In The Supreme Court of Florida

CASE NO. 90,018

LENNAR FLORIDA PARTNERS I, L.P.
and LENNAR FLORIDA LAND V Q.A., LTD.,

Petitioners,

v.

REWJB GAS INVESTMENTS, a Florida general partnership; F.S. CONVENIENCE STORES, INC., a Florida corporation, as general partner of REWJB Gas Investments; and TONI GAS & FOOD STORES, INC., a Florida corporation, as general partner of REWJB Gas Investments,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON THE MERITS

Marc Cooper
COOPER & WOLFE, P.A.
First Union Bldg., Suite 3580
200 South Biscayne Blvd.
Miami, Florida 33 13 1
(305) 371-1597

Joseph A. DeMaria
Humberto H. Ocariz
TEW & BEASLEY, L.L.P.
Miami Center, Suite 2600
201 South Biscayne Boulevard
Miami, Florida 33 13 1-4336
(305) 536-1112

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INTRODUCTION

This case is **not** about the meaning of a single word or phrase, as urged by Petitioners. It is about the meaning of an entire contract. As both the trial court and the Third District Court of Appeal recognized," whether a contract is ambiguous requires an analysis of the entire document. In this case, such an analysis reveals that two simultaneously-included paragraphs (paragraphs 3 and 4) in a document amending twenty-two leases, both relating to the term of the leases, are in irreconcilable conflict. Significantly, Petitioners do not even attempt to explain what the entire contract means. They offer no explanation for the parries' simultaneous inclusion of both paragraph 3 and paragraph 4 in an otherwise uncomplicated, 1½ page document. Indeed, Petitioners offer no explanation whatsoever for paragraph 3. As the Third District concluded, the answer to this "paradigmatic 'ambiguity"' is found only in parol evidence. The trial court therefore correctly allowed the jury to consider extrinsic evidence regarding how the parties intended these two contract provisions to operate.

Petitioners ask this Court to adopt an immutable rule of law that in all cases, in all circumstances, and in all contexts, a "notwithstanding" clause always trumps a conflicting provision in a document, and that all documents are unambiguous as a matter of law simply because they use the word "notwithstanding." Adoption of such an unnecessary and restrictive rule of law would be repugnant to the existing, long-established legal principles that all provisions of a contract must be given some meaning and effect and that the goal of contract interpretation is to give effect to the parties' intent. No court has adopted the rule that Petitioners espouse and it would be improvident for this Court to do so, because such a ruling would, in effect, construe all documents and statutes containing a "notwithstanding" clause without even considering their language or substance.

"The decision is reported as Land O'Sun Realty, Ltd. v. REWJB Gas Investments., 685 So.2d 870 (Fla. 3d DCA 1996) (hereafter "Third District Opinion").

Moreover, adoption of such a rule would substantially impair a court's ability to interpret and give effect to the contracting parties' intent. Even Petitioners eventually concede that such a rule would not work in all circumstances. The Court of Appeal recognized this and did not, as Petitioners suggest, make any new contrary rule respecting use of the word "notwithstanding." Rather, that court merely applied existing, long-standing principles of contract construction to reach a correct result. Its decision should be affirmed.

STATEMENT OF THE CASE AND FACTS

In July 1992, Mr. Joe Bared developed a plan of reorganization to acquire Farm Stores, Inc. from bankruptcy through an entity known as REWJB Gas Investments ("Farm Stores" or "REWJB"). Farm Stores, Inc. was then owned by members of the Fogg family.[2] The acquisition included approximately 22 Farm Stores locations (the "Leased Properties") leased from two partnerships owned by the Foggs. (TT. 466).[3] Thus, the Foggs were both owner and landlord for these 22 stores. The leases for these 22 stores (the "Leases") were all for long terms, extending into the 21 st century. (TT. 1066).

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[2] The Foggs in this case include the following entities and individuals: Land O'Sun Realty, Ltd., Alan S. Fogg, Jr., Suzanne Fogg Rentz, C'Store Realty, Ltd., Richard D. Rentz, Steven M. Fogg and F. S. Disposition, Inc. The Foggs were defendants at trial and appellants before the Third District; however, they did not seek review in this Court and therefore remain bound by the judgment below.

[3] "TT." refers to the trial transcript. "R." refers to the Third District record. Respondents supplemented the record in the Third District with an appendix containing the relevant trial exhibits. That appendix is now part of the record before this Court. References to exhibits include both the appendix reference and the original trial exhibit number. "App.Ex." refers to the appropriate section of the appendix. "Pl.Ex." and "Def.Ex." refer to the original trial exhibit numbers. All emphasis in this brief is supplied by counsel unless otherwise noted.

Part of Mr. Bared's bankruptcy plan included renegotiation of the Leases.[4] Mr. Bared's attorney, Daniel Lampert, and Mr. Alan Fogg, Jr. undertook those negotiations and, consistent with a long-term deal the Foggs initially proposed,[5] they successfully negotiated a long-term lease agreement to which Lennar agreed. The agreement was set forth in two letters – the "Fogg Letter Agreement" (between REWJB and the Foggs) and the "Lennar Letter Agreement" (between REWJB and Lennar). Exhibit B to each of the Letter Agreements contained the long-term lease provisions and stated in pertinent part:

> In addition to the Amended Rents, F.S. Purchasing Corp.[6] or assigns will pay all sales tax on the Amended Rents. The Amended Rents will increase by 2% per year (over the base year) during the initial and all renewal terms. **The initial term of all of the leases shall be 7 years, subject to four, five-year options exercisable by the tenant.**

(App.Ex. E; Pl.Ex. 2).

But for the Foggs' mortgage problems with Lennar, the Letter Agreements would not have

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[4] The Foggs were also trying to renegotiate with Petitioners Lennar Florida Partners I, L.P. and Lennar Florida Land V Q.A., Ltd. (collectively "Lennar") the mortgages which encumbered the 22 stores. The mortgage balances far exceeded the value of the Leased Properties and were in default. (TT. 466-67). Lennar, however, was not cooperative. (TT. 475; App.Ex. C; Pl.Ex. 7). In fact, Lennar required the Foggs to obtain renegotiated lease terms from Mr. Bared before Lennar would even consider renegotiating the terms of the mortgages. (TT. 483-84). As Lennar was a major creditor of Farm Stores, Inc., Mr. Bared needed Lennar's support to purchase the assets of the bankrupt estate. (TT. 603).

[5] "Alan Fogg, Jr. first proposed a long-term lease to Mr. Lampert. (App.Ex. D; Pl.Ex. 6, 28). In that offer, Mr. Fogg represented to Mr. Lampert that the Foggs "would be willing to enter into the same agreement with the Bared's group" as had been proposed by the Davidson group, a competing bidder. Id. Attached to Mr. Fogg's letter was the Davidson group's proposal for a long-term lease deal, providing "for a term of 7 years, with five, 5-year options . , . [and that] [t]he rents would be subject to an escalation of 2% annually." Id.

[6] F.S. Purchasing Corp. was the initial entity created by Mr. Bared to acquire the assets of Farm Stores, Inc. It subsequently assigned its rights to REWJB.

contained any further language concerning the lease term. However, the Foggs believed that Lennar would not restructure the mortgages after the renegotiated leases took effect because these long-term leases would guarantee Lennar a satisfactory cash flow from the Leased Properties. (TT. 624). For this reason, Mr. Fogg asked Mr. Bared to help him solve this problem; he asked Mr. Bared to add an additional provision to the Letter Agreements so that the Leases, and the cash flow paid to Lennar as mortgagee, could end after 12 months. (TT. 240, 260-63). The Foggs intended to use this lease termination provision in their negotiations with Lennar. (TT. 260-63). Indeed, Lennar actively participated in the negotiations among Mr. Bared, Mr. Lampert and Mr. Fogg, and understood that the Foggs added this provision to the Letter Agreements to place "a gun to [its] head." (TT. 639-40). See Third District Opinion, 685 So.2d at 872, n. 2. See also n.37, infra. Because Mr. Bared trusted Mr. Fogg,[7] he agreed to provide this accommodation. (TT. 262).

In response to the proposed termination revision to the Letter Agreements, Lennar negotiated to enlarge the 12 month provision to 18 months, to allow it time to complete foreclosure proceedings against the Foggs if a deal was not reached between them. (TT. 639). Pursuant to these negotiations, the parties revised the Letter Agreements to add the following language:

> However, the Leases will automatically terminate at the date that is eighteen (18) months after the Effective Date of the Purchaser's Plan.

(App.Ex. E, F; Pl.Ex. 2, 15). Because all the parties completely understood the limited purpose of this clause, they did not delete the long-term lease provisions in the Letter Agreements. Instead, both the long-term 27 year provision and this 18 month clause remained in successive sentences in

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[7] Mr. Bared believed Mr. Fogg would serve Farm Stores' best interests since he had accepted Mr. Bared's offer to serve as the company's Senior Vice-President and Chief Operating Officer. (TT. 262).

the Letter Agreements. The rent escalation provision, calling for annual rent increases that compounded at 2%, also remained unchanged. Id.

The Bankruptcy Court ultimately confirmed Mr. Bared's plan. On September 14, 1992, at the closing of Mr. Bared's purchase of Farm Stores, Inc.'s assets, the parties entered into an agreement titled "Amendment To Leases" (the "Amendment"). (App.Ex. H; Pl.Ex. 1). This document formally modified each of the 22 Leases to include the long-term lease provisions and the accommodation sought by the Foggs. It provided, among other things, as follows:

> 3. The term of the Leases is amended so that each of the Leases shall have an initial seven (7) year term (beginning on the date of this Amendment), subject to four (4) options exercisable by the Assignee by notice to Lessor to extend said term for up to 5 years each, so that if all said options are fully exercised, the initial and all renewal terms will aggregate to 27 years from the date of this Amendment.
>
> 4. Notwithstanding any conflicting or inconsistent provisions of the Leases or this Agreement, including specifically paragraph 3 hereof, the term of each of the Leases and all renewal terms shall automatically terminate at the date that is eighteen months after the date of this Amendment.

(App.Ex. H; Pl.Ex. 1). Both Mr. Bared and Mr. Lampert testified at trial that the parties understood that paragraph 3 embodied the long-term lease deal and that paragraph 4 would be operative only if both Farm Stores and the Foggs invoked it – which is why Mr. Bared granted this accommodation to the Foggs in the first place. (TT. 413-14, 500, 507-08). The possibility that Farm Stores and the Foggs – together – could seek to end the Leases was precisely the reason the Foggs requested paragraph 4, and Lennar had to respect this threat to its long term cash flow. This was the "gun" Lennar understood the Foggs had placed to Lennar's head. (TT. 640). However, if either Farm Stores or the Foggs declined to trigger paragraph 4, then Farm Stores would perform the long term leases set forth in paragraph 3 and continue to pay rent, including the increases on "October 1 of each

year," as required by paragraph 2 of the Amendment." (TT. 643). Thus, both paragraphs 3 and 4 (and the long-term lease provisions of paragraph 2) were given meaning and effect.

During 1993, the Foggs were unable to renegotiate the mortgage terms and Lennar commenced foreclosure proceedings. (TT. 643,103 1). Faced with losing the Leased Properties, and in an apparent effort to exert leverage over Lennar by impairing its cash flow, the Foggs threatened to evict Farm Stores, purportedly under paragraph 4 of the Amendment. (TT. 415). Significantly, Lennar initially responded to this eviction threat by contesting the Foggs' position and seeking to enforce the long-term lease deal. (TT. 637). Lennar filed court pleadings to appoint a receiver in order to effectuate the long-term leases over the Foggs' objections. (App.Ex. I; Def.Ex. G). Lennar only abandoned this position on the morning of the receivership hearing when it obtained summary judgment in the foreclosure action. Lennar then joined in the Foggs' attempts to evict Farms Stores. (TT. 633-34). As a result, Farm Stores filed this action seeking, among other things, a declaratory judgment that the 22 Leases were for a term of 27 years each, including options.

The trial court denied motions for summary judgment on the basis that paragraphs 3 and 4 of the Amendment, taken together, were ambiguous and required parol evidence to resolve the ambiguity. In August 1995, the case was tried to a jury for six days during which, as the Third District found, Farm Stores presented "ample evidence" supporting its construction of the

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"Paragraph 2 of the Amendment also reflected the long-term nature of the Leases. It addressed new base rent and the manner in which it would escalate, providing a "2% per year" escalation "during the initial and all renewal terms of the Leases; each such increase shall be effective as of October 1 of each year commencing with October 1, 1993 ." Under Lennar's interpretation of the Amendment, the rent escalation clause, which contemplated continuous yearly compounded increases, would be superfluous because only one rent increase would occur during the 18 months following the execution of the Amendment. However, Farm Stores continued at all times to pay its rent, including the compounded 2% annual increases, to Lennar. (TT. 643).

Amendment. Third District Opinion, 685 So.2d at 872. The evidence supporting the jury's findings included the following course of conduct that flatly contradicts Lennar's position that the Amendment provides for only an 18 month term: (a) the Foggs, in their capacity as executive officers and fiduciaries of Farm Stores (i) made purchase commitments for the stores at the Leased Properties extending well beyond the end of the 18-month period (TT. 770-71, 777-78); (ii) prepared and presented financial projections to support proposals for bank financing that reflected revenues and profits for the Leased Properties well beyond any 18 month lease term (TT. 810-13); (iii) failed to mention upcoming lease terminations for the 22 stores at monthly management meetings at which lease expirations were routinely discussed (TT. 832-35); and (b) Lennar filed a motion to appoint a receiver, and scheduled a hearing on that motion, in its foreclosure action against the Foggs for the sole purpose of confirming the long-term leases on the Leased Properties (TT. 643; App.Ex. I; Def.Ex. G).[9/]

The jury returned a verdict in favor of Farm Stores, finding the parties intended to enter into 27-year lease terms. (R. 453-54). The Foggs and Lennar appealed. (R. 592-95). In an opinion written by Chief Judge Schwartz, a majority of the panel of the Third District Court of Appeal affirmed the final judgment. (R. 1018-27). The Third District, en banc (including Judge Jorgenson, the sole dissenter from the panel opinion) refused to review this case and also refused to certify conflict to this Court. (R. 1028). Lennar, but not the Foggs, sought review in this Court based on a claim of conflict between the Third District and the Second and Fourth Districts. This Court accepted jurisdiction.

9/ The evidence also included handwritten notes of Mr. Bared's conversation with Mr. Fogg, detailing Mr. Fogg's request for the inclusion of the accommodation – which ultimately became the "notwithstanding" clause – to help the Foggs with the Lennar mortgage negotiations.

SUMMARY OF ARGUMENT

The single issue in this appeal is whether the Amendment to Leases was ambiguous and therefore warranted the admission of parol evidence to explain it. The trial court and the Third District analyzed the entire Amendment and determined that, considered as a whole, the document was ambiguous because it includes two provisions regarding the term of the Leases that were added to the document at the same time and are repugnant to each other. The trial court therefore correctly let the jury hear parol evidence to determine how the parties intended this Amendment to operate.

Lennar's brief focuses entirely on the "notwithstanding" clause in paragraph 4 of the Amendment. Lennar asks this Court to avoid analysis of the entire contract and instead adopt a mechanical rule of law holding that all contracts and statutes that use the word "notwithstanding" are unambiguous as a matter of law, regardless of the context and meaning of other provisions in the contract, regardless of the language of the entire document, and regardless of the facts and circumstances surrounding execution of the document. But no such rule of contractual interpretation exists. No court has ever so held. Although many contracts and statutes containing a "notwithstanding" clause may be unambiguous, no case cited by Lennar stands for the rule of law it tries to create here: that all contracts and statutes containing a "notwithstanding" clause are unambiguous. Indeed, many courts have found directly to the contrary.

As explained in Section I below, the Third District correctly applied established principles of contract construction. It properly concluded that this is one of those cases in which the contract, taken as a whole, is ambiguous, even though it contains a "notwithstanding" clause.

The Amendment at issue here is only 1½ pages long. In paragraph 3 it provides for 27 year lease terms, including options. In paragraph 2 it provides for rent increases to apply at a compound

rate over several years and option terms. Immediately thereafter, however, the Amendment provides in paragraph 4 for a lease term of 18 months "notwithstanding" any other provision in the Amendment. Lennar contends that this paragraph, considered in isolation, is not ambiguous and must control the outcome of this case. But, as the Third District recognized, the Amendment does not only contain paragraph 4; it must be analyzed and interpreted as a whole to make sense of the entire document and give effect to the parties' intentions. Taken as a whole, the Amendment is ambiguous.

Lennar's focus on paragraph 4 ignores the fact that the parties negotiated over the conflicting language in paragraphs 2 and 3 and inserted them in the same Amendment at the same time as paragraph 4. As the Third District recognized, this raises the obvious question of "why people would say two directly contrary things in the same breath." Third District Opinion, 685 So.2d at 872. Significantly, Lennar does not even attempt to explain what the whole Amendment means. It offers no explanation for the parties' simultaneous insertion of both paragraph 3 and paragraph 4 in an otherwise uncomplicated, 1½ page document, Indeed, Lennar offers no explanation whatsoever for paragraph 3. The Third District correctly concluded that the answer to this "paradigmatic 'ambiguity'" is found only in parol evidence. The trial court therefore properly allowed the jury to consider extrinsic evidence.

The Third District's determination that parol evidence was properly admitted to aid the jury in resolving this "paradigmatic 'ambiguity'" does not undermine settled principles of law. As explained in Section II below, no court has adopted the universal rule urged by Lennar, that a "notwithstanding" clause always prevails over all other potentially conflicting provisions of a contract or statute, regardless of the facts and circumstances involved, and that a contract or statute containing a "notwithstanding" clause is always unambiguous. There are numerous cases, discussed in

Section II, which found contracts and statutes ambiguous even though the document contained a "notwithstanding" clause.

As explained in Section III below, the Third District's decision does not conflict with other Florida cases involving "notwithstanding" clauses. In each of the Florida cases cited by Lennar, the court analyzed the particular language of the contract at issue and determined that the contract, taken as a whole, including the "notwithstanding" clause, made sense, that effect could be given to all of the contract's provisions, and therefore the contract was not ambiguous. All of these cases rest on the particular facts and contract language involved. None held that contracts containing "notwithstanding" clauses are alwavs unambiguous; none support the universal rule of law Lennar espouses.

Finally, Section IV shows that the ruling below gives effect to the parties' intent in entering into the Amendment, as demonstrated by their conduct and performance after the Amendment was executed. The goal of contract construction is to give effect to the parties' intent. In this case, that intent can only be discerned from extrinsic evidence, including the parties' conduct after the Amendment was signed. As shown in Section IV, the parties' conduct in this case clearly established that they intended a long term lease agreement. The mechanical rule sought by Lennar, that all contracts containing "notwithstanding" clauses are unambiguous, would turn these principles on their head. Such a rule would ignore the facts and circumstances surrounding the contract and the parties' conduct in carrying out that contract. It would give effect only to an isolated part of the contract and completely ignore the remaining provisions, without any indication or assurance that this effectuates the parties' intent. No rule of contract construction supports that result.

In sum, the Third District properly recognized that this is one of those cases in which the

contract, taken as a whole, was inexplicable on its face and therefore ambiguous even though it contains a "notwithstanding" clause. Its decision follows well-established principles of contract construction. This case does not warrant adoption of the rule of law advocated by Lennar, that documents containing "notwithstanding" clauses are always unambiguous, a rule which has not previously been adopted by any court. This Court should afiirm.

ARGUMENT

I. THE THIRD DISTRICT'S OPINION IS IN ACCORD WITH BASIC PRINCIPLES OF CONTRACT CONSTRUCTION

This case involves a unique set of facts. The original 22 Leases provided for initial long-terms and multiple renewal options, extending well into the next century. Farm Stores and the Foggs amended the Leases. The Amendment included irreconcilable and mutually repugnant provisions. Paragraphs 2 and 3 of the Amendment provided for a 7 year initial term, with 4 five-year options, established a base rent for each Lease, and provided for compounding 2 percent annual rent increases "during the initial and all renewal terms." Paragraph 4, the very next paragraph, provided that "notwithstanding" this, the Leases would terminate in 18 months.

The Third District properly recognized that it had to examine the entire document, not just paragraph 4, in order to determine the parties' intentions. When looking at both paragraph 3 and paragraph 4, neither logic nor common sense provided any explanation as to why both provisions would be inserted in the same agreement at the same time.[10/] The parties would not reasonably have

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[10/] In his dissent, even Judge Jorgensen recognized that both paragraphs 3 and 4 have some meaning:

> Both paragraphs were there for purposes that served all the parties at the time.

(continued.. .)

crafted long-term lease provisions, and the Foggs would not have drafted language that specified compounded rental increases would apply "during the initial and all renewal terms," only to completely nullify those provisions in the very next paragraph. The Third District succinctly explained:

> It is apparent that paragraph 3 (27 year term) and 4 (no-more-than-18 month term) are in irreconcilable conflict, or, as the law pompously says, "mutually repugnant." See Dune I. Inc. v, Palms N. Owners Assoc., 605 So.2d 903, 905 (Fla. 1st DCA 1992); Crown Management Corp. v. Goodman, 452 So.2d 49, 52 (Fla. 2d DCA 1984); Saco Dev.. Inc. v. Joseph Bucheck Constr. Corp., 373 So.2d 419,421 (Fla. 1 st DCA 1979). Moreover, contrary to the appellants' primary position that the "notwithstanding" language in paragraph 4 conclusively resolves the conflict in favor of the eighteen month term which follows, the term simply does not have that logical, semantic, or legal effect. Derosa v. Shiah, 205 Ga.App. 106, 108,421 S.E.2d 718, 72 1 (1992) (provision that a contract term shall apply "notwithstanding" directly conflicting one does not resolve contradiction); see Quiring v. Plackard, 412 So.2d 4 15, 4 17 (Fla. 3d DCA 1982) ("notwithstanding" clause effective to narrow broad or

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[10/](... continued)
685 So.2d at 874. However, the dissent, like Lennar, fails to explain what purpose is served by paragraph 3 and the long-term provisions of paragraph 2 if only paragraph 4 controls. This unstated and unexplained meaning of both paragraphs reminds one of the following quotation from *The Man of Genius [1891], pt. I, ch.* 2 as compiled in Bartlett's Familiar Quotations (1993) :

> Rlopstock was questioned regarding the meaning of a passage in his poem. He replied "God and I both knew what it meant once; now God alone knows."

As recognized by the Third District, the purpose of paragraph 3 and paragraph 4, and the intended effect of the Amendment, must be found in parol evidence. Significantly, even Judge Jorgensen found it necessary to resort to parol to resolve the controversy, He looked, not solely to the language of paragraph 4, but to the nature of the negotiations between the parties and their commercial sophistication. 685 So.2d at 874. After reviewing the circumstances surrounding execution of the contract, the dissenter improperly substituted his evaluation of the contract's meaning for that of the jury.

> ambiguous preceding provision)." Acceptance of the appellants' claim that everything after "notwithstanding" negates everything before would unacceptably render the preceding language completely superfluous, contrary to the rule of construction and of common sense that every provision is deemed to serve some useful purpose. [citations omitted]. The internal conflict, a paradigmatic "ambiguity," which thus remains is resolvable -- and the obvious question of why people would say two directly contrary things in the same breath is answerable -- only by evidence beyond the words themselves that the parties intended each of the terms to operate in particular, but different, circumstances. [citations omitted].
>
> Accordingly, the trial court's admission of extensive parol evidence as to the purposes paragraphs 3 and 4 were respectively meant to serve was, despite the appellants' protests, entirely correct.

685 So.2d at 871-72 (footnote omitted).[12/]

Lennar argues at length that paragraph 4, considered by itself, is unambiguous. But, as the Third District recognized, whether an ambiguity exists must be determined, not by review of an isolated phrase or paragraph, but by review of the entire document. The issue is not whether the individual words are comprehensible and make sense; the issue is whether the entire document makes sense:

> In determining, so far as the par01 evidence rule is concerned, whether or not an ambiguity exists in a document, the test lies, not necessarily in the presence of particular ambiguous words or phrases, but rather

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[11/] Lennar, in its jurisdictional brief, made much of the fact that the Third District's slip opinion referred to Quiring with a "contra" signal, as evidence that even the author of the majority opinion recognized a conflict between the decision in this case and Quiring. Lennar's jurisdictional argument is undermined by the fact that in the final, published opinion, a copy of which is attached to Lennar's brief on the merits, the Third District revised Quiring's introductory signal to "see" 685 So.2d at 871. See p. 26, infra.

[12/] In a footnote, the Third District Opinion provided the dictionary definition of "notwithstanding" -- as "in spite of', "regardless of hindrance by", "all the same" -- to establish that nowhere does the term mean to the complete exclusion of other conflicting language. 685 So.2d at 871, n. 1.

> in the purport of the document itself, whether or not particular words or phrases in themselves are uncertain or doubtful in meaning. Accordingly, a document may be ambiguous so as to warrant the admission of parol evidence notwithstanding the fact that it contains no words or phrases which are ambiguous in themselves. The ambiguity in the document may arise solely from the unusual use therein of otherwise unambiguous words or phrases.

30 Am.Jur.2d, Evidence § 1069 at 211. Stated more succinctly,

> In determining whether or not a writing is ambiguous, it must be considered as a whole. A writing may be ambiguous although no particular word or phrase is ambiguous.

32 C.J.S., Evidence § 1214 at 568. Ultimately, the issue is whether, after reviewing the entire document, the mutual intent of the parties is clear or ambiguous. Id. at 567

This Court has consistently adopted and applied these same principles. The goal of contract construction is to determine the parties' intent. Underwood v. Underwood, 64 So.2d 281,288 (Fla. 1953). "[A] contract should be considered as a whole in determining the intention of the parties." Triple E Development Co. v. Floridagold Citrus Corn., 51 So.2d 435,438 (Fla. 1944). "[I]f clauses in a contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them ifpossible." Id. at 438. See also Florida Power Corp. v. Citv of Tallahassee, 18 So.2d 671, 674 (Fla. 1944). Moreover, contrary to Lennar's argument, the construction of a contract is for the court as a matter of law only when the contract "is clear, plain, certain, undisputed, unambiguous, unequivocal, and not subject to conflicting inferences." Friedman v. Virginia Metal Products Corn., 56 So.2d 515, 516 (Fla. 1952).[13/]

'"Significantly, the trial court instructed the jury on all of these rules of contract construction (TT. 1188-90), including the rule that "when clauses in a contract appear to conflict with each other, they must be given such an interpretation and construction as will reconcile them if possible. In other words, you should attempt to reconcile any inconsistencies in a manner that renders the contract (continued.. .)

In Friedman, this Court recognized that resolution of contract ambiguity cannot rest on the dictionary definition of isolated words. In that case, a dispute arose regarding the word "purchased" in a contract. Appellants contended that the word had a well understood and unambiguous meaning and thus the trial court properly excluded parol evidence. In support of their position, they quoted from dictionaries and ignored all reference to the facts and circumstances surrounding the contract, as Lennar and amici do here. This Court rejected such a simplistic dictionary approach because "[t]here are other considerations besides these definitions from standard dictionaries and works on grammar." Thus, the isolated words of the contract, even those with a common meaning, could not be blindly interpreted without regard to the parties' intent, as demonstrated by parol evidence:

> Parol evidence may be received, not to vary or change the terms of the contract, but to explain, clarify or elucidate the word 'purchased' with reference to the subject matter of the contract, the relation of the parties, and the circumstances surrounding them, when they entered into the contract and for the purpose of properly interpreting, or construing, the contract. It was error to exclude parol evidence for this purpose.

56 So.2d at 517.[14/]

[13/](...continued)
meaningful." (TT. 1189). All parties, including Lennar, agreed to these instructions. (TT. 1213).

[14/]Respected authorities have voiced similar sentiment. Professor Corbin has written that "[a]s long as the court is aware that there may be doubt and ambiguity and uncertainty in the meaning and application of agreed language, it will welcome testimony as to antecedent agreements, communications, and other factors that may help to decide the issue." 3 Corbin on Contracts §579, at 420-21, n. 56 (citing cases allowing parol evidence); see, e.g., Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448, 454-55 (N.J. Sup. Ct. App. Div. 1963) (admitting extrinsic evidence to interpret lease provision and citing Corbin for the proposition that "[c]onstruing a contract of debatable meaning by resort to surrounding and antecedent circumstances and negotiations for light as to the meaning of the words is never a violation of the parol evidence rule").

The Third District followed these principles. It looked, not at individual words or phrases in the contract, but at the entire contract, to determine its import. It concluded that, when so viewed, the entire contract made no sense. As the Third District asked, why would anyone amend what had been long term leases by adding the 27 year lease provision in paragraph 3 and then completely nullify that provision with paragraph 4? If paragraph 4 completely overrides paragraph 3, as Lennar contends, what is the purpose of paragraph 3? Why would anyone insert paragraph 3 and paragraph 4 in the same document at the same time? What did the parties intend the entire contract to mean? Because these questions could not be answered from the face of the contract, the Third District concluded that the trial court properly allowed the jury to consider par01 evidence. See J.M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So.2d 484,486 (Fla. 1957) (while subcontract was on its face unambiguous, the simultaneous execution of a second contract covering the same construction work "served to cast some doubt upon the meaning of the 'ventilation' provision of the plaintiffs contract and to render ambiguous a contract that otherwise would not have been so; and we think that, in these circumstances, parol evidence may properly be admitted to clarify the matter and show the true intent of the parties").

In contrast, Lennar makes no attempt to apply these well-established rules of contract construction utilized by the Third District. It makes no attempt to give meaning to the entire contract; it ignores questions which are apparent from the face of the document.[15/] Instead, Lennar asserts the extreme proposition – its only argument-that a "notwithstanding" clause always prevails over conflicting language and that a contract with a "notwithstanding" clause can never be

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[15/]Lennar has never offered any explanation which does not require consideration of parol evidence. The failure to provide any such explanation establishes that the term "notwithstanding," without more, does not resolve the Amendment's ambiguity.

ambiguous. Far from giving effect to the entire document, Lennar's interpretation of the Amendment seeks to nullify more text in that brief agreement than it would enforce. To bolster its position, it argues that the Third District's refusal to give mechanical effect to the "notwithstanding" clause will wreak havoc in the law. As explained in the following sections, Lennar is wrong in all respects.

II. NO COURT HAS ADOPTED THE UNIVERSAL RULE URGED BY LENNAR THAT A "NOTWITHSTANDING" CLAUSE ALWAYS PREVAILS OVER ANY OTHER POTENTIALLY CONFLICTING PROVISION OF A CONTRACT OR STATUTE

According to Lennar, "'notwithstanding' language has always and routinely been treated in the law as a plain designation of what clause or provision of law is to govern over all others in the event ofconflict." Lennar's Brief at 1 (emphasis added).[16] Whether construing contracts or statutes, however, no court has adopted a rule of construction which mandates that a "notwithstanding" clause always "automatically overrides" every other conflicting provision. No court has adopted a rule of construction which holds that a contract or statute containing a "notwithstanding" clause is always unambiguous. To the contrary, courts have found that the word "notwithstanding" does not resolve all conflicts, that each contract must be analyzed as a whole to determine whether ambiguity exists

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[16] Lennar devotes much of its brief to demonstrating that statutes, forms, manuals and judicial opinions use the word "notwithstanding" "routinely." Of course, the word "notwithstanding" is used routinely; it is part of the lexicon of lawyers. But the fact that it is used routinely does not compel the conclusion that it is always used unambiguously and can never create ambiguity. The words "shall" and "may" are also used routinely as part of the lawyers' lexicon, to differentiate that which is mandatory from that which is permissive. Yet this Court has not hesitated to substitute one for the other when the intent of the draftsman so required. See, e.g., Rich v. Rvals, 212 So.2d 641,643 (Fla. 1968).

and that in some cases ambiguity remains even in contracts or statutes that use the term "notwithstanding."[17/]

A. In Analyzing Contracts, Courts Examine the Effect of a "Notwithstanding" Clause on a Case-by-Case Basis

Numerous cases recognize that a contract may be ambiguous even though the document contains a "notwithstanding" clause. For example, in Erdenberaer. Inc. v. Partek North America, Inc., 865 P.2d 850 (Colo.Ct.App. 1993), the contract contained a clause which stated that royalties were payable "notwithstanding termination . . . of this Agreement." Two years later, the parties entered into a new agreement which stated, among other things, that the first agreement "shall for all purposes terminate and become null and void." When the court had to resolve a dispute regarding a claim to royalties beyond the termination of the agreement, it recognized that it could not reconcile these conflicting provisions from the contractual language itself, even though one of the provisions included a "notwithstanding" clause. The court found that an ambiguity existed and resolved it in favor of paying royalties under the first provision onlv after considering parol evidence to ascertain the parties' intent.

[17/] Indeed, the Third District long ago recognized the potential ambiguity of clauses such as the one at issue here:

> Why do [insurance companies and their lawyers] compound error by scattering their provisions and clauses with equally baffling phrases such as "unless as a condition precedent thereto"; "but only if'; **"notwithstanding anything to the contrary";** "except with respect to" – naming just a few? For years they have insisted upon inserting ambiguity and repugnancy in their policies, to the consternation of laymen and attorneys alike, ...

Fountainbleau Hotel Corp. v. United Filigree Corp., 298 So.2d 455, 458 (Fla. 3d DCA 1974).

Similarly, in Derosav. Shiah, 421 S.E.2d 718 (Ga. Ct. App. 1992), cited by the Third District, the appellate court reversed the entry of summary judgment on the basis that a "notwithstanding" clause almost identical to the one in this case created an ambiguity with other contractual provisions on the same subject. The contract at issue contained three provisions (sections 6.4, 6.7(a) and 6.7(h)) where the successor employer (Dreyfus) specifically assumed the employment contract between Derosa and his employer (Stratus). 421 S.E.2d at 720. The very next paragraph (section 6.8), like paragraph 4 here, purported to nullify those other employment provisions:

> [n]otwithstanding the foregoing, nothing express or implied in this Lease is intended to confer upon any member or former member of the SPC Employees, the Terminal Employees or the Existing Lessee Employees any rights or remedies (including any rights of employment for any specified period of time) . . . .

Id. at 720. The court of appeals held that the "notwithstanding" language did not resolve the ambiguity between these conflicting provisions:

> We conclude that an ambiguity exists on the issue ofwhether Dreyfus assumed liability under appellant's contract with Stratus **based on the language of Sections 6.4, 6.7(a) and 6.7(h) of the lease agreement, on the one hand, and the language of Section 6.8, on the other hand. Even after applying the applicable rules of construction, the ambiguity remains.** The intent of the parties to the lease agreement with respect to the assumption of appellant's employment contract is "'an evidentiary, factual matter for resolution by the jury and not a matter of law for determination by the court."' Because of the ambiguity of the lease agreement, the grant of summary judgment was error.

Id. at 721 (citations omitted). Here, as in Derosa, an ambiguity exists because paragraph 4 purports to nullify paragraph 3 completely (and most of paragraph 2) through the use of "notwithstanding" language, even though both paragraphs were added at the same time. In such circumstances, par01 evidence is necessary to determine how the parties intended the conflicting provisions to operate.

Virginia National Bank v. United States, 443 F.2d 1030 (4th Cir. 1970), is another case which found that ambiguities arose within the four corners of a will precisely because the "notwithstanding" clause, when read with another provision, was "wholly inconsistent, thereby rendering the will ambiguous and the testator's true intent unascertainable from the will alone." Id. at 1034. The United States Court of Appeals for the Fourth Circuit therefore reversed the trial court and required consideration of parol evidence. Id.[18/]

B. In Analyzing Statutes, Courts Also Examine the Effect of A "Notwithstanding" Clause On a Case-By-Case Basis

Ambiguity may exist, not only in contracts containing "notwithstanding" clauses, but also in statutes containing such clauses. In Conoco. Inc. v. Skinner, 970 F.2d 1206 (3d Cir. 1992), the United States Court of Appeals for the Third Circuit rejected an argument that a "notwithstanding" provision in a statute completely nullified another part of the same statute. The court refused to reach that conclusion and instead relied on legislative history – the statutory analog of parol evidence – to discern the purpose of the entire statute:

> Conoco makes much of the fact that the Bowaters Amendment begins with the phrase "Notwithstanding any other provision of law." . . . However, "ordinarily competing sections of a statutory scheme should be construed to give maximum effect to all provisions." [citation omitted]. Consequently, this court has recently interpreted a

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"'Other jurisdictions have reached this same result. See Adam Gindi. Inc. v. Those Certain Underwriters at Llovds, 1991 WL 84572 (S.D.N.Y. 1991) (warranty clause enforced over terms of "notwithstanding" clause); Jewell v. Kroo, 5 17 P.2d 657 (Or. 1973) (language of grant in easement ambiguous because "notwithstanding" clause inconsistent with other wording ofeasement); Far West Federal Bank. S.B. v. Director. Office of Thrift Supervision, 746 F.Supp. 1042, 1048 (D. Or. 1990), rev'd on other grounds, 951 F.2d 1093 (9th Cir. 1991) (language of conversion agreement was ambiguous and consideration of parol evidence was required despite inclusion of "notwithstanding" clause); Stillman v. North American Life & Cas. Co., 698 F.Supp. 13, 16 (D. New Hamp. 1988) (provision in insurance policy rider stating that rider applied "notwithstanding" any other provision in policy did not apply to override premium payment provisions in policy).

> "notwithstanding" phrase as **not** taking precedence over other conflicting provisions. See United States v. Gordon, 961 F.2d 426, 431 (3rd Cir. 1992) (adopting a narrow definition of "notwithstanding" and noting that "[c]ourts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify the other provision"). . . . **Thus, courts must discern the meaning of "notwithstanding" from the legislative history, purpose, and structure of the entire statute.**

970 F.2d at 1224.

Likewise, in West Virginia ex rel. Water Dev. Authority v. Northern Wayne County Public Service District, 464 S.E.2d 777 (W.Va. 1995), the Supreme Court of Appeals of West Virginia decided whether the water development authority ("WDA") could impose certain service charges in light of conflicting sections of the West Virginia statutes. The WDA asserted that "rules of statutory interpretation do not apply because the above language [in the statute] clearly and unambiguously confers certain powers upon the WDA 'notwithstanding any provision to the contrary elsewhere contained in this code."' 464 S.E.2d at 78 1. The public service commission successfully argued that this "notwithstanding" provision was ambiguous when considered in the context of the entire statutory scheme for the setting of rates and charges. Id. at 782. Taking into consideration the legislative history of the relevant statutes, the court determined that the "notwithstanding" clause relied upon by the WDA could not prevail.

Lennar argues that the Third District's decision will create "chaos" because "notwithstanding" clauses are routinely used in constitutions, among other documents, to designate predominance. Lennar's Brief at 12. According to Lennar, the Supremacy Clause, in Article 6, Clause 2 of the

United States Constitution,"[19] uses a "notwithstanding" clause as "the clear and unequivocal signal of dominance." Id. at 13.

Under this argument, the use of "notwithstanding" in the Supremacy Clause would require that federal law always prevails over – or, as Lennar puts it, "automatically overrides" – competing state law, without regard to Congressional intent, the statutory analog of parol evidence. However, the opposite is true. "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" Cippollone v. Linnett Group, Inc., 505 U.S. 504, 5 16 (1992) (citation omitted), Thus, the "notwithstanding" clause is not an automatic override. To the contrary, "the purpose of Congress is the ultimate touchstone . . .", even **in the context of such a settled doctrine as the Supremacy Clause.** Id. (quotations omitted).[20]

As these cases properly recognize, the issue is not simply whether the contract (or statute) contains a "notwithstanding" clause, as suggested by Lennar. Instead, the issue is whether that clause, in the context of the entire contract (or statute), makes sense and resolves the ambiguity. The cases cited by Lennar are nothing more than particular examples where the entire contract or statute, including the "notwithstanding" clause, made sense and was unambiguous. None hold that "notwithstanding" clauses automatically prevail over all other potentially conflicting provisions in a

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[19] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[20] Testa v. Katt, 330 U.S. 386 (1947), and Claflin v. Houseman, 93 U.S. 130 (1876), relied upon by Lennar at page 13, are distinguishable. Those decisions involve the effort by individual states to disregard the Supremacy Clause on the basis that federal law emanates from a foreign sovereign; they did not address the question of predominance when federal and state law conflict.

contract and automatically resolve all ambiguity. As the cases cited above make clear, not all contracts and statutes containing "notwithstanding" clauses are always unambiguous. One of those cases where ambiguity remains even though there is a "notwithstanding" clause. Thus, the trial court properly allowed the jury to consider parol evidence to explain the operation of the repugnant contractual provisions.

C. The Authorities Upon Which Lennar Relies Do Not Hold that a "Notwithstanding" Clause Always Resolves the Ambiguity in a Contract or Statute

Perhaps the best indication that there is no "automatic override" by "notwithstanding" clauses comes from Lennar's own authorities. Lennar cites cases from ten jurisdictions as examples where "notwithstanding" clauses were found to resolve particular ambiguities. Lennar's Brief at 21, n. 8. However, the courts in one-half of those states -- Georgia, New Hampshire, New York, Colorado and Illinois -- have issued opinions where they concluded that a "notwithstanding" clause did not resolve the conflict between repugnant provisions.[21/]

[21/] See Adam Gindi. Inc. v. Those Certain Underwriters at Lloyds, 1991 WL 84572 (S.D.N.Y. 1991); Derosa v. Shiah, 421 S.E.2d 718 (Ga.Ct.App. 1992); Williamson v. Schmid, 229 S.E.2d 400 (Ga. 1976); Erdenberger, Inc. v. Partek North America. Inc., 865 P.2d 850 (Colo.Ct.App. 1993); American Family Ins. Co. v. Village Pontiac-GMC. Inc., 538 N.E.2d 859 (Ill. App. Ct. 1989); and Stillman v. North American Life & Cas. Co,, 698 F.Supp. 13 (D. N.H. 1986).

In Williamson, contrary to Lennar's argument, the Georgia Supreme Court held that the "notwithstanding" clause in the State Constitution "was not intended as the exclusive method for effecting changes in school board terms" and thus "[t]he word 'Notwithstanding' does not indicate here any repugnancy among constitutional provisions." 229 S.E.2d at 402-03. Therefore, the seemingly conflicting provisions in that case each had a separate field of operation.

Similarly, in American Family, also cited by Lennar, the Illinois appellate court actually disregarded a "notwithstanding" clause contained in a limitations statute on the basis that the clause was not intended to limit a plaintiffs cause of action but "only meant to apply to situations where the injury was not immediately discoverable." 538 N.E.2d at 861-62. In identifying this separate field

(continued.. .)

These cases, from the very jurisdictions relied on by Lennar, demonstrate that there is no rule of law automatically giving supremacy to "notwithstanding" clauses, as Lennar would have this Court believe. There is simply no singular rule of construction applicable to such clauses, nor should there be.[22/]

This does not mean as Lennar suggests, that affirming the Third District will start a "stampede" of litigation. Most draftsmen would not include provisions like paragraphs 3 and 4 in the same document at the same time. Most contracts and statutes containing "notwithstanding" clauses are clear; there is no need to litigate their meaning.[23/] But where, as here, the contract makes no sense even though it contains a "notwithstanding" clause, the court must discern and enforce the parties' intent rather than blindly apply a mechanical rule to frustrate that intent. To do otherwise would violate the admonition announced by this Court many years ago, that "the great object, and

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[21/](. . . continued)
of operation, the court disagreed with two other Illinois cases which held otherwise. Id. at 861 (citing cases).

[22/]The divergence of judicial opinions concerning the interpretation of "notwithstanding" clauses indicates that "[w]hile a 'judicial headcount' is, of course, not dispositive, it does suggest that whatever one can say about [notwithstanding clauses], . . . the fact that experienced jurists could disagree . . . suggests that the [clause's] provisions were certainly not 'unmistakably clear."' Pennsylvania v. Union Gas, 49 U. S. 1, 46-47 (1989) (White, J., concurring in part, dissenting in part).

[23/]"Lennar cites several statutes, forms and contracts where the use of a "notwithstanding" clause was clear. In many of Lennar's examples, unlike in this case, the provision which the "notwithstanding" clause modified had a separate field of operation (i.e., there were circumstances under which its terms would be given effect despite the provisions of the "notwithstanding" clause), and was not completely nullified by the provisions of the "notwithstanding" clause. In several of Lennar's examples, the provisions of the "notwithstanding" clause were used merely to indicate an exception to a general rule, where the general rule had application under different circumstances. And in other of Lennar's examples, the "notwithstanding" clause was used to establish preeminence over provisions previously adopted. All of these examples are distinguishable from this case, where, under Lennar's interpretation, the provisions of the "notwithstanding" clause completely nullify the paragraph which precedes it.

practically the only foundation, of rules of construction of contracts, is to arrive at the intention of the parties." St. Lucie County Bk. & Tr. Co. v. Avlin, 94 Fla. 528, 114 So. 438,441 (1927). No court has adopted the mechanical rule urged by Lennar; this Court should not be the first.

III. THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH OTHER FLORIDA DECISIONS INVOLVING "NOTWITHSTANDING" CLAUSES

Lennar argues that the Third District's decision is an "aberration" contrary to three Florida cases which "routinely and uniformly treated the phrase 'notwithstanding anything to the contrary' as plainly signaling the dominant among conflicting clauses." Lennar's Brief at 7. According to Lennar, these Florida cases establish a rule of law requiring the "automatic override" interpretation Lennar wants to give to such clauses. They do not. Instead, unlike the case here, they represent nothing more than examples of contracts where the documents, read as a whole, including the "notwithstanding" clause, make sense. The courts in those cases did not hold that the word "notwithstanding" clarifies all ambiguities in all contracts, regardless of the context.

In Quirina v. Plackard, 412 So.2d 415 (Fla. 3d DCA 1982), the Third District considered a discount clause and an acceleration clause in a mortgage. The discount clause provided for a discount upon payment of the mortgage before a certain date; the acceleration clause provided for immediate payment of the full amount on default "notwithstanding" anything in the mortgage to the contrary. The borrower defaulted, but thereafter attempted to pay off the mortgage by deducting the discount. The Third District held that, in light of the default, the acceleration clause governed over the discount clause.

Quiring does not present the kind of ambiguity which exists here. Typically contains both an acceleration clause to govern after default and other provisions (in Quiring, a

discount clause) that apply absent default. It is therefore entirely understandable to provide that the acceleration clause will govern the parties' rights in the event of default, "notwithstanding" any other provision to the contrary. Under those circumstances, both clauses had meaning and effect – the discount clause applied to prepayments when no default existed, but not after default and acceleration; the acceleration clause applied to payments after a default occurred. The use of the term "notwithstanding" thus clarified the proper application of each clause under different circumstances. Quiring's interpretation of the clause did not completely invalidate one of the conflicting provisions, as would occur here if Lennar's interpretation were adopted.

As previously noted, Lennar in its jurisdictional brief made much of the fact that the Third District in its slip opinion referred to Quiring with a "contra" signal, as indicative of the conflict in decisions. However, in the final, published opinion, the Third District revised the introductory signal to "see". This signal, together with the Third District's parenthetical explanation of Quiring,[24/] makes it clear that the Third District viewed Quiring as involving a contract where the "notwithstanding" clause clarified the proper role of two overlapping, but not completely repugnant, clauses.

Here, the "notwithstanding" clause in the Amendment does not resolve the ambiguity among paragraphs 2, 3 and 4. Under Lennar's interpretation, without the explanation provided by extrinsic evidence, there is no basis on which paragraphs 2, 3 and 4 can all have some meaning and effect. If, as Lennar contends, paragraph 4 governs, then it would render paragraph 3 and most provisions of paragraph 2 completely meaningless; there would be no circumstances in which these two paragraphs

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[24/]The Third District's parenthetical reference describes Quiring as a case where "'notwithstanding' clause effective to narrow broad or ambiguous preceding provision." Third District Opinion, 685 So.2d at 871.

would have any meaning or effect. One of the cardinal canons of contract construction discussed above, that effect be given to all parts of the contract, would be violated. See cases cited in the Third District Opinion, 685 So.2d at 872.

Although each paragraph may be unambiguous when construed alone, the ambiguity arose when all three paragraphs were simultaneously included in the Amendment with the effect, as argued by Lennar, of giving meaning only to the short-term provision of paragraph 4 and "wiping out" the long-term provisions.[25] Florida precedents require consideration of parol evidence in precisely these circumstances. See J.M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So.2d 484 (Fla. 1959) (unambiguous contracts simultaneously executed created ambiguity when construed together); Saco Development. Inc. v. Joseph Bucheck Const. Corp., 373 So.2d 419,421 (Fla. 2d DCA 1979).[26] The Third District recognized this ambiguity and concluded that parol evidence was necessary to ascertain the field of operation for each of the conflicting clauses:

> The internal conflict, a paradigmatic "ambiguity," which remains is resolvable – and the obvious question of why people would say two

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[25] In Quiring the purpose of each provision was clear; here, the purpose of each provision is not. In Quiring, each provision had a separate field of operation; each had some effect. Here, under Lennar's interpretation, one paragraph would completely nullify the other. Unlike in Quiring, the use of the "notwithstanding" clause here does not resolve the ambiguity.

[26] In Saco, the court stated:

> It is not understandable why Saco would insist upon and accept an indemnity and hold harmless agreement . . . and at the same time execute a release . which would have the effect of wiping out the indemnity and hold harmless agreement. The ambiguity created by the mutual repugnance of the instruments reauires consideration of such evidence. parol or otherwise. as the Parties may present on the auestion of the intent of the parties.

373 So.2d at 421.

> directly contrary things in the same breath is answerable – only by evidence beyond the words themselves **that the parties intended each of the two terms to operate in particular, but different, circumstances.**

Third District Opinion, 685 So.2d at 872.

The other two Florida cases involving a "notwithstanding" clause, KRC Entemrises. Inc. v. Soderauist, 553 So.2d 760 (Fla. 2d DCA 1989), and Grier v. M.H.C. Realtv Corn., 274 So.2d 21 (Fla. 4th DCA 1973), concerned a similar interplay between differing acceleration provisions in a note and mortgage securing the note, where the mortgage provision stated that it applied "notwithstanding" any provision in the note. Those cases merely recognize that use of a "notwithstanding" clause clarified the field of operation for each of two competing clauses so that both provisions applied in their proper context and neither was rendered meaningless.[27/] These cases, like Ouiring, do nothing more than consider the particular provisions in the contracts before them. Neither they nor Quiring establish the universal rule sought by Lennar that the word "notwithstanding" resolves all ambiguities in all documents as a matter of law. The rulings in Ouiring, KRC Enterprises and Grier therefore cannot be extended and applied blindly across all commercial transactions regardless of the contractual language and factual context at issue. Ambiguities in complex contracts in commercial transactions should be resolved only after careful analysis of the particular contract at issue and, if necessary, consideration of parol evidence – not by the rote

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[27/] Indeed, Grier explicitly notes that the acceleration provision in the note could apply because "plaintiff can sue on the note without foreclosing the mortgage." 274 So.2d at 22. However, when plaintiff sues on the note and forecloses on the mortgage, the "notwithstanding" clause of the mortgage comes into play. Again, each provision in Grier had a clear purpose and effect within its field of operation. This is obviously far different than Lennar's claim that the "notwithstanding" provision of paragraph 4 automatically and completely overrides paragraph 3 so that paragraph 3 never comes into play and could not be enforced under any circumstances, the purpose of paragraph 3 thus remaining obscure.

application of a universal rule to be mechanically applied whenever the word "notwithstanding" appears.

This is why the flood of litigation which Lennar and amici suggest, if the Third District's opinion is affirmed, will never materialize. The frequency with which "notwithstanding" appears in legal documents hardly means that it can never appear in an ambiguous document or statute. In those cases, as Lennar points out, contracts containing this clause were not ambiguous. As shown above, however, in many cases courts have found that "notwithstanding" clauses failed to resolve ambiguities. In these jurisdictions, there has been none of the flood of cases that Lennar parades to this Court as its horrible. This is simply because contractual analysis depends on the particular documents and circumstances at issue in each case, a principle that has been uniformly and successfully applied in jurisprudence. In the jurisdictions that have applied this principle to find that a particular "notwithstanding" clause does not resolve an ambiguity, the legal system has been perfectly capable of distinguishing such cases from other cases in which "notwithstanding" does resolve an ambiguity, without any flood of cases. Florida law is no different, and attempts by Lennar and amici to shock the Court into adopting such a self-serving and improper rule of law are unpersuasive.[28/]

[28/] Lennar also attempts to turn this case into something more than it is by distorting the Third District's holding. Lennar states:

> The proceedings before this Court arise from a Third District decision which implicates language used in hundreds of thousands of documents throughout this country. . . . The Third District's decision in this case . . . has determined that "notwithstanding" language does ***not*** resolve conflicts among provisions, and that such conflicts must be resolved by parol evidence-a decision surely destined to encourage a stampede of litigants if allowed to stand.

(continued.. .)

Morever, the rule of law that Lennar espouses would create serious, unintended and unwelcome results. If Florida courts could not consider evidence of the parties' intent in construing contracts and other legal documents, or the legislature's intent in construing statutes, in many cases that intent would be frustrated rather than enforced. The unyielding, universal rule of law Lennar urges this Court to adopt would govern the interpretation of innumerable statutes and contracts that are not before this Court for decision. Courts in Florida would be bound by controlling precedent to exclude parole evidence and apply "notwithstanding" clauses mechanically, regardless of whether this would enforce the parties' intent or, as here, lead to a senseless and absurd result. Such a rule of law would be unprecedented and entirely unsupportable.

In the end, Lennar concedes, as it must, that its automatic, mechanical rule is unworkable. After repeatedly attempting to glorify "notwithstanding" clauses on the basis of repeated usage as a "fundamental tool" in contracts and statutes, Lennar retreats from its untenable position:

> The result we have requested does not, as Respondents have erroneously suggested in theirjurisdictional brief, result in the creation of a new and unique "per se" rule automatically dictating the outcome of any dispute over "notwithstanding" language in whatever context. All established rules of contract construction remain available where applicable. Thus, for example, if giving effect to a "notwithstanding" clause will produce an unconscionable result, or disadvantage the lesser of parties of unequal bargaining power, or condone a fraud, courts remain free to apply well-established principles of contract law or of eauitv to nullify the clause. Or, if a "notwithstanding" clause

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[28](...continued)
Lennar's Brief at 1 (emphasis by Lennar). The Third District determined nothing of the kind. It merely held that this unique document, under these particular facts, is ambiguous. Its holding does not affect "hundreds of thousands of documents throughout this country". It affects only one, by affirming a jury verdict which interpreted the duration of the Leases after a review of the parol evidence permitted by the trial court because of the ambiguity in the document.

> does create an ambiguity – as, for example, if there were competing "notwithstanding" clauses – then. of course. ambiguity principles of construction remain available to the court. In short, Respondents' purported "per se" rule fears are simply unfounded.

Lennar's Brief at 22 and n. 9.

If Lennar means what it says, there is no basis to overturn the Third District's decision. If "all established rules of contract construction remain available," then the Third District properly utilized those rules by looking at the entire document, not just at an isolated phrase or paragraph of an agreement, and giving meaning to all its parts. Lennar is simply asking this Court to substitute Lennar's most recent interpretation of the Amendment for that of the jury. However, the Third District properly followed the fundamental rules that, because the parties' intent was not clear from the contract itself, the issue was for the jury to decide after consideration of all evidence reflective of that intent, and that, where, as here, evidence of that intent was conflicting, the court should not substitute its judgment for that of the jury. Third District Opinion, 685 So.2d at 872 (citing cases). That decision should stand.

IV. THE UNIVERSAL RULE PROPOSED BY LENNAR WOULD LEAD TO AN ABSURD RESULT IN THIS CASE AND WOULD BE CONTRARY TO THE INTENTION OF THE PARTIES UNDER THE LEASE AMENDMENT

The paramount concern of a court in interpreting a contract is to ascertain the intent of the parties. Underwood v. Underwood, 64 So.2d at 28 1, citing St. Lucie County Bk. & Tr. Co. v. Avlin, 114 So. at 438. In doing so, the courts strive to avoid absurd results. James v. Gulf Life Ins. Co., 66 So.2d 62, 63-64 (Fla. 1953); Katz v. Katz, 666 So.2d 1025, 1027-28 (Fla. 4th DCA 1996) (court found ambiguity due to conflicting provisions in agreement and refused to interpret contract in a manner that would lead to an absurd result). Further, to discern the parties' intent, the court

appropriately considers the circumstances that surround the contract's execution, the occasion giving rise to the contract and the apparent purpose the contract served for the parties. Blackhawk Heating & Plumbing Corp. v. Data Lease Financial Corp., 302 So.2d 404,407 (Fla. 1974); see also American Home Assurance Co. v. Larkin General Hosnital, 593 So.2d 195, 197 (Fla. 1992) (construing contract requires consideration of the object and purpose of contract); Rvlander v. Sears Roebuck & Co., 302 So.2d 478, 479 (Fla. 3d DCA 1974) (intent of parties derived from language of agreement and objects to be accomplished); Bal Harbour Shops. Inc. v. Greenleaf& Crosbv Co.. Inc., 274 So.2d 13, 15 (Fla. 3d DCA 1973) (same).

To this end, courts most often rely on the parties' conduct as the best evidence of their true intention in entering into a contract. Oakwood Hills Co. v. Horacio Toledo. Inc., 599 So.2d 1374, 1376 (Fla. 3d DCA 1992); Spindler v. Kushner, 284 So.2d 481, 483 (Fla. 3d DCA 1973) (actions of parties used to determine their interpretation of the contract); see also Trail Burger King, Inc. v. Burger King of Miami, 249 So.2d 483,485 (Fla. 3d DCA 1971) (affirming judgment which focused on conduct of the parties). As Justice Oliver Wendell Holmes long ago explained:

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.

Boston Sand & Gravel Co. v. United States, 278 U.S. 4 1, 48 (1928). Although the meaning, purpose and intended effect of the Amendment cannot be discerned from the face of the document, the parties' conduct after the Amendment was signed clearly and unambiguously demonstrates that all parties acted upon their understanding that the Amendment created long-term leases.

A. The Parties' Conduct After Execution of the Amendment Confirms Their Intent to Operate Under Long-term Leases

In reviewing whether the jury verdict was supported by the evidence, the Third District concluded that there was "ample evidence" that

> paragraph 3 was the operative one and that paragraph 4 was inserted only for the landlords' use as leverage in their attempts to secure relief from the mortgage, and would apply only if both parties later agreed to the 18-month term, which tenant [Farm Stores] did not.

Third District Opinion, 685 So.2d at 872 (footnote omitted). The record reflects numerous examples in which the Foggs, as executive officers and fiduciaries, conducted Farm Stores' business based on long-term leases and not an 18-month termination, and in which Lennar attempted to enforce the long-term lease deal to which they agreed.[29/]

1. The Foggs Operated Farm Stores Consistent With a Long-term Lease Agreement

As key executive officers of Farm Stores, the Foggs significantly influenced and implemented the company's business decisions. In numerous instances, the Foggs committed Farm Stores to obligations that only make sense to the company if it enjoyed long-term lease arrangements for the Leased Properties. This conduct reflects a clear understanding by the Foggs that the Amendment created a long-term lease arrangement.

For example, the Foggs committed Farm Stores to long-term supply arrangements with minimum volume purchase requirements. Farm Stores could only perform these commitments if it enjoyed a long-term tenancy in the Leased Properties. (TT. 770-780).

[29/] The statements and conduct of the Foggs were admissible and binding against Lennar as the successor-in-interest to the Foggs. Vineberg v. Hardinson, 108 So.2d 922, 926-27 (Fla. 3d DCA 1959); Chisolm v. Mapp, 347 So.2d 697, 698 (Fla. 4th DCA 1977). In fact, Lennar stipulated that it was the successor-in-interest to the Foggs and the jury was so instructed. (TT. 1191).

Similarly, in 1992 and 1993, the Foggs allowed Farm Stores to submit 5 year projections of revenue and profit to financial institutions to support requests for bank financing (TT. 808-813); these projections relied upon the long-term Leases. Both Mr. Alan Fogg and Mr. Richard Rentz reviewed and approved these projections for presentation to the federally-insured banks. (TT. 8 11, 813). Neither Mr. Fogg nor Mr. Rentz ever suggested that the projections be revised downward to reflect an 18 month lease term to avoid misleading the banks.[30/]

Moreover, the Foggs attended Farm Stores' regular monthly managerial staff meetings; it was their responsibility to discuss the status of lease expirations for all of Farm Stores' properties. (TT. 764, 832-35). Although the Foggs identified other properties that had expiring leases, they never mentioned at any of these meetings that the Leases would expire in 18 months.[31/] (TT. 764).

The significance of the foregoing evidence is twofold. First, it provides the factual circumstances surrounding the contradictory terms of the Amendment and thus the evidentiary support for the jury verdict. Second, this evidence demonstrates that the result urged by Lennar would "produce an unconscionable result, . . or condone a fraud." Lennar's Brief at 22 and n. 9. In such circumstance, Lennar itself recognizes that a "notwithstanding" clause should not be given the "automatic override" effect which Lennar espouses.

[30/] As Farm Stores argued below, this evidence is extremely compelling because a person who makes a false statement to a federally insured financial institution can be imprisoned for up to 30 years if convicted. 18 U.S.C. § 1014. If the Foggs truly understood that the Amendment provided for an 18-month lease term, they offered no explanation for misleading the financial institutions and exposing themselves to criminal liability.

[31/] The jury also considered the contemporaneous handwritten notes of Mr. Bared which he took during the conversation with Mr. Fogg concerning Mr. Fogg's request for language which ultimately became the "notwithstanding" clause. Mr. Fogg denied that this conversation took place.

1. Lennar Reauested the Circuit Court to Enforce the Long-term Leases

Similarly, Lennar always intended for Farm Stores to remain on the Leased Properties pursuant to the long-term lease deal set forth in paragraphs 2 and 3 of the Amendment. (TT. 637). To effectuate the long-term Leases, Lennar filed formal pleadings before the Dade Circuit Court in its foreclosure action against the Foggs to seek the appointment of a receiver to replace the Foggs as landlords for "the limited purpose of executing lease extensions to protect and preserve the rents assigned to" Lennar. (App.Ex. I; Def.Ex. G). Lennar thus sought to eliminate the Foggs' threatened eviction of Farm Stores and to enforce the long-term leases to which Lennar had agreed. Lennar's receivership pleadings relied on its agreement with Mr. Bared, and pled to the court that Farm Stores "is obligated to extend the Leases if requested by its landlord (currently defendants), and **plaintiff [Lennar] has given its mortgagee's consent to such an extension."** Id.[32/] Accordingly, Lennar acted on its understanding that the Letter Agreements and the Amendment created a long term tenancy by the most convincing means at its disposal -- filing pleadings and scheduling a hearing before the Dade County Circuit Court solely to achieve that result.[33/]

[32/]The Foggs -- but not Lennar argued at trial that an agreement from Farm Stores to "extend" the Leases demonstrated an understanding that the Leases expired in 18 months. However, by June 1993, the Foggs already had made clear their intent to evict Farm Stores. (TT. 415). When Farm Stores advised Lennar of this fact, Lennar responded by seeking appointment of a receiver who could confirm or extend the Leases in his capacity as the new "landlord". Farm Stores then would be obligated to accept this "extension" pursuant to the terms of paragraph 6 of the Lennar Letter Agreement which required Farm Stores to accept a proposal from "any landlord." (App.Ex. F; Pl.Ex. 15). Thus, there was nothing inconsistent with Farm Stores' willingness to "extend" the Leases and Lennar's agreement to do so. This course would have yielded the result desiied by both Lennar and Farm Stores: long-term leases under paragraph 3 of the Amendment without the costly litigation that ensued.

[33/]Just before the hearing on the receiver motion, Lennar obtained summary judgment against the Foggs in the foreclosure proceedings. This caused Lennar to postpone the receivership hearing and later to abandon its motion. Thereafter, Lennar, for the first time and after almost a year and a (continued.. .)

B. Lennar's Interpretation Renders Most of the Amendment Superfluous

The inherent problem with Lennar's current interpretation of the Amendment is that it leads to the absurd result of rendering most of the Amendment a complete nullity, even though all provisions were added at the same time. As the Third District held, such an interpretation is "contrary to the rule of construction and common sense that every provision is deemed to serve some useful purpose." Third District Opinion, 685 So.2d at 871-72 (citations omitted); see also Royal American Realtv. Inc. v. Bank of Palm Beach, 215 So.2d 336,338 (Fla. 4th DCA 1968); McArthur v. A.A. Green& Co., 637 So.2d 311,312 (Fla. 3dDCA 1994).

Under Lennar's interpretation, paragraph 3 and most of the rest of the Amendment become meaningless. For example, paragraph 2 of the Amendment contemplates numerous vears of annual rent increases and "each such [rent] increase" is to become "effective as of October 1 of each year commencing with October 1. 1993."[34/] Obviously, this language contemplates more than one rent increase. In fact, Mr. Lampert and Mr. Fogg discussed the fact that the rent increases would occur over the initial 7 year term and never discussed that paragraph 4 would affect the rent increases. (TT.

[33/](...continued)
half of contradictory conduct, changed its position and claimed that the Leases terminated in 18 months. Lennar's cavalier explanation for its changed position was that, as the landlord, it had the right to do what it wanted with the Leased Properties. (TT. 643-44).

[34/]Paragraph 2 of the Amendment provides in part:

> The Assignee [REWJB] shall commence paying this Base Annual Rent beginning with the rental period commencing October 1, 1992 . . The Additional Annual Rent shall be computed by increasing the Base Annual Rent by the amount of 2% per year (over the relevant Base Annual Rental) during the initial and all renewal terms of the Leases; each such increase shall be effective as of October 1 of each year commencing with October 1, 1993.

504).

By contrast, Lennar cannot plausibly explain why it was necessary for the Foggs and Farm Stores to adopt language for multinle and compounding rent increases if only an 1 X-month lease term was intended. Indeed, the Foggs and Lennar have contradicted each other on this point. Lennar believed that paragraph 4 would "drop out" if the mortgages were renegotiated. Mr. Fogg did not agree that paragraph 4 would ever be dropped. He testified that the lease was for 18 months and that paragraph 3 was there only because Lennar wanted it there.[35] He asserted that he "did not understand the purpose it was there." (TT. 1056, 1058).[36]

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[35] After Mr. Krasnoff testified that Lennar believed if the mortgages were renegotiated, "all that would happen is Paragraph 4 would be stricken," (TT. 612), Mr. Fogg was asked if he agreed with this position:

> **Q.** **[By Farm Stores' counsel]** You heard Mr. Krasnoff testify that his understanding was that if you were able to renegotiate the mortgage with Lennar Paragraph 4 would drop out and 3 would become the new term of the leases, is that your understanding of how 3 and 4 would work?
>
> **A.** No.
>
> **Q.** You disagree with Mr. Krasnoff?
>
> **A.** If that's what he said then I disagree with him. This was an 18 month term on the lease. We were going to try to renegotiate the mortgage and then we could renegotiate the leases.
>
> **Q.** So it is your position that Paragraph 3 is a nullity?
>
> **A.** My position is that Paragraph 3 is in there because I was told Lennar wanted it in there . . . .

(TT. 1057).

[36] Moreover, any explanation offered by Lennar is pure speculation because it was not privy (continued.. .)

C. Farm Stores' Interpretation Gives Effect to All Terms of the Amendment

In contrast to Lennar, Farm Stores' understanding and interpretation of paragraphs 2, 3 and 4 give meaning to **all** the terms of the Amendment. According to Mr. Bared and his attorney Mr. Lampert, the parties intended paragraph 4 to operate only if both Farm Stores **and** the Foggs jointly invoked it after the mortgage renegotiation failed -- and this was why Mr. Bared was willing to give this accommodation to the Foggs in the first instance. (TT. 413-14, 500, 507-08). This was the "gun" the Foggs believed they had placed to Lennar's head. Third District Opinion, 685 So.2d at 872 and n. 2; (TT. 640).[37] Thus, paragraph 4 had its own field of operation not inconsistent with or

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[36](...continued)
to Farm Stores' conversations and negotiations with Alan Fogg, Jr. and Richard Rentz, both of whom were involved in drafting the language of Paragraph 2. (TT. 1052-54). See (App.Ex. J; Pl.Ex. 21, 22). Significantly, the Foggs' involvement in drafting the language of paragraph 2 to provide for multiple rent increases -- when only one such increase would occur between September 14, 1992 and March 14, 1994 (if the Leases truly expired in 18 months) -- belies Mr. Fogg's testimony that he had no idea why paragraph 3 was inserted in the Amendment.

[37]Lennar's representative, Mr. Krasnoff, provided the following testimony at trial:

Q. **[By Farm Stores' counsel]** And you also understood that Lennar, that the Foggs were trying to tie together the term of the lease and renegotiation on the mortgage, correct?

A. **[By Mr. Krasnoff]** Yes. There was this discussion about the fact that they were trying to tie it together.

Q. In fact, your words were "the old gun to your head theory," correct?

A. I cannot remember using that word.

Q. Take a look at Page 71 of your deposition and your answer and tell me if that refreshes your recollection of whether you used the term "the old gun to the head theory" described in there.

A. Yes, I mentioned that as a comment . . . .

(continued...)

contradictory to paragraph 3; however, if paragraph 4 was not jointly triggered, then Farm Stores would continue to enjoy the long-term lease terms set forth in paragraphs 2 and 3. (TT. 643).

This explanation makes the provision in paragraph 2 for multi-year rent increases complementary to the long-term lease language of paragraph 3. Significantly, this interpretation does not nullify paragraph 4. Because Farm Stores' construction gives meaning to all the paragraphs of the Amendment, the jury was entitled to accept it and the judgment entered below should be affirmed. See McArthur, 637 So.2d at 3 12.

CONCLUSION

The contract involved in this case is short. It is simple. Its meaning is not. Anyone reading paragraphs 2, 3 and 4 comes away with only one reaction – what does it mean? Why did the parties provide for a long-term lease in paragraph 3 and at the same time in the very next paragraph provide for a short term lease? The answer appears nowhere on the face of the document. The parties' intent is obscure. None of this changes through a rote, mechanical application of the "notwithstanding" clause. Indeed, such an application abuses one of the fundamental rules of contract construction –

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[37] (...continued)

Q. You understood that the head that the Foggs were putting a gun to was Lennar's head, correct?

A. I think that was -- that may have been the intent to do that.

* * *

Q. So the gun was to your head?

A. I think that's what they thought they were doing.

(TT. 640-41).

that the contract must be read as a whole and that meaning must be given to all its provisions. The Third District properly reached these conclusions and determined that the issue was properly submitted to the jury after consideration of all relevant evidence. This Court can only conclude that the Third District's analysis was correct and should be affirmed.

Respectfully submitted,

COOPER & WOLFE, P.A.
First Union Bldg., Suite 3580
200 South Biscayne Blvd.
Miami, Florida 33 13 1
(305) 371-1597

By: _____
Marc Cooper
Fla. Bar No. 198358

TEW & BEASLEY, L.L.P.
Miami Center, Suite 2600
20 1 South Biscayne Boulevard
Miami, Florida 33 13 1-4336
(305) 536-1112

By: _____
Joseph A. DeMaria
Fla. Bar. No. 764711

By: _____
Humberto H. Ocariz
Fla. Bar. No. 740860

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 30 day of October, 1997 to: **Elizabeth K. Russo,** Attorney for Petitioner Lennar, Russo & Talisman P.A., Suite 2001, Terremark Centre, 2601 South **Bayshore** Drive, Miami, Florida 33 133; **David Trench,** Co-Counsel for Petitioner Lennar, **Rubin,** Baum, et al., Suite 2500, First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33 13 1 and **Charles R Gardner,** Attorney for The Real Property, Probate and Trust Law Section of The Florida Bar, Gardner, Shelfer, Duggar & Bist, P.A., 1300 Thomaswood Drive, Tallahassee, Florida 323 12.

Joseph A. DeMaria