IN THE SUPREME COURT OF FLORIDA

CASE NO: 65330

CLARENCE H. JOHNSON and
DANA JOHNSON, his wife,

Defendants/Petitioners,

v.

MORTON DAVIS, et al.,

Plaintiffs, Defendant/
Respondents.
_____/

PETITIONERS' BRIEF ON JURISDICTION

A PETITION FOR WRIT OF CERTIORARI
FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
CASE NO: 83-1574

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INTRODUCTION

For purposes of this appeal, Petitioners, CLARENCE JOHNSON and DANA JOHNSON, who were the Defendants/Counter-Claimants in the trial court, will be referred to as "JOHNSON."

Respondents, MORTON DAVIS and ESTHER DAVIS, who were the Plaintiffs/Counter-Defendants, will be referred to as "DAVIS."

STATEMENT OF THE CASE AND FACTS

This is an action seeking Certiorari review of an opinion of the Third District Court of Appeal, which is in direct conflict with the opinions of other District Courts of this State.

The DAVIS' filed an amended Three Count Complaint against the JOHNSON'S seeking damages and rescission of a Purchase and Sale Agreement of the sale of a used home located in Dade County, Florida. Count II sought damages for fraud, alleging that after the contract was entered into JOHNSON represented to DAVIS that the roof was in a water tight condition, that JOHNSON knew that the representation was to a material fact "unknown to Plaintiffs" and that "Plaintiffs were misled" by said representation. (Count I is not material to the facts herein).

Count III sought rescission of the Deposit Receipt and Sales Purchase Agreement, due to JOHNSON'S "misrepresentation" and the "reliance" by DAVIS. In addition to the rescission, DAVIS sought the return of the Thirty One Thousand ($31,000.00) Dollar deposit.

JOHNSON denied the allegations of the Complaint, and set forth four (4) affirmative defenses. JOHNSON also counterclaimed for Breach of Contract, alleging that the DAVIS' breached the Purchase and Sale Agreement, entitling JOHNSON to damages in excess of Thirty One Thousand ($31,000.00) Dollars.

The Purchase and Sale Agreement was executed by parties

on May 13, 1982. At that time, a Five Thousand ($5,000.00) Dollar deposit was placed in escrow by the DAVIS'.

Prior to the execution of the Purchase and Sale Agreement, it is uncontroverted that there were no discussions between the parties concerning the condition of the roof. Several days after the Contract was signed, MRS. DAVIS visited the JOHNSON'S home and asked MR. JOHNSON "what seems to be the problem with the window?". According to DAVIS, he responded "there was a minor problem quit a long time ago and it was taken care of". MRS. DAVIS then alleges JOHNSON said there were no problems with the ceiling.

MRS. JOHNSON testified that there were leakage problems at the end of 1979, which were repaired in January, 1980. She further stated that from that point in time through May 18, 1982, there were no leak problems in the house. MR. JOHNSON testified that when asked by MRS. DAVIS about prior problems with the roof, he responded "yes, I did". Several days after these conversations (bearing in mind that they took place after the execution of the Contract), the DAVIS' placed an additional Twenty-Six Thousand $26,000.00) Dollars deposit in escrow, which was required under the terms of the Purchase and Sale Agreement.

Two days later, MRS. DAVIS visited the home during a heavy rain (after the JOHNSONS had vacated) and discovered leaks in the roof. The five (5) experts who inspected the roof over the course of two (2) months testified that the roof could be repaired

to correct the leaks, and gave estimates ranging from Four Hundred Thirty ($430.00) Dollars to One Thousand Four Hundred Ninety ($1,490.00) Dollars.

A trial was had without a jury. The trial Court entered its Final Judgment on May 27, 1983, without making any specific findings of fact. The Court held:

> 1. That DAVIS recover the sum of Twenty Six Thousand ($26,000.00) Dollars, plus interest in the amount of Three Thousand Two Hundred Forty-Five ($3,245.00) Dollars from May 13, 1982; and
>
> 2. That JOHNSON recover from DAVIS the sum of Five Thousand ($5,000.00) together with interest in the amount of Six Hundred Seventeen 92/100 ($672.92) Dollars from May 13, 1982.

The JOHNSONS appealed the trial Court Judgment. The Third District apparently had a difficult time reconciling the award made by the trial Judge, without the benefit of specific findings of fact. The Court "theorized" that the JOHNSONS must have misrepresented the condition of the roof several days after the execution of the Contract, but prior to the DAVIS' placing an additional Twenty Six Thousand ($26,000.00) Dollars deposit in escrow. Their authority rested in this Court's opinion of Besett v. Besnett, 389 So.2d 995 (Fla. 1980), wherein it was held:

> ...that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.
>
> Id. at Page 998.

The Third District affirmed this portion of the trial Court Judgment.

However, the Court opined that if there was a fraudulent misrepresentation that occurred after the 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. Justice Jorgensen, writing for the majority, felt that not withstanding any mistatements made after the execution of the Contract, the JOHNSONS, as Sellers of a used home, had an affirmative duty to disclose the existence of prior roof leaks which had been repaired, to a real estate broker purchaser where the Contract for Purchase and Sale in an arm's length transaction provided for roof inspections and repairs of the roof if leaks were found. The imposition of a "duty to disclose" is a departure from the law of other District Courts of Appeal in this State.

ARGUMENT

I. THE ORDER SOUGHT TO BE REVIEWED DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT's DECISION OF BANKS v. SALINA, 413 So.2d 851 (Fla. 4th DCA 1982) AND THE SECOND DISTRICT's OPINION IN RAMEL v. CHASEBROOK CONSTRUCTION CO., 135 So.2d 876, (Fla. 2d DCA 1961).

The Order of the Third District Court of Appeals directly conflicts with opinions from other Districts within this state. The Third District in this case pronounced a new rule of law that

> "where a seller of used real property deals with a Buyer in an arm's length transaction, the Seller has an affirmative duty to disclose the existence of defects, of which they are aware".

This principle of law was not heretofore set by this Court and is in direct conflict with the opinions of the other District Court of Appeals.

In Banks v. Salina, 413 So.2d 851 (Fla. 4th DCA 1982), the Buyers sought damages against the Seller for a defective swimming pool and a leaking roof. The trial Court entered judgment for the Buyers, and the Sellers appealed. The Fourth District reversed, even though they found that the Sellers knew the pool and roof were not in good condition. The Court stated:

> In Florida, there is no duty to disclose when the parties are dealing at arm's length.
>
> Banks v. Salina, supra, at p. 952

In Ramel v. Chasebrook Construction Co., 135 So.2d 876 (Fla. 2nd DCA, 1961), the Buyer sued the Sellers for rescission of contract to purchase a home, after finding that the pool and patio

began pulling away from the house foundation. The Appellate Court stated that:

> In the absence of a fiduciary relationship, mere non-disclosure of all material facts in an arm's length transaction is ordinarilly not actual misrepresentation.
>
> Ramel v. Chasebrook Construction Co., supra, at p. 882

However, the Second District established an exception to this Rule of Law, which applied specifically to the Ramel case, and reversed on other grounds. This exception is inapplicable to the facts of the case sub judice.

The Third District in the instant opinion recognized the law as set forth in the Fourth and Second Districts, but expressly chose not to follow it. The Third District specifically stated:

> However, having acknowledged this authority (referring to the Banks and Ramel cases), by which we are not bound and which we feel represents an offensive view of societal duties and fails to embody the ideals which the law should always strive to reflect, we choose not to follow it.
>
> (Opinion, pp. 5 & 6). (Emphasis supplied).

Not only did the Third District apply this new rule of law to sellers of used homes, but the Court extended this principle to all types of property, commercial and residential and imposed this duty not only upon sellers, but upon real estate brokers. No such duty exists for sellers of used homes in the Second and Fourth Districts. Nor does such duty extend to real

estate brokers in any other district or to sellers of any type of property. The presently existing conflict must be resolved to avoid mass confusion. The First District and the Fifth District Courts of Appeals have not yet decided this issue. Do they impose such a duty upon the seller of property and upon real estate brokers in accordance with the Third District's decision or do they follow the Second and Fourth District Courts of Appeal? Does a purchaser of commercial property located within the Second and Fourth Districts have a cause of action for a breach of a duty to disclose the existence of defects in an arm's length transaction where the seller of the property is located within the Third District or the real estate broker is located within the Third District? Not only is there uncertainty as to the existence of a cause of action, but the Third District's opinion will only serve to tend to increase the number of cases brought within the Third District and over burden an already burdened trial court.

Not only does a seller of property now not know what his duty to disclose is in connection with any type of property, the effect of the Third District's opinion is devastating to the real estate market and the associated industries throughout the state. If such a duty is imposed, there is no question that the price of property will increase to encompass the risk that there has not been a disclosure. If a roof leak the cost of which to repair is between Four Hundred ($400.00) Dollars and One Thousand Four Hundred ($1,400.00) Dollars on a piece of property which has a

value in excess of Three Hundred Thousand ($300,000.00) Dollars justifying a rescission of the contract, a seller of property will ask more for his property and increase the price to cover the contingency that the contract may be rescinded for a failure to disclose a known defect. Furthermore the inflation of prices caused by the imposition of this duty will serve to deprive purchasers of property of the opportunity to purchase caused by this inflationary cost. Not only will the price of property be substantially affected causing a lessening of the purchase and sales of property within the state, but numerous businesses will also be affected. For example, under the standard form realtor contracts used in connection with the purchase of used homes, the purchasers are given the opportunity to make certain inspections. There are numerous businesses who perform these inspection services. There will be no need for these services if the Third District's opinion is followed. Certainly sellers will not employ these persons to learn of the existence of defects not theretofore known. A large portion of the economy of this state is derived from the real estate market as well as the purchase and sale of other types of property. Undoubtedly the economy will be detrimentally affected by the loss of caveat emptor in all arm's length transactions. It would appear that a seller of used property is not permitted to sell his personal or real property in an "as is" condition. The foregoing public policy considerations as well as the basic issue of whether parties to a contract may

establish what duties exist and do not exist in connection with their arm's length transaction, mandate that this Court accept jurisdiction and allow a full hearing on the merits of this very important issue that has far reaching consequences.

CONCLUSION

Petitioners respectfully request this Court to accept certiori jurisdiction based on the direct conflict existing as heretofore stated to resolve the conflict and establish a uniform law applicable to all persons within this state.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25 day of May, 1984, to STANLEY N. NEWMARK, ESQ., Attorney for DAVIS, 9400 South Dadeland Boulevard, Suite 300, Miami, Florida 33156, JOHN DICK, ESQ., 7600 Red Road, Suite 225, South Miami, Florida 33143 and JOE N. UNGER, ESQ., 66 West Flagler Street, Suite 606, Miami, Florida.

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