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.

BRIEF OF RESPONDENTS IN OPPOSITION TO JURISDICTION

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STATEMENT OF THE FACTS

For purposes of establishing conflict jurisdiction in this Court, Petitioners are limited to the factual recitation contained in the opinion of the District Court of Appeal. The Statement of Facts set forth in Petitioners' brief does not follow this mandatory guideline.

On page 2 of Petitioners' brief there is a recitation of inquiries and answers between the parties which does not correspond to the facts in the opinion. The opinion sets forth the conversations concerning leaks which occurred. After signing a form purchase contract and making a $5,000 deposit payment, but before making an additional $26,000 deposit payment five days later, Mrs. Davis noticed buckling and peeling plaster around the corner of a window frame and stains on the ceiling. She was told by Mr. Johnson that the window had a minor problem that had long since been corrected and that the stains were wallpaper glue and the result of ceiling beams being moved. The opinion goes on to state that there is disagreement among the parties as to whether

Mr. Johnson also told Mrs. Davis at this time that there never had been any problems with the roof or ceiling.

Mr. Johnson denied telling Mrs. Davis that there had never been any problems with the roof or ceilings, but claimed that he admitted to Mrs. Davis that a leak had developed two years earlier and told her of the roof problem. These are the only factual statements contained in the opinion of the District Court of Appeal which are relevant to this Court's determination of the conflict issue.[1]

The District Court of Appeal did not "opine", as stated by Petitioners, that if there was a fraudulent misrepresentation occurring after execution of the contract ". . .that same 'misrepresentation' would compel the return of the initial Five Thousand ($5,000.00) Dollar deposit made at the time of the execution of the Contract." (Brief of Petitioners, p. 4.)

The District Court of Appeal decided the purchasers were entitled to rely on the truth of material misrepresentations even though the falsity could have been ascertained had an investigation been made unless there was knowledge the representations

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[1] While not relevant to the conflict issue, Petitioners also state that five experts who inspected the roof testified that the roof could be repaired to correct the leaks, giving various dollar estimates for the repairs. On the contrary, the opinion states that two roofers hired by the sellers' broker concluded that they could fix the leaks for under $1,000. However, three roofers hired by the purchasers found that the roof was inherently defective and any repairs would be temporary since only a new $15,000 roof could be watertight. These witnesses also testified that repairs to the walls could be accomplished at an additional cost of $10,000, necessitated by damage attributable to the defective roof.

were false or the falsity was obvious, citing this Court's decision in Besett v. Basnett, 389 So.2d 995 (Fla. 1980). In addition, the sellers were under a duty to disclose to the buyers facts materially affecting the value or desirability of the property which were known to the sellers and not readily observable or known to the buyer. In a footnote to the opinion, the court specifically limits its holding by the facts of the case before it to the sellers of used homes but states, ". . .we realize that this duty is equally applicable to realtors and to all forms of real property, new and used."

ARGUMENT

Petitioners rely on the decision in Ramel v. Chasebrook Construction Co., 135 So.2d 876 (Fla. 2d DCA 1961) as creating a conflict with the instant decision. The Ramel case was an action for fraud and deceit for alleged fraudulent misrepresentations made to the purchasers concerning construction of a home. Prior to the purchase, the seller told the purchaser that the house was well constructed and well built, when in fact the house was built on a defective foundation--a fact known to sellers. As stated by the court, ". . .the essential question is, does the statement by Stone [seller] that the house was well constructed constitute actionable misrepresentation?" Ramel v. Chasebrook Construction Co, supra at page 879, emphasis supplied.

The opinion discusses at length the law concerning positive representations and states the "well-settled" law to be that where one claims fraudulent representations had been made that

party is charged with knowledge of all facts which could have been learned through diligent inquiry. Since, however, the defects in the Ramel case were buried beneath the surface of the land and were not apparently visible or discoverable without excavation, diligent inquiry would not have disclosed the defect. Accordingly, it was determined that the evidence adduced by the purchasers of fraudulent misrepresentation was sufficient to establish a prima facie case of fraud and deceit.

The question involved and holding in Ramel have to do with oral misrepresentations. The rule of law announced by the court charged the purchaser with knowledge of all facts that could have unearthed through diligent inquiry. This determination was repudiated by this Court almost 20 years later in Besett v. Basnett, 389 So.2d 995 (Fla. 1980). The Besett case holds 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.

The statement of law set forth in Ramel has been expressly disapproved by a later decision of this Court. No conflict exists and there is no basis to accept jurisdiction. Bailey v. Hough, 441 So.2d 614 (Fla. 1983).

In a strictly gratuitous comment, the court in Ramel comes to the rather baffling conclusion that the statement of the seller was also an actionable non-disclosure. The rule is set forth that mere non-disclosure of all material facts in an arms-length transaction is ordinarily not actionable misrepresentation

with three exceptions not relevant here.

Here, a misrepresentation was made. Whether it took place before payment of the initial $5,000 deposit, before payment of the $26,000 additional deposit, or after payment of the entire $31,000 is immaterial to the right of rescission and return of the entire deposit. The rule of law announced in Ramel which would otherwise apply to the instant case has been renounced and can afford no basis for conflict.

Petitioners assert conflict with the decision in Banks v. Salina, 413 So.2d 851 (Fla. 4th DCA 1982). There, the court was considering an award to a purchaser for roof replacement, carpentry repairs for the damage caused by the leak, and repairs to the swimming pool. On the question of repairs to the swimming pool, the court states there were no warranties in the contract of sale nor were there material representations relative to the pool although the sellers knew it was not in good condition. The court reverses the award for pool repairs with a one-line holding: "In Florida, there is no duty to disclose when the parties are dealing at arms length", citing Ramel. Banks v. Salina, supra at page 852.

The cases are factually distinguishable. While a "defective swimming pool" is readily observable to a prospective purchase, the same is not true where the question is whether a roof is "inherently defective", as here. Thus, this case does not conflict with Banks since the decisions are not ". . .based practically on the same state of facts and announce antagonistic conclusions." Ansin v. Thurston, 101 So.2d 809, 811 (Fla. 1958).

Futhermore, the rule of law announced is incorrect since it fails to incorporate the three important exceptions noted in the Ramel decision concerning non-disclosure of material facts. The "rule" of the Banks case is simply a maverick misstatement and should not be the basis for conflict jurisdiction.

The well-reasoned opinion of the District Court in the instant case analyzes authorities of this Court, treatises, encyclopedia and decisions of other jurisdictions before coming to the conclusion that the seller of a used home is obligated to impart to the purchaser facts that he knows which materially affect the value and desirability of the property which are not observable and are not known to the buyer. The rule of caveat emptor should not and cannot be a shield to those with knowledge of a defect not readily observable to a purchaser who do not impart this information.

In Besett, decided almost four years ago, 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, set forth in the opinion which Petitioners seek to have reviewed, 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. There is no rational distinction between a fraudulent disclosure and a fraudulent non-disclosure.

The fine distinction necessary to support conflict here, if it exists, seems a classic situation for a denial of jurisdiction because of the discretionary nature of the writ. The constitutional authors of Article III, Section 3(b)(3) stated that this Court may review decisions in direct conflict, not that it must do so. See, Florida Greyhound Owners & Breeders Association, Inc. v. West Flagler Associates, Ltd., 347 So.2d 408 (Fla. 1977).

The entire real estate market will not collapse with enforcement of the stated rule. All that is required is that a seller be honest in relaying to a purchaser information which could materially affect the sale. If that seller makes this information known to a broker, that broker should be held to the same standard. This requirement of honest disclosure is no more a burden on commercial transactions than are the criminal laws of Florida imposing fine and penalty for fraud and deceit.

CONCLUSION

For the reasons and under the authorities set forth above, it is respectfully submitted that there is no express and direct conflict between the instant decision and those cited by petitioners nor is there any compelling reason to accept jurisdiction in the instant case. The petition previously filed herein should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Patricia M. Silver, Attorney At Law, Smith & Mandler, P.A., 1111 Lincoln Road Mall, 8th Floor,

Miami Beach, Florida 33139, this 15th day of June, 1984.

Respectfully submitted,

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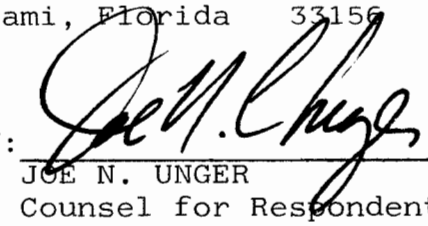
BY: 
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