O|A 1-11-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,330

CLARENCE H. JOHNSON and
DANA JOHNSON, his wife,

Petitioners,

vs.

MORTON DAVIS and
ESTHER DAVIS, his wife,

Respondents.

ANSWER BRIEF OF RESPONDENTS

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INTRODUCTION

For the purposes of this proceeding, Petitioners, Clarence Johnson and Dana Johnson, who were the defendants in the Trial Court and the Appellants in the Third District Court of Appeals, will be referred to as the "Johnsons" or "Appellants" as may be appropriate. Respondents, Morton Davis and Esther Davis, who were the plaintiffs in the Trial Court and the Appellees in the Third District Court of Appeals, will be referred to as the "Davises" or "Appellees" as may be appropriate. The symbol "R" will be used to designate the record on appeal. The symbol "TR" will be used to designate the transcript of the trial held on April 5 and 6, 1983, before the Honorable Robert H. Newman. The symbol "Exh." will be used to designate the exhibits introduced into evidence during the trial.

STATEMENT OF THE CASE AND FACTS

On August 20, 1982, Mr. and Mrs. Davis filed a three-count Amended Complaint seeking damages and rescission of a contract for purchase of a family residence owned by Clarence and Dana Johnson. Count I sought damages for breach of contract, Count II for fraud and misrepresentation, and Count III sought rescission of the contract and return of their deposit. (R. 15-26)

On October 15, 1982, the Johnsons answered and denied the allegations in the Complaint setting forth four affirmative defenses and counterclaiming for breach of contract alleging damages in excess of $31,000.00. (R. 11-12)

A trial was held on April 5 and 6, 1983, before the Honorable Robert N. Newman, Circuit Court Judge, and Judgment was entered on May 27, 1983. (R. 153-154) The Trial Court did not issue any findings of fact and

awarded the Davises $26,000.00 of the total $31,000.00 deposit money plus interest and awarded the Johnsons $5,000.00 of the deposit money plus interest. The Court found that each party was responsible for their own attorney fees and costs despite a provision in the Purchase and Sales Contract providing for the payment of such fees and costs to the prevailing party in any litigation arising out of the contract. (Exh. 3) On June 10, 1983, Judge Newman denied all motions for a rehearing. (R. 156)

The Johnsons appealed and the Davises cross-appealed from the final judgment. The Third District Court of Appeals found for the Davises affirming the Trial Court's return of the majority of the deposit to the Davises ($26,000.00), and reversing the award of the $5,000.00 to the Johnsons as well as the Court's failure to award the Davises costs and fees. Accordingly, the Court remanded with directions to return to the Davises the balance of their deposit and to award them costs and fees. The Johnsons requested and this Court granted review based on conflict jurisdiction.

The following recitation of the facts is necessarily lengthy given the issues that are involved and

to ensure an accurate representation of the testimony at trial.[1]

On May 11, 1982 Esther Davis first saw the Johnson residence and returned later in the day with her husband, Morton Davis, to show him the house. On this date neither Mr. Davis nor Mrs. Davis examined the ceilings, as she so testified. (T.R. 323-326)[2]

On May 13, 1982, a final contract for the purchase of the home was prepared (Exh. 3) The contract used was a form provided by Jeanne Baker, Inc., who acted as real estate agent for the Johnsons during this transaction. (T.R. 327, 557) Appellees gave a partial deposit of $5,000.00 at this time to be followed with a subsequent $26,000.00 deposit payment. Under the contract the purchase price was $310,000.00, and the Davises were to pay $80,000.00 in cash at the time of closing.

[1]The appellees contend and will so demonstrate that the appellants have misrepresented the transcript record with misleading if not patently erroneous statements and characterizations of the testimony. Accordingly, appellees present a substantial account of the testimony by the roofers since their testimony is crucial to the issues in this case.

[2]Contrary to appellants' statements in their Brief on pages 3, 25, and 27, the record does not reflect testimony by Mrs. Davis that on this day "she saw stains in the ceiling. . ." or that "at the first visit to the house she noted water stains." She saw these stains following payment of the initial $5,000.00. (T.R. 340 - 341) Thus, a subsequent argument of appellants based on this misstatement is negated. (See infra p. 23-24)

The crucial provision of the contract, for the purposes of the case at bar, is Paragraph F which required that the roof of the home be in "watertight" condition:

> F. Roof Inspection: Prior to closing at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damage to facia or sofit, seller shall pay for said repairs which shall be performed by a licensed roofing contractor. (R. 20) (Emphasis added).

On May 16, 1982, Esther Davis returned to the house. She noticed some buckling of plaster and peeling around the corner of the window frame in the family room, stains on the ceiling of the family room, and stains on the ceiling in the kitchen. (T.R. 338-339) Mrs. Davis was concerned about the condition of the roof and asked Mr. Johnson if the roof ever had any problems. (T.R. 399-400)

Mrs. Davis testified that Mr. Johnson told her the window had had a minor problem that had been repaired long ago, that the stains on the family room ceiling had been caused by the beams being moved, and that the stains on the kitchen ceiling had been caused by glue from the wallpaper and that there had never been any problems with the roof or the ceilings. Mrs. Davis stated that Mr. Johnson was "very reassuring" and that she believed him and relied on his statements when the

Davises paid the remainder of the deposit, $26,000.00, on May 18, 1982. (T.R. 338-340; 344-345; 400). Mr. Johnson testified that Mrs. Davis was "lying", claiming that he never told her that the roof was problem-free and claimed that he told her about a leak over the kitchen which existed in December, 1979, which occurred ten months after they purchased the home, less than a year after it was built. (T.R. 500-505)

Significantly, at the time of the disputed conversation between Mrs. Davis and Mr. Johnson, Mr. Johnson had already purchased a new home in Illinois (where he had been transferred) and was now paying mortgages and upkeep on two homes. (T.R. 495-496) The Illinois home had been purchased in April, 1982. (T.R. 500) Mr. Johnson had made a commitment to his employer to be relocated in Illinois no later than May or June. (T.R. 497)

On May 20, 1982, T. J. Bushloper of Andrews Roofing Company, on the request of Jeanne Baker, the Johnsons' agent, inspected the roof. Mr. Bushloper was <u>not</u> a licensed roofer as required by Paragraph F of the contract. (T. R. 218-219; Exh. 3) (He also inspected the house on May 28 and June 4, 1982.)

Bushloper testified that

on these inspections he saw "minor" leaks,

leaks in the sliding glass door, over the hood in the kitchen, in the bay windows, in the family room window,

and the fireplace, (T.R. 225, 252) but that he did not consider these to be a roofing problem. (T.R. 252) While Mr. Bushloper opined that he did not feel a new roof was necessary (T.R. 233) and that the roof would be watertight after repairs were made, (T.R. 235) he claimed not to have seen any slippage. (T.R. 233) He did testify that if there were slippage it could cause leaks and he probably would not call the roof watertight if it had slipped. (T.R. 241-242) On May 20, 1982, he found the roof was in "satisfactory" condition and needed only $432.00 in repairs. (T.R. 222; Exh. 7)

On May 26, 1982 following a period of heavy but not wholly unusual rain (T.R. 217), Esther Davis and her mother, Anne Abromovitz, returned to the home. They discovered water gushing in from and around the window, the ceiling in the family room, from the lights in the kitchen ceiling, near the back of the kitchen, by the glass doors, and above the kitchen stove. Two maids employed by Jeanne Baker were working in the house and were quite busy trying to contain the water with the use of rags and buckets, but the carpeting was already soaked. In addition, Mrs. Davis and Mrs. Abromovitz also discovered water stains on the ceiling in the kitchen, in the area where Mrs. Davis had previous-

ly found the stains that Mr. Johnson had claimed were caused by glue. (T.R. 305-308; 316-318; 345-348)[3]

Mrs. Davis called Jeanne Baker to demand that Mr. Bushloper get back out there. (T.R. 348) Mr. Bushloper performed his second inspection on May 28, 1982. Though Mr. Bushloper felt if repairs were made the home would be "watertight" (meaning by his definition - "no leaks") (T.R. 222-226), he did not communicate this at the time to the Davises. (T.R. 351-352; 363-364) Indeed, the Davises never saw his report stating that in his opinion repair of the existing leaks would render the roof "watertight." (T.R. 353-354)

On June 3, 1982, Charles Almyda, the Vice President of Tomco Roofing, a licensed roofer of twenty-one years experience, inspected the house as requested by Mrs. Davis. (T.R. 14-19) Mr. Almyda testified that he found several leaks in the kitchen, patio, and external walls. (T.R. 17, 36-37) He found that there was sliding because the roof had not been "backnailed" due to "poor" construction. (T.R. 19-20) Mr. Almyda testified that, in his opinion, the sliding was causing the leaks and that repairing the present leaks would not make the roof watertight because the roof would just keep on sliding. (T.R. 36; 39-40) He contended that

[3]Clearly, the record reveals much more evidence of damage than appellants' cursory summary of this testimony would indicate. (See, appellants' Brief pg. 5 last paragraph.)

the roof could not be made watertight unless it was replaced and so informed the appellees (T.R. 30; 23-42)[4] Mr. Almyda told Mrs. Davis that he did not prepare written reports. (T.R. 35)

Paul T. Hayes, a licensed roofer, T.R. 56) inspected the house on June 12, 1982. Mr. Hayes found evidence of leaks (stains) in the kitchen, fireplace and dining room (T.R. 57, 70) lots of loose tile (T.R. 59) and cracks where the roof met the wall. (T.R. 61) Mr. Hayes testified that the roof had "poor mechanics" (T.R. 59) and was constructed with "poor workmanship." (T.R. 61) He found the roof to be sliding, (T.R. 63) and that it would continue to slide (T.R. 64). Mr. Hayes would not guarantee the watertight integrity of the roof. (T.R. 66)

While Mr. Hayes testified he did not believe the existing leaks were caused by the sliding (T.R. 68), he did testify that if one were to repair the existing leaks there would still be problems due to the slippage (T.R. 65-66) which would cause leaks in the future

[4]Thus, appellants' presentation of Mr. Almyda's testimony on page 7 of their Brief is extremely misleading. For example, he did not testify that he didn't know whether slippage was causing the leaks, but that it was his opinion that slippage was causing the leaks. (T.R. 35 - 36) The sum and substance of Mr. Almyda's testimony is as stated above. Indeed, the Appellate Court in summarizing the testimony of the three licensed roofers so agreed. (See, Judgment, Appellants' Appendix, Exh. 1, pg. 3.)

(T.R. 67068), and which could cause problems "now." (T.R. 74, 76)

Morton Davis testified that Mr. Hayes informed him it would cost $25,000.00 to replace the roof and fix the walls. (T.R. 371) After this second negative report the Davises on June 14th through their attorney Mr. Newmark, cancelled the closing on the house (T.R. 429-435) realizing that for all intents and purposes a watertight roof would require a new roof.

On June 16, 1982, Charles Walton, of Bob Hilson and Co. and a licensed roofer with great experience, inspected the house. He had been contacted by Mrs. Davis to perform a roof inspection on June 9, 1982, but was unable to do so until June 16, 1982. (T.R. 87-88, 91-92) Mr. Walton found evidence of leakage on the kitchen ceiling, in the window adjacent to the bathroom, and in the bathroom downspouts. (T.R. 93-94) He also found cracks in the frame stucco and parapet walls (T.R. 96) and found that the plywood siding was pulling apart. (T.R. 96) Mr. Walton also found that the roof was sliding, (T.R. 97-98) which could cause more leaks. (T.R. 102)

Mr. Walton defined "watertight" "as a roof that will stop water from penetrating the membranes of the system. . .[with] no possibility" of such penetration. He stated that watertight was different from leak free. (T.R. 104-111) He said it would cost $1,000.00 to re-

pair the leaks but recommended the roof be replaced at a cost of $14,650.00. (T.R. 103-105) Mrs. Davis testified that Mr. Walton informed her he would not "touch" the house and that it needed a new roof to be watertight. (T.R. 442-443)[5]

On June 16, 1982, Don Greenleaf, of Pierce Roofing at the time an unlicensed roofer, inspected the house. In his testimony he stated he found evidence of leakage in the kitchen (T.R. 272, 288). While Mr. Greenleaf testified that the leaks could be repaired so that the roof would be watertight and that replacement was unnecessary, he also claimed not to have seen any evidence of slipage (T.R. 274-275) except for one area over the living room. (T.R. 291) Mr. Greenleaf testified that sliding could cause leaks and that to repair sliding you would have to remove the roof. (T.R. 298) Mr. Greenleaf repaired the leaks on July 19, 1982, one month after the scheduled closing date. After receiving no complaints of leaks, he inspected the house on October 12, 1982, and found it "watertight." (T.R. 278, 296) However, during this period the house was

[5]While Walton did not recommend replacement of the roof in his report, he did recommend replacement as an alternative in his estimate report and orally to the Davises. (T.R. 122 - 123) Accordingly, appellants' reference to T. R. 105 on page 7 of their Brief for support of their assertion that Walton did not recommend replacement of the roof is erroneous. On page 105 Walton testifies that he included replacement as an alternative on his estimate report and states only that he did not recommend replacement in his report.

empty so he could not receive complaints of leakage. (T.R. 313; 609)[6]

It is thus established by the record that all three licensed roofers involved in this case (Almyda, Hayes and Walton) would not guarantee the watertight integrity of the roof; that the two unlicensed roofers (Bushloper and Greenleaf) who testified it was watertight claimed not to have seen the sliding which was detailed to exist by all three licensed roofers. [7]

On June 18, 1982, Stanley Newmark, attorney for the Davises, informed the Johnsons that because the roof could not be placed in watertight condition the contract was cancelled and the appellants should return the Davises' deposit to them. (Exh. 6) On June 21, 1982, the Johnsons demanded the closing take place and informed Mr. Newmark they would repair the leaks or give the Davises a credit for the repairs. The Johnsons did not offer to replace the roof. (Exh. E) On June 25, 1982 the attorney of the Johnsons was advised that since the roof was not "in a watertight condition and can not be placed in a watertight condition unless the entire roof is replaced and damage to the wall is

[6]This is the "guaranty period" referred to by appellants in their Brief on pg. 11 wherein they state "no complaints were made during this period."

[7]It should be apparent based on the statement of facts set forth above, that appellants' summary of the roofer reports on page 6 of their Brief is woefully incomplete and therefore misleading.

corrected, your clients are not in a position to finalize this transaction." (Exh. F) (Therefore, the house was only off the market for approximately one month.)

ARGUMENT

I. APPELLANTS BREACHED THE PURCHASE AND SALES CONTRACT BECAUSE PRIOR TO CLOSING THE APPELLEES WERE UNABLE TO OBTAIN A WRITTEN REPORT FROM A LICENSED ROOFER STATING THAT THE ROOF WAS IN A WATERTIGHT CONDITION.

The specific provision of the contract breached by the appellants reads as follows:

> F. Roof Inspection: Prior to closing at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damage to facia or sofit, seller shall pay for said repairs which shall pay for said repairs which shall be performed by a licensed roofing contractor. (R. 20) (Emphasis added.)

Apellants refer to the written roofing reports of Andrews Roofing (Mr. Bushloper) and Paul T. Hayes as the only reports in existence at the time the Davises, through their attorney, cancelled the closing on June 14, 1982. (Appellants' Brief pg. 12)

As previously noted Mr. Bushloper is unlicensed, and the contract calls for reports by licensed roofers. Therefore, his report is immaterial to this issue. Moreover, and as previously noted herein, the Davises

never saw his report stating that in his opinion repair of the existing leaks would render the roof "watertight." (T.R. 352-354)

The appellants are further misleading in referring to Mr. Hayes' report. It does not indicate the roof could be or was watertight. Mr. Hayes testified that he could not guarantee the roof to be watertight because he had no idea of the "mechanics behind the workmanship." (T.R. 61-63; Exhibit 1)[8]

Mr. Hayes informed the Davises that even if they performed the repairs they would still have problems due to the slippage, "because when the paper is separated and asphalt heats and cools it will crack and then all you have is bay sheet and that is not watertight paper." (T.R. 64-65) Thus, Mr. Hayes had a very unfavorable opinion about the roof and certainly was not about to provide a report that it was watertight.

In view of the substantial testimony of the licensed roofers, appelless find it difficult to understand how temporary repairs to specific leaks would render such a roof watertight. Surely, "watertight" means something more than merely free of leaks at the moment, as Mr. Walton so testified. (See facts in-

[8]Q. In your report, indicated June 17, would you please read the note?

A. "The above guarantee is for leak repairs made by us only. We do not guarantee complete roofing to be in watertight condition being we have no idea of mechanics behind workmanship." (T.R. 61.62)

fra)[9] Accordingly, it is respectfully submitted that "watertight" means free of leaks and any present condition likely to cause leaks. Such a definition would require only that a licensed roofer attest that the roof prior to closing does not contain leaks or a present condition likely to cause leaks. It would not create a warranty requiring the seller to guarantee the future condiion of the roof as appellants imply throughout their Brief. The provision, as contained in the Purchase and Sales Contract would not be in force against the seller after the closing.[10]

The contract for purchase and sale requires that the roof be watertight - - a requirement obviously material to the contract. As the roof had "sliding" which would result in new leaks, the mere repair of the existing leaks would not be sufficient to place it in a watertight condition as required by the contract. The

[9]It is significant that when appellants, again using Jeanne Baker as their agent, later sold the house to the Blanks the contract provision regarding roof inspections had been changed. The term "watertight" had been replaced by "free of leaks." (T.R. 554-555), (Exh. 4)

[10]Thus for example: Seller contracts with Buyer in the Purchase and Sale Agreement that Buyer can obtain a written report from a licensed roofer that the roof is watertight prior to closing. Roofer reports the roof is watertight when, in fact, there is sliding, and after the closing leaks caused by the sliding appear. Buyer's recourse would be against Roofer, not Seller as all Seller contracted was that Buyer could get a written report saying the roof was watertight, and Buyer had done so.

contract did not stipulate that in order to effectuate this material requirement that the roof be replaced.

Two of the licensed roofers (Almyda and Walton) recommended replacing the roof. One of the unlicensed roofers (Greenleaf) testified that to repair any sliding that existed you would have to remove the entire roof, i.e., replace the roof. (T.R. 298) The contract language spoke only of repairs, not a complete replacement of the roof. Appellees respectfully submit that since the contract contemplated only minor repairs, it is irrelevant to state as appellants do that Davis did not demand replacement of the roof pursuant to Paragraph F of the contract. (Appellants' Brief, p. 12) The contract calls for no such demand.

To the extent the contract can be deemed ambiguous, the law in Florida is quite clear that any ambiguity of language within a contract will be strictly construed against the party who chose the language and drafted the contract. See, e.g. Tannen v. Equitable Life Ins. Co. v. Washington, D.C., 303 So. 2d 354 (Fla. 2d D.C.A. 1974); Sol Walker and Co. v. Seaboard Coast Line R. Co., 362 So. 2d 45 (Fla. 2d D.C.A. 1978). The evidence establishes that in this case the form contract which included provision F, was provided by Jeanne Baker, Inc. (T.R. 327, 528) Baker at all times during this transaction was acting as an agent and on behalf of the Johnsons. This was the substance of

Baker's testimony and there is no evidence to contradict it. ("I represent the seller." T.R. 557). Accordingly, it is respectfully submitted that any ambiguity regarding the term "watertight" and/or the meaning of "repairs to correct leaks" must be construed against the appellants.

Unlike the situation in Twenty-Four Collection, Inc. v. N. Weinbaum Construction, Inc., 427 So. 2d 110 (Fla. 3d D.C.A. 1983) cited in Appellants' Brief at page 15, the Davises were not demanding performance of a condition not required by the contract. As indicated in Paragraph F, it was their right to obtain a report from a licensed roofer by the time of closing indicating the roof to be in a watertight condition. Clearly, this could not be done. Simply put, neither the appellants nor the appellees were able to obtain a written report from a licensed roofer stating the roof to be in a watertight condition, and thus the appellants breached the contract. As such, appellees' remedy under the circumstances was rescission and a return of their total deposit. See, e.g., Sun City Holding Co. v. Schoenfeld, 97 Fla. 777, 122 So. 252 (1929); Santa Barbara Estates v. Couch, 98 Fla. 515, 123 So. 857 (1929); John Ringling Estates v. White, 105 Fla. 581, 141 So. 884 (1932); Norris v. Eichenberry, 131 Fla. 104, 113 So. 128 (1931).

II. JOHNSON'S STATEMENTS TO MRS. DAVIS REGARDING THE CONDITION OF THE ROOF CONSTITUTED A FRAUDULENT MISREPRESENTATION ENTITLING THE APPELLEES TO RESCISSION.

An action for fraud arises when there is (a) a misrepresentation of a material fact; (b) knowledge of the representor of the misrepresentation; (c) an intention that the representation induce another to act on it; and (d) resulting injury to the party acting in justifiable reliance upon the representation. Kutner v. Kalish, 173 So. 2d 763 (Fla. 3d D.C.A. 1965)

Mrs. Davis testified that upon discovering stains on the kitchen and family room ceilings and puckering in the family room window on May 16, 1982, she asked Mr. Johnson about the condition of the roof, and he said there had never been problems with it. (T.R. 338-340; 400) Mrs. Davis testified that she relied on this assurance when the Davises paid the remainder of the deposit. (T.R. 345) Mr. Johnson's statements were clearly fraudulent, as he knew there had been leakage in December, 1979. (T.R. 500-505) Mr. Johnson made the remark with the intention that the Davises rely on it so that any problems with the roof would not delay the closing.

The evidence indicated that it was important for the Johnsons to close quckly because the Johnsons were required to move to Illinois by May or June, 1982, due to a career change and his commitment to his em-

ployer to be in Illinois by May or June. (T.R. 497) The house in question had been on the market since January and remained unsold as of mid-May, 1982, when the Davises first saw it. Further, the Johnsons had purchased a new home in April, 1982 in Illinois. (T.R. 500) With this as a factual background Mr. Johnson denied ever telling Mrs. Davis there were no problems with the roof.

It should be apparent given the concerns Mrs. Davis had already voiced concerning the stains, that if Mrs. Davis had known of the past leakage problems she would have had an experienced licensed roofer examine the roof before the Davises paid a $26,000.00 deposit, which the Davises paid just two days after the conversation between Mr. Johnson and Mrs. Davis. (T.R. 2.43) It is thus respectfully submitted that the most reasonable inference to be drawn from the evidence is that Mr. Johnson did, in fact, tell Mrs. Davis there were never any problems with the roof when he either knew or should have known such a statement to be false.

Under Florida case law those in the position of the Davises may rely on the truth of a representation even though its falsity could have been ascertained had they made an investigation, unless they know the representaiton to be false or its falsity is obvious to them Bessett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980; Upledger v. Vilanor, Inc., 369 So. 2d 427 (Fla. 2d

D.C.A. 1979). Where a fraudulent misrepresentation is made by a seller of real property to induce the other party to enter the contract, the buyer may rescind the contract and recover the deposit. Hauser v. Van Zile, 269 So. 2d 396 (Fla. 4th D.C.A. 1972).

Appellants at page 16 of their Brief argue that there can be no purported fraudulent inducement to perform that which one was contractually bound to perform, i.e., paying the remaining $26,000.00 deposit money. Appellants' argument has some surface appeal, but in this case is without merit.

The parties entered into the contract on May 13, 1982, at which time the Davises paid the intial $5,000.00 deposit. Within five days they were to pay another $26,000.00. During this five day period the crucial conversation between Mrs. Davis and Mr. Johnson took place. As a result of this conversation, appellees paid the additional $26,000.00 in reliance upon the statements made by Mr. Johnson.

The liquidated damages provision of the contract provides:

> S. Default: If Buyer fails to perform this contract within the time specified, the deposit paid by Buyer may be retained by or for the account of Seller as consideration for the execution of this Agreement and in full settlement of any claims for damages. . ." (Emphasis added)

It must be stressed that the contract does not say the Seller would recover $31,000.00 as their

liquidated damages, and it does not say the Seller could recover ten percent of the purchase price as liquidated damages. It only states they recover as liquidated damages the deposit paid. Thus, under the contract the Davises did not have to pay the additional $26,000.00.

On May 18 the Davises could have refused to pay the $26,000.00 and forfeit the $5,0000.00 deposit already paid, i.e., "failure to perform." Because of the misstatements made by Mr. Johnson, however, the Davises were induced to make a further payment of $26,000.00 which increased the deposit paid and the potential liquidated damages. (T.R. 337-345) Therefore, appellees submit they are entitled at the very least to return of their $26,000.00 deposit. Indeed, the Third District Court of Appeals obviously found there was substantial evidence in the record supporting the Trial Court's award of this amount. See Banks v. Selina, 413 So. 2d 851 (Fla. 4th D.C.A. 1982) citing Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976)

Had Mr. Johnson accurately described the roof problems to Mrs. Davis prior to appellees making the $26,000.00 deposit, they would have called in a licensed roofer. They then would have realized at that time rather than after paying the $26,000.00 that the roof was not and could not be put in a watertight condition before closing. Consequently, they would have been

entitled to return of the $5,000.00 as it was "subject to the terms" of the contract and a term of the contract could not be fulfilled. (See Exh. 3) Accordingly, appellees maintain and the contract language so indicates, that the entire deposit was subject to the terms of the contract.[11] Since one of the material terms subsequently was fraudulently misrepresented inducing payment of the majority amount of the deposit, the Davises are entitled to return of the entire deposit amount based on this misrepresentation.

1. When The Seller Of A Used Home Knows Of Facts Materially Affecting The Value Or Desirability Of The Property Which Are Not Readily Observable And Not Known To The Buyer, The Seller Is Under A Duty To Disclose Them.

In overturning the Trial Court's Decision to award appellants $5,000.00 and award the entire deposit amount to the Davises, the Appellate Court saw fit to distinguish return of the $5,000.00 from return of the $26,000.00 based on a seller's duty to disclose mate-

[11] See contract first paragraph wherein $5,000.00 from appellees is listed as proceeds to be held in escrow by Baker "subject to the terms hereof as a deposit. . . The Purchaser shall further deposit the sum of $26,000.00 in the above mentioned escrew account. . ." Although Paragraph F requiring the roof to be watertight before closing is not precisely labeled as a "term" of the contract, appellees argue that a reasonable interpretation of the contract clearly indicates it is.

rial facts as described above.[12] Although appellees respectfully maintain that it was not necessary to reach this issue in order to award full rescission, they fully support the Court's analysis and conclusion.

In its well reasoned opinion the Third District Court rejects the rationales expressed by the Second and Fourth District Courts in Ramel v. Chasebrook Construction Co., 135 So. 2d 876 (Fla. 2d D.C.A. 1961) and Banks v. Salina, 413 So. 2d 851 (Fla. 4th D.C.A. 1982) which are cited favorably by appellants. Accordingly, the Third District Court presented a cogent analysis of authorities of this Court, treatises, encyclopedia and decisions of other jurisdictions citing, for example, the following:

> "[s]ome cases carry the doctrine of caveat emptor so far as to hold that the seller is under no obligation to communicate the existence of defects in the thing sold not discoverable by examination. . . But it is generally held in this country that the intentional non-disclosure of a latent defect by the seller, when he knows that it is unknown to the buyer, is fraudulent. . .," Kitchen v. Wong, 67 Fla. 72, 75, 64 So. 429, 430 (1914) quoting 35 Cyclopeida of Law & Procedure [Sales] 69 (1910)

The ruling by the Third District Court of Appeals states and clarifies a duty that is consistent with and extends from this Court's decision in Besett v. Basnett, 389 So. 2d 995 (Fla. 1980). In Besett it

[12]It should be noted that Argument II 1 states the verbatim holding by the Third District Court of Appeal.

was held that a recipient may rely on the truth of a representation even though its falsity could have been ascertained had an investigation been made unless he knows the representation to be false or its falsity is obvious to him. Thus, in Besett this Court determined that Florida would follow a reasoned rule of law which prohibits one from making a fraudulent misrepresentation and then avoiding the consequences by asserting that there was a duty to find out whether it was true or not. The logical extension of that rule is that where the seller of a used home knows of facts materially affecting the value or desirability of the property which are not readily observable and not known to the buyer, that seller is under a duty to disclose them to the buyer. The Appellate Court recognized that there can be no rational distinction between a fraudulent disclosure and a fraudulent non-disclosure.

The appellants' reliance on Roberts v. Rivera, 9 F.L.W. 2152 (5th D.C.A. Oct. 11, 1984) is misplaced and provides support for the ruling of the Third District Court in this case, since the Court in Roberts states that sellers will be liable for concealing facts "known to them under circumstances impelling disclosure, i.e., a hidden defect, . . ." (p. 2153) Perhaps appellants' reliance on this case can be explained by their erroneous interpretation of the testimony which they repetitiously claim reflects Mrs. Davis' knowledge and

notice of water stains at the time of her first visit to the house and prior to the payment of the initial $5,000.00 deposit payment.[13] Appellees must once again point out that this is not an accurate representation of the testimony. There is no such evidence. Mrs. Davis noticed stains following the initial deposit payment at which time appellees maintain affirmative misrepresentations were made inducing payment of the remainder of the deposit. (T.R. 338-341) At the time of payment of the $5,000.00 the roof problems constituted a hidden defect known by the seller which would materially affect the desirability of the property. As noted by the Third District Court in finding for the appellees, "It is obvious, however, because of Mr. Johnson's admissions during his testimony, that the Johnsons were aware of roof problems prior to entering into the contract of sale and receiving the $5,000.00 deposit payment."

Contrary to the appellants' assertions, the rule announced by the Third District did not require the Johnsons (and does not require sellers) to be expert

[13]Appellants make this claim on pages 3, 25, and 27 of their Brief.

roofers.[14] The Johnsons knew the roof had leaked, by their own admission in 1979 (T.R. 500-505), if not at other times. Indeed, given the extent of the damage observed by Mrs. Davis on May 26, 1982, it is difficult not to infer there were more problems and instances of leaking other than the admitted instance in 1979 and not revealed by the Johnsons.

Appellants would have this Court believe that the ruling by the Third District Court would have a doomsday effect on individual sellers of real estate and the entire commercial real estate industry. All that is required is that a seller be honest in relaying to a purchaser information which could materially affect the sale. Non-disclosure of a leaky roof on a house not more than three years old certainly is a fact that would materially affect the desirability of the property to the buyer.

For these reasons the ruling by the Third District Court of Appeals should be affirmed.

III. APPELLEES ARE ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Paragraph P of the contract states the following:

[14] Although appellants also note that the Davises were real estate brokers, it should be noted that Mr. Davis, who had vast experience with employment with the Internal Revenue Service, and in the investment field, had only an educational background in real estate. (T.R. 361-362) Mrs. Davis had a real estate license but never engaged in the profession. (T.R. 454)

> P. Attorneys' Fees and Costs: In connection with any litigation arising out of this contract, the prevailing party shall be entitled to recover all cost incurred, including reasonable attorneys' fees. Any realtor's costs as to Bill of Inter-pleader or Declaratory Decree or appeals thereof shall be borne equally by buyer and seller. (Emphasis added)

As argued, Appellees are entitled to rescission and return of the entire amount of the paid deposit because of the seller's breach of contract or in the alternative, fraudulent misrepresentation. Should this Court determine the sellers to be liable based on fraud, appellees, as the prevailing party, maintain that they are entitled to an award of attorney fees and costs as stipulated by the Contract even if this Court awards $5,000.00 of the $31,000.00 deposit money to the Johnsons.

The Third District Court's decision in finding for the appellees and accordingly, awarding fees and costs clearly indicates that whether or not the decision to rescind is based on fraud or breach of contract, the prevailing party is entitled to fees and costs from "the litigation that arose out of this contract." Should the appellees by this litigation be awarded the overwhelming majority amount of the deposit money - - the $26,000.00 - - it is evident they should still be considered the "prevailing party" by any reasonable definition of the term. In Williams v. Dolphin Reef, Ltd., 455 So. 2d 640 (Fla. 2d D.C.A. 1984), the

Court held that where contracts to purchase condominium units provided liability for attorney fees and costs to prevailing parties in any litigation arising under the contract, the vendor was entitled to such fees although the amount he recovered was less than the amount initially sought. (In Williams the party sought $52,000.00 in deposit money and the Trial Court awarded $35,400.00 but denied award of fees and costs.)

In this case an award of $26,000.00 while allowing the appellants to retain $5,000.00 of the deposit monies, denies them their claim of $64,000.00 in damages. Under all of these circumstances a $26,000.00 Judgment clearly is one awarded to the "prevailing party."

In summary, a determination of the sellers' liability based on breach of contract or fraudulent misrepresentation entitles an award of attorney fees and costs whether or not $26,000.00 or $31,000.00 is returned to the appellees.

IV. APPELLANTS SUSTAINED LITTLE OR NO ACTUAL DAMAGES BY THE ALLEGED BREACH BY APPELLEES.

Appellants claimed to have sustained and have asked for damages in the amount of $64,130.96. (T.R. 571-577) Appellees dispute this claim for the following reasons:

On November 5, 1982 the Johnsons sold their home to another party (Mr. and Mrs. Blank) for $272,500.00.

The terms of this contract call for payment of $100,000.00 at the time of closing and balance to be paid one year later at ten percent interest. (T.R. 571; 588; 287)

Appellees' mortgage and real estate experts reviewed the Davis contract and the later Blank contract and, per the analysis undertaken by them (present value on the second mortgage market) testified that the Blank contract was more valuable to the sellers than was the Davis contract. (T.R. 132-140, 148-150, 182-189, 204-206) The significant differences were that:

(1) The amount of the Davis second mortgage ($114,000.00) exceeded the equity of the Davis' in the house whereas the Blank second mortgage ($56,500.00) was substantially less than the Blank equity in the house;

(2) The Davis second mortgage was at eight percent interest for five years, thirty-year amortization ballooning at the end of five years whereas the Blank second mortgage was at ten percent interest ballooning at the end of one year;

(3) The Blank contract would result in the holder of the second mortgage being in receipt of the total payments under that mortgage ($62,150.00) on or before November 5, 1984, and the use of that money for investment purposes at prevailing rates while over the balance of the period of the Davis second mortgage (until June 21, 1987) the holder of that second mortgage

would only receive monthly interest payments of eight percent;

(4) The Davis contract only provided the Johnsons with $80,000 cash at closing, $15,500 of which was to be paid, at closing, to the brokers thereby only leaving the sellers with $64,500.00 cash; the Blank contract provided the Johnsons with $100,000.00, less the broker's commission of $13,625, or a net of $86,375.00. Although the Johnsons would have had the use of the $64,500.00 between June 21 (date of Davis closing) and November 5 (date of Blank Closing), at the time of the Blank closing the Johnsons realized approximately $20,000.00 more cash after accrued interest, than they would have had the Davis contract closed.

Johnson testified, in his analysis of the two contracts, that he would have invested the Davis money at closing at eight percent interest. In his computations he did not account for the payment of brokerage fees and based his testimony on interest to be earned on the $80,000.00. He testified that he would have invested the money at eight percent interest. Eight percent interest on this sum computes to a daily rate of $14.13. There were some 137 days between the two closing dates. Hence, $1,935 in interest would have accrued, leaving the appellants with $19,940 less than they actually received, in cash, from the Blanks at the

November 5, 1982, closing ($86,375 less $66,435 = $19,960.)

While the analysis used by the appellees' experts was a commercially, reasonable approach (T.R. 149-150), it was not the only approach that could be used. Mr. Davis (who was eminently qualified to opine on this issue) testified that another approach which was reasonable to use was to discount to present value the two mortgages. Using this approach the Blank contract was still more favorable to the Johnsons than was the Davis contract. (T.R. 477-480; 484)

Thus, merely comparing the sales prices of the two contracts is inadequate. Appellees respectfully submit that a closer examination of all the terms of the respective contracts reveals that, in fact, the Johnsons suffered little or no actual damages as a result of any breach by appellees.

CONCLUSION

Appellees, respectfully request that this Court affirm the Judgment of the Third District Court of Appeals and therefore award the appellees the entire $31,000.00 deposit, with interest, as well as costs and fees. Should this Court reinstate the decision of the Trial Court, awarding the appellees $26,000.00, Appellees maintain they are by this award, the prevailing

party and are therefore entitled to attorney fees and costs.

In the alternative, appellees also respectfully submit that they are entitled to the entire deposit amount and attorney fees and costs based on the appellants' breach of contract.

November 21, 1984

Respectfully submitted,
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