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.

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

PETITIONER'S REPLY BRIEF ON THE MERITS

Terrence Russell, Esq.
Nancy W. Gregoire, Esq.
John R. Keller, Esq.
RUDEN, McCLOSKY, SMITH, SCHUSTER & RUSSELL, P.A.
Attorneys for Petitioner
15th Floor
200 East Broward Boulevard
Post Office Box 1900
Fort Lauderdale, Florida 33302
(305)764-6660; Miami (305)789-2700
Florida Bar No. 475688

TABLE OF CONTENTS

PREFACE

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

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

MFDI's Brief on the Merits will be cited as "MBR-___."

LACPI's Brief on the Merits will be cited as "LBR-___."

CITATION OF AUTHORITIES

Other Authorities

STATEMENT OF THE CASE AND OF THE FACTS

MFDI agrees with LACPI that the Statement of the Case and Facts in MFDI's Brief on the Merits incorrectly stated that the trial court's Order contains a finding that no showing of irreparable harm was necessary. MBR-1; LBR-1. Although the Order does not contain such a finding, the trial court did not require a showing of irreparable harm, and did not find that LACPI had shown irreparable harm in ordering MFDI to post the $1 million lis pendens bond. The Opinion, and not the Order, specifically finds that no showing of irreparable harm is necessary and that a bond is required to support every lis pendens.

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.

LACPI mischaracterizes MFDI's argument as"suggest[ing]" that a lis pendens is merely a "rather benign creature designed to protect the courts, the public, third parties and the lis pendens proponent." LBR-6. To the contrary, MFDI explicitly recognized the harshness of the doctrine, particularly in its effect on innocent third parties. MBR-8. Florida's statutory scheme is designed to ameliorate that effect by requiring a recorded notice before the doctrine is enforceable. MFDI's point, recognized by this Court and numerous others, is that the doctrine and notice, taken together, protect the courts, the public, third parties, and the lis pendens proponent. MBR-7-9. As to those entities, LACPI has cited no authority to contradict MFDI's argument.

With respect to the property owner whose property is subject to a notice of lis pendens, LACPI inaccurately implies that MFDI refuses to recognize the "potential for severe damage . . .." LBR-6. To the contrary, MFDI specifically recognized the potential harm to the property owner. MBR-10. MFDI simply believes that the potential does not exist in every case and that a bond is inappropriate where it does not. Second, however, whether or not a property owner can show potential harm, the doctrine balances the interests of the property owner and the lis pendens advocate--as this Court has noted. *Chiusolo v. Kennedy,* 614 So. 2d 491, 493 (Fla. 1993); MBR-10. The initial protection is the doctrine's requirement of a "fair nexus" between the lis

pendens proponent's claim and the property subject to the lis pendens. If the judgment sought by the claimant would not affect the owner's interest in the real property, this Court has held that the notice must be discharged as improper. The analysis does not require that the property owner show any harm. *Id.* at 492; *see also 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); *Worldwide Development--Kendale Lakes West v. Lot Headquarters, Inc.*, 305 So. 2d 271, 272 (Fla. 3d DCA 1974).

The property owner's other protections delineated in MFDI's Brief on the Merits, which LACPI treats as meaningless and illusory, are no more so for a party whose property is subject to a notice of lis pendens than they are for any other litigant. MBR-11-12; LBR-6, 7. The ultimate protection, the lis pendens bond, should not invariably supersede all other available protections whether or not a property owner can show any potential harm from the existence of the lis pendens. To the contrary, once the lis pendens proponent has already carried its initial burden of showing a "fair nexus," there is justice and manifest logic in requiring some showing of the property owner before requiring a bond of the party who has carried the burden of showing a fair claim to the property. LACPI appears to agree that some showing should be required, LBR-10, but disagrees that the showing should be more than money damages. Even a requirement of "some showing," without more, would mandate that this Court quash the Third District's Opinion.

Furthermore, a presumption of harm in every case, the only logical conclusion from the Opinion's bond requirement, is not well-founded. LACPI's use of the phrase "potential of causing severe damage" is a tacit acknowledgement that a lis

pendens may cause no harm. LBR-6. MFDI agrees. While there are instances where a property owner may be able to show the potential for harm, and irreparable harm, the "potential" does not exist in every case. In those cases where a lis pendens opponent fails to show any harm, much less irreparable harm, there is no justification for requiring a bond.

LACPI's partial quotation from a California appellate decision does not support the proposition that any notice of lis pendens not founded on a recorded instrument, whether or not authorized by statute, is a presumptively improper and abusive "blackjack." LBR-6. The full text of the quotation shows only that California courts, like Florida courts, understand the need for initial scrutiny of the claim on which a lis pendens is founded. In *Allied Eastern Financial v. Goheen Enterprises*, 71 Cal. Rptr. 126, 128 (Cal. Ct. App. 1968), the court, applying a standard like Florida's "fair nexus," held that a notice of lis pendens filed in an action which in no way related to the real property had the potential for abuse, and should be discharged.

> Plaintiff's action here in no way relates to the real property and no judgment entered in it can affect that property. Thus the notice, even if permitted to remain of record, would have no legal effect but would serve only as a practical blackjack.

Allied, 71 Cal. Rptr. at 128, partially quoted in David M. Gersten, *The Doctrine Of Lis Pendens The Need for a Balance*, THE FLORIDA BAR JOURNAL June 1995 at 83.

Moreover, the major theme of Judge Gersten's article supports MFDI's position here--the need for a "balance" between the rights of the lis pendens proponent and those of the property owner. In contrast, the unstated premise of LACPI's argument--and of the Third District's Opinion--is that any form of

deterrence to the seller's freedom of action is unacceptable in the absence of a bond. To invariably condition the notice of lis pendens upon the proponent's ability to post a bond, however, ignores the primary interests of the public and of innocent third parties, and merely places the "nuclear weapon" or "practical blackjack" in the seller's hands. LBR-6-7. In its exclusive emphasis on the concerns of the property owner and disregard of an owner's existing protections or the risks of the lis pendens proponent, LACPI reverses the priorities and ignores the need for a careful balance of the interests which underlie the doctrine and the notice.

B. The Third District's Erroneous Approach To The Bond Requirement Does Not Serve The Purposes Of The Doctrine And The Notice.

LACPI never responds to MFDI's explanation of the reasons the Third District is incorrect, MBR-12-14, but simply repeats its one-sided harm-to-the-owner arguments for requiring a bond. LBR-6-7. LACPI's approach disregards entirely MFDI's point that automatic cancellation of the notice deprives the claimant of its only possible protection against loss of the property before completion of the litigation. Its arguments, like the Third District's Opinion, ignore the possibility that the claimant, having already shown a "fair nexus" to an interest in the land, is entitled to "cloud" the owner's title until its own interest is resolved--particularly so that third parties are not misled on the status of the owner's right to alienate its title. *Medical Facilities Development, Inc. v. Little Arch Creek Properties, Inc.*, 656 So. 2d 1300, 1304 (Fla. 3d DCA 1995).

LACPI's primary rationale for its argument appears to be its belief that sellers of property are unable to protect themselves from the risks posed by prospective

buyers who sign purchase and sale contracts through newly formed corporations or as trustees. LBR-6-7. LACPI apparently believes that those sellers are entitled to insulation from their risks while prospective buyers, despite potentially valid claims under their purchase and sale contracts, should bear the entire risk of loss of the property during litigation if they are unable to post bonds to support their notices of lis pendens. Contrary to LACPI's argument, prospective sellers are able to protect themselves against such risks through their contracts--by requiring sufficient down payments. In contrast, a prospective buyer has no contractual protection for its claim to the property except its right to specific performance. That right is illusory if, in the absence of a lis pendens, the property is lost during the litigation.

LACPI's comment regarding the absence of harm in requiring a bond of a lis pendens proponent who proceeds "on an unrecorded claim which damages a property owner" is not only incorrect but also inconsistent with the Third District's Opinion under review here. LBR-7 (emphasis added). The Third District has decided that no showing of "damage" is necessary; it requires a bond in every instance. *Medical Facilities*, 656 So. 2d at 1304. To compensate the lis pendens proponent who may be irreparably harmed through its inability to post a bond, LACPI offers empty relief--the ability to tax the cost of the unobtainable bond. LBR-7.

LACPI also overlooks the potential harm to innocent third parties who have encumbered or purchased the property during the litigation in the absence of a notice of lis pendens. Those third parties have purchased a lawsuit by the "prevailing" claimant. The new lawsuit will result in additional waste of time and money, not only to the original claimant but also to the third parties who now have interests in the property.

LACPI's statement that "Florida courts have held on numerous occasions that the bond requirement is a vehicle for protecting the property owner" is deceptively incomplete. It suggests that the bond is a necessary protection without any analysis of whether it is either necessary or exclusive of other available protections. Contrary to LACPI's suggestion, this Court has held that the bond requirement, where appropriate, is a vehicle for protecting the property owner, where needed, from irreparable harm. *Chiusolo,* 614 So. 2d at 493 (citing *Sparks v. Charles Wayne Group*, 568 So. 2d 512 (Fla. 5th DCA 1990)). The Third District simply did away with every condition to the bond requirement. The Opinion is ill-considered and should be vacated.

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.

LACPI again misunderstands MFDI's position. LBR-8-9. Contrary to LACPI's characterization, MFDI's argument does not state, nor can it be fairly construed to suggest, that the definition of "'irreparable harm' in the injunction area . . . must have the same meaning in the lis pendens/bond area." LBR-8. First, MFDI agrees that the requirements of an injunction and a lis pendens are not parallel. For that reason, contrary to the Third District's Opinion, adherence to the requirement for an injunction bond should not eliminate a court's discretion to require a lis pendens bond. *Medical Facilities*, 656 So. 2d at 1304. LACPI apparently admits as much by quoting a portion of the Opinion that describes the "lenient" approach of the Fourth District--the approach urged by MFDI and rejected by the Third District. LBR-9. Paradoxically LACPI's first argument, LBR-5, also appears to reject the Third District's mandatory approach and adopt the Fourth District's "discretionary" standard for reviewing a trial court's order requiring a lis pendens bond.

Second, MFDI did not argue that "irreparable harm" is identical to "non-monetary harm." LBR-8; MBR-23-26. MFDI explained that the type of harm that may be "irreparable" in lis pendens bond proceedings include 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." MBR-25-26. However, irreparable harm must encompass more than simple money damages or the

property owner is able to deprive the claimant of its right to perfect title to unique property by showing no more harm than that potentially suffered by any defendant in any lawsuit--loss of money. Meanwhile, the claimant, despite its ability to show irreparable harm through possible loss of unique property, cannot protect its interests while fighting to obtain title unless it can post a bond.

Contrary to LACPI's position, a property owner's ability to show irreparable harm is not a "rare" instance. LBR-9-10. MFDI provided various examples of the types of harm that would justify the property owner's right to require a bond of the lis pendens claimant. MBR-23-25. Judge Green's example of the unique value of fifty bulls, taken from *Bailey v. Rolling Meadows Ranch, Inc.*, 566 So. 2d 63 (Fla. 5th DCA 1990), is another illustration of the type of "irreparable harm" recognized by Florida law. *Medical Facilities*, 656 So. 2d at 1307 (Green, J., dissenting). While LACPI argues that a buyer might purchase one of the bulls for a designated price if the owner chose to sell and put a price tag on the bull, LBR-9, it fails to recognize that loss of the unique animal would result in irreparable harm if the owner did not wish to sell. Similarly, the bull may be insured against casualty, but contracting for a monetary amount of insurance would not render loss of the unique property any less irreparable. LACPI's analysis leads to a conclusion that anything--loss of a limb, loss of a life, loss of a unique piece of art--is merely monetary damage because the law's only ability to compensate is in money damages. That view is retrospective. Prospectively, however, each of the losses is considered irreparable by Florida law.

LACPI misunderstands the holding of *Gay v. Gay*, 604 So. 2d 904 (Fla. 5th DCA 1992). LBR-9. The case does not illustrate that property is fungible and nonunique merely because its value may be determined. Unique property is

commonly mortgaged, and insured, for a sum certain; it may be lost through foreclosure for failure to pay an agreed sum of money; its loss may occasion an insurance payment. The property remains, however, unique, and its loss irreparable, to an owner who does not offer it for sale, or to a buyer who wishes to obtain that particular piece of property. The irreparable harm recognized in *Gay* was the disproportion between the risk of loss of the entire parcel and the value of the piece subject to the lis pendens.

LACPI also misunderstands MFDI's recognition that no other state statute uses "injunction" language. LBR-8. Although Florida's specific statutory analog between a lis pendens and an injunction appears in no other jurisdiction's law, the criterion of irreparable harm is quite well-defined in the lis pendens context in other jurisdictions, and provides a logical and equitable means to guide their courts in balancing the interests affected by the doctrine and notice of lis pendens. MBR-22-26.

Finally, LACPI incorrectly suggests that proof of non-monetary damages and determining the amount of a lis pendens bond are inconsistent. LBR-9-10. In contrast to LACPI's argument and Judge Barkdull's concurring opinion, Judge Green recognized that the law of injunctions inextricably connects the requirement of a bond in a certain amount with the concept of irreparable harm. As MFDI emphasized, however, the balance of interests to be protected in lis pendens proceedings is "unlike a typical injunction." *Chiusolo*, 614 So. 2d at 492; MBR-9, 19. An injunction prohibits or mandates a specific act or activity and, thus, changes the behavior of the enjoined party against its will; it necessarily affects the enjoined party's activity. A lis pendens, in contrast, may or may not affect the property owner's activity with respect to the property in litigation.

While the legislative reference to injunctions should not and cannot be ignored, it must be harmonized with the multiple purposes served by the notice of lis pendens. *Chiusolo*, 614 So. 2d at 492. Although a court is required to condition injunctive relief on the existence of an injunction bond, the legislature has seen fit to allow notices of lis pendens without such a requirement. This Court, consistent with the grant of authority in section 48.23(3) to control or discharge a lis pendens, has held that a trial court must discharge a lis pendens if no "fair nexus" exists. LACPI's "better rule," to further require a bond to support a lis pendens where a property owner can show no harm or only potential money damages, imposes on the lis pendens proponent a further burden well beyond that comprehended by the statute and effectively eviscerates the statutory protection. LACPI's "better rule," based as it is on a trial court's discretion to determine when a bond is appropriate, is also contrary to the Third District's Opinion, which deprives the trial court of all discretion by mandating a bond whenever a notice of lis pendens is filed.

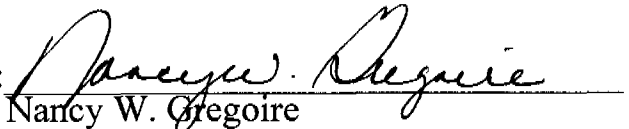
However, even LACPI's alternative to the Third District's decision is unworkable. In the common circumstance in which the owner, like LACPI here, refuses to perform because of a more lucrative subsequent offer, the owner will probably always have the practical ability to show "damages," *i.e.*, that it would be richer if the plaintiff had not made its claim. But this is exactly the circumstance where a bond requirement has the potential to deprive the first buyer of its only protection during the litigation. The "better rule" is the rule implied by this Court in *Chiusolo*. Irreparable harm should be the guide to the requirement of a bond--for either or both or neither of the parties.

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,

RUDEN, MCCLOSKY, SMITH, SCHUSTER & RUSSELL, P.A.
Attorneys for Petitioner
200 East Broward Boulevard
Post Office Box 1900
Fort Lauderdale, Florida 33302
(305) 764-6660 Miami (305) 789-2700

By: 
Nancy W. Gregoire
Florida Bar No. 475688
Terrence Russell
Florida Bar No. 116057
John R. Keller
Florida Bar No. 796890

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 11 day of March, 1996.

Respectfully submitted,

RUDEN, MCCLOSKY, SMITH, SCHUSTER
& RUSSELL, P.A.
Attorneys for Petitioner
200 East Broward Boulevard
Post Office Box 1900
Fort Lauderdale, Florida 33302
(305) 764-6660 Miami (305) 789-2700

By: _____
Nancy W. Gregoire
Florida Bar No. 475688