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, FS CONVENIENCE STORES, INC.,
REWJB GAS INVESTMENTS, and TONI GAS AND FOOD STORES INC.,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

PETITIONERS' BRIEF ON JURISDICTION

RUBIN BAUM LEVIN CONSTANT
FRIEDMAN & BILZIN
2500 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33 13 1-2336
–and–
RUSSO & TALISMAN, P.A.
Suite 2001, Terremark Centre
260 1 South Bayshore Drive
Miami, Florida 33 133
Telephone (305) 859-8100

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	5
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Page

Bende v. McLaughlin
448 So. 2d 1146 (Fla. 4th DCA 1984) 4

Benson *v.* First Trust *& Savings Bank*
142 So. 887 (Fla. 1932) 9

Derose v. Shiah
421 S.E.2d 718 (Ga. Ct. App. 1992) 3

Florida Power *&* Light Co. *v.* Beard
626 So. 2d 660 (Fla. 1993) 9

Goodman *v.* Goodman
290 So. 2d 552 (Fla. 1st DCA 1973) 9

Grier v. M.H.C. *Realty Corp.*
274 So. 2d 21 (Fla. 4th DCA 1973) 5, 6, 8, 12

In Re: Amendments to the Florida Rules of Appellate Procedure,
609 So. 2d 516,518 (Fla. 1992)) 4

Isignia Homes, Inc. *v. Hinden*
675 So. 2d 673 (Fla. 4th DCA 1996) 9

Kaufman v. Mutual of Omaha Insurance Co.
681 So. 2d 747 (Fla. 3d DCA 1996) 9

KRC Enterprises, Inc. *v. Soderquist*
553 So. 2d 760 (Fla. 2d DCA 1989) 5-8, 12

Martin-Johnson, Inc. *v.* Savage
488 So, 2d 567 (Fla. 1st DCA 1986) 4

National Union Fire Insurance Co. v. Westinghouse Electric Supply Co,
206 So. 2d 60 (Fla. 3d DCA 1968) 9

Quiring v. Plackard
412 So. 2d 415 (Fla. 3d DCA 1982) 4, 5, 8

Weiman v. *McHaffie*
470 So. 2d 682 (Fla. 1985) 9

Zolonz v. Zolonz
659 So. 2d 451 (Fla. 4th DCA 1995) 9

Other authorities

Art. V §3(b)(3), FLA. CONST 5

Fla.R.App.P. 9.800(n) 4

The Bluebook: A Uniform System of *Citations* (16th ed. 1996) 4

The Bluebook: A Uniform System *of Citations* (16th ed. 1991) 4

SUMMARY OF ARGUMENT

Petitioners here seek review of a decision of the Third District Court of Appeal holding that an asserted conflict between two clauses of a contract created an ambiguity, thus permitting parol evidence, even though one of those clauses said unambiguously that it applied "notwithstanding" the other. In thus nullifying the contract's "notwithstanding" language, the Third District created express and direct conflict with decisions of two other districts enforcing identical "notwithstanding" language. In the process, the district court likewise has nullified the "notwithstanding" language in thousands of Florida contracts (the language is so common that we have discovered 700 reported Florida decisions in which it was employed by parties, courts, and the legislature to denote predominance, and the present Florida statutes alone include 400 "notwithstanding" clauses) inviting countless hours of parol litigation which the parties explicitly intended to avoid.

The express and direct conflict generated by the district court's decision provides a basis for exercise of this Court's jurisdiction. And, we respectfully submit, it is a conflict that should be resolved because so many legal instruments will be affected if the efficacy of "notwithstanding" clauses is left in limbo.

STATEMENT OF THE CASE AND FACTS

Petitioners here seek review of a decision issued by the Florida Third District Court of Appeals on grounds of express and direct conflict.' **Accordingly,** the facts are recited as they appear on the face of the decision,

A. The legal dispute and trial court proceedings thereon

This case arose from a dispute over the legal effect of "notwithstanding any conflicting or inconsistent provisions" language in an amendment to 22 commercial leases. (A. 2). The amendment had been negotiated, and agreed upon, by the principals and lawyers of the commercial entities involved. (A. 1, 2, 10). The "notwithstanding" language in question is contained in a single sentence, and it appears, specifically, in the opening clause of the sentence:

> 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.

(A. 2). Paragraph 3 had amended the terms as to the length of the various leases such that they were to have certain initial terms with optional renewal periods for a potential total duration of 27 years. (A. 2).

Differences arose amongst the parties, and a declaratory judgment suit was filed by the lessees, Respondents herein. (A. 2). The issue in the litigation was whether the paragraph 4

'The Third District's decision has been included in the appendix hereto, and all references to the appendix appear as (A. ___). Where pertinent, reference is also made to the dissent written by the Honorable Judge James Jorgenson. All emphasis in this brief is supplied unless otherwise stated.

"notwithstanding any conflicting or inconsistent provisions, including specifically paragraph 3" language about the term of the leases unambiguously provided that it would govern over any inconsistent provisions, including paragraph 3. (A. 1- 10).

Cross-motions for summary judgment filed by the parties seeking a judicial determination as to the legal effect of the "notwithstanding" language in the amendment were denied by the trial judge, who decided that a jury should determine the parties' intent as to the term of the leases on the basis of parol evidence. (A. 2, 4). The jury's findings ran counter to the H-month lease termination date set by paragraph 4 of the amendment, and Petitioners appealed contending that the trial judge should have entered summary judgment confirming the l&month lease termination date based on the unambiguous language of the amendment. (A. 2).

B. The Third District's majority opinion

The Third District majority affirmed, holding that the "notwithstanding any conflicting or inconsistent provisions . . . including specifically paragraph 3" language in paragraph 4 of the amendment did not — despite explicitly saying so — operate to override inconsistent provisions, including paragraph 3. (A. 1-6). Rather, the majority concluded, it created an "irreconcilable conflict" (A. 2) and a "paradigmatic 'ambiguity' " (A. 4), which only parol evidence could resolve. (A. 1-6).

In reaching its conclusion as to the effect of the "notwithstanding" clause, the majority relied upon a decision from an intermediate appellate Georgia court,[2] but acknowledged — with a

[2] *Derose v. Shiah*, 421 S.E.2d 718 (Ga. Ct. App. 1992).

"*contra*" introductory signal[3] — contrary authority on the issue from the Third District itself.[4] (A. 3).

C. Judge Jorgenson's dissent

Believing that the admission of parol evidence as to the parties' intentions was error, Judge Jorgenson dissented from the majority opinion. (A. 7-10). His dissenting opinion pointed out that the "irreconcilable conflict" described in the majority opinion was explicitly resolved in the amendment itself: "[A]ny conflict [between paragraphs 3 and 4] is resolved through the concise wording of paragraph four." (A. 7). Judge Jorgenson also pointed out that these were commercially sophisticated parties with extensive experience in real estate transactions, represented by counsel, such that their selection of specific contractual language could only be deemed to have served their purposes as known to them at the time:

> All of the parties involved in this transaction were knowledgeable and sophisticated when it came to drafting real estate leases. Intense negotiations between corporations and partnerships were involved; all parties were represented by counsel. This was not an adhesion contract signed by naive players under duress. Both paragraphs were there for purposes that served all parties at the time. The wording of

---

[3] "*Contra*" as an introductory signal indicates direct conflict with the cited decision. *Martin-Johnson, Inc. v.* Savage, 488 So. 2d 567 (Fla. 1st DCA 1986); Bende *v. McLaughlin*, 448 So. 2d 1146 (Fla. 4th DCA 1984). Prior editions of The Bluebook: A *Uniform* System *of Citations* ("Bluebook") (16th ed. 1996 — which controls citation references in Florida in all legal documents, including Court opinions (See Fla.R.App.P. 9.800(n); *In* Re: Amendments to the *Florida Rules* of *Appellate* Procedure, 609 So. 2d 516, 518 (Fla. 1992)) — said that contra was to be used when "the cited authority directly states the contrary of the proposition" in the just cited case. See, e.g., *The* Bluebook: A *Uniform* System of *Citations* (15th ed. 1991), p. 23. The 16th edition has apparently included the "*contra*" concept under "but see". *See The* Bluebook: A *Uniform System of Citations* (16th ed. 1996), p. 23 and Introduction at p. 3.

[4] *Quiring v. Plackard,* 412 So. 2d 415 (Fla. 3d DCA 1982).

> paragraph four is articulate, concise, and unambiguous as to what is intended. Paragraph four clearly and expressly incorporates paragraph three, and we should honor the intent of the parties and their freedom to contract.

(A. 10). Finally, Judge Jorgenson's dissent — taking issue with the majority's reliance on the cited Georgia case — identified inter-district conflict between the majority opinion and KRC *Enterprises, Inc. v. Soderquist,* 553 So. 2d 760 (Fla. 2d DCA 1989) and *Grier v.* M.H.C. Realty Corp., 274 So. 2d 21 (Fla. 4th DCA 1973), as well as the intra-district conflict with *Quiring v. Plackard,* 412 So. 2d 415 (Fla. 3d DCA 1982). (A. 7-10).

D. Timely invocation of this Court's discretionary jurisdiction

Upon issuance of the Third District's decision, Petitioners timely filed a motion for rehearing or certification. (A. 11-24). The request for certification was based on the inter-district conflict and on the public importance of the issue as to whether these common "notwithstanding anything to the contrary" clauses do — or do not — unambiguously override contrary provisions. (A. 11-24). Petitioners also timely filed a motion for rehearing en *banc* based on the intra-district conflict and on the public importance of the issue. (A. 25-42). These motions were denied by the Third District by order dated January 29, 1997 (A. 43), and on February 26, 1997 Petitioners timely filed their notice to invoke this Court's discretionary jurisdiction on grounds of express and direct conflict. (A. 44-45).

ARGUMENT

A. This Court has a basis for exercising jurisdiction due to inter-district conflict

This Court has jurisdiction pursuant to Art. V §3 (b) (3), FLA. CONST. on the grounds that the Third District's decision is in direct conflict with decisions of other district courts of appeal.

The conflict decisions are from the Second and Fourth District Courts of Appeal: KRC Enterprises, *Inc. v. Soderquist*, 553 So. 2d 760,761 (Fla. 2d DCA 1989); *Grier v.* M.H.C. Realty *Corporation*, 274 So. 2d 21 (Fla. 4th DCA 1973).

The Third District majority held in this case that a "notwithstanding any conflicting or inconsistent provisions" clause is not a clear directive as to which of conflicting provisions will control. On the contrary, they ruled that the conflict between provisions created an ambiguity making parol evidence a necessity. The Third District majority opinion thereby created conflict with the above cited Second and Fourth District decisions which held that substantively identical "notwithstanding" language *is* a clear and unambiguous designation as to which of conflicting provisions is to govern.

The KRC Enterprises opinion provides a graphic demonstration of the conflict which the Third District decision has now created. In KRC Enterprises, a promissory note executed contemporaneously with a mortgage had an automatic acceleration clause providing that upon default the unpaid principal and accrued interest would "forthwith become due and payable notwithstanding their tender." 553 So. 2d at 761. The mortgage, however, had an inconsistent provision which indicated that acceleration was *not* automatic, but rather could occur, alternatively, at the option of the mortgagee:

> In the event that any of the sums of money herein referred to shall not be promptly and fully paid on or before the due date . . . the aggregate sum mentioned in said promissory note shall become due and payable forthwith or thereafter at the option of the Mortgagee as fully and completely as if the said aggregate sum of said promissory note was originally stipulated to be paid on such day, anything *in* said promissory note or *herein* to the contrary notwithstanding.

553 So. 2d at 761 (court's emphasis). The issue in KRC *Enterprises* was whether the acceleration occurred automatically on the default date (April 15, 1983) as provided in the promissory note, or whether it occurred at a later date because the mortgagee had not exercised its option to accelerate. The Second District noted the general rule that two documents executed simultaneously are to be read and construed together, and then ruled on the legal effect of the "notwithstanding" language:

> Here, the note contained an automatic acceleration clause, **but the mortgage contained an acceleration clause and *specifically* provided that "anything *in* said promissory note or herein *to the contrary* notwithstanding." Thus, the *mortgage,* providing *for* acceleration at the mortgagee's *option, prevails* over *the language in the note.***

553 So. 2d at 761.

It is obvious that the provisions in the KRC Enterprises documents were mutually incompatible — or, "mutually repugnant," to use the phrase referenced by the Third District majority in the instant case — and that a mortgage indebtedness could not both (a) accelerate automatically upon default, **and** (b) accelerate only at the option of the mortgagee at the same time. The 'mutual repugnancy' was, however (quite properly, we believe) deemed irrelevant by the Second District because the "notwithstanding" language unambiguously directed which of the inconsistent clauses was to govern over the other.

The KRC Enterprises factual circumstances are identical in practical effect to those presented here. A lease term may not be both 'twenty-seven years' and 'eighteen months' in length at the same time. However, where "notwithstanding any conflicting or inconsistent" language has been included, the Second District held, clear directions have been provided as to which of two conflicting provisions is to govern. The Second District did not either (a) engage in a discussion of the fact that enforcement of the unambiguous "notwithstanding" clause meant that another clause

became superfluous and a nullity, or (b) resort to rules of contract construction about trying to give effect to all provisions in a contract.

The Fourth District's decision in *Grier*, upon which the Second District relied, is the same. The *Grier* court said:

> There does not appear to be any genuine issue of fact with regard to the acceleration rights of the plaintiff. When these two instruments are construed together, as they should be, [cites omitted], ***it* seems *clear* the provision of the mortgage controls the *provision* of the note *relative to acceleration since the mortgage specifically provides* 'anything in *said* note** or ***herein* to the *contrary notwithstanding.***'

274 So. 2d at 22.

Although not a basis for exercise of this Court's conflict jurisdiction, the Third District's decision here also directly conflicts with a prior Third District decision, *Quiring, supra,* which also relied on *Grier* in ruling that use of parol evidence to explain or vary the conflicting terms of a mortgage was *prohibited* because a "notwithstanding" clause acts as a clear directive in resolving conflicts between provisions. 412 So. 2d at 417. (A. 7-10). The Third District has declined to resolve this intra-district conflict. Therefore, the existence of the *Quiring* decision, which is in accord with the Second District's KRC Enterprises decision and the Fourth District's *Grier* decision, at a minimum exacerbates the disharmony and confusion created by the instant case.

B. Because the potential negative impact of the conflict is so substantial, exercise of this Court's discretionary jurisdiction is warranted

Petitioners respectfully submit that review should be granted because this case presents an important issue which requires resolution in order to provide certainty for drafters of legal instruments and to forestall unnecessary litigation. "Notwithstanding any other/conflicting/contrary provisions" clauses are routinely used in the drafting of contracts and other legal documents.

Legislators and regulators also rely on such clauses in writing statutes and regulations. As an example, such "notwithstanding" clauses are used 400 times in the current Florida Statutes.[5] There are, additionally, over 700 Florida cases in which these "notwithstanding" clauses have appeared in various types of legal writings.[6] A review of these cases makes it clear that Florida courts, including this Court, have routinely treated "notwithstanding" clauses in contracts and statutes as unambiguously denoting the provision introduced by such clauses as controlling.[7]

Given the widespread use of "notwithstanding" clauses, the conflict created by the Third District's decision should be resolved. Under the prior — and uniform — Florida decisions, drafters of legal instruments were able to utilize "notwithstanding anything to the contrary" language to designate an override clause that would -because of its clear and unambiguous nature — operate *automatically*, with no possibility that parol evidence squabbles would be permitted to vary or nullify the contractual designation as to primacy. The Third District's contrary decision has now cast doubt

---

[5]A list of the statutory provisions in which "notwithstanding" clauses appear is included in the Appendix hereto. (A. 46-49). The list was generated by Lexis searches. Search of LEXIS, Florida Library, FLCASE File (March 7, 1997) (searches for: (1) notwithstanding /10 contrary; (2) notwithstanding /10 conflict!; and (3) notwithstanding /10 inconsistent).

[6]The list of cases was also generated by Lexis searches. Search of LEXIS, Florida Library, FLCODE File (March 7, 1997) (searches for: (1) notwithstanding /10 contrary; (2) notwithstanding /10 conflict!; and (3) notwithstanding /10 inconsistent). The cases — a sampling of which is provided in note 7 below — arose in a variety of contexts and the "notwithstanding" language thus appears in contracts, statutes, and court opinions. The cases simply illustrate the widespread use of "notwithstanding" language to signal a controlling provision or concept.

[7]*See*, e.g., *Florida Power & Light* Co. *v.* Beard, 626 So. 2d 660 (Fla. 1993); *Weiman v. McHaffie*, 470 So. 2d 682 (Fla. 1985); *Benson v.* First Trust *& Savings* Bank, 142 So. 887 (Fla. 1932); *Kaufman v.* Mutual *of Omaha* Insurance Co., 681 So. 2d 747 (Fla. 3d DCA 1996); *Isignia* Homes, Inc. *v. Hinden*, 675 So. 2d 673 (Fla. 4th DCA 1996); *Zolonz v. Zolonz*, 6.59 So. 2d 4.51 (Fla. 4th DCA 1995); Goodman *v. Goodman*, 290 So. 2d 552 (Fla. 1st DCA 1973); *National* Union Fire *Insurance* Co. *v.* Westinghouse Electric *Supply* Co., 206 So. 2d 60 (Fla. 3d DCA 1968).

on the automatic effectiveness of "notwithstanding" language. The bench, bar, and public in this state need the certainty of an answer to the question one way or the other, and now only this Court can provide it due to the existing inter-district conflict,

The conflict is not only significant for prospective legal documents, but also affects all existing legal documents containing "notwithstanding" clauses, banking instruments, statutes, etc. All such legal writings are now vulnerable to 'ambiguity' attacks based on the present decisional conflict. The conflict will unquestionably spawn countless after-the-fact efforts to avoid the consequences of previously clear provisions.

In sum, the conflict in Florida law which now exists as a result of the Third District's majority decision in this case creates a serious dilemma for drafters of legal instruments and is absolutely certain to foster an increase in litigation with commensurate additional burdens of cost and delay for the citizens and courts of this state. Because the potential impact of the conflict is so substantial, we respectfully submit that review should be granted and the conflict resolved.

CONCLUSION

Based on the foregoing facts and authorities, Petitioners respectfully submit that this Court should exercise discretionary jurisdiction over this case,

Respectfully submitted,

RUBIN BAUM LEVIN CONSTANT
FRIEDMAN & BILZIN
2500 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33 131-2336
–and–

RUSSO & TALISMAN, P.A.
Suite 2001, Terremark Centre
2601 South Bayshore Drive
Miami, Florida 33 133
Telephone (305) 859-8 100

Attorneys for Petitioners

By: Elizabeth K. Russo
ELIZABETH K. RUSSO
Florida Bar No. 260657

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioners' Brief on Jurisdiction was mailed this 10th day of March, 1997 to: HUMBERTO OCARIZ, ESQUIRE, Tew & Beasley, Counsel for Plaintiffs/Respondents,. 201 South Biscayne Boulevard, Miami Center, Suite 2600, Miami, Florida 33131-4336; and CURTIS S. CARLSON, ESQUIRE, Carlson & Bales, Counsel for Co-Defendants Land O'Sun Realty, Ltd., et al., 2770 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33 13 1.

Elizabeth K. Russo

INDEX TO APPENDIX

Decision of the Third District dated October 30, 1996 1-10

Motion for Rehearing or Certification dated November 14, 1996 11-24

Motion for Rehearing En *Banc* dated November 14, 1996 25-42

Order denying Motions for Rehearing or Certification and Motion for Rehearing *En Banc* dated January 29, 1997 43

Petitioners' Notice to Invoke Discretionary Jurisdiction dated February 26, 1997 44–45

Statutory provisions in which "notwithstanding clauses appear 46-49

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

LAND O'SUN REALTY LTD., ALAN S. FOGG, JR., individually and as general partner of LAND O'SUN REALTY, LTD., STEVEN M. FOGG, individually and as general partner of LAND O'SUN REALTY, LTD., SUZANNE FOGG RENTZ, as general partner of LAND O'SUN REALTY, LTD., C'STORE REALTY, LTD., C'STORE MANAGEMENT CORPORATION, as general partner of C'STORE REALTY, LTD., RICHARD D. RENTZ, individually and F.S. DISPOSITION, INC., f/k/a FARM STORES, INC., LENNAR FLORIDA PARTNERS I, L.P. and LENNAR FLORIDA LAND V Q.A., LTD.,

Appellants,

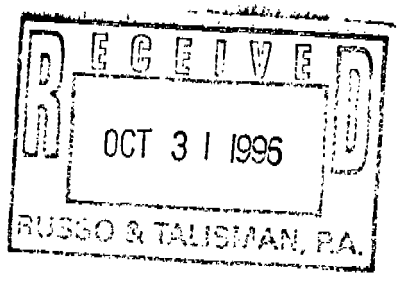
vs.

REWJB GAS INVESTMENTS, a Florida general partnership; FS CONVENIENCE STORES, INC., a Florida corporation, as general partner of REWJB GAS INVESTMENTS and TONI GAS AND FOOD STORES, INC., a Florida corporation, as general partner of REWJB GAS INVESTMENTS,

Appellees.

CASE NOS. 95-3539
95-3404

LOWER TRIBUNAL NO. 94-4460



A.1

Opinion filed October 30, 1996.

Appeals from the Circuit Court for Dade County, Margarita Esquiroz, Judge.

Carlson & Bales and Curtis Carlson and Julie A. Moxley and Ronald J. Lewittes; Rubin, Baum, Levin, Constant, Friedman & Bilzin and Larry A. Stumpf and David W. Trench and Mindy L. Pallot, for appellants.

Tew & Beasley and Humberto H. Ocariz and Joseph A. DeMaria, for appellees.

Before SCHWARTZ, C.J., and JORGENSON and GODERICH, JJ.

SCHWARTZ, Chief Judge.

The parties' lease agreement provided:

> 3. The term of [each of] the [twenty two] Leases is amended so that . . . 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.

On this appeal, the landlords challenge a declaratory judgment based on a jury verdict that the term of the leases in question was 27 years as provided in paragraph 3. They contend that the eighteen month term provided in paragraph 4 controls as a matter of law. we disagree and affirm.

It is apparent that paragraphs 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. 3d 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,[1] or legal effect. Derosa v. Shiah, 205 Ga. App. 106, 108, 421 S.E.2d 718, 721 (1992) (provision that a contract term shall apply "notwithstanding" directly conflicting one does not resolve contradiction). Contra Quiring v. Plackard, 412 So. 2d 415, 417 (Fla. 3d DCA 1982) ("notwithstanding" clause effective to narrow broad or 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. See H.R. McArthur v. A.A. Green & Co., 637 So. 2d 311, 312 (Fla. 3d DCA 1994); Hillsborough County Aviation Auth. v. Cone Bros. Contracting Co., 235 So. 2d 619, 621 (Fla. 2d DCA 1973);

---

[1] The American Heritage Dictionary (William Morris ed., New College ed. 1979) defines the word as follows:

> notwithstanding (not with-stan ding, not with-)prep. In spite of; regardless of hindrance by: He *left notwithstanding his father's opposition.*- -adv. All the same; nevertheless: *We proceeded, notwithstanding,*-- conj. In spite of the fact that; although.

Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Co., 215 So. 2d 336, 338 (Fla. 4th DCA 1968). 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 two terms to operate in particular, but different, circumstances. See Barclays Am. Mortgage Corp. v. Bank of Cent. Fla., 629 So. 2d 978 (Fla. 5th DCA 1993); Grand Bay Hotel v. Guerra, 605 So. 2d 134 (Fla. 1st DCA 1992); State Farm Fire and Casualty Co. v. DeLondono, 511 So. 2d 604 (Fla. 3d DCA 1987), review dismissed, 519 So. 2d 988 (Fla. 1987).

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. Royal Dev. & Management Corp. v. Guardian 50/50 Fund V, Ltd., 583 So. 2d 403 (Fla. 3d DCA 1992); Coscan Fla., Inc. v. Equiventure Fla., 567 So. 2d 17 (Fla. 3d DCA 1990), review denied, 577 so. 2d 1325 (Fla. 1991); Tropicana club, Inc. v. James H. Topping, Inc., 502 So. 2d 29 (Fla. 2d DCA 1987); First State Ins. Co. v. General Elec. Credit Auto Lease, Inc., 518 So. 2d 927 (Fla. 3d DCA 1987); Royal Continental Hotels, Inc. v. Broward Vending, Inc., 404 so. 2d 782 (Fla. 4th DCA 1981). The evidence on that issue was completely contradictory. Apart from their principal's testimony that paragraph 3 was simply redundant, but see H.R. McArthur, 637 So. 2d at 312, the landlords-appellants claimed that

paragraph 4 controlled and that paragraph 3 would have kicked in only if they succeeded in renegotiating an outstanding defaulted mortgage, which they did not. On the other hand, the tenants' evidence was 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,[2] and would apply only if both parties later agreed to the 18 month term, which the tenants did not. Our system entrusts the resolution of factual conflicts of this kind, including those involving the terms and operation of written contracts, to the jury.[3] See Myrick v. Saint Catherine Laboure Manor, Inc., 529 So. 2d 369 (Fla. 1st DCA 1988); DeLondono, 511 So. 2d at 605; Neumann v. Brigman, 475 So. 2d 1247

---

[2] The theory was that, faced with the prospect that there might be no tenant after eighteen months, the mortgagees, whose representative described the clause as a "gun to [their] head," would be more likely to accede to the landlords' demands. In the event, the plan did not succeed.

[3] Contract interpretation is for the court as a matter of law, rather than the trier of fact, only when the agreement is totally unambiguous, or when any ambiguity may be resolved by applying the rules of construction to situations in which the parol evidence of the parties' intentions is undisputed or non-existent. See Lambert v. Berkley South Condominium Assoc., ___ So. 2d ___ (Fla. 4th DCA Case nos. 95-0366 & 95-2654, opinion filed, September 11, 1996) [21 FLW D2015]; Time Ins. Co. v. Neumann, 634 So, 2d 726 (Fla, 4th DCA 1994); Shuster v. South Broward Hosp. Dist. Physicians' Professional Liab. Ins. Trust, 570 So. 2d 1362 (Fla. 4th DCA 1990), approved, 591 So. 2d 174 (Fla. 1992); BMW of N. Am., Inc. v. Krathen, 471 So. 2d 585 (Fla. 4th DCA 1985), review denied, 484 So. 2d 7 (Fla. 1986); Child v. Child, 474 So. 2d 299 (Fla. 3d DCA 1985), review denied, 484 So. 2d 7 (1986). None of these circumstances obtain here, in which the testimony was just as hopelessly in conflict as the written agreement.

(Fla. 2d DCA 1985); Hoffman v. Terry, 397 So. 2d 1184 (Fla. 3d DCA 1981); Florida Shade Tobacco Growers, Inc. v. Jno. H. Swisher & Son, Inc., 369 So. 2d 657 (Fla. 1st DCA 1979). Since its acceptance of the appellees' position was based on ample evidence to that effect, its decision must stand. Espino v. Anez, 665 So. 2d 1080 (Fla. 3d DCA 1995); Raheb v. DiBattisto, 483 So. 2d 475 (Fla. 3d DCA 1986).[4]

Affirmed.

GODERICH, J., concurs.

---

[4] The appellants' other claims of error are without merit.

A.6

(JORGENSON, J., dissenting)

Because in my view the trial court erred in admitting par01 evidence as to the parties' agreement, I respectfully dissent.

Paragraph four of the five-paragraph amendment to the lease agreement is clear on its face:

> Notwithstanding anv 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. (Emphasis added.)

The court maintains that paragraphs three and four are in "irreconcilable conflict." However, any conflict is resolved through the concise wording of paragraph four. The parties expressly used the word "notwithstanding" when drafting their amendment.[5] As the court properly notes, the meaning of "notwithstanding" incorporates such concepts as "in spite of," "regardless of hindrance by," "nevertheless," "in spite of the fact

[5] The parties could have used the ungainly "notwithstanding anything to the contrary contained herein," which is described as a legal phrase inserted in complex contracts in order to introduce the most important provisions, According to one source, it "can be fairly said to mean 'the true agreement is as follows.'" Bryan A. Garner, A Dictionary of Modern Legal Usage 380 (1987).

that," and "although."[6] Cases that specifically define "notwithstanding" are in agreement. Wilshire Ins. Co. v. Home Ins. Co., 179 Ariz. 602, 604, 880 P.2d 1148, 1150 (1994) (citing the American Heritage Dictionary [1991] and noting that "'Notwithstanding' means '[i]n spite of."'); Hellina v. Webster Parish Police Jury, 523 So. 2d 904, 908 (La. Ct. App.) (using Webster's Ninth New Collegiate Dictionary [1984] and defining the use of "notwithstanding" within a statute as "despite"), appeal denied, 525 So. 2d 534 (1988); State ex rel. PIA Psychiatric Hosps., Inc. v. Ohio Certificate of Need Review Bd., 60 Ohio St. 3d 11, 17, 573 N.E.2d 14, 20 (1991) (citing to State ex rel. Carmean v. Hardin City Bd. of Educ., 170 Ohio St. 415, 422, 165 N.E.2d 918, 923 (1960), which defined "notwithstanding" as "without prevention or obstruction from or by; in spite of"); Pate v. Marathon Steel Co., 777 P.2d 428, 431 (Utah 1989) (noting that "[a]ctually, the word 'notwithstanding' means 'in spite of'").

In Quiring v. Plackard, 412 So. 2d 415 (Fla. 3d DCA 1982), this court affirmed the exclusion of extrinsic evidence regarding an acceleration clause and a discount clause within a mortgage, finding no ambiguity. Quiring, 412 So. 2d at 417. We held:

> Paragraph eleven of the mortgage, which specifically provides that the acceleration clause controls "anything in said promissory note or herein to the contrary notwithstanding," resolves any conflict between the two

---

[6] Additional words and phrases can be found in other dictionaries. For example, an unabridged edition adds "without prevention or obstruction from or by," "however," and "yet." Webster's Third New International Dictionary of the English Language, Unabridged 1545 (1986).

> provisions and manifests the oredominance of the acceleration clause over the discount clause. Accordingly, use of parol evidence to explain or vary the terms of the mortgage was prohibited . . . .

Ouiring, 412 So. 2d at 417 (emphasis added).[7]

The court's reliance on Derosa v. Shiah, 205 Ga. App. 106, 108, 421 S.E. 718, 721 (1992), is misplaced. Dernsa involved two employment agreements incorporated into a lease agreement, with three provisions of the lease agreement being in conflict with one "notwithstanding" provision of the lease Here we have paragraph three juxtaposed with paragraph four and no conflict. These two provisions were inserted at the same time, and this brief document knowingly signed by experienced, capable parties. We would do better to adhere to our own controlling precedent rather than grounding our decision on another jurisdiction's highly distinguishable case.

While the court reminds us of "the rule of construction and of common sense that every provision is deemed to serve some useful purpose," its affirmance, through the trial court's use of parol evidence, results in paragraph four being entirely discarded. Without resorting to paroi evidence, all paragraphs can be given

---

[7] The Second and Fourth District Courts of Appeal also agree with our reasoning in Ouiring. KRC Enterprises, Inc. v. Soderquist, 553 So. 2d 760, 761 (Fla. 2d DCA 1989) (emphasizing the specific language "anything in said promissory note or herein to the contrary notwithstanding" as prevailing); Grier v. M.H.C. Realty Corp., 274 So. 2d 21 (Fla. 4th DCA 1973) (finding a provision of a mortgage controlling over a provision of a simultaneously executed note because of the clarity of the mortgage provision, which specifically provided "anything in said note or herein to the contrary notwithstanding").

full effect by reading them together, as written, with the specific wording selected by the parties - "Notwithstanding any conflicting or inconsistent provisions" and "including specifically paragraph 3 thereof."

All of the parties involved in this transaction were knowledgeable and sophisticated when it came to drafting real estate leases. This agreement incorporated twenty-two complex commercial leases. Intense negotiations between corporations and partnerships were involved; all parties were represented by counsel. This was not an adhesion contract signed by naive players under duress. Both paragraphs were there for purposes that served all parties at the time. The wording of paragraph four is articulate, concise, and unambiguous as to what is intended. Paragraph four clearly and expressly incorporates paragraph three, and we should honor the intent of the parties and their freedom to contract.

I would reverse and remand with instructions to the trial court to enter judgment for the appellants.

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 95-3539

LAND O'SUN REALTY LTD., ALAN S. FOGG, JR., individually and as general partner of LAND O'SUN REALTY, LTD., STEVEN M. FOGG, individually and as general partner of LAND O'SUN REALTY, LTD., SUZANNE FOGG RENTZ, as general partner of LAND O'SUN REALTY, LTD., C' STORE REALTY, LTD., C' STORE MANAGEMENT CORPORATION, as general partner of C' STORE REALTY, LTD., RICHARD D. RENTZ, individually and F.S. DISPOSITION, INC., f/k/a FARM STORES, INC., LENNAR FLORIDA PARTNERS I, L.P. and LENNAR FLORIDA LAND V Q.A., LTD.,

Appellants,

v.

REWJB GAS INVESTMENTS, a Florida general parmership; FS CONVENIENCE STORES, INC., a Florida corporation, as general partner of REWJB GAS INVESTMENTS; and TONI GAS AND FOOD STORES, INC., a Florida corporation, as general partner of REWJB GAS INVESTMENTS,

Appellees.

APPELLANTS' MOTION FOR REHEARING OR CERTIFICATION

Appellants Lennar Florida Partners I, L.P., and Lennar Florida Land V Q.A., Ltd., pursuant to Fla.R.App.P. 9.330, hereby respectfully file this motion for rehearing ***or*** for certification of this Court's decision dated October 30, 1996. The grounds for this motion are set forth below.

A. Motion for rehearing

1. The majority opinion

The majority opinion in the decision issued in this case on October 30, 1996 (copy attached) determined the legal import of a clause contained in an amendment to certain commercial leases. The specific issue on which the majority's ruling hinged was whether the language in paragraph 4 of the amendment that: "Notwithstanding any *conflicting* or inconsistent provisions of the Leases or this Agreement, including specifically paragraph 3 hereof, the term of each of the leases shall [etc] . . ." unambiguously provided that the terms of paragraph 4 would override any conflicting or inconsistent provisions of the lease amendment, including paragraph 3.

The majority opinion determined that the existence of conflicting provisions in the lease agreement created an ambiguity as to which provision the parties intended to govern, and that the "notwithstanding any conflicting or inconsistent provisions" language would not — despite clearly saying so — be taken to mean that the provisions of paragraph 4 were to govern over the inconsistent provisions in paragraph 3. In so ruling, the majority opinion failed to follow governing precedent from this Court set by the decision in *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982), which held that substantively identical language is a clear override provision.'

'The majority opinion reads as if it is ruling that the ambiguity which necessitates resort to parol evidence arises from the fact that the provisions of the paragraph 4 "notwithstanding" clause and those of paragraph 3 are in conflict — "mutually repugnant" as the opinion puts it. When so read, the opinion indicates a broad holding that a contract which contains conflicting, "mutually repugnant" clauses is ambiguous simply by reason of the conflict, and that even unambiguous "notwithstanding" language purporting to resolve the conflict is insufficient to do so. Another possible reading of the opinion is that it is creating a heretofore unrecognized sub-category of "notwithstanding" clauses that will always require parol explanation even though worded unambiguously, i.e., those which, if applied as written, have the effect of rendering another clause in the contract superfluous or a nullity. The only indication in the opinion that it may be intending

2. The contrary governing Third District precedent

In *Quiring*, there was an internal conflict in a mortgage and promissory note between a discount clause and an acceleration clause. The discount clause provided that if the mortgage were paid in full in advance of November 1, 1981, the principal balance would be discounted by $28,000. The acceleration clause provided that acceleration of the full indebtedness would take place upon the occurrence of an event of default, "anything ***in*** said ***promissory note or herein to the contrary*** notwithstanding." 412 So. 2d at 417.

After several late payments, and despite notice that no further grace periods would be allowed, the *Quiring* mortgagors made yet another late payment in June of 1980. The paymenr was not accepted, the debt was accelerated, and foreclosure proceedings were initiated by the mortgagees. The mortgagors then tendered full payment of all amounts owing under the mortgage, less $28,000. The mortgagees refused to accept the check, and proceeded with their foreclosure action. The mortgagors argued that the conflict between the acceleration and discount clauses created an ambiguity, such that they should be entitled to introduce parol evidence to explain their intent and why they should still be allowed the discount. The trial court ruled otherwise and this Court affirmed, holding that use of parol evidence to explain or vary the conflicting terms of the mortgage was prohibited because the "notwithstanding" language provided a clear override and acted

---

to create such a sub-category is the reference to the rule of construction that contracts should when possible be interpreted to give effect to all provisions. Read either way, the opinion requires an unambiguous "notwithstanding" clause to be disregarded and thus directly conflicts with the prior controlling precedent discussed in text in this motion — *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982). *Quiring* held that an unambiguous "notwithstanding" clause will be given effect as written, and will as a matter of law — without resort to parol evidence — resolve the question of which of two conflicting provisions predominates over the other.

to resolve any conflict between provisions:

> Paragraph eleven of the mortgage, which specifically provides that the acceleration clause controls "anything in said promissory note or herein to the *contrary notwithstanding," resolves* any conflict between the two provisions and manifests the predominance of the *acceleration* clause over *the* discount clause. Accordingly, use of *parol* evidence to *explain or* vary the *terms* of the mortgage was prohibited, and the [mortgagees'] contractual right to accelerate the full balance of the mortgage was properly enforced.

412 So. 2d at 417.

The majority opinion in this case directly conflicts with the *Quiring* holding by ruling that language substantively identical[2]! to that in *Quiring* designating which of two conflicting provisions is to predominate does not unambiguously resolve the conflict. Indeed, the majority opinion acknowledges the direct conflict with the *Quiring* decision by use of the introductory signal "contra".[3]

Thus, there are now two directly opposing decisions from this District on the legal effect of "notwithstanding anything to the contrary" clauses. *Quiring* holds that because "anything

---

[2]The language in the lease amendment here is even more precise than the generalized "notwithstanding" clause used in the *Quiring* mortgage. At issue was whether paragraph 4 would govern over the inconsistent paragraph 3, and the precise language of paragraph 4 was that it set a termination date for the leases notwithstanding any conflicting or inconsistent provisions "including *specifically* paragraph 3".

[3]"*Contra*" as an introductory signal indicates direct conflict with the cited decision. *Martin-Johnson, Inc. v.* Savage, 488 So. 2d 567 (Fla. 1st DCA 1986); *Bende v.* McLaughlin, 448 So. 2d 1146 (Fla. 4th DCA 1984). Prior editions of The *Bluebook:* A Uniform System of *Citations* ("Bluebook") (16th ed. 1996 — which controls citation references in Florida in all legal documents, including Court opinions (See Fla.R.App.P. 9.800(n); In Re: Amendments to the Florida Rules of Appellate Procedure, 609 So. 2d 516, 518 (Fla. 1992)) — said that *contra* was to be used when "the cited authority directly states the contrary of the *proposition*" in the just cited case. See, *e.g.*, Bluebook (15th ed. 1991), p. 23. The 16th edition has apparently included the "contra" concept under "*but* see". See Bluebook (16th ed. 1996), p. 23 and Introduction at p. 3.

to the contrary herein notwithstanding" is an unambiguous statement that the "notwithstanding" clause will govern over any conflicting provisions, the contract language itself resolves the conflict so that reference to parol evidence is not only unnecessary but prohibited. The panel majority opinion here — in direct contrast — says that such a "notwithstanding" clause will not be given effect to resolve conflicts through its plain designarion of which conflicting provision will predominate because the mere existence of conflicting, "mutually repugnant" clauses in a contract creates an ambiguity such that resort to parol evidence is not only necessary but *mandatory.*[4]

3. Grounds for rehearing — impermissible creation of intra-district conflict

Appellants respectfully request rehearing because the panel majority appears to have overlooked the law established by the Florida constitution and the Florida rules of appellate procedure which requires a three-judge panel of a Florida district court to follow prior decisions from that district. See, e.g., *In* Re: Rule 9.331, 416 So. 2d 1127 (Fla. 1982). *Carr v. Carr,* 569 So. 2d 903 (Fla. 4th DCA 1990); O'Brien *v. State,* 478 So. 2d 497 (Fla. 5th DCA 1985). A panel is simply not at liberty to disregard on-point precedent *from* its own court and to issue a contrary opinion, thereby creating intra-district conflict and generating confusion and more litigation for the bench, bar, and public within the district. Id. Any revisitation of prior district decisions by the district itself must take place en *banc.* Id. See *also Inscho v.* State, 521 So. 2d 164 (Fla. 5th DCA 1988).

---

[4]As discussed in note 1 above, if the opinion is attempting to create a sub-category of "notwithstanding" clause cases where application of one provision renders another provision superfluous, the conflict with *Quiring* is still present. *Quiring* says that an unambiguous "notwithstanding" clause resolves the conflict between inconsistent provisions, and the inquiry ends there. No further steps are necessary, including determining what happens to the overriden clause, in terms of being rendered superfluous or otherwise.

The Florida Supreme Court discussed the principle in reviewing the 1980 constitutional amendments to Florida's appellate review procedures. The amendments, inter *alia*, empowered the district courts to resolve intra-district conflict by sitting en *banc*, in keeping with the intent of the amendments to make the district courts, to the extent possible, *final* appellate courts. In Re: *Rule* 9,331, 416 So. 2d 1127 (Fla. 1982). The question of whether a three-judge panel has the ability to overrule another intra-district panel's decision was raised by rhe chief judges of the district courts, and the Supreme Court answered in the negative:

> This historical discussion [of the constitutional amendment providing for district courts' power to resolve intra-district conflicts en banc] leads to the question raised by the chief judges of the district courts, whether one three-judge panel can expressly overrule or recede from a prior decision of a three-judge panel of the same court on the same point of law. Under our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole.

416 So. 2d at 1128. The Court went on to poinr out that under Florida's appellate structural scheme, the district courts are intended to be, in most instances, the courts of final appeal. As such, they are obligated to establish uniform law within their jurisdictions:

> The view that one district court panel is independent of other panels on the same court could possibly be a proper constitutional interpretation if our constitution provided that district courts were merely intermediate courts, with this Court as the state's highest court, having full discretionary jurisdiction to review all intermediate court decisions. This was not, however, the type of appellate structural scheme adopted by the electorate. In fact, the suggestion that each three-judge panel may rule indiscriminately without regard to previous decisions of the same court is totally inconsistent with the philosophy of a strong district court of appeal which possesses the responsibility to set the law within its district.

416 So. 2d at 1128. The Supreme Court concluded the discussion by noting that a three-judge panel

which disagrees with a prior panel decision from the same district should suggest an *en banc* hearing.

> We would expect that, in most instances, **a** three-judge panel confronted with precedent with which it disagrees will suggest an en *banc* hearing. . . . **Consistency of law within a district is essential to avoid unnecessary *and*** costly **litigation.** We conclude that the district court judges, through their opinions, will adopt principles to ensure this result.

416 So. 2d at 1128.

Since the prior Third District decision in *Quiring* is directly controlling precedent, this panel was bound to follow it. In Re: Rule 9.331, *supra*; *Carr v. Carr*, 569 So, 2d 903 (Fla. 4th DCA **1990); O'Brien** *v. State*, **478** So. 2d 497,499 (Fla. 5th DCA 1985). See *also State* v. *Navarro*, 464 So. 2d 137, 140 (Fla. 3d DCA 1984). Accordingly, we respectfully submit that this motion for rehearing should be granted, and that the panel should follow the dispositive prior decision of this Court in *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982). The trial court's judgment should be reversed with directions to enter summary final judgment in favor of the Lennar Appellants.

B. Request for certification

We believe that the *Quiring* decision not only represents the controlling law in this District, but that it also represents the *correct* rule of law for the reasons set out in the compelling discussion in Judge Jorgenson's dissent. If *Quiring* is not to be followed, however, and the panel declines to suggest an en *banc* hearing as outlined by the Florida Supreme Court in In Re: *Rule* 9.331, 416 So. 2d 1127, 1128 (Fla. 1982), we alternatively request, pursuant to Fla.R.App.P. 9.330, that the panel decision be certified for Supreme Court review, for the reasons set forth below.

1. Certification of inter-district conflict

We first request certification, pursuant to Fla.R.App.P. 9.303 (a) (2) (A) (vi), on the grounds that the panel decision is in direct conflict with decisions of other district courts of appeal. Specifically, and as pointed out in Judge Jorgenson's dissent, there are decisions from the Second and Fourth District Courts of Appeal which are in accord with the *Quiring* decision, and which expressly and directly conflict with the majority opinion in thii case. *KRC Enterprises, Inc. v. Soderquist*, 553 So. 2d 760, 761 (Fla. 2d DCA 1989); *Grier v.* M.H.C. Realty Corporation, 274 So. 2d 21 (Fla. 4th DCA 1973).

In these conflicting decisions, the district courts without hesiration ruled that language substantively identical to the language involved here constituted a clear override of any other provisions — including *conflicting* provisions. The specific language in those cases was "*anything in said note or herein to the contrary notwithstanding*". 553 So. 2d at 761; 274 So. 2d at 22. Both cases were decided as a matter of law, and, as indicated, both the Second District and the Fourth District found the language to be quite clear in overriding contrary provisions,

A review of the facts in *KRC Enterprises* demonstrates the conflict which the majority opinion here has created. In *KRC Enterprises*, a promissory note executed contemporaneously with a mortgage had an automatic acceleration clause providing that upon default the unpaid principal and accrued interest would "forthwith become due and payable notwithstanding their tender." 553 So. 2d at 761. The mortgage, however, had an inconsistent provision which indicated that acceleration was not automatic, but rather could occur alternatively at the option of the mortgagee:

> In the event that any of the sums of money herein referred to shall not be promptly and fully paid on or before the due date . . . the aggregate sum mentioned in said promissory note shall become due

> and payable forthwith or thereafter at the option of the Mortgagee as fully and completely as if the said aggregate sum of said promissory note was originally stipulated to be paid on such day, *anything* in *said promissory* note or herein to the *contrary* notwithstanding.

553 So. 2d at 761 (Court's emphasis). The issue in KRC *Enterprises* was whether the acceleration occurred automatically on the default date (April 15, 1983) as provided in the promissory note, or whether it occurred at a later date because the mortgagee had not exercised its option to accelerate under the acceleration clause in the simultaneously executed mortgage. The Second District noted the general rule that two documents executed simultaneously are to be read and construed together, and then ruled on the legal effect of the "notwithstanding" language which is, again, substantively identical to that contained here:

> Here, the note contained an automatic acceleration clause, but the mortgage contained an acceleration clause and specifically provided that "anything in said promissory note or herein to the contrary notwithstanding." Thus, the mortgage, providing for acceleration at the mortgagee's option, prevails over the language in the note.

553 So. 2d at 761. It is perfectly obvious that the provisions in the KRC Enterprises documents were mutually incompatible — or "mutually repugnant" to use the phrase referenced by the majority opinion in the instant case — and that a mortgage indebtedness could not both (a) accelerate automatically upon default, *and* (b) accelerate only at the option of the mortgagee at the same time. The 'mutual repugnancy' was, however, quite properly deemed irrelevant by the Second District because the "norwithstanding" language unambiguously directed which of the inconsistent clauses was to govern over the other.

The KRC Enterprises factual circumstances are identical in practical effect to those presented here. A lease term may not be both 'twenty-seven years' and 'eighteen months' in length

at the same time. However, where the "notwithstanding any conflicting or inconsistent" language has been included, clear directions have been provided as to which of two conflicting provisions is to govern — precisely as the Second District held. The Second District — appropriately — did not either (a) engage in a discussion of the fact that enforcement of the unambiguous "notwithstanding" clause as written meant that another clause was superfluous and a nullity, or (b) resort to rules of contract construction about trying to give effect to all provisions in a contract, since Florida law has always been clear that if a contract is unambiguous, the courts will enforce it without reference to rules of construction and without concern for the wisdom or folly of its provisions. See, e.g., *Voelker v.* Combined Ins. Co. *of America,* 74 So. 2d 403 (Fla. 1954); *Walgreen Company v. Habitat* Development *Corporation,* 655 So. 2d 164 (Fla. 3d DCA 1995).

The majority opinion in this case has created conflict with the cited Second and Fourth District decisions, and certification for resolution by the Florida Supreme Court is appropriate. See, e.g., Ford Motor Co. *v. Kikis,* 401 So. 2d 1342 (Fla. 1981); Excelsior Insurance Co. *v. Pomona* Park *Bar & Package* Store, 369 So. 2d 938 (Fla. 1979); Nielsen *v.* City of *Sarasota,* 117 So. 2d 731 (Fla. 1960).

As detailed in the next section, Appellants also respectfully submit that certification of the conflict is important because "notwithstanding any other/conflicting provisions" clauses are very commonly used in the drafting of legal documents and instruments, as well as statutes and regulations. The bench, bar, and public should be given clear and direct guidance as to whether such "notwithstanding" clauses will be given their self-evidently intended effect as clear overrides — as all prior Florida decisions have held — or if they are hereafter to be deemed insufficient to effect an override where a conflicting provision exists ***or*** will be rendered superfluous. Such certification is also

desirable and important for the reasons set forth in the next section.

2. Certification of passage upon a question of great public importance

Appellants also request certification, pursuant to Fla.R.App.P. 9.030(a) (2) (A) (v), that the panel decision passes upon a question of great public importance. The question presented here has great public importance for two distinct reasons; the first concerns the drafting of legal documents in the future, and the second concerns the litigation which will be generated as to already existing legal documents.

a. Impact on future drafting efforts

As indicated above, all prior Florida decisions on the legal effect of "notwithstanding other/conflicting/contrary provisions" clauses have held or decisionally indicated that such clauses act as unambiguous oven-ides of other and conflicting provisions in the documents referenced. Drafters of legal instruments have thus previously been able to utilize such notwithstanding clauses to ensure that the override clause will operate automatically without any possibility that parol evidence will be admissible to vary or derail it. If that is no longer to be the case, drafters of legal documents intended to govern rights and obligations in this state should be given clear and unified instructions to that effect.[5]

'If, as referenced in footnote one above, the majority opinion intended to indicate that "notwithstanding" clauses will be considered ambiguous only in some contexts, such as where they render other clauses superfluous, the opinion has an even greater potential for creating chaos in commercial transactions. The sub-category, if one is being suggested at all, is ill-defined and provides little guidance as to when a "notwithstanding" clause will be given effect, and when it will not. Just one example — the impact on form contracts — illustrates the magnitude of the problem created by the panel decision. Form contracts are routinely used in a variety of contexts — e.g., construction contracts, real estate sales contracts, leases, installment contracts, etc. Parties could heretofore simply add to such contracts clauses containing individualized terms of paramount importance, by using "notwithstanding anything to the contrary . . ." language, certain that such language would

We submit that the better rule is to continue to give the clauses their automatic override effect. They do so simply and directly enough, and they are easily understood. Where, as here, there are commercially sophisticated parties on both sides, the inconsistencies drafted into their own unambiguous contracts should be left as their business alone, and not converted into puzzle-solving problems for the already overburdened courts. Thus, we believe the conflict should be resolved in favor of the previously existing law, but, whatever the outcome is to be, the question should be certified for resolution.

b. Impact on existing legal instruments

Additionally, the panel decision has immediate major significance because it has, in effect, ruled that a very commonly used clause is ambiguous. All existing legal documents containing such clauses — contracts, leases, mortgages, notes, banking instruments, etc. — are now vulnerable to attack and will undoubtedly engender many after-the-fact attempts to avoid previously clear agreements. Considering not least the fact that there are many common types of legal instruments which span long time periods — e.g., 99-year commercial ground leases or 15 and 30 year residential mortgages — it is clear that countless legal documents in Florida may be affected by the ruling in this case for a long time to come.

---

ensure its predominance over any potentially conflicting terms from the form contract. Under the majority opinion here, however, each provision in a form contract will have to be carefully reviewed to make sure rhat it is not one which will be rendered superflous and thereby trigger the need for a full-blown parol evidence trial as to intent in the event of a dispute. Moreover, parties could never be certain what degree or type of inconsistency between provisions would generate a ruling that the conflict had reached the "paradigmatic ambiguity" level, to use the majority's phrase, thereby deactivating the "notwithstanding" clause's ability to resolve the conflict. Some conflicts are temporal, some are contextual, and many are actually deliberate. The majority opinion gives no guidance as to which will be deemed so "mutually repugnant" that a "notwithstanding" clause will be disregarded and parol evidence required to resolve which of the two will predominate.

Any court decision that is certain to generate increased litigation bears great public importance because of the costs and delays with which it will inevitably burden both citizens and courts. Given the potentially profound impact of the question passed upon by the decision in this case, certification pursuant to Fla.R.App.P. 9.030(a) (2) (A) (v) should be granted.

CONCLUSION

Based on the foregoing facts and authorities, the Lennar Appellants respectfully request that this motion for rehearing be granted, that the panel decision be withdrawn, and that reversal be ordered with directions to enter judgment in favor of the Lennar Appellants. Alternatively, Appellants request the panel to suggest an en *banc* hearing to resolve the intra-district conflict, or that the case be certified on express and direct conflict grounds and on grounds that a question of great public importance has been passed upon.[6]

Respectfully submitted,

RUBIN BAUM LEVIN CONSTANT
FRIEDMAN & BILZIN
2500 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33 13 1-2336

By: Larry A. Stumpf by EMR
LARRY A. STUMPF
Florida Bar No. 280526

–and–

[6]Both Appellants and Appellees filed untimely requests for attorneys' fees in this appeal. When Appellants realized this problem, Appellants' request was withdrawn and objection was made to Appellees' request. This Court subsequently granted the Appellees' request, which indicates that the untimeliness of the requests was not deemed material. Accordingly, if Appellants are afforded any of the relief requested herein so as to prevail at any point in this appeal, Appellants respectfully hereby reinstate their request for attorneys' fees.

RUSSO & TALISMAN, P.A.
Suite 200 1, Terremark Centre
2601 South Bayshore Drive
Miami, Florida 33133
Telephone (305) 859-8100

Attorneys for Appellants Lennar Florida Partners I, L.P. and Lennar Florida Land V Q.A., Ltd.

By: Elizabeth K. Russo
ELIZABETH K. RUSSO
Florida Bar No. 260657

By: Kimberly L. Boldt
KIMBERLY L. BOLDT
Florida Bar No. 957399

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Appellants' Motion for Rehearing or Certification was mailed this 14th day of November, 1996 to: HUMBERTO OCARIZ, ESQUIRE, Tew & Beasley, Counsel for Appellees, 20 1 South Biscayne Boulevard, Miami Center, Suite 2600, Miami, Florida 33 13 1-4336; and CURTIS S. CARLSON, ESQUIRE, Carlson & Bales, Counsel for Appellants Land O'Sun Realty, Ltd. and C' Store Realty, Ltd., 2770 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33 13 1.

Elizabeth K. Russo

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 95-3539

LAND O'SUN REALTY LTD., ALAN S. FOGG, JR., individually and as general parmer of LAND O'SUN REALTY, LTD., STEVEN M. FOGG, individually and as general partner of LAND O'SUN REALTY, LTD., SUZANNE FOGG RENTZ, as general partner of LAND O'SUN REALTY, LTD., C' STORE REALTY, LTD., C' STORE MANAGEMENT CORPORATION, as general parmer of C' STORE REALTY, LTD., RICHARD D. RENTZ, individually and F.S. DISPOSITION, INC., f/k/a FARM STORES, INC., LENNAR FLORIDA PARTNERS I, L.P. and LENNAR FLORIDA LAND V Q.A., LTD.,

Appellants,

v.

REWJB GAS INVESTMENTS, a Florida general partnership; FS CONVENIENCE STORES, INC., a Florida corporation, as general partner of REWJB GAS INVEST-MENTS; and TONI GAS AND FOOD STORES, INC., a Florida corporation, as general parmer of REWJB GAS INVEST-MENTS,

Appellees.

APPELLANTS' MOTION FOR REHEARING *EN BANC*

Appellants Lennar Florida Partners I, L.P. and Lennar Florida Land V Q.A., Ltd., pursuant to Fla.R.App.P. 9.33 1 (d), hereby respectfully file this motion for rehearing en *banc* of the opinion issued by a panel of this Court on October 30, 1996. A copy of the opinion is attached to

this motion as Appendix A ("Opinion"). The grounds for this motion and counsel's statement of professional judgment are set forth below.

A* Counsel's Statement for Rehearing En Banc

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.
>
> I also express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court:
>
> *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982).

By: Elizabeth K. Russo
ELIZABETH K. RUSSO
Florida Bar No. 260657

B. Overview of **the issues in this** appeal and the panel's majority opinion

1. Factual background

a. The focus of the case: the effect **of** the **language** in the "notwithstanding" clause of the lease amendment

This case involves a dispute over the legal effect of language in an amendment to certain commercial leases, which amendment was negotiated and agreed upon by commercially sophisticated parties represented by experienced counsel. Since we contend that the language in question — contained in a single sentence — is clear and unambiguous, there are no extrinsic facts of any significance. The specific language is set forth in the opening clause of the sentence, which provides:

> 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.

(R. 39-40). A copy of the amendment — which consists of five paragraphs on one and a half pages — is attached hereto as Appendix B. The issue decided by the panel's majority decision, with Judge Jorgenson dissenting, was whether the cited clause unambiguously provided that it would govern over any inconsistent lease provisions including paragraph 3. As discussed more fully below, the majority opinion determined that the "notwithstanding any conflicting or inconsistent provisions . . . including specifically paragraph 3" language did *not* — despite explicitly saying so — provide a clear override of the inconsistent provisions contained in paragraph 3 so that parol evidence was required and it was up to a jury to decide the intent of the parties as to the term of the leases.[1]

b. Procedural history

The issue concerning the effect of the language of the lease amendment came into the court system via a declaratory judgment suit filed by the lessors, Appellants herein. Cross-motions for summary judgment were denied by the trial judge, who ruled that a jury should determine the parties' intent as to the lease term. The jury's Endings ran counter to the 18-month lease termination date set by paragraph 4 of the lease amendment, and this appeal ensued with the

---

'Paragraph 3 says: "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. (R. 39).

Appellants contending that the trial judge should have entered summary judgment confirming the 18-month lease termination dated based on the unambiguous language of the parties' agreement.

2. The panel's majority opinion

The majority opinion determined that the "notwithstanding any conflicting or inconsistent provisions . . . including specifically paragraph 3" language in paragraph 4 of the parties' ease amendment did not — despite saying so — operate to override the inconsistent provisions in paragraph 3. In so ruling, the majority opinion failed to follow governing precedent from this Court set by the decision in *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982), which held that substantively identical language is a clear override provision.'

The majority seems to have reached its decision because of discomfort with its inability to ascertain from the contract language a satisfactory explanation as to why two such inconsistent provisions — paragraph 3 (providing a 27 year lease term) and paragraph 4 (providing

---

[2]The majority opinion reads as if it is ruling that the ambiguity which necessitates resort to parol evidence arises from the fact that rhe provisions of the paragraph 4 "notwithstanding" clause and those of paragraph 3 are in conflict — "mutually repugnant" as the opinion puts it. When so read, the opinion indicates a broad holding that a contract which contains conflicting, "mutually repugnant" clauses is ambiguous simply by reason of the conflict, and that even unambiguous "notwithstanding" language purporting to resolve the conflict is insufficient to do so. Another possible reading of the opinion is that it is creating a heretofore unrecognized sub-category of "notwithstanding" clauses that will always require parol explanation even though worded unambiguously, i.e., those which, if applied as written, have the effect of rendering another clause in the contract superfluous or a nullity. The only indication in the opinion that it may be intending to create such a sub-category is the reference to the rule of construction that contracts should when possible be interpreted to give effect to all provisions. Read either way, the opinion requires an unambiguous "notwithstanding" clause to be disregarded and thus directly conflicts with the prior controlling precedent discussed in text in this motion — *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982). *Quiring* held that an unambiguous "notwithstanding" clause will be given effect as written, and will as a matter of law — without resort to parol evidence — resolve the question of which of two conflicting provisions predominates over the other.

an 18 month lease termination date) — were included in the lease amendment. There was no legal support, however, for the conclusion that the inconsistency between the two — however seemingly inexplicable to outsiders to the contract — created an *ambiguity*. The language of the amendment showed that the parties were well aware of the inconsistency, and that they had made specific provision for resolving it by stating — quite simply and directly — "notwithstanding any conflicting or inconsistent provisions including specifically paragraph 3 . . . the term of the Leases shall . . . terminate., . etc." (R 39).

3. Judge Jorgenson's dissent

Believing that the admission of parol evidence as to the parties' intentions was error, Judge Jorgenson dissented from the majority opinion. As Judge Jorgenson pointed out succinctly, encapsulating the pivotal point in the case, the "irreconcilable conflict" described in the majority opinion is *explicitly* resolved in the amendment itself: "[A]ny conflict [between paragraphs 3 and 4] is resolved through the concise wording of paragraph four." Judge Jorgenson also pointed out that these were commercially sophisticated parties who were represented by counsel, and who had extensive experience in real estate transactions such that their selection of specific contractual language could only be deemed to have served their purposes as known to them at the time:

> All of the parties involved in this transaction were knowledgeable and sophisticated when it came to drafting real estate leases. Intense negotiations between corporations and partnerships were involved; all parties were represented by counsel. This was not an adhesion contract signed by naive players under duress. Both paragraphs were there for purposes that served all parties at the time. The wording of paragraph four is articulate, concise, and unambiguous as to what is intended. Paragraph four clearly and expressly incorporates paragraph three, and we should honor the intent of the parties and their freedom to contract.

(Opinion p. 10, Jorgenson, J., dissenting).

Finally, Judge Jorgenson's dissent properly took issue with the majority's reliance on a clearly distinguishable Georgia case when controlling precedent from this Court existed on the very issue presented.

C. Grounds for rehearing en banc

1. Intra-district conflict

a. The contrary governing Third District precedent

The panel decision directly conflicts with this Court's decision in *Quiring v. Plackard*, 412 So. 2d 415 (Fla. 3d DCA 1982). Intra-district conflict has accordingly been created which requires resolution by the en banc Court.

In *Quiring*, a simultaneously executed mortgage and promissory note contained an internal conflict between a discount clause and an acceleration clause. The discount clause provided that if the mortgage were paid in full in advance of November 1, 1981, the principal balance would be discounted by $28,000. The acceleration clause provided that acceleration of the full indebtedness would take place upon the occurrence of an event of default, "anything in said *promissory note or* herein *to* the *contrary* notwithstanding." 412 So. 2d at 417.

After several late payments, and despite notice that no further grace periods would be'allowed, the *Quiring* mortgagors made yet another late payment in June of 1980. The payment was not accepted, the debt was accelerated, and foreclosure proceedings were initiated by the mortgagees. The mortgagors then tendered full payment of all amounts owing under the mortgage, less $28,000. The mortgagees refused to accept the check, and proceeded with their foreclosure

action. The mortgagors argued that the conflict between the acceleration and discount clauses created an ambiguity, such that they should be able to introduce parol evidence to explain their intent and why they should still be allowed the discount. The trial court ruled otherwise and this Court affirmed holding that use of parol evidence to explain or vary the conflicting terms of the mortgage was prohibited because the "notwithstanding" language constituted a clear override and acted to resolve any conflict between the provisions:

> Paragraph eleven of the mortgage, which specifically provides that the acceleration clause controls "anything in ***said*** promissory note or ***herein to the contrary*** notwithstanding," ***resolves*** any conflict between the two provisions and manifests the ***predominance of the acceleration clause over the discount clause.*** Accordingly, ***use*** of ***parol*** evidence to ***explain*** or ***vary*** the ***terms*** of the mortgage was prohibited . . . and the [mortgagees'] contractual right to accelerate the full balance of the mortgage was properly enforced.

412 So. 2d at 417.

The panel decision in this case directly conflicts with ***Quiring*** by ruling that "notwithstanding" language substantively identical[3] to that in ***Quiring*** designating which of two conflicting provisions is to predominate does *not* unambiguously resolve the conflict. Indeed, the panel decision acknowledges the direct conflict with the *Quiring* decision by use of the introductory signal "***contra***".[4]

---

[3]The language in the lease amendment here is even more precise than the generalized "notwithstanding" clause used in the ***Quiring*** mortgage. At issue was whether paragraph 4 would govern over the inconsistent paragraph 3, and the precise language of paragraph 4 was that it set a termination date for the leases notwithstanding any conflicting or inconsistent provisions "including ***specifically paragraph 3".***

[4]"*Contra*" as an introductory signal indicates direct conflict with the cited decision. *Martin-Johnson, Inc. v.* Savage, 488 So. 2d 567 (Fla. 1st DCA 1986); Bende *v.* McLaughlin, 448 So. 2d 1146 (Fla. 4th DCA 1984). Prior editions of The Bluebook: A *Uniform* System of Citations ("Bluebook")

Thus, there are now two directly opposing decisions from this District on the legal effect of "notwithstanding anything to the contrary" language in legal instruments. *Quiring* holds that because "anything to the contrary herein notwithstanding" is an unambiguous statement that the "notwithstanding" clause will govern over any conflicting provisions, the contract language itself resolves the conflict so that reference to parol evidence is not only unnecessary but prohibited. The panel decision here — in direct contrast — says that such "notwithstanding" language will not be given effect to resolve conflicts through its plain designation of which conflicting provision will predominate because the mere existence of conflicting, "mutually repugnant" clauses in a contract creates an ambiguity such that resort to parol evidence is not only necessary but *mandatory*.[5]

b. Entitlement to en *banc* rehearing

The intra-district conflict between the panel decision and *Quiring* provides a sound basis for *en banc* review under Florida Rule of Appellate Procedure 9.331. The en *banc* review process was designed specifically to enable the district courts to maintain uniformity of the law within their

---

(16th ed. 1996 — which controls citation references in Florida in all legal documents, including Court opinions (See Fla.R.App.P. 9.800(n); In Re: Amendments *to the Florida Rules* of *Appellate* Procedure, 609 So. 2d 516, 518 (Fla. 1992)) — said that contra was to be used when '"the cited authority directly states the contrary of the proposition" in the just cited case. See, e.g., *Bluebook* (15th ed. 1991), p. 23. The 16th edition has apparently included the "*contra*" concept under "but see". See *Bluebook* (16th ed. 1996), p. 23 and Introduction at p. 3.

[5]As discussed in note 1 above, if the opinion is attempting to create a sub-category of "notwithstanding" clause cases where application of one provision renders another provision superfluous, the conflict with *Quiring* is still present. *Quiring* says that an unambiguous "notwithstanding" clause resolves the conflict between inconsistent provisions, and the inquiry ends right there. No further steps are necessary, including determining what happens to the overriden clause, in terms of being rendered superfluous or otherwise.

respective jurisdictions. The Florida Supreme Court has described the purpose of en banc review by the district courts as follows:

> The en banc process now authorized for the district courts is designed to help the district courts avoid conflict, assure harmonious decisions within the courts' geographic boundaries, and develop predictability of the law within their jurisdiction. Consistency of decisions within each district is essential to the credibility of the district courts.

Chase Federal Savings and Loan Association v. Schreiber, 479 So. 2d 90, 93 (Fla. 1985). The Court also emphasized that the district courts are to utilize their en banc review powers to prevent individual panels from creating intra-district conflicts in the law based simply on the individual panels propensities and inclinations since it is important for citizens and practitioners within the district to be provided with a clear and unified version of the law by their governing appellate court:

> The en banc process provides a means for Florida's district courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole. The process provides an important forum for each court to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within each court's jurisdiction.

479 So. 2d at 94.

The majority of the panel in this case may disagree with this Court's decision in Quiring and may believe that Quiring should be receded from or overruled, but the panel was, respectfully, bound to follow Quiring. Only this Court sitting en banc can now resolve the conflict which has been created by the panel majority decision. We accordingly respectfully request en banc review.

We also respectfully submit that the Court should grant en banc review in this case because the point involved is a significant one for the reasons detailed in the section below requesting

en *banc* review due to the exceptional importance of the case. "Notwithstanding" clauses are routinely used in drafting legal documents. It is important for thii Court to provide clear and uniform rules with respect to the efficacy of such clauses. We believe the Court should adhere to its decision in *Quiring* and vacate the panel decision because Quiring represents the better rule of law.

c. The intra-district conflict should be resolved in favor of the *Quiring* decision

Appellants respectfully submit that *Quiring* represents the better rule on the legal effect to be given to "notwithstanding contrary provisions" clauses, at least when phrased as they usually are — and as they were both here and in *Quiring* — in perfectly simple and straightforward language. Judge Jorgenson described the subject clause as "articulate, concise, and unambiguous as to what is intended." (Opinion, p. 10, Jorgenson, J., dissenting). *Quiring* recognized the lack of ambiguity in these "notwithstanding clauses", and required that they be applied as written, so thar digression into time-consuming parol evidence explanations is both unnecessary and *prohibited*. The less time spent on litigation the better. Clear contractual provisions, whether they are consistent or not, should simply be given effect without further ado — precisely as this Court held in Quiring.

It is not for courts or juries to try to create more sensible or more meaningful contracts than those reached by parties bargaining on an equal basis. Commercial parties like those involved here may have any number of unstated purposes for what they do and for why their contracts are worded a particular way. Absent an ambiguity, however, the contract requires no interpretation and should simply be enforced as written. The bewilderment or curiosity of outsiders — including courts — as to how or why parries would unambiguously pen mutually inconsistent clauses provides no legal basis for interfering via parol inquiries trying to make sense of every provision.

The intra-district conflict now existing due to the panel decision has generated a need for en *banc* review by the full Court to maintain uniformity of decisions. Appellants respectfully submit that *en banc* review should-be granted, and that this Court's *Quiring* decision should remain the law.

2. Exceptional importance

Appellants also respectfully submit that rehearing en *banc* should be granted because this case presents a question of exceptional public importance. "Notwithstanding any other/conflicting provisions" clauses are routinely used in the drafting of legal documents and instruments, as well as statutes and regulations. The bench, bar, and public in this District should be given clear and direct guidance as to whether such "notwithstanding" clauses will be given their self-evidently intended effect as clear overrides — as *Quiring* and the ocher prior Florida decisions on this issue have held[6] — or if they are hereafter to be deemed insufficient to effect an override where a conflicting provision exists.

The question presented here has exceptional importance for two distinct reasons. First, the drafting of legal documents in the future will have to take into account the questionable efficacy of "notwithstanding" clauses if the panel's decision is adopted or allowed to stand without

---

[6]Specifically, and as pointed out in Judge Jorgenson's dissent, there are decisions from the Second and Fourth District Courts of Appeal which are in accord with the *Quiring* decision, and which expressly and directly conflict with the majority opinion in this case. *KRC Enterprises,* Inc. *v. Soderquist,* 553 So. 2d 760, 761 (Fla. 2d DCA 1989); *Grier v.* M.H.C. Realty *Corporation, 274 So.* 2d 21 (Fla. 4th DCA 1973). In these conflicting decisions, the district courts without hesitation ruled that Ianguage substantively identical to the language involved here constituted a clear override of any other provisions — including conflicting provisions. The specific language in those cases was *"anything in* said note or *herein* to the *contrary notwithstanding".* 553 So. 2d at 761; 274 So. 2d at 22. Both cases were decided as a matter of law, and, as indicated, both the Second District and the Fourth District found the language to be clear and unequivocal in overriding conflicting provisions.

review. Second, the panel decision carries with it an inevitable increased burden on the courts because of the litigation which will be generated as to interpretation of already existing legal documents.

As indicated above, all prior Florida decisions on the legal effect of "notwithstanding" clauses have held or decisionally indicated that such clauses act as unambiguous overrides of other and conflicting provisions in the documents referenced. Drafters of legal instruments have thus previously been able to utilize such "notwithstanding" clauses to ensure that the override clause will operate automatically without any possibility that parol evidence will be admissible to vary or derail it. If that is no longer to be the case, drafters of legal documents should be given clear and uniform instructions to that effect.

We submit that the better rule is to continue to give such clauses their automatic override effect. They do so simply and directly enough, and they are easily understood. Where, as here, there are commercially sophisticated parries on both sides, the inconsistencies drafted into their own unambiguous contracts should be left as their business alone, and not converted into puzzle-solving problems for the already overburdened courts.

The panel decision also has exceptional importance because it has ruled that a very commonly used clause is ambiguous — or that it may be deemed ambiguous if it nullifies other clauses.[7] All existing legal documents containing such clauses — contracts, leases, mortgages, notes,

---

[7]If, as referenced in footnote two above, the panel opinion intended to indicate that "notwithstanding" clauses will be considered ambiguous only in some contexts, such as where they render other clauses superfluous, the opinion has an even greater potential for creating chaos in commercial transactions. The sub-category, if one is being suggested at all, is ill-defined and provides little guidance as to when a "norwithstanding" clause will be given effect, and when it will not. Just one example — the impact on form contracts — illustrates the magnitude of the problem created

banking instruments, etc. — are now vulnerable to attack and will undoubtedly engender many after-the-fact attempts to avoid previously clear agreements. Considering not least the fact that there are many common types of legal instruments which span long time periods — e.g., 99-year commercial ground leases or 15 and 30 year mortgages — it is clear that countless legal documents in this District will be candidates for ambiguity litigation for years to come on the basis of the panel's decision, if it is allowed to stand.

The panel decision is, in short, absolutely certain to foster an increase in litigation wirh commensurate additional burdens of cost and delay for the citizens and courts of this District. Because its potential impact is so substantial, the panel decision in this case should be reheard en *banc* and, further, should be vacated because it does nor represent a better or more desirable rule of decision.

CONCLUSION

Based on the foregoing facts and authorities, the Lennar Appellants respectfully

---

by the panel decision. Form contracts are routinely used in a variety of contexts — e.g., construction contracts, real estate sales contracts, leases, installment contracts, etc. Parties could heretofore simply add to such contracts clauses containing individualized terms of paramount importance, by using "notwithstanding anything to the contrary . . ." language, certain chat such language would ensure its predominance over any potentially conflicting terms from the form contract. Under the panel decision here, however, each provision in a form contract will have to be carefully reviewed to make sure that it is not one which will be rendered superflous and thereby trigger the need for a full-blown parol evidence trial as to intent in the event of a dispute. Moreover, parties could never be certain what degree or type of inconsistency between provisions would generate a ruling that the conflict had reached the "paradigmatic ambiguity" level, to use the panel's phrase, thereby deactivating the "notwithstanding" clause's ability to resolve the conflict. Some conflicts are temporal, some are contextual, and many are actually deliberate. The panel decision gives no guidance as to which will be deemed so "mutually repugnant" that a "notwithstanding" clause will be disregarded and parol evidence required to resolve which of the two will predominate.

request that this motion for rehearing en *banc* be granted, that the panel decision be vacated, and that reversal be ordered with directions to enter judgment in favor of the Lennar Appellants.'

Respectfully submitted,

RUBIN BAUM LEVIN CONSTANT
FRIEDMAN & BILZIN
2500 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33 13 1-2336

By: _____
LARRY A. STUMPF
Florida Bar No. 280526

–and–

RUSSO & TALISMAN, P.A.
Suite 2001, Terremark Centre
260 1 South Bayshore Drive
Miami, Florida 33 133
Telephone (305) 859-8100

Attorneys for Appellants Lennar Florida Partners I, L.P. and Lennar Florida Land V Q.A., Ltd.

By: _____
ELIZABETH K. RUSSO
Florida Bar No. 260657

By: _____
KIMBERLY L. BOLDT
Florida Bar No. 957399

'Both Appellants and Appellees filed untimely requests for attorneys' fees in this appeal. When Appellants realized this problem, Appellants' request was withdrawn and objection was made to Appellees' request. This Court subsequently granted the Appellees' request, which indicates that the untimeliness of the requests was not deemed material. Accordingly, if Appellants are afforded any of the relief requested herein so as to prevail at any point in this appeal, Appellants respectfully hereby reinstate their request for attorneys' fees.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Appellants' Motion for Rehearing En Banc was mailed this 14th day of November, 1996 to: HUMBERTO OCARIZ, ESQUIRE, Tew & Beasley, Counsel for Appellees, 20 1 South Biscayne Boulevard, Miami Center, Suite 2600, Miami, Florida 33 13 1-4336; and CURTIS S. CARLSON, ESQUIRE, Carlson & Bales, Counsel for Appellants Land O'Sun Realty, Ltd. and C' Store Realty, Ltd., 2770 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33 13 1.

Elizabeth Russo