by posting a bond, if "sufficient measures have been taken to protect the interest claimed by the plaintiff," *i.e.*, the plaintiff will not be irreparably harmed by removal of the lis pendens. *Id.* at 492 n.3. A bond should be required where the owner will suffer some unique, unreasonable, and disproportionate--*i.e.*, irreparable--injury because of the notice of lis pendens. Equally, the notice should not be dischargeable, nor a plaintiff's bond required, where the plaintiff would thereby suffer irreparable harm.

3. Other Jurisdictions Illustrate a Balance of the Factors.

The language of the Florida lis pendens statute is unique in American jurisdictions. Decisions in other jurisdictions and general treatises, therefore, provide no direct guidance. Other jurisdictions have, however, recognized the factors which must be balanced in controlling a notice of lis pendens:

> The rigid and inflexible rule enforced prior to the legislation in question have been subject to much abuse and had made it a relatively simple matter to tie up property by strike suits for long periods of time. The amendment [permitting discharge of the lis pendens on defendant's posting a bond] is, however, susceptible to grave abuse in the contrary direction to the extent that honest and bona fide claimants may be deprived of their right to an interest in, or the enjoyment of, specific real property by the cancellation of a lis pendens and the substitution of an undertaking in an amount fixed by the court. The power to cancel the notice of pendency of action in actions affecting the title to specific realty is one which should, therefore, be exercised with the greatest caution, and in none but the most obvious cases of injustice to the property owner.

63rd Street Theaters, Ltd., Inc. v. Mansion Estates, Inc., 243 N.Y.S. 204, 206 (N.Y. Sup. Ct.), *aff'd*, 245 N.Y.S. 767 (N.Y. App. Div. 1930).

The concerns and considerations expressed in the early New York decision are illustrative of general judicial thinking on the topic. While no statute, and no decision revealed by research, inexorably requires the proponent of the notice to post a bond, certain states permit the opponent to obtain discharge upon posting a bond if the proponent's claim can be adequately satisfied by money. Conn. Gen. Stat. § 46b-80 (West 1995) (dissolution of marriage); N.J. Rev. Stat. § 2A:15-15 (West 1995) (discharge of notice in "action for the enforcement against real estate of a claim for the payment of money"); N.C. Gen. Stat. §50-20(h) (The Michie Co. 1995) (dissolution of marriage); Tex. Property Code Ann. § 12.008 (West 1995)(if party seeking affirmative relief can be adequately protected by deposit of money into court or by giving of undertaking; requiring an undertaking of twice amount sought); W. Va. Code, §48-2-35 (The Michie Co. 1995) (dissolution of marriage). Similarly, Alabama Code section 35-4-137 (1995), permits the defendant to cancel a notice of lis pendens for enforcement of a lien by posting a bond in double the amount of the fair market value of the land.

In California, Michigan, and New York, statutes likewise permit the opponent to cancel the lis pendens by posting a bond where the proponent can be adequately compensated in money; but also permit the court to require a bond of either the proponent or the opponent, or both (in Michigan and New York), as a condition of maintaining, or canceling, the notice. Cal. Civ. Proc. Code §§ 405.33-.34 (West 1995) (similar provisions existed in repealed §§409.1-.2); Mich. Comp. Laws § 600.2731 (West 1995); N.Y. Civ. Prac. L. & R. 6515 (West 1995). In construing New York's statute, its courts have recognized that "double bonding"--requiring that both parties may have to post a bond--is preferable in specific performance actions.

Andesco, Inc. v. Page, 530 N.Y.S.2d 111, 114 (N.Y. App. Div. 1988); *Ansonia Realty Co. v. Ansonia Associates*, 498 N.Y.S.2d 141, 142 (N.Y. App. Div. 1986); *Weksler v. Yaffe*, 493 N.Y.S.2d 682, 686 (N.Y. Sup. Ct. 1985).

Courts have imposed a bond upon the plaintiff, either upon equitable or statutory grounds. *E.g. CMSH Co., Inc. v. Antelope Development, Inc.*, 272 Cal. Rptr. 605, 606 (Cal. Ct. App. 1990) (requiring plaintiff's bond pursuant to statute); *West Virginia ex rel. Parkland Development, Inc. v. Henning*, 429 S.E.2d 73, 75 (W. Va. 1993) (permitting defendant to post bond to partially lift lis pendens from property unaffected by lawsuit). In Florida, the *Parkland* result would also be reached without a bond under this Court's *Chiusolo* analysis.

B. The Criterion of Irreparable Harm Correctly Guides a Court in Balancing the Equities and Interests to be Protected.

The precise question before the Court for consideration is how to place, if at all, the burden of showing "irreparable harm" in considering issues involving notices of lis pendens. "Irreparable harm" for purposes of granting or denying injunction, means harm which cannot be adequately compensated by a money award. *Atlantic Coast Line R. Co. v. Feagin*, 90 Fla. 62, 105 So. 141, 141 (Fla. 1925); *Davidson v. Floyd*, 15 Fla. 667, 670 (1876); *B.G.H. Insurance Syndicate, Inc. v. Presidential Fire & Casualty Co.*, 549 So. 2d 197, 198 (Fla. 3d DCA 1989), *rev. dismissed*, 557 So. 2d 867 (Fla. 1990). In a lis pendens context, the phrase is just as carefully defined.

1. Irreparable Harm is Well-Defined for Control of Notices of Lis Pendens.

In relation to notices of lis pendens, the concept of "irreparable harm" has been well-defined by courts in other jurisdictions, especially in construing statutes

permitting the defendant to "bond off" the notice upon a showing that the plaintiff will be adequately secured by a monetary award.

First, if the party's interest in the property is merely to sell it to obtain money, no irreparable harm can be shown as a matter of law. *Coppinger v. Superior Court of Orange County*, 185 Cal. Rptr. 24, 30 (Cal. Ct. App.1982) (action for constructive trust); *Trapasso v. Superior Court of Orange County*, 140 Cal. Rptr. 820, 824 (Cal. Ct. App. 1977) ("Here, plaintiff's complaint establishes that plaintiff is interested only in the monetary value of his [one-third] interest in the real property."); *Empfield v. Superior Court for Los Angeles County*, 108 Cal. Rptr. 375, 377 (Cal. Ct. App.1973) ("Here, however, [they] claim the property only for its value as a source of future income and support. Pecuniary relief would equally serve . . . .); *Hercules Chemical Co., Inc. v. VCI, Inc.*, 462 N.Y.S.2d 129, 137 (N.Y. Sup. Ct. 1983) (action for constructive trust); *Ransopher v. Deer Trails, Ltd.*, 647 S.W.2d 106, 108 (Tex. Ct. App. 1983) ("His complaint was not that it was sold, but that he was defrauded of the sale proceeds.").

In *Jessen v. Keystone Savings and Loan Association*, 191 Cal. Rptr. 104, 106 (Cal. Ct. App. 1983), by virtue of a similar analysis, the court denied an injunction against foreclosure, noting: "Here, unit numbers 8 and 15 had been price tagged and were being openly marketed. The trial court correctly determined they had no unique relationship to [plaintiff] other than their market price." *See also McCahill v. Roberts*, 219 A.2d at 308 (discharging lis pendens without bond where "plaintiff's real aim was to recover the cash value of the structure").

In contrast, where the property has a unique value to the owner or to the purchaser, irreparable harm may be found. In *Stewart Development Co. IV v.*

Superior Court for Orange County, 166 Cal. Rptr. 450, 454 (Cal. Ct. App. 1980), an action for specific performance, the court held that the buyer had established the requisite harm:

> [The] buyer's purpose in entering into the alleged contract to purchase the property was to develop it extensively with commercial buildings and building pads, and buyer wanted the specific property because of its substantial size, its corner location, and its proximity to two main thoroughfares and a United States Post Office. Thus, buyer is interested in this particular parcel of property as such, not just the monetary value of the property.

In another California case, *Sheets v. Superior Court of Los Angeles County*, 149 Cal. Rptr. 912, 913-14 (Cal. Ct. App. 1978), the court allowed a lis pendens in an action for specific performance where the property was "uniquely appropriate . . . for supermarket development," and the plaintiff alleged that it had "expended substantial sums of money to investigate the development of a shopping center on the property, that it wants the land itself, and not damages . . . ." A New York court, in *Weksler v. Yaffe*, 493 N.Y.S.2d at 686, another action for specific performance, noted: "The uniqueness of the property still remains as an important factor in determining whether to permit lifting of the lis pendens." In that case, however, the court concluded the plaintiffs had a "minimal interest in defendants' building except for the purposes of a profitable re-sale." In *Creno v. Masterpol*, 264 N.Y.S.2d 168, 172 (N.Y. Sup. Ct. 1965), another New York court noted that, where the plaintiff's right to specific property is at issue, "adequate relief cannot be secured to the Plaintiff by a deposit of money . . . ." *See also Ransopher*, 647 S.W.2d at 108 ("There was no evidence that this property had intrinsic, sentimental, or historic value making it unique."); *Kelly v. Perry*, 531 P.2d 139, 141 (Ariz. 1975) (quashing notice of lis pendens without bond in action for accounting and constructive trust where defendant "was in the process

of developing 70 acres from raw land to dwelling and commercial property."). The risk that specific property may be sold to unknown third parties has also been held to be harm sufficient to deny cancellation of the notice of lis pendens. *Elna Construction Co. v. Flynn*, 240 N.Y.S.2d 581, 584 (N.Y. Sup. Ct. 1963) (action against a city for specific performance of a competitive bid).

Disproportionate injury may constitute harm justifying cancellation of a notice of lis pendens. In *Dice v. Bender*, 117 A.2d 725 (Pa. 1955), the court canceled a notice of lis pendens for a $47.70 mechanics lien claim where plaintiff's total claim was adequately secured by his lis pendens on a second property while the notice of lis pendens could prevent the sale of the first property for $15,000.00:

> [I]f one had a claim of merely a trifling sum he could, pending litigation for its recovery in an equity proceeding, prevent his alleged debtor from conveying away property even though, perhaps, of a fabulous value, on an unjustified assumption that the working of the doctrine of lis pendens is wholly inexorable and uncontrollable.

Id. at 727 ("[T]he doctrine of lis pendens is wholly subject to equitable principles.").

Irreparable harm may also arise where property, or a sale of property, other than that which is the subject of litigation could be lost. *See Gay*, 604 So. 2d at 906 (canceling notice of lis pendens on 2.5 acres of a large parcel of real property to permit its sale to obtain funds to pay off a defaulted mortgage, which would otherwise "probably lead to the loss of the entire 53.02 acres"); *Parkland,* 429 S.E.2d at 75 (canceling lis pendens on property not subject to plaintiff's claim).

Thus, in the context of cancelling a notice of lis pendens, especially if conditioned on a bond, the standard of irreparable harm (or, conversely, of adequate monetary damages) indicates a risk of losing the right to possess uniquely valuable

property; risk of losing other property; or harm which is unreasonably disproportionate to a relatively trivial claim. But if the party's only interest is monetary, especially where the party has offered or intends to offer the property for sale, irreparable harm cannot be found. Understood in this way, "irreparable harm" is the proper criterion to balance the factors to determine whether to require a bond.

2. <u>The Nature of the Proponent's Claim is Relevant.</u>

Consideration of the plaintiff's claim is appropriate. Section 48.23(3) applies to any and every action not founded on a recorded interest. These actions may assert less concrete interests, such as demands for a constructive trust or an equitable lien, which have no objective existence prior to the lawsuit which seeks to establish their existence and to impose them on the property. A claim for constructive trust may be easily stated in conjunction with an action which is really for money damages; such remedies are also common in proceedings supplementary and actions to enforce money judgments. *See, e.g., Kelly v. Perry*, 531 P.2d at 140 (plaintiff alleged implied joint venture, expenditure of time and effort in development of property, demanded accounting and constructive trust on 25% interest in real property of joint venture whose existence he was seeking to establish); *Hercules Chemical*, 462 N.Y.S.2d at 137 (plaintiff's demand for constructive trust in defendant's real property unsupported by allegations).

By contrast, an existing written contract to purchase real property is also likely to be an unrecorded interest, but only because section 696.01, Florida Statutes (1993), prohibits its recordation, unless acknowledged. According to the Third District's construction of section 48.23(3), however, a suit on an unrecorded contract requires a bond even if the property owner planned to sell the property to another and the

original contract purchaser could show that its loss of the property would result in irreparable harm. Non-recordation is generally to the seller's benefit, because if the buyer defaults (or the seller wishes to argue that the buyer has defaulted or that the contract is unenforceable or nonexistent), the seller will be able to simply convey to another buyer who has no actual or constructive notice of the prior interest, without the necessity of legal action to clear the title. Ralph Boyer, 1A *Florida Real Estate Transactions* § 3.11 (Matthew Bender, 1995). Thus, recordable contracts are not the rule.

Actions on recorded contracts are subject to section 48.23(1) and, therefore, a bond could never be required to support a notice of lis pendens. Actions on unrecorded contracts, in contrast, are subject to section 48.23(3). Absolutely requiring a bond in one case, but never in the other, "is not a reasonable or logical consequence, being based as it is on the mere formality of adding an appropriate acknowledgment to create the distinction." *Cacaro*, 394 So. 2d at 540 (holding that a prior hearing could not be required). *Compare* N.J. Stat. §2A:15-7a. (West 1995) (in which non-dischargeable notices are based on written instruments which are either recorded *or* are unrecorded but satisfy the Statute of Frauds: "instrument . . . executed by defendant and identifies such real estate or appears of record").

A common fact pattern in a buyer's action for specific performance of an unrecorded contract, such as this case, is that the seller hoped to make more profit from a subsequent prospective buyer, and refused to perform the first contract. On those facts, the seller will always be able to allege that the lawsuit is causing him monetary damages, measured by the extra profit he hoped to gain on the sale to the second prospective buyer, plus the cost of carrying the property during the lawsuit.

To always require a proponent's bond, or to require a bond in all cases where the owner can show some monetary loss, amounts to a categorical rule of law that the equities invariably favor the seller over those of the plaintiff, the public, and innocent third parties; and requires the plaintiff to essentially pay for the privilege of maintaining a lawsuit to protect its rights.

However, the seller in that circumstance has created his own predicament. Having no right to profit from a sale to the second prospect, the seller's "losses" are imaginary, and such alienation should clearly be constrained. In the usual case, the buyer will have arranged to finance the purchase but would be unlikely to have the funds or be able to arrange financing for a bond instead of (or in addition to) the purchase. It would be highly inequitable and unwise to discourage, or effectively deny, the buyer's redress in a court of law by requiring the buyer to finance, in advance, the seller's inequitable best-case outcome. Similarly, the public notice of lis pendens is, in such cases, particularly important as a warning for the protection of innocent third parties.

3. The Criterion of Irreparable Harm Considers All Interests.

A showing of irreparable harm (or adequacy of monetary relief) is necessary to guide courts in balancing the interests of the public, the courts, innocent or unsophisticated prospective purchasers or encumbrancers, the plaintiff, and the defendant when deciding whether to require (or to permit) the posting of a bond to continue (or discharge) a notice of lis pendens in actions legitimately based upon unrecorded instruments.

In some cases, the plaintiff may be able to show a fair nexus with the real property for a claim which can, nevertheless, be adequately secured by a deposit of money. Examples may include some actions for an equitable lien or a constructive trust. In those cases, the absence of any possibility of "irreparable harm" on the part of the plaintiff would permit the defendant to bond off the lis pendens, as suggested in *Chuisolo*, 614 So. 2d at 492 n.3.

In other cases, the plaintiff can show irreparable harm if the notice of lis pendens is dissolved, such as where the property subject to the unrecorded contract is uniquely important to the plaintiff. In those instances, the defendant, ready to sell its property in any event for a specified amount, cannot make a showing of irreparable harm and will be made whole by money damages equal to the value of the property. In those cases, traditional equitable principles and injunctive theories suggest the defendant is not entitled to a bond from the plaintiff because of the existence of the notice of lis pendens. *Chiusolo*, 614 So. 2d at 493.

In a third group of cases, the defendant may be able to show that the existence of the lis pendens subjects it to irreparable harm or a great, disproportionate, or inequitable injury. In those cases, the plaintiff may be required to post a bond in support of its notice of lis pendens unless it, also, can show that it will suffer irreparable harm in the absence of the notice. In such an event, the court has the discretion to require both parties, either, or neither, to post a bond.

The requirement of a bond, which could result in canceling a properly filed notice of lis pendens prior to final judgment, should be considered with great care and only after balancing the equities. In contrast to the approaches taken by various courts in an attempt to balance the equities in cases involving notices of lis pendens,

the Third District majority's approach merely imposes the burden on the plaintiff and violates the purposes of the doctrine and the notice discussed by this Court in *Chiusolo*. The better reasoned view is expressed by Judge Green's dissent in *Medical Facilities*, 456 So. 2d at 1306 (Green, J., dissenting), and should be the law of this State.

CONCLUSION

For the foregoing reasons, the Opinion of the Third District should be quashed and this matter remanded with instructions to discharge the Lis Pendens bond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to Stanley A. Beiley, Esq., Hornsby, Sacher, Zelman, Stanton, Paul & Beiley, P.A., Attorneys for LACPI, 1401 Brickell Avenue, Suite 700, Miami, Florida 33131, Barry L. Meadow, Esq., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130, and to Michael B. Chesal, Esq., Kluger, Peretz, Kaplan & Berlin, P.A., Attorneys for Trustee, 201 South Biscayne Boulevard, Suite 1970, Miami, Florida 33131, this 5 day of February, 1996.

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