IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 63,242

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

Appellants,

vs.

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

Plaintiff/Appellee.

_____/

On Appeal From the District Court
Of Florida, Third District

APPELLANT'S BRIEF ON JURISDICTION

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INTRODUCTION AND PRELIMINARY STATEMENT

Appellants, Joseph T. Lance and Cross Key Waterways, Inc. (hereinafter referred to as "Lance" and "Cross Key Waterways" or "Defendants"), were the Defendants in the Court below. Appellees, Charles H. Wade, Frank C. Herringer, and all others similarly situated, and the Homeowners Association of Cross Key Waterways, Inc. (hereinafter referred to as "Wade", "Herringer", "Homeowners Association" or "Plaintiffs"), were the Plaintiffs in the Court below.

The symbol "R" will signify reference to the record proper and "TR" to transcript of the testimony. Exhibits, if any, will be identified by the number or as otherwise indicated in the record. All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE

This action was begun on September 29, 1978, by the Plaintiffs' filing of their Complaint (R 1-11). Thereafter, Defendants filed a Motion to Strike (R 12-14), and Motion for Change of Venue (R 15-16).

An Order was entered on April 3, 1979 (R 30) and Defendants' filed their Answer and Affirmative Defenses to the original Complaint on April 23, 1979 (R 31-34).

Plaintiffs filed their First Amended Complaint on November 7, 1979 (R 47-55) and Defendants filed their Answer and Affirmative Defenses to Plaintiffs' First Amended Complaint on November 21, 1979 (R 56-60).

On April 18, 1980, the Court set this cause for jury trial which began on September 15, 1980. Trial resulted in a verdict in favor of Plaintiffs for both compensatory and punitive damages.

Defendants' timely Motion for Judgment in Accordance with Motions for Directed Verdict, Motion for Judgment Notwithstanding the Verdict, and/or Motion for New Trial (R 95-102) were denied (R 105), and timely Notice of Appeal was filed on January 6, 1981 (R 106). On January 4, 1983, the Third District Court of Appeal filed an Opinion affirming (with dissent by Baskin, J.), the judgment of the trial court. Timely Motion for Re-hearing was denied on January 24, 1983, and Notice to Invoke Discretionary Jurisdiction was filed on February 8, 1983. This Appeal seeks review of the Verdict and Final Judgment entered in this cause on October 3, 1980, and the Opinion of the Third District Court of Appeal dated January 4, 1983.

STATEMENT OF THE FACTS

This was an action for damages by the purchasers of mobile home lots in Key Largo against the Seller/Developer and its President for fraudently misrepresenting that the Developer would install in the trailer park roads which were paved to the specification of the Monroe County Engineer and subsequently not installing said roads. The Complaint was filed by two of the lot owners on their own behalf and "on behalf of all others similarly situated" and the Homeowners Association of Cross Key Waterways, Inc., a non-profit corporation formed by some of the lot owners.

The Complaint alleged that the Plaintiffs were real property owners of Cross Key Waterways Estates and that the Complaint was brought on behalf of themselves and all other persons who had purchased property in the subdivision from the Defendants or their agents. The Plaintiffs alleged that this was a matter of common or general interest to many persons constituting a class so numerous as to make it impractical to bring them all before the Court. Neither the size nor the identity of the alleged members of the class was otherwise alleged.

The Complaint further alleged that Cross Key Waterways filed a Public Offering Statement pursuant to Section 478.011, Florida Statutes, which contained the following alleged misstatments of material facts upon which the Plaintiffs materially relied to their detriment:

> "Improvements will include...construction of a graded, rolled, water bonded, oiled and sanded road".
>
> "...the balance of the lots shall have access by a paved road constructed to the specifications of the Monroe County engineer, which road shall be constructed down the middle of a fifty foot right-of-way fronting each of the lots".

Plaintiffs claim that on or about the calendar years 1970 to 1971 the various individual Plaintiffs purchased lands from Cross Key Waterways. Plaintiffs did not allege that the members of the class were engaged in a cooperative enterprise or had a joint pecuniary interest. Nor did the Complaint allege that the interest of the named Plaintiffs was coextensive with the interests of the others in the class, that the named Plaintiffs adequately represented the class, or show Plaintiffs' right to represent the class. Plaintiffs' class action allegations merely tracked the language of the Rule of Civil Procedure.

The Defendants filed an Answer (R 56-60) to the Amended Complaint admitting the filing of the Public Offering Statement, but denying the remaining allegations. In their Answer the Defendants raised the Affirmative Defenses of statute of limitations, laches, waiver and estoppel, lack of constitution of a valid class, failure to state a cause of action, lack of jurisdiction over the subject matter, and performance by the Defendants of the acts represented in the Offering Statement.

On February 26, 1980, Plaintiffs filed a Motion to specially set this cause for trial, even though Plaintiffs had taken no action to either certify this action as a class action or to notify the members of the alleged class. On April 18, 1980, the Court entered an Order (R 63) setting the action for trial by jury beginning on September 16, 1980.

The testimony at trial revealed that Cross Key Waterways had filed a Public Offering Statement as alleged and in 1970 entered into a contract with Zinke-Smith, Inc. to perform the construction of the road as specified in the Public Offering Statement. Testimony further proved that the work was done in the years 1970 and 1971 (T 155, 535). Mr. Jasper Dudley, a foreman of Zinke-Smith, testified that the roads were constructed as represented in the Public Offering Statement (T 526).

The evidence demonstrated that some (2), but not all, of the members of the class had seen the Offering Statement before entering into their separate contracts for the purchase of their lots. Reliance on the Public Offering Statement was not proven on behalf of all of the Plaintiffs.

Plaintiffs offered no testimony on damages except for Mr. Calvin Chalker, a paving contractor, who testified that the cost to pave the roads was $250,000.00.

At the close of Plaintiffs' case in chief and at the close of all of the evidence, Defendants moved for a directed verdict on the grounds of the insufficiency of the Pleadings and the evidence, but said Motions were denied.

At the close of the evidence a jury charge conference was held, at which time Defendants raised the question of the propriety of the Court's allowing the action to proceed as a class action in view of the general rule prohibiting class actions for fraud, the lack of certification of the class, the lack of proof of identity of the class, and the lack of notice to the members of it. This objection was overruled and the case was allowed to go to the jury as a class action.

At the charge conference, the Plaintiff Homeowners Association was dismissed as a Plaintiff since the Association never purchased any property from the Defendants and had not even been formed as a corporation until 1976, 5 years after the alleged misrepresentation.

At the jury charge conference the Defendants objected to the Court's instruction on damages (TR 566-569). The specifications of the Monroe County engineer were never introduced into evidence. After receiving the Court's charges, the jury returned with two questions. In the first one the jury requested the specifications of the Monroe County engineer. These were not in evidence.

After lengthy deliberations the jury returned a verdict against Cross Key Waterways for $200,00.00 compensatory damages and $300,000.00 punitive damages, and against Joe Lance for $50,000.00 compensatory damages and $60,000.00 punitive damages.

The Court entered judgment on the verdict. A timely Motion for New Trial, Motion for a Judgment in Accordance with Motions for Directed Verdict, and Motions for Judgment Notwithstanding the Verdict, were denied. On January 4, 1983, the Third District Court of Appeal filed an Opinion affirming (with dissent by Baskin, J.), the judgment of the trial court. Timely Motion for Re-hearing was denied on January 24, 1983, and Notice to Invoke Discretionary Jurisdiction was filed on February 8, 1983. This Appeal seeks review of the Verdict and Final Judgment entered in this cause on October 3, 1980, and the Opinion of the Third District Court of Appeal dated January 4, 1983.

ARGUMENT

This case involves a class action for fraud allegedly committed on 350 purchasers of parcels of land under separate contracts.

The Florida Supreme Court has ruled that such actions are not permissible as class actions. Osceola Groves v. Wiley, 78 So. 2d 700 (Fla. 1955), Avila South Condominium Association, Inc. v. Kappa Corporation, 347 So. 2d 599 (Fla. 1976), Cherin v. Southern Star Land and Cattle Company, Inc., 390 So. 2d 104 (Fla. 3dDCA 1980). This rule has been recognized and followed by the First District Court of Appeal in Costin v. Hargraves, 283 So. 2d 375 (Fla. 1stDCA, 1973), the Fourth District Court of Appeal in Hendler v. Rogers House Condominium, 234 So. 2d 128 (Fla. 4thDCA, 1970) and the Third District Court of Appeal in Equitable Life Assurance Society of the United States vs. Fuller, 275 So. 2d 568 (Fla. 3rdDCA, 1973) and Cherin, supra.

The majority of the Court below interpreted Frankel v. City of Miami Beach, 340 So. 2d 463 (Fla. 1976) as "limiting" fraud class actions to cases where three criteria are met, and then attempted to distort the facts of the present case to meet those criteria.

The Frankel case, however, was overruled by a subsequent ruling by the Florida Supreme Court in Avila South, supra, in which this Court stated:

> "Counts III and IV allege fraud and for that reason fall under the rule of Osceola Grove v. Wiley, 78 So. 2d 700 (Fla. 1955), that recovery

> for fraud on separate contracts can not be had in class action." Page 608
>
> "We therefore conclude that the Association lacks standing with respect to the fraud claims for much the same reasons that lead us to the conclusion that fraud claims on separate contracts can not be consolidated into a class action." Page 609

Justice England, in his dissent in Avila South, also recognized the no fraud class action rule, but questioned the benefit of continued adherence to it.

The reluctance of the Third District Court of Appeal to properly apply the fraud class action rule was exemplified by its decision in Cherin, supra, in which it stated:

> "The Supreme Court, in Frankel v. City of Miami Beach, supra, has expressed doubt as to the desirability of continued adherence to the fraud class action rule enunciated in Osceola Groves, supra, and we are not privileged to overrule a principle enunciated by the Supreme Court. We therefore certify this question to the Supreme Court as one which passes upon a question of great public importance, so as to afford it a vehicle for review as provided for in Article V, Section 3(b)(4) of the Florida Constitution."

The decision in this case clearly conflicts with Osceola Groves, Avila South, Cherin, Costin, and Hendler, supra.

The Supreme Court's hearing of this case would serve two purposes:

1. To correct erroneous decisions at the trial court and District Court of Appeal levels, and
2. To re-examine the fraud class action rule and to clarify and settle this area of law for the benefit of both the public and The Bar.

CONCLUSION

Appellant respectfully requests that this Court take jurisdiction of this cause and direct the parties to brief the issues raised in this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief on Jurisdiction was mailed to Silver, Levy & Hershoff, on this 14th day of February, 1983.

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