IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 81-1693

LEONARD GOLD and
AUGUSTA GOLD,

Appellants,

vs.

MAX WOLKOWITZ, et al.,

Appellees.

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ANSWER BRIEF OF WOLKOWITZ AND WARD

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STATEMENT OF THE CASE

The complaint asked for both compensatory and punitive damages. The allegations of the complaint (A 1-7) (R 1-19) were not supportive of a claim for punitive damages. In addition to Wolkowitz and Ward's motion to strike appellants' claim for punitive damages (R 25), they filed a motion for summary judgment (R 551) with a supporting memorandum of law (A 8-10) (R 564) and a memorandum of law re non-liability of attorney in representation of client (A 11) (R 583-584).

The amended final judgment for compensatory damages in the amount of $33,831.00 should have been $32,867.93 (see stipulation of counsel at R 1122).

STATEMENT OF THE FACTS

Page 3 of appellants' Statement of Facts incorrectly states that the certificate of title went to appellee Wolkowitz in February, 1975, wherein the correct year is 1979.

ARGUMENT

I.

Wolkowitz and Ward suggest to the Court that appellants' issue I as presented

> THE COURT ERRED IN VACATING THOSE PORTIONS OF THE JURY VERDICT AWARDING PUNITIVE DAMAGE AGAINST THE APPELLEES WOLKOWITZ AND WARD

should actually be restated as follows:

> ARE PUNITIVE DAMAGES RECOVERABLE WHERE THE PLEADINGS FAIL TO ALLEGE THAT THE COMPLAINED OF ACTIVITIES CONSTITUTE WILLFULNESS, MALICE OR WANTONNESS

Simply stated, the Plaintiffs' complaint alleged a breach of contract action.

In 17 Fla. Jur. 2d DAMAGES Section 117, the author states:

> "Since damages for breach of contract are generally limited to the pecuniary loss sustained, punitive or exemplary damages are not ordinarily recoverable in actions for breach of contract, even where the breach is willful and flagrant. This rule does not obtain, however, in those exceptional cases where the breach amounts to an independent, willful tort, in which event exemplary damages may be recovered under proper allegations of malice, wantonness, or oppression. In such a case, the recovery must be based upon an intentional wrong, insult, abuse or gross negligence, which amounts to an independent tort."
>
> (emphasis added)

In the complaint filed herein, there are no allegations of a willful, independent tort, separate and apart from the breach of contract.

In Griffith v. Shamrock Village, 94 So2nd 854 (Fla. 1957), the Court said at Page 858:

> "(6,7) The general rule is that punitive damages are not recoverable for breach of contract, irrespective of the motive of the defendant. But where the acts constituting a breach of contract also amount to a cause of action in tort there may be recovery of exemplary damages upon proper allegations and proof. In order to permit a recovery, however, the breach must be attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort. 25 C.J.S. Damages Sec. 120, pp. 716-717.
>
> "In the case of City of Sebring v. Avant, 1928, 95 Fla. 960, 117 So. 383, and other related cases this Court has defined gross negligence as the want of slight care.
>
> "(8) This Court has held that allowance of punitive damages is dependent on a showing of malice, moral turpitude, wantonness or outrageousness of tort. Dr. P. Phillips & Sons, Inc. v. Kilgore, 1943, 152 Fla. 578, 12 So. 2d 465, Ross v. Gore, Fla. 1950, 48 So. 2d 412.
>
> "Plaintiff did not allege nor prove that defendant acted or failed to act from malice or wilfully. He argues that malice is imputed to defendant because of the entire want of care or attention to the implied duty which defendant owed to plaintiff."

In MacDonald v. Penn Mutual Life Insurance Company, 276 So.2nd 232, (Fla. 2nd DCA 1973) the Court said at Page 233:

"(2,3) Generally, damages for breach of contract are limited to the pecuniary loss sustained, or those which are the natural and proximate result of the breach. An award of punitive damages for a breach of contract is generally not permitted in Florida unless the breach amounts to an independent tort; Griffith v. Shamrock Village, Fla. 1957, 94 So. 2d 854; Fontainbleau Hotel Corp. v. Kaplan, Fla. App. 1959, 108 So. 2d 503; Maco Supply Corp. v. Masciarelli, Fla. App. 1968, 213 So. 2d 265.

"(4) The allegations of appellant's Count 6 fail to show a case of sufficient severity to impose liability for an independent tort. There was only an alleged mishandling and refusal to pay claims or delay in paying claims due under the contract."

In Country Club of Miami Corporation v. McDaniel, 310 So. 2nd 436, (Fla. 3rd DCA 1975), the Court said at Page 437:

"(1,2) Count I of the plaintiff's complaint sets forth allegations for breach of contract. Count II, entitled 'Punitive Damages,' sets forth allegations as to defendant's willful disregard of its contractual obligations. There are no other counts or claims. Generally, punitive damages are not recoverable for breach of contract; but where the acts constituting a breach of contract also amounts to a cause of action in tort, there may be recovery of exemplary damages upon proper allegations and proof of intentional wrong, insult, abuse or gross negligence constituting an independent tort. Griffith v. Shamrock Village, Fla. 1957, 94 So. 2d 854,858. In Count II, the plaintiff fails to allege a willful, independent tort, separate and apart from the breach of contract upon which punitive damages might be claimed."

The Country Club of Miami case was cited with approval in B & J Holding Corp. v. Weiss, 353 So2d 141 (Fla. 3rd DCA 1978).

In Commodore Cruise Line, Ltd. v. Kormendi, 344 So. 2nd 898, (Fla. 3rd DCA 1977), the Court said at Page 897:

> "(3) Under Florida Law, punitive damages are not generally recoverable for breach of contract unless the acts constituting the breach also amount to an independent cause of action in tort, sustained by proper allegations and proof of an intentional wrong, insult, abuse or gross negligence. Country Club of Miami Corporation v. McDaniel, 310 So. 2d 436 (Fla. 3d DCA 1975)."

In Greer v. Williams, 375 So. 2nd 333 (Fla. 3rd DCA 1979), the Court said at Page 334:

> "(2,3) We are unable, however, to affirm the punitive damages award. As a general rule punitive damages are not recoverable for a breach of contract irrespective of the motive of the defendant. Only where the acts constituting a breach of contract also amount to a cause of action in tort, which must be separately pled and proved, can punitive damages be recovered and then only upon a proper showing of malice, moral turpitude, wantonness or outrageousness in the commission of the tort. Griffith v. Shamrock Village, Inc., 94 So. 2d 854 (Fla. 1957). Our review of the record reveals that the plaintiff neither pled nor proved an independent tort for fraud or deceit in this case, and, consequently, the punitive damages award of $10,000 must be reversed. American International Land Corp. v. Hanna, 323 So. 2d 567 (Fla. 1975)."

The testimony and evidence shows that appellants Gold and appellee Wolkowitz were each represented by attorneys. The Golds' attorney relied solely on the abstract of title to determine the status of title without checking out the foreclosure court file in

which Wolkowitz obtained title. There was no contrary evidence adduced but that a purchaser's attorney should check out the court file if title deraigns from a mortgage foreclosure. This was not done.

Appellants complain that they were defrauded and deceived in not being informed by the seller or his attorney of the pendency of the appeal. A review of the Florida law clearly reflects that the appeal was not a flaw in seller's title where supersedeas is not posted by the foreclosed party.

Sundie v. Haren, 253 So2d 857 (Fla. 1971) held that a reversal of a decree on appeal does not affect the rights under that decree as to persons who were not parties to the appeal. In the instant appeal, it is important to remember that the Golds were not parties to the Wolkowitz foreclosure. In Sundie, the foreclosed party appealed without supersedeas. The Florida Supreme Court said at page 858:

> "(1,2) However, despite the misplaced reliance of the District Court on the Housing Authority case, supra, the correct result, requiring a new sale, was reached in the instant case. Further, no conflict is created with the statements of law appearing in the Horn and Wells cases, supra. A supersedeas bond in the instant case would have prevented sale of the property pending appeal, but even in the absence of a supersedeas bond, reversal of the summary final decree required, as between the parties to the suit, restoration of the original status. A party against whom an erroneous judgment has been made is entitled upon reversal to have his property restored to him by his adversary.

"These principles were weighed by this Court in Maxwell v. Jacksonville Loan & Improvement Co. In that case, a mortgagor appealed without posting supersedeas; the plaintiff in foreclosure bought the property at foreclosure sale and went into possession. Upon reversal of the foreclosure decree, the mortgagor was held entitled to restoration of the property and an accounting.

"(3,4) It must be noted that the result in this case is limited to those situations in which the person required to make restitution was connected with the litigation. It is settled law that reversal of a decree on appeal does not affect the right under that decree as to persons who were not parties to the appeal. As to non-party persons, a purchase at an execution sale pursuant to a judgment afterwards reversed is final.

"(5) The rights of third parties or bona fide purchasers were weighed in Simms v. City of Tampa. In that case, one Wright acquired property which had been purchased at a judicial sale to enforce municipal tax liens. This Court held that no restitution was required, stating:

> 'It is well settled that restitution, on reversal of a judgment can be compelled only from parties to the record, or from their beneficial assignees, or, in case of the death of the execution plaintiff, from his executor or administrator. Restitution cannot be compelled from third persons, strangers to the record, who were bona fide purchasers at a sale under process dependent upon a judgment subsequently reversed, or who acquired bona fide collateral rights thereunder, and their rights are in no way affected by the subsequent reversal of the judgment.'

"Also see Restatement of the Law, Restitution, § 74; 'Restitution of Judgments Subsequently Reversed'; and Glenn on Mortgages, § 378, concerning the doctrine of innocent purchaser for value as applied to mortgage sales. We note that there is inherent in the settled law an assumption that notice of

> a pending appeal does not prevent a person otherwise a stranger from being a bona fide purchaser at a mortgage sale. We do not here examine the circumstances in which a judgment debtor may be held estopped or be deemed to have waived his right to restitution."
>
> (all emphasis are added)

The following cases all stand for the foregoing principles of law:

> Garvin v. Watkins 10 So818 (1892) holding that the title of a purchaser at execution sale, under process issued from a court of general jurisdiction is not affected by a subsequent reversal of the judgment from which the execution emanated. (The Court approved Ponder v. Moseley 2 Fla. 207). The court also approved Jessup v. Bank 15 Wis. 604, which held that where a sale was allowed to take place upon a decree, without any steps taken to stay proceedings, the title of a stranger who purchases and advances his money will not be divested by a subsequent reversal of the decree.
>
> Walker v. Sarven 25 So. 855 (1899) if purchaser's title acquired at such sale is such that a reversal of the decree will not affect it under previous decisions (Garvin case) then appellant will be left to his remedies for restitution.

Appellants complain that appellee Ward was deceitful in saying that the Wolkowitz vs. Cooper foreclosure was over and done with and was res judicata. In 19 Fla Jur, JUDGMENTS AND DECREES, Section 152, page 197 appears:

> "However, the pendency of an appeal from an adjudication does not affect its operation as res judicata where the proceeding on appeal is limited to the record made in the court below. But, if the appellate proceeding is taken to a court which tries the cause de novo, and enters its own judgment on that trial and enforces the judgment by its own process, it

> will, while pending, prevent the adjudication of the lower tribunal from being used as an estoppel.
>
> "Where an appeal is dismissed, that dismissal leaves the trial court's judgment in the same status as if no appellate proceedings had ever been taken, and its effectiveness as an estoppel remains unimpaired.
>
> "In stating the doctrine of res judicata, reference is sometimes made to an 'existing' judgment. For the doctrine of res judicata prevails as long as the judgment used as a basis thereof remains in full and operative effect."
>
> (emphasis added)

If the appellants under the facts of the instant case are entitled to recover punitive damages, then an attorney representing a seller has a duty of advice to the buyer's attorney beyond his duty of representing his client even though the status of title is readily discoverable by the buyer's attorney. If that duty is extended, then where does the seller's attorney draw the line and of what purpose or function is an abstract of title? The trial judge properly summarized the evidence and testimony when the court said at R 1117:

> "THE COURT: Of course, as Mr. Klingensmith points out, they do adopt the principle of law as expressed in the restatement, but these principles have to be taken in the context of the factual situation.
>
> "Here you've got two lawyers, you know, and one attorney was specifically retained to represent a buyer, and a lawyer representing a buyer has certain obligations and duties.
>
> "MR. ZEMEL: But that--

> "THE COURT: The lawyer who represents the seller--
>
> "MR. ZEMEL: But I don't believe that gives the right of one lawyer to stand back and lie and do things that are fraudulent. Because he feels he can get away with it, the other attorney's not going to pick it up, and then they take advantage of it.
>
> "THE COURT: See, the facts of this case and the testimony, there was really no testimony adduced that Mr. Ward knew that the appeal was not entered in the abstract or that Elliot did not or was not going to make an independent investigation of the court file."

Appellants have cited no authority to this Court supporting the recovery of punitive damages where the complaint totally fails to allege malice, moral turpitude, wantonness or outrageousness. Appellants cite Besett v. Basnett, 389 So2d 995 (Fla. 1980) as authority for their entitlement to punitive damages. Besett is not on point since that case dealt (with sufficient allegations) with fraudulent misrepresentations.

Appellants argue that Vance v. Indian Hammock Hunt & Riding Club, 403 So2d 1367 (Fla. 4DCA 1981) is authority for their entitlement to punitive damages. Vance dealt with the applicability of punitive damages for a violation of Section 817.41, Florida Statutes (a crime for misleading advertising under the fraudulent practices statute). In Vance the appellate court referred to Ashland Oil, Inc. v. Pickard, 269 So2d 714 (Fla. 3DCA 1972). Ashland Oil held that where the Plaintiff alleged that Defendants formulated a scheme to lead Plaintiff to rely on oral and written representations that the Plaintiff would

have the first right to outfit and sell large fiberglass hulls manufactured by one defendant so that the defendants could utilize plaintiff's expertise in outfitting the hulls, while at the same time, defendants secretly prepared to outfit the vessel themselves, made out elements of tort of intentional misrepresentation. Neither Vance nor Ashland Oil are even remotely similar to the instant case. A cusory inspection of appellants' complaint simply does not meet the pleadings test. The appellants' oral motion to amend the pleadings to conform to the evidence was denied by the trial judge (Trial Transcript 961) presumptively on the theory that none of the evidence tended to show actionable fraud. The trial judge also had serious reservations on the applicability of punitive damages where he observed at page 965 of the trial transcript:

> "THE COURT: I'm going to let it go to the jury on this issue of punitive damages, but I would give any award of punitive damages some serious consideration on post-trial motions. I do have some reservations about that aspect of this case, but I am going to let the jury determine that issue and we'll take it up again on post-trial motions."

The above comments by the trial judge follow the holding in Ashland Oil, where the Court said at page 721:

> "(3,4) We express the view that an action setting forth the elements of common law deceit, such as for fraud in the inducement, may be based on oral and written representations and these representations may be in the form of contractual promises or statements of present intention. See: cases cited Note 4, supra; General Corporation v. General Motors Corporation, 184 F.Supp. 231, 234 (U.S.D.C. Minn., 1960)

and 'Anno., Promises and statements as to future events as fraud,' 51 A.L.R. 46 (1927). Therefore, the elements of the tort of intentional misrepresentation were made out by the allegations and proof in the instant case."

(emphasis added)

II.

WAS THE JURY'S VERDICT IN FAVOR OF APPELLEE AMERICAN TITLE AGAINST THE MANIFEST WEIGHT AND PROBATIVE EFFECT OF THE EVIDENCE. (IF THE COURT REVERSES ON THIS ISSUE THEN THE COST JUDGMENT IN FAVOR OF AMERICAN TITLE INSURANCE COMPANY SHOULD BE REVERSED.)

Appellees Wolkowitz and Ward both agree that the jury's verdict absolving American Title was against the evidence. Had the trial attorney for appellants moved for a directed verdict against American Title, the trial judge would have been compelled to grant it. There was absolutely no evidence absolving or tending to absolve American Title. All of the expert witnesses testified unanimously that American Title should have included the Notice of Appeal in the abstract so that appellants' attorney could make an informed judgment. Although the appeal without supersedeas was not a flaw in the title of Wolkowitz, American Title is not allowed or privileged in making legal decisions or rendering legal advice; it had an affirmative duty to include in the abstract any recorded instrument affecting title. In this context, as stated in appellants' brief at page 21, appellant Mrs. Gold, indicated that the house would be sold as soon as possible

and that she would not get title insurance, but would rely on appellee Elliott's opinion. Elliott could only give a legal opinion based on a complete abstract and an examination of the court file re the Wolkowitz v. Cooper foreclosure.

In Kovaleski v. Tallahassee Title Co., 363 So2d 1156 (Fla. 1DCA 1978); 391 So2d 315 (Fla. 1DCA 1980), the party ordering the abstract of title was absolved from liability for the abstracter's negligence. In Kovaleski the action was against the tax collector and the title company that negligently prepared the abstract. The Florida Supreme Court held that the abstracter was solely liable since the injury could not have occurred but for the negligently prepared abstract.

III.

THE JURY'S VERDICT IN FAVOR OF THE APPELLEE ELLIOTT WAS AGAINST THE MANIFEST WEIGHT AND PROBATIVE EFFECT OF THE EVIDENCE. (IF THE COURT REVERSES THE JUDGMENT IN FAVOR OF ELLIOTT THEN THE COST JUDGMENT RENDERED IN HIS FAVOR SHOULD LIKEWISE BE REVERSED.)

Appellees Wolkowitz and Ward also agree that the jury verdict in favor of appellee Elliott was contrary to the law and the evidence. All of the experts agreed that Elliott had a duty to examine the Court file. He failed to do so. Having breached his duty to his clients, the appellants herein, Elliott was liable for compensatory damages to appellants.

CONCLUSION

Appellants have failed to demonstrate error in the amended judgment as against Wolkowitz and Ward and therefore the appeal should be dismissed. That portion of the amended judgment in favor of Elliott and American Title should be reversed.

Respectfully submitted,

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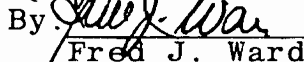
By 
Fred J. Ward

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: MALLORY H. HORTON of Horton, Perse & Ginsberg, Attorneys for GOLD, 410 Concord Building, 66 W. Flagler Street, Miami, Florida 33130; H. JACK KLINGENSMITH, of Broad & Cassel, 1108 Kane Concourse, Bay Harbor Islands, Florida 33154; and ALLEN P. REED, ESQ., 3501 Biscayne Boulevard, Miami, Florida 33137, this 4th day of January, 1982.

Fred J. Ward