JML:lk
#L481-1033(d):8/19/83

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 63, 242

JOSEPH T. LANCE AND CROSS KEY WATERWAYS, INC.,

Petitioner,

vs.

CHARLES H. WADE, FRANK C. HERRINGER, and all others similarly situated, and the HOMEOWNERS ASSOCIATION OF CROSS KEY WATERWAYS, INC.,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

HERSHOFF AND LEVY
Attorneys for Respondent
9445 Bird Road, 2nd Floor
Miami, Florida 33165
Tel. 226-1071

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_____/

I

STATEMENT OF THE CASE

Petitioners seek review of a Final Judgment entered on a jury verdict which found that Petitioners had committed a fraud on the Respondent class and assessed compensatory and punitive damages. Respondents adopt the symbols of the Petitioner as their own.

The issues in this cause are framed by the Amended Complaint and the Answer and Affirmative Defenses thereto (R. 47-55, 56-60). The cause was submitted to the jury solely on fraud (TR. 572, 640).

Plaintiffs are owners in the subdivision located in Monroe County known as Cross Key Waterways. Plaintiffs alleged, in their Complaint, that Defendants intentionally misrepresented in the Florida Public Offering Statement, and in other written and oral statements, that the roads and streets in the subdivision would

be paved (R. 48, 51). The Defendants, in their Answer, denied the essential allegations of the Complaint.

Plaintiffs produced more than sufficient proof as to the elements of fraud to the satisfaction of the court which denied the Defendants' Motion for Directed Verdict at the close of the Plaintiffs' case (TR. 525). Plaintiffs' and Defendants' Motion for Directed Verdict at the close of the evidence were denied (TR. 558). The jury was charged by the court in common law fraud (TR. 640). As to the elements of damage recoverable by the Plaintiffs, the court charged the jury as follows:

> "What award to Plaintiffs would restore them to the position they had been in had the wrong not been committed". (TR. 642).

The jury returned a verdict in the amount of Fifty Thousand ($50,000.00) dollars compensatory and Sixty Thousand ($60,000.00) dollars punitive as to Defendant, LANCE, (TR. 647), and Two Hundred Thousand ($200,000.00) dollars compensatory and Three Hundred Thousand ($300,000.00) dollars punitive as to Defendant, CROSS KEY WATERWAYS, INC., (TR. 648). A Final Judgment was duly entered by the court upon the verdict (R. 110-111). Defendants' Motion for New Trial and Motion for a Judgment Notwithstanding the Verdict were denied by Order dated September 17, 1980 (R. 95-102, 105).

Defendants' appealed to the District Court of Appeal, Third District.

On January 4, 1983, the District Court of Appeal rendered its decision (R. 112-116).[1] The majority, relying upon this

[1] Lance vs. Wade, 424 So.2d 161 (Fla. 3 DCA 1983).

court's decision in Frankel vs. City of Miami Beach, 340 So.2d 463 (Fla. 1976), held that a class action sounding in fraud may be brought when the Plaintiffs' class is engaged in a cooperative enterprise, has a joint pecuniary interest and does not have a choice of remedies which may be subject to separate and distinct defenses. The court construed this court's decision in Osceola Groves vs. Wiley, 78 So.2d 700 (Fla. 1955), not to be an absolute bar to the bringing of a class action for fraud. The dissent in the District Court of Appeal implicitly agreed that class actions for fraud can be brought. However, recognizing the vitality of this court's decision in Hoffman vs. Jones, 280 So.2d 431 (Fla. 1973), the dissent left it up to this Honorable Court to allow a class action for fraud perceiving such a decision to be a change in the decisional law of the state (R. 115-116).

Rehearing was made by Defendants, before the District Court, and denied by Order dated January 24, 1983 (R. 117).

Defendants timely sought to invoke this court's discretionary jurisdiction on the ground of express and direct conflict. By Order dated July 20, 1983, this court accepted jurisdiction by a vote of four to three.

II

STATEMENT OF THE FACTS

Plaintiff, WADE, is an original purchaser of property in the subdivision known as Cross Key Waterways which is located in Monroe, County, Florida (TR. 190). WADE originally bought

two lots (TR. 191). He received a Florida Public Offering Statement when he purchased the second lot in the subdivision (TR. 194). The Florida Public Offering Statement was admitted into evidence as Plaintiffs' Exhibit #4. The Offering Statement contains the following statement relative to the roads:

> "Improvements will include . . . construction of a graded, rolled, water-bonded, oiled and sanded road, an elevation of four feet at the crown of the road, in accordance with county engineering requirements. . . Roads will be maintained by subdivider until maintenance is taken over by the Cross Key Waterways Property Owners Association, Inc. . . .
>
> Access to the highway frontage is by U.S. Highway #1, and the balance of the lots shall have access by a paved road constructed to the specifications of the Monroe County Engineer, which roads shall be constructed down the middle of a 50' right of way fronting each of the lots."

Prior to the purchasing the property, Plaintiff, WADE, also received a flyer which was introduced into evidence as Plaintiffs' Exhibit #9 (TR. 79). The salient portions of the flyer reads:

> Roads are dedicated and graded to county specifications. They are provided by the subdivider and maintained by the county."

Plaintiff, WADE, relied upon the flyer and the Public Offering Statement and would not have purchased his lots if he knew the statements were false (TR. 258). WADE also received two Contracts for Deed for his property (Plaintiffs' Exhibits #11 and #12 in

evidence). Exhibit #11 indicated that the improvements to the property included graded and paved roads.

In 1977, WADE attended a meeting with representatives of the Defendant, CROSS KEY WATERWAYS (TR. 207-208). At that time, the representations contained in the Public Offering Statement, the brochure and the Contracts for Deed were discussed (TR. 212). Despite this meeting, nothing was done to pave the roads (TR. 16). Suit against the Defendants was not instituted because continuous negotiations were taking place with the Defendants concerning the paving of the roads and Defendants continued to promise to pave the roads (TR. 217).

Plaintiff, FRANK HERRINGER, is an original purchaser in the subdivision (TR. 425). He was shown a copy of the flyer and signed a Contract For Deed (TR. 426, 427). Mr. Herringer testified that he relied upon the representations contained in these documents and would not have bought the property if he had known that those representations were false (TR. 428). The testimony in this cause is overwhelming that other members of the class relied on the representations (TR. 370, 381, 390, 411). At the time of the trial, he testified that the Defendants have never paved the roads, although in 1976, at the insistance of the Defendants the roads were worked on but not repaired (TR. 431). HERRINGER believed that the words "paved roads" meant an asphalt road (TR. 435).

A paving contractor, Calvin Chalker, gave the only testimony in this cause on damages. Mr. Chalker has been involved in road construction for twenty-five (25) years (TR. 315). He defined

"prime" as shooting liquid asphalt. Chalker defined "paving" as putting down an asphalt surface with a paver (TR. 319-320). He testified that paving means a one inch thick layer of asphalt. Chalker did not consider paved to mean water-bonded and oiled (TR. 32,332). He testified that the Monroe County specifications in 1970 to 1973 required a one inch surface of asphalt (TR. 323). Chalker examined the roads in Cross Key Waterways and stated that it would cost approximately $250,000.00 to repair the roads up to County specifications and put in the proper grade of asphalt (Plaintiffs' Exhibit #21)(TR. 324). Chalker noted that the only surface on the roads was oil (TR. 324). He testified that the roads that he observed were just graded and primed and not paved (TR. 325).

The last sale of a lot in the subdivision by the Defendants occurred in 1975 (TR. 393) (Plaintiff's Exhibit #23). An oil surface was put on the roads by the Defendants in 1974 and 1975 (TR. 419). Jasper Dudley, the foreman for the paving contractor that did the original work in Cross Keys testified that the road work was done in 1973 (TR. 529). As of the date of trial, Monroe County had never taken over maintenance of the roads (TR. 362, 382, 406, 412).

As of the date of trial, the roads that are the subject of this case, were in terrible condition. Defendant, LANCE, admitted that the roads were full of Chuckholes (TR. 119). The Plaintiffs' witnesses' testimony indicates that Mr. Lance's testimony as to the condition of the roads is too charitable. The contractor that the Defendants hired in 1976 left the roads in a worse condition

than before the contractor started repairing the roads. Many witnesses refer to the condition of the roads as "scarified" (TR. 421, 450).

III

POINTS INVOLVED ON APPEAL

I

WHETHER THE COURT ERRED IN ALLOWING THIS ACTION WHICH WAS BASED ON FRAUD AND DECEIT TO PROCEED AS A CLASS ACTION.

II

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT WHERE PLAINTIFFS OFFERED NO PROOF AS TO THE SPECIFIC REQUIREMENTS WHICH DEFENDANTS ALLEGEDLY FAILED TO MEET AND INTRODUCED NO EVIDENCE AS TO ANY LEGALLY RECOVERABLE DAMAGES.

III

WHETHER THE COURT IMPROPERLY INSTRUCTED THE JURY ON THE PROPER MEASURE OF DAMAGES FOR THE SELLERS' ALLEGED MISREPRESENTATION MATERIAL FACTS RELATING TO THE PROPERTY SOLD BY THEM.

IV

WHETHER THE COURT ERRED IN ALLOWING THIS ACTION TO GO TO THE JURY AS A CLASS ACTION WHERE THE PLAINTIFFS FAILED TO JUSTIFY MAINTAINING THIS ACTION AS A CLASS ACTION.

IV

ARGUMENT

POINT I

THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL WERE CORRECT IN ALLOWING THIS ACTION BASED UPON FRAUD ON SEPARATE CONTRACTS TO PROCEED AS A CLASS ACTION.

The present cause is a suit brought by two individuals, individually and as representatives of those persons who own lots in the subdivision known as Cross Key Waterways Estates (R. 47). The case, as presented to the jury, was for fraud in making oral and written misrepresentations concerning the paving of the roads in the subdivision known as Cross Key Waterway Estates (R. 51). Defendants objected to this class action and maintained that a class action could not be instituted for fraud. The trial court overruled the Defendants' objection and allowed this cause to go to the jury as a class action. The District Court of Appeal, in a two to one decision, affirmed the trial court's decision to allow this cause to proceed as a class action. In so doing, neither the trial court nor the District Court of Appeal has committed error.

Petitioners suggest a per se rule that there may be no class actions for fraud under any set of circumstances. As will be presently demonstrated, this is not and has never been the law in Florida. As will be further demonstrated, the use of class actions is still evolving as a procedural device to diminish the amount of lawsuits brought in our court system. Since there have

been significant changes in the law concerning class actions and the modern day evolution of the class action rule, class actions for fraud are allowed. With this as a preface, Respondents turn to the merits.

A. The Rule of Osceola Groves

In Osceola Groves, Inc. vs. Wiley, 78 So.2d 700 (Fla. 1955), the Defendants had subdivided three hundred ninety four (394) acres into one acre units and sold the units to numerous persons who signed leases and similar contracts of sale. In the sales contracts, the Defendants promised to plant each tract with citrus trees (which for convenience, Plaintiffs will refer to as "on premises" improvements) and to cultivate and maintain the trees. In the leases, the Defendants agreed to maintain the units and to market the crops. In 1948, the Defendants breached the lease agreement, raised the maintenance charges and took returns from the land that should have gone to the owners. Plaintiff, Wiley, sued individually and on behalf of all the purchasers of the various one acre tracts for fraud. Injunctive and equitable relief was sought in the complaint.

This court, relying on Associated Almond Growers of Pasco Robles vs. Wymond, 42 F.2d 1 (9th Cir. 1930) refused to allow the class to proceed as a class action because the parties were legally distinct, each member of the class was afforded a choice of remedies and no community of interest was present. This court noted, at page 702 of its opinion:

> "It does not appear that in these contracts was any provision showing ... that any purchaser had a pecuniary interest in any development of land other than those covered by his own contract".

This court reversed the Order of the trial court and refused to allow the Osceola case to proceed as a class action.

Defendants contend that this court's decision in Osceola is an absolute ban on the class action for fraud in this state. Quite to the contrary, this court, in Osceola Groves, merely decided that on the unique factual situation presented by that case, a class action could not be maintained. There is no language in this court's Osceola decision that indicates that there can never be a class action for fraud. This is a misconception that Defendants have labored under since this lawsuit was filed.

As noted by the majority opinion below, this court revisited the Osceola Groves case in Frankel vs. City of Miami Beach, 340 So.2d 463 (Fla. 1977). There, this court recognized that Osceola Groves did allow a class action for fraud in Florida. The Osceola Groves decision was construed as enunciating a "special" rule for class actions concerning fraud. In order to bring a class action for fraud, this court stated that three additional elements must be established by the evidence:

1. There must be a cooperative enterprise;
2. The class must have a joint pecuniary interest, and;
3. There must not be a choice of remedies which may be subject

to separate and distinct defenses.[1]

This court chose not to go any further and determine whether the above three elements should continue to be required in fraud actions because the Frankel case did not involve fraud.[2]

In this cause, the issue is not whether a class action for fraud is proper. Even under Osceola, a class action for fraud is appropriate in this state whenever the three elements are met.[3]

---

[1]A majority in the District Court of Appeal found all three of these elements to be present in the present case. Therefore, the District Court of Appeal affirmed the decision. Contrary to the contention contained in the dissent below, the decision does not break any new ground and there is no violence done to this curt's holding in Hoffman vs. Jones, 280 So.2d 431 (Fla. 1973).

[2]Defendants maintain that this court's decision in Avila South Condominium Association, Inc. vs. Kappa Corporation, 347 So.2d 599 (Fla. 1976) overrules Frankel. Nowhere, in Avila does this court expressly or impliedly overrule Frankel.

Defendants rely on Cherin vs. Southern Star Land and Cattle Company, Inc., 400 So.2d 1 (Fla. 1981) as authority that Osceola Groves is still good law. Cherin does not stand for this proposition. In Cherin, this court declined to consider the certified question because of an undeveloped factual record. Presumably, the present case concerns the same question certified by the District Court in Cherin for this court's determination.

[3]Plaintiffs respectfully request that this court reconsider its jurisdiction to hear this case on the grounds of express and direct conflict. There is no conflict between the holding and the decision below and any other decision rendered by any court of this state. As has just been demonstrated, the decision of the majority below is directly consistent with the holdings of this court in Frankel and Osceola Groves. Therefore, no conflict jurisdiction is present.

The majority opinion below states:

> "The Frankel court established a three prong test which, when satisfied, permits a class action sounding in fraud".

This statement is incorrect. The three prong test was established by Osceola Groves. Frankel only clarified the point by crystalizing the requirements. There is no conflict, express, direct or otherwise.

The issue, in this cause, is whether we need maintain the three prong Osceola test. Plaintiffs suggest that the Osceola requirements are no longer needed due to the flexibility of the Florida class action rule as it exists in 1983.

B. Present cause involves fraud by common misrepresentations concerning common elements

The facts of the present cause remove it from the bar of Osceola Groves because the three "special" rules are satisfied by this case. Here, the fraudulent misrepresentations concern the common roads within the Cross Key Waterways subdivision, which Plaintiffs will refer to as "off premises improvements". Even more significant is that the Plaintiff class, in the instant case, owns the roads in question. In this regard, Defendant, LANCE, the president of the Defendant, CROSS KEY WATERWAYS, (TR. 119) testified:

> "Q.(By Mr. Nachwalter): Who owns those roads; do you know?
>
> A. The property owners" (TR. 119).

Charles Netter, the attorney for the Defendant, CROSS KEY WATERWAYS, INC., at the time of the transactions complained of in the complaint testified:

> "Q (By Mr. Nachwalter): ... do you actually know who has legal title to them?
>
> A. ... we make no claims to the roads. If they want title to the roads subject to the easement, they can have it tomorrow". (TR. 177).

The Chairman of the Monroe Board of Couny Commissioners, Donald Schlosser, testified:

> "Q (By Mr. Nachwalter) Do you know who owns the roads?
>
> (The Court) Yes or no?
>
> A. By county policy, yes.
>
> Q. And who?
>
> A. People living along the side of it. (TR. 362).

This case involves the class, through its representatives, suing over off premises property that the class owns and uses as a type of common element. In this case, as opposed to the situation confronted by the Supreme Court in Osceola Groves, Inc., the three special elements are satisfied. The majority of the District Court of Appeal recognized that these three special elements were present in this cause and therefore affirmed the decision. While Defendants have cited many cases in support of their argument, none of the cases cited by the Defendants involve a class suing over property owned jointly by the members of class. Plaintiffs therefore respectfully submit that the trial court was eminently correct in allowing this cause to proceed as a class action.

C. Federal Court Decisions

As recognized by the Florida Supreme Court in Frankel vs. City of Miami Beach, supra., the Federal Courts have reversed themselves and no longer prohibit class actions for fraud. To the contrary, the Federal Courts, at the present time, allow class actions for fraud. In Harris vs. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964), the same court that had decided

Associated Almond Growers of Pasco Robles vs. Wymond, supra., upheld the use of a class action for fraud against the subdivider under the Securities Act of 1933. The court held that even if the members of the class stood in different positions as to reliance and representations, all members of the class need not be substantially identical, but there need be only questions of either law or fact, common to all for the cause to proceed as a class action. The decision of the Ninth Circuit, in Associated Almond Growers of Pasco Robles vs. Wymond, supra., is no longer good law. Reliance upon it by the Supreme Court in Osceola Groves to prohibit class actions for fraud is unsound at the present time.

The Second Circuit has also grappled with the use of class actions in fraud cases. In Green vs. Wolf Corporation, 406 F.2d 291 (2nd Cir. 1968), a class action suit brought for alleged misrepresentation under the antifraud provisions of the Securities Act of 1934. The court recognized that if common questions of fact or law which predominate as to all members of the class are present, a class action is appropriate. In the event that the entire class does not stand in the same position, sub-classes could be utilized to allow the class action to go forward. Regarding the appropriatness of fraud in class actions, the court stated:

> "A fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action and it may remain so despite the need, if liability is found through a separate determination of the damages suffered

> by individuals within the class. On the other hand, although showing some common core, a fraud may be unsuited for treatment as a class action if there were material variations in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed". Id at 300-301.

Accord, Advisory Committee Notes on Amendments to the Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966). Clearly, in the present case, the same representations were made to the entire class. As set forth in the Green decision, class actions may now be brought for fraud.

D. Decisions of other States

Our sister states, recognizing the flexibility of the class action procedures, are currently becoming more liberal in the use of class actions for fraudulent misrepresentations. While Plaintiffs' research on this point, with regard to other states, is not exhaustive, Plaintiff has found at least eight jurisdictions that allow class actions for fraud: California, Occidental Land, Inc. vs. Superior Court of Orange County, 18 Cal.3d 355, 556 P.2d 750 (1976)(en banc); Georgia, Stay-Power Industries, Inc. vs. Avant, 134 Ga.App. 952, 216 S.E.2d 897 (2 DCA 1975), cert. den. by Georgia Supreme Court in an unreported decision; Illinois, Steinberg vs. Chicago Medical School, 69 Ill.2d 20, 371 N.E. 2d 634 (1977); Indiana, Skalbania vs. Simmons, 443 N.E.2d 352 (Ind. 2 DCA 1982); Michigan, Paley vs. Coca Cola Company, 389 Mich. 583, 209 N.W.2d 232 (1973); Nevada, Johnson vs. Travelers Insurance Company, 515 P.2d 68 (Nev. 1973); New York, King

vs. Club Med, Inc., 76 A.D.2d 123, 430 N.Y.S.2d 65 (1 Dep. 1980); Ohio, Portman vs. Akron Savings and Loan Company, 47 Ohio App.2d 216, 353 N.E.2d 634 (1975). Many, if not all of the foregoing jurisdictions, have class action rules similar in most respects to Fed. R. Civ. Pro. 23.[4] These rules, provide flexibility with regard to class action procedures and allow for trial on common issues with separate trials on individual issues. Florida should follow the lead of its sister states and adopt the same kind of flexible class action rules for fraud that is allowed for sister states.

Two cases from California are especially apropos to this cause. In Vasquez vs. Superior Court, 4 Cal.3rd 800, 484 P.2d 964 (1971), the California Supreme Court approved a class action for fraudulent misrepresentation against the seller of a product. With regard to the concept of community of interest, the court stated:

> "The mere fact that separate transactions are involved does not itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions that determine his individual right to recover". 484 P.2d at 969.

The court went on to discuss each element of fraud and explain why a class action is not precluded merely because the gravamen

[4]The present Florida Civil Procedure Rule on class actions, Fla. R. Civ. Pro. 1.220, effective January 1, 1981, is also similar to the Federal Rule.

of the case is fraud.

The second California decision is Occidental Land, Inc. vs. Superior Court of Orange County, supra.. In this case, the Supreme Court of California was confronted with a factual situation analagous to the present case. The Plaintiffs in Occidental Land were homeowners in a subdivision and each homeowner was a member of a community association which operated the common areas and facilities. Each owner was assessed a maintenance charge for maintenance of the common areas. The Plaintiffs sued the Defendant developer for fraudulent misrepresentations concerning maintenance of certain common areas. The Trial Court certified the action as a class action and the Supreme Court of California affirmed the Trial Court. While noting that class actions involving land are inappropriate where issues of liability and damage to each owner vary and each piece of land is affected differently by the liability issue, the court nevertheless held that a class action was appropriate on the facts presented:

> "In contrast, the problems of liability and the calculation of the diminished value of each parcel in the present case do not depend on such variables because Plaintiffs do not allege damage to the land as such. Consequently, the uniqueness of each parcel presents no obstacle to class treatment. Plaintiffs allege a standard claim of allegedly fraudulent misrepresentations, the terms of which are common to the class. They seek compensation for the diminution in the value of their homes resulting from the overall reduction and increased cost of maintenance charges. The damages sought may be calculated according to a standard formula ..." 556 P.2d at 755.

In the present case, the Plaintiffs have alleged standard claims of allegedly fraudulent misrepresentation, the terms of which are common to the class and the subject of which concern common property. The damages relate exclusively to the common property of the class. Under the reasoning of the California Supreme Court in both the Vasquez decision and the Occidental Land decision, a class action is proper for fraud. The rule in Florida should be no different.

E. Florida Rule Civil Procedure 1.220

This court decided Osceola Groves in 1955. At that time, the class action rule in effect was Fla. R. Civ. P. 3.6.[5] This rule was renumbered in 1967 as Fla. R. Civ. P. 1.220 but no changes were made in the verbiage of the rule. There was no substantive change until this court's decision in Avila South Condominium Association vs. Kappa Corporation, 347 So.2d 599 (Fla. 1976). There, this court held unconstitutional, Fla. Stat. 711.12(2), a statute which allowed the condominium association to maintain a class action on behalf of the unit owners of that condominium. To fill the void left by the Avila decision, this court created Fla. R. Civ. P. 1.220(b) which had the effect of converting Fla. Stat. 711.12(2) into a rule of civil procedure.[6] In 1980, the Florida class action rule was completely revised to its present

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[5] "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole".

[6] Renumbered effective January 1, 1981 as Fla. R. Civ. P. 1.221 Florida Bar, In Re Rules of Civil Procedure, 391 So.2d 165 (Fla. 1980).

format. The Florida Bar, In Re Rules of Civil Procedure, 391 So.2d 165 (Fla. 1980). As noted by the committee note, the rule in its present form is similar to the Federal Rule 23. Therefore, at the present time, Florida and Federal procedure on class actions are similar if not identical.

The 1980 revision of the Florida class action rule, effective January 1, 1981, while setting forth procedures to be employed in the use of class actions, did not constitute a major revision in the law of class actions established by Florida judicial decision.[7] In Port Royal, Inc. vs. Conboy, 154 So.2d 734 (Fla. 2 DCA 1983), the court established the requirements for pleading a class action lawsuit. The Port Royal decision was approved by this court in Harrell vs. Hess Oil & Chemical Corporation, 287 So.2d 291 (Fla. 1973). At least one commentator has viewed Harrell as an attempt by this court to set guidelines to judge the appropriateness of class actions by announcing seven class action pleading requirements. Arnold, Class Actions in Florida, 31 U.Fla.L.Rev. 551, 568 (1979). Mr. Arnold goes on to argue that the seven Harrell requirements are the equivalent of the procedure set forth in Fed. R. Civ. P. 23. Therefore, prior to the enactment of the rule of civil procedure in its present form, although Florida, by decisional

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[7]The 1980 amendments to rule 1.220 are not applicable to the present cause which was commenced in 1978 and tried on September 19, 1980.

law had adopted the same guidelines that the United States Supreme Court set down in the Federal Rule.

The existence of a hegemony between Federal and Florida law concerning class actions as demonstrated by this court's Frankel decision wherein this court cited to Eisen vs. Carlisle and Jacquelin, 417 U.S. 156 (1974) concerning notice to the class.[8] Succinctly put, prior to the 1981 revision of the Florida Rules of Civil Procedure concerning class actions, although the language of the Florida Rule on class actions and the Federal Rule on class actions were decidedly different, the law concerning procedures to be applied in class actions in Florida and the Federal Courts were similar. Therefore, the procedures recommended by the Second Circuit in its landmark decision in Green vs. Wolfe Corporation, (previously discussed in this brief at pages 15-16) were applicable in Florida even prior to the adoption of the 1980 revision to the class action rule. Such procedure allows class actions for fraud on common issues for the class, separating out the dissimilar issues for a determination by separate trials.

[8]Other Florida cases citing to Fed. R. Civ. P. 23 for guidance in analyzing Florida class action procedure: Paulino vs. Hardister, 306 So.2d 125,128 (Fla. 2 DCA 1974); Imperial Towers Condominium vs. Brown, 338 So.2d 1081, 1084 (Fla. 4 DCA 1976); Paradise Shore Apartments, Inc. vs. Practical Maintenance Company, 344 So.2d 299, 303 (Fla. 2 DCA 1977); Scott vs. Walker, 378 So.2d 828, 829 (Fla. 2 DCA 1979).

F. Class action concepts have changed since Osceola Groves.

The court, in Osceola Groves, was involved in a search for internal cohesion or homogeneity among the class members. This court was very concerned that each member of the alleged class had a contract different from that of the others and that they were exposed to separate remedies. Recent cases on class actions indicate that similar actions may be tried together with separate trials occurring on the dissimilar issues. Thus, applying modern class action procedure to this case, one trial could be had on the issue of fraud since all class members in this case stood in the same position with regard to the misrepresentations concerning the road. With regard to the different positions of the parties concerning alleged remedies (if this court were to accept Defendants' position), separate trials could be had.[9] In short, the use of class actions in present day is expanding and the procedures have become more flexible. Under the evolving class action rule, a cause of action in fraud is not per se excluded from class action treatment. Furthermore, using present day class action procedure, the additional elements required by Osceola Groves vs. Wiley, supra., to bring a class action for fraud are no longer required since the use of the subclass device eliminates the problems that this court had with a class action

[9] In view of the fact that the subject of the fraudulent representation was the roads in the community which was the common property of the class, the concept that each member of the subdivision has separate remedies is illusory.

in an Osceola Groves situation.

G. Conclusion

The essence of the Plaintiffs' position before this court is that Florida has always allowed class actions for fraud. Under the decision of Osceola Groves vs. Wiley, supra., class actions for fraud had to have three elements in addition to those required in other fraud actions. The present case, concerned as it is with common elements owned by the class itself, satisfies the three additional Osceola elements. Therefore, this cause qualified as a class action even under Osceola Groves. The Defendants/Petitioners' contention that there can be no class actions for fraud under Florida law is erroneous as a matter of law.

Plaintiffs/Respondents further contend that under modern class action procedure, through the use of subclasses, the concerns of this court in Osceola Groves are no longer pertinent. Any dissimilarity in the class can be resolved through the use of subclasses and/or separate trials on nonsimilar issues. For these reasons, we contend that the District Court and the Circuit Court correctly allowed this cause to proceed as a class action and that no reversible error is demonstrated. We suggest to this honorable court that it is time to sound the death knell of Osceola Groves and once and for all abandon this anachronistic decision. In concert with the enactment of the present version of Fla. R. Civ. P. 1.220, This court should strike down the Osceola Groves decision which is not compatible with the present day rule and

recognize that through the adoption of the present day rule, the flexibility allowed therein provides sufficient leeway to allow class actions for fraud.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT WHERE PLAINTIFFS OFFERED NO PROOF AS TO THE SPECIFIC REQUIREMENTS WHICH DEFENDANTS ALLEGEDLY FAILED TO MEET AND INTRODUCED NO EVIDENCE AS TO ANY LEGALLY RECOVERABLE DAMAGES.

This court accepted jurisdiction to hear this cause on the issue of whether a class action for fraud can be had in this state. Point II, seeks to have this court review a matter separate from the class action fraud issue. There is no reason to allow Defendants a second appeal on this issue. Sanchez vs. Wimpey, 409 So.2d 20 (Fla. 1982); International Patrol and Detective Agency, Inc. vs. Aetna Casualty Insurety Company, 419 So.2d 323 (Fla. 1982)(Alderman, C.J., concurring). Therefore, Plaintiffs respectfully request that this court not even consider this Point.[10]

(A)

SUFFICIENCY OF THE EVIDENCE

The Defendants in their Brief challenge the sufficiency of

[10]Although we will not repeat this argument later this argument applies with equal force to Points III and IV raised by Petitioners before this court.

the evidence establishing the fraud. In thier Motion for New Trial, the Defendants only challenged the evidence concerning the measure of damages and the Plaintiffs' failure to introduce into evidence the Monroe County specifications (R. 96,100). Therefore, the challenge to the sufficiency to the evidence raised for the first time is improper. Furr vs. Gulf Exhibition Corporation, 114 So.2d 27 (Fla. 1 DCA), aff'd 116 So.2d 672 (Fla. 1959); Southern American Fire Insurance Company vs. Rinzler, 324 So.2d 133 (Fla. 1 DCA 1975). Even if this point is properly preserved for review; no error is present. The burden of proof for fraud in a civil case is not clear and convincing proof, but by a proponderance of the evidence. Rigot vs. Bucci, 245 So.2d 51 (Fla. 1971). In reviewing this point, the test that this Court should apply is whether the evidence is such that reasonable men could have reached the verdict rendered in this case. Midstate Hauling Company vs. Fowler, 176 So.2d 87 (Fla. 1965). This burden has been met by the Plaintiffs and the Final Judgment entered on jury verdict should be affirmed.

Evidence was introduced in this cause concerning misrepresentation by the Defendants in the Public Offering Statements, Contracts For Deed, advertising brochures and other verbal and written representations and action. The testimony in this cause was overwhelming that the class relied upon these representations (R. 258, 370,381,390,411,428,429). It has long been established that proof of intent to deceive may be proved by circumstantial

evidence. Florida East Coast Railway Company vs. Thompson, 93 Fla. 30, 111 So. 525 (1927); Plantation Key Developers, Inc., vs. Colonial Mortgage Company of Indiana, Inc., 589 F.2d 164 (5th Cir. 1979). It is recognized that an intent not to perform existing at the time the promise was made is usually not susceptible to direct proof but may be ascertained from promissory subsequent conduct and speech. 5 P.O.F.2d 727(4)(1975).[11] Evidence was offered in this case through both expert and lay witnesses that the roads were never paved (TR. 199, 204,245,261,278,320,324,325). The photos introduced into evidence also confirmed this beyond any doubt. Viewing the evidence in a light most favorable to the Plaintiffs as the prevailing parties below, an issue of fact was certainly presented for the jury's determination on the fraudulent intentions of the Defendants. The jury chose to decide adversely to the Defendants.

(B)

MONROE COUNTY SPECIFICATIONS

Calvin Chalker testified without objection that the Monroe County specifications in 1970 to 1973 required one inch (1") of asphalt (TR. 323). He further testified that the roads as paved did not meet those specifications (TR. 325). Even if, as Defendants contend, the written specifications were the best evidence, a timely objection had to be made to Chalker's oral testimony concerning

[11] Such evidence was introduced at trial.

the contents of the specifications to preserve this point for appeal. Dowd vs. Star Manufacturing Company, 385 So.2d 179 (Fla. 3 DCA), cert. den. 392 So.2d 1373 (Fla. 1980). No objection was made by Defendants below. We respectfully submit that this point is waived by Defendants and should not be considered by this Court.

The Plaintiffs in this cause, as previously pointed out, also relied upon other fraudulent statements which were contained in the advertising brochure, Contracts for Deed and other written and oral statements. Therefore, the failure to introduce evidence concerning the Monroe County road specifications would have only been error as to the representations contained in the Florida Public Offering Statement. Evidence was present to go to the jury concerning these other misrepresentations. Therefore, Plaintiffs' contend that no reversible error has been demonstrated. Colonial Stores, Inc. vs. Scarbrough, 355 So.2d 1181 (Fla. 1977). The Final Judgment on jury verdict ought be affirmed.

(C)

MEASURE OF DAMAGES

Defendants claim that the measure of damages of a defrauded purchaser of property is the difference between actual value of the property and the value if the facts represented were true. Williams vs. McFadden, 23 Fla. 143, 1 So. 618 (1978). This measure of damages is commonly referred to as the "Benefit of the Bargain Rule". The rule is designed to place a defrauded purchaser in the same position as he had if he had not been defrauded. 27

Fla.Jur.2d Fraud & Deceit,, Sec. 58 (1981). This measure of damages gives the Plaintiff his expectation interest for the loss of the bargain. Dobbs, Remedies Sec. 9.2(West 1973). Here, the measure is the paving of the common roads. Applying this measure of damages to this cause, no error has been shown.

The defendants under the facts of this case are estopped from arguing that the failure to introduce evidence of the proper measure of damages is error. Plaintiffs at trial called Norma Starr, an experienced real estate broker in Monroe County whose place of business is located near the Cross Key Waterways subdivision (TR. 378). The Plaintiffs at trial attempted to ask Ms. Starr questions concerning the diminution of value of the subject property. The Defendants objections to these questions were sustained (TR. 312-313). The Plaintiffs proffered that the broker would testify as to the difference in the value of the property (TR. 313). Where, as in the instant case, the appealing party is the cause of the error complained of, the case is governed by the Invited Error Rule that a party may not take advantage of the error he himself induced at trial. Stanley vs. State, 357 So.2d 1031 (Fla. 3 DCA 1978), cert. den. 364 So.2d 891 (Fla. 1978); Behar vs. Southeast Banks Trust Company, N.A., 374 So.2d 572 (Fla. 3 DCA 1979), cert. den. 379 So.2d 202 (Fla. 1980); 3 Fla. Jur. 2d Appellate Review, Sec. 294 (1978). Therefore, if any error is present concerning the required quantum of proof on damages, such error is the Defendants own fault.

Even if the Defendants are not estopped to raise the damage issue on appeal, no error is present. The only testimony on damages permitted by the Trial Court was that of Calvin Chalker, a paving contractor. Mr. Chalker testified that it would cost the Plaintiffs $250,000.00 to repair and pave the roads (TR. 324). In this cause, the total award by the jury for compensatory damages was $250,000.00 (TR. 75-76,110-111). Plaintiffs, therefore, respectfully submit that the jury award conforms to the Benefit of the Bargain Rule of damages for fraud.

Defendants overlook the entire holding of the Court in Williams vs. McFaddon, supra. In Williams, the Court noted that damages are recoverable for whatever loss the purchaser sustains from being lead into a disadvantageous purchase by willful misstatements of the vendor. Id. at 622. This Court has recognized that in cases involving fraud in the sale of land, Florida applys the Benefit of the Bargain Rule. DuPuis vs. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3 DCA), cert. den. 238 So.2d 105 (Fla. 1970). The difference in value which constitutes the basis of the Benefit of the Bargain Rule, may be proven by the reasonable cost of correcting the defect. Reid vs. Minter, 137 Ga.App. 799, 224 S.E.2d 849 (1976); See, Moore vs. Swanson, 171 Mont. 160, 556 P.2d 1249 (1976); Sodal vs. French, 35 Col. App. 16, 531 P.2d 972 (1974) aff'd, 190 Col. 411,547 P.2d 923 (1976); Posner vs. Davis, 77 Ill.App.3d 638, 395 N.E.2d 133 (1979); Alderman vs. O'Rourke Company, Inc., 94 Wis.2d 17, 288 N.W.2d 95, 112 (1980), Annot.

13 A.L.R.3d 875, Sec. 3,5 (1967). Applying the Benefit of the Bargain Rule to this cause, it is apparent that the Benefit of the Bargain is the paving of the roads since that is the expectation interest of the Plaintiff in this cause. See, Stout vs. Tunney, 22 Cal.3d 718, 586 P.2d 1228, 1232 (1978)(en banc); Dobbs, supra. Indeed, Williams vs. McFadden, supra., clearly recognizes that it is the expectation interest of the Plaintiff that is the measure of the damages, since damages are awardable for whatever loss is sustained from being lead into the disadvantageous position. Plaintiffs, therefore, submit that no error is present in this cause concerning the measure of damages and the Judgment should be affirmed.

POINT III

THE COURT IMPROPERLY INSTRUCTED THE JURY ON THE PROPER MEASURE OF DAMAGES FOR THE SELLERS' ALLEGED MISREPRESENTATION OF MATERIAL FACTS RELATING TO THE PROPERTY SOLD BY THEM.

As has already been discussed in Point II of this Brief, Defendants objected to Plaintiffs attempt to introduce evidence on the difference in the value of the property. As we previously pointed out, since Defendants successfully objected to the evidence which would have supported the charge that the Defendants claim should have been given to the jury, the Invited Error Rule governs and the Defendants may not argue this point here. Furr vs. Gulf Exhibition Corporation, supra.; Cf. Bould vs. Touchette, 349 So.2d 1181 (Fla. 1977).

A party is entitled to have the jury instructed on the law applicable to the evidence under the issues presented. Gallagher vs. Federal Insurance Company, 346 So.2d 95 (Fla. 3 DCA), cert. den. 354 So.2d 980 (Fla. 1977). In Point II of this Brief, we have already argued that evidence concerning the costs of paving the roads is admissible as evidence of Plaintiffs expectation interest under the Benefit of the Bargain Rule of damages for fraud. Since, as Defendants concede in their Brief, the Court instructed the jury on the costs to repair the roads in conformity with the only evidence on damages produced by the Plaintiffs and allowed by the Court, no error is shown. The jury was charged on the proper measure of damages. The Defendants have, therefore, failed to show reversible error.

Secondly, as has already been discussed in Point II, the charge given to the jury was in conformity with the expectation interest under the Benefit of the Bargain Rule. The Defendants, therefore, have failed to likewise show reversible error on this point.

POINT IV

THE COURT WAS CORRECT IN ALLOWING THIS ACTION TO GO TO THE JURY AS A CLASS ACTION WHERE THE PLAINTIFFS FAILED TO EITHER ALLEGE OR PROVE SUFFICIENT FACTS TO JUSTIFY MAINTAINING THIS ACTION AS A CLASS ACTION.

This is an appeal after trial. The question is whether the evidence established Plaintiffs' right to bring a class action.

The evidence before the Court established that the Plaintiffs were the owners of the real property in the subdivision and that the class which consists of the owners of the property owned the roads (TR. 119, 177, 312). The evidence at trial showed that the subdivision consisted of three hundred sixty lots. Mr. DuPuis, the President of the Homeowners Association, testified that the association consisted of approximately three hundred and fifty members and that all persons who owned residential property within the subdivision were members of the Property Owners Association (TR. 287, 296, 297). Clearly, the Plaintiffs showed that the class was so numerous as to make the bringing of separate lawsuits impractical.

The evidence also showed that the individual Plaintiffs adequately represented the class. The threshold question to be answered is whether the interest of the Plaintiffs is coextensive with the interest of the other members of the class with a common right to recovery based upon the same essential facts. Port Royal, Inc. vs. Conboy, 154 So.2d 734, (Fla. 2 DCA 1963). Stated another way, a community of interest represents a conceptualization to determine if the putative class members possess the requisite privity to justify the use of the class action device. Arnold, Class Actions in Florida-A New Look, 31 U.Fla. L. Rev. 551 (1979). Here, the evidence established that both Mr. Wade and Mr. Herringer were owners in the subdivision and that they were original owners (TR. 189, 426). Both, like many of the members of the class, signed Contracts for Deed, received Florida Public Offering

Statements and relied upon the representations contained therein, received the advertising flyer (introduced into evidence as Plaintiffs' Exhibit #9) and relied upon the representations contained therein and were aware of the work done on the roads in 1977 which was paid for by the Defendants (TR. 191,196,197,200,202,204,277,370,381,390, 411,425,427,431,432). Both would not have bought had they known of the misrepresentations in the various documents (TR. 204,428). Both are owners of the property within the subdivision and, therefore, are common owners of the roads. The evidence established the adequacy of the representation because all of the class stands in the same situation (TR. 274,277,376,412). This is neither a situation where diverse business interests and inconveniences are present, Southern Bell Telephone & Telegraph vs. Wilson, 305 So.2d 302 (Fla. 3 DCA 1974), cert. disch. 327 So.2d 220 (Fla. 1976), where each member is suing on a separate account, Watnick vs. Florida Commercial Banks, Inc.,[12] nor were individual's rights in separate and distinct parcels of land involved, Osceola Groves, Inc., vs. Wiley, supra. Here, the class through its representatives is suing over property that the class itself owns. The necessary mutuality and cooperative enterprise are present in this cause. Therefore, no error was present in allowing this cause to go forward as a class action.

[12] Watnick vs. Florida Commercial Banks, Inc., 275 So.2d 278 (Fla. 3 DCA 1973).

V

CONCLUSION

Based upon the foregoing cases, statutes, arguments and other authorities, Respondents respectfully request that this Court affirm the Trial Court's ruling in all respects.

Respectfully submitted,

GEORGE M. NACHWALTER, ESQUIRE
Attorneys for Respondents
9445 Bird Road, 2nd Floor
Miami, Florida 33165
Tel. 223-2391

BY: _____
GEORGE M. NACHWALTER, ESQUIRE

HERSHOFF AND LEVY
Attorneys for Respondents
9445 Bird Road, 2nd Floor
Miami, Florida 33165
Tel. 226-1071

BY: _____
JAY M. LEVY, ESQUIRE

VI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondents was mailed this 26th day of August, 1983 to JEFFREY E. LEHRMAN, ESQUIRE, 2699 South Bayshore Drive, Suite 900F, Miami, Florida 33133, and to KARL BECKMEYER, ESQUIRE, Tittle, Tittle & Beckmeyer, P.A., P.O. Drawer 535, Tavernier, Florida 33070.

_____
JAY M. LEVY, ESQUIRE