IN THE SUPREME COURT OF FLORIDA

FIRST INTERSTATE DEVELOPMENT CORPORATION, a Florida corporation, OCEAN WOODS, INC., a Florida corporation, THOMAS WASDIN, et al,

Defendants/Petitioners,

CASE NO. 67,848

CARLOS M. ABLANEDO, et al,

Plaintiffs/Respondents.
_____/

ANSWER BRIEF OF APPELLEE/CROSS/APPELLANT
AND
INITIAL BRIEF OF APPELLEE/CROSS/APPELLANT

APPEAL FROM THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, FIFTH DISTRICT

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PRELIMINARY STATEMENT

In this brief, the Plaintiffs/Appellees/Crossappellants, CARLOS M. ABLANEDO, et al, below, will be referred to as Plaintiffs. Defendants/Appellants/Crossappellees, FIRST INTERSTATE DEVELOPMENT CORPORATION, OCEAN WOODS, INC. and THOMAS WASDIN below, will be referred to as Defendants.

All references to the Record on Appeal will be made with an "R" followed by the appropriate page number. All references to the Appendix will be made with an "A" followed by the appropriate page number.

STATEMENT OF THE CASE

The Defendants have stated the fraud count was presented by appellees as four distinct issues and misrepresentations. All issues of fraud were framed in the amended Count IV of the complaint. (R-2209). At the end of Plaintiffs' case, Plaintiffs moved for the pleadings to conform to the evidence. (R-1356). The motion was granted. (R-1359).

STATEMENT OF THE FACTS

The Defendants in the first sentence of the Statement of the Facts represent that Ocean Woods, Inc., First Interstate Development Corporation and Tom Wasdin, were involved in a development project located in Cape Canaveral, Florida, known as Ocean Woods, and that the project was originally conceived by the Defendant First Interstate Development Corporation, which was the original owner of the property to be developed. First Interstate Development Corporation owned all the property, which extended from Atlantic Avenue to the Atlantic Ocean, as represented in the

brochure, Exhibit 16. (R-668, 669) (A-16). First Interstate Development Corporation conveyed portions of this property to Ocean Woods, Inc., after Ocean Woods, Inc. had arranged for a buyer of an individual unit. (R-1346). First Interstate Development Corporation retained title to all the common elements to the property within the Ocean Woods project proper, as well as to the 11.5 acres of property, which lay east of Ridgewood Avenue between Ridgewood and the Atlantic Ocean. (R-1346).

First Interstate Development Corporation retained control over the Ocean Woods Homeowners Association up to the day of trial. (R-1193-1195, 1145). In August of 1983, First Interstate Development Corporation did, convey an easement over their 11.5 acres of property, which would give the persons living in Ocean Woods a route to the Atlantic Ocean over the Corporation's property. (R-1598). The Plaintiffs agree there was testimony that First Interstate Development Corporation sold the land to Ocean Woods, Inc. under an oral sales contract. However, we would add to that simple statement that while it's true Ocean Woods, Inc. was ostensibly the developer of this project, (purchasing the land from First Interstate as the stages developed,) it is also true that First Interstate Development Corporation retained complete control through the Declaration of Restrictions. (R-2585-2620). Also all the amendments to the Declaration of Restrictions were made by First Interstate Development Corporation. (R-2585-2620). This was done even though the ostensible developer, Ocean Woods, Inc., could have made each one of these amendments. (R-2585-2650). All the

evidence and testimony in the trial below proves that First Interstate Development Corporation's involvement in the development of this project was much more complex than simply one of seller to Ocean Woods, Inc. While at all times the defendant, Thomas Wasdin was the president of Defendant, Ocean Woods, Inc., as stated in the Defendants' Statement of Facts, it is also true that he represented First Interstate Development Corporation's interest with respect to the Homeowners Association, as president of Ocean Woods, Inc., (R-1195). First Interstate Development Corporation did control the Homeowners Association, through Ocean Woods, Inc. (R-1195).

The Defendants, on page 7, have indicated that Ocean Woods, Inc. has an option to purchase the land immediately to the east of the planned unit development. According to Mr. Biery, President of First Interstate, there is no such option. (R-668, 669). Mr. Tom Wasdin did, however, state that there was an oral option. (R-1591).

On page 9 of their brief, the Defendants break down the Plaintiffs' testimony into several different catagories. First is a list of Plaintiffs as having testified they were told that Ocean Woods was beachfront. Within that category each of the following Plaintiffs were also specifically defrauded by Exhibit 16. (R-2709-2711) (A16). (Jakeway R-45; Harrington R-113; Jerome R-152; Richard R-193, 194; McDonald R-338; Finnigan R-405, 406; Wood R-416; Slattery R-432; Holmes R-460, 461; Evans R-551; Rutkowski R-578, 579; Roseland R-607, 608; Qualls R-626; MacConnachie R-712; Forrest R-721; Newman R-753; Spellman R-784; Ablanedo R-795; Rooney R-875; Bragg R-913; A. Wilkerson R-929,

930; Coleman R-953; Latzios R-981; Dorofee R-1021; Johnson R-1036; Rodriquez R-1132; Buckey R-1142; King R-1167; Pelham R-1303).

Defendants maintain there is a second group of Plaintiffs, who testified they had no conversations on the subject of ocean-front, but relied exclusively on the advertising brochure, which misrepresented the planned unit development as having 600 feet of ocean frontage. The record shows that the following Plaintiffs, contrary to what is indicated in the Defendants' brief on page 9, did, in fact, have conversations with the Defendants about ocean frontage, and, in fact, did rely thereon in some instances. (Sanders R-528, 529; Hackney R-680). The Defendants continue to state that Plaintiff, McAra, was told the property fronting the beach would be developed by Ocean Woods at some unspecified later date. While that is true, he also specifically stated that one of the representations made that was very important to his wife and himself was that the property extended from Atlantic Avenue to the beach. (R-1006). Contrary to what the Defendants represent in their brief, Plaintiff Sholar clearly stated Norma Cross told him there was ocean frontage. (R-357). Defendants' on page 10 of the brief contend Plaintiff Anita Jean Miller only stated she thought there was ocean frontage. Plaintiff Anita Jean Miller testified she had the brochure marked Exibit 16, read it, and relied upon it. (R-733) (A-68).

The Defendants on page 10 have attempted to set out a summary of the testimony concerning the type of structure which Plaintiffs were told would be built in the area of the ocean

front. At the end of the summary, Defendants misleadingly state, "Another of the Appellees testified that she was told that Ocean Woods, Inc. did not even own the land." (McDonald R-336-337). Mrs. McDonald testified she had the benefit of the brochure, that the most important thing to her and her husband, at the time of the purchase, was the representation it was oceanfront property. (R-338). She was told by Norma Cross the development went from Atlantic Avenue to the ocean, that Mr. Wasdin owned the land down to the ocean, that he also owned land across the street from the development and that he might develop it into a shopping area. When this particular testimony is taken in context of Plaintiff Mrs. McDonald's full testimony, it is obvious that Mrs. McDonald believed she was purchasing a home in a project, which was bounded on the east by the Atlantic Ocean. (R-336-346).

Plaintiffs concede Defendants' personnel, past and present, contradicted the Plaintiffs. However, Plaintiffs would add that Norma Cross, sales person for defendant Ocean Woods, testified she never told a plaintiff nor anyone else that the brochure, Exhibit 16, might be misleading. (R-1223, 1225) (A-79). We also have the testimony of defendant Tom Wasdin that the brochure, Exhibit 16, was presented to potential buyers to induce them to purchase the property. (R-1343). Beth Foy, another of the sales personnel, who testified for the Defendants, confirmed Tom Wasdin's testimony, when she stated that the brochure, Exhibit 16, was a sales tool given to everyone. (R-1528-1529). This same Beth Foy testified she did not recall any conversation about ocean frontage with any of the individual Defendants. (R-1538-1539). She also testified and confirmed the same thing Norma

Cross had said, that she had never explained to any of the people the brochure might be misleading. (R-1540-1541).

The Defendants on page 10 and 11, make an interesting observation that the sales brochure, which all the Plaintiffs received, does not use the term "ocean front project" or "ocean front development". The brochure, referred to by the Defendants, clearly states, in addition to the word itself, "Ocean Woods", that it is a planned unit development which extends from **Atlantic Avenue to the Atlantic Ocean.** The brochure depicts a little map in two places that Ocean Woods extends from Atlantic Avenue to the ocean. (A-16). The brochure is the best objective evidence in this case other than Exhibit 15, which was an equally false advertisement placed in the newspaper. (R-2708) (A-15).

Next, the Defendants comment about the video presentation clearly depicting an area that is reserved for apartment construction. The video tape introduced in the trial below did in fact, have a legend on the 11.5 acres that says future apartment construction. However, the video does not clearly indicate whether the 11.5 acres is part of Ocean Woods or not. (R-2766). Only five of the successful Plaintiffs testified they saw any portion of the video presentation, and they all denied that it indicated to them the ocean area was not a part of the project. (Those five are Sholar R-359; Harris R-816; Crosby R-901; Bragg R-915; Latsios R-980). The actual maps that were used by the sales force were never placed into evidence by Defendants. (R-1540).

The Defendants on page 11 state two of the Plaintiffs not

only knew that the property on the beach was not a part of the development, but specifically told the defendant that they did not want that part to be a part of the planned unit development. Plaintiff Asp testified that people were concerned at a meeting held well after he purchased his unit, when they realized that the 11.5 acres of property did not belong to the Ocean Woods project, and that the Developer was going to allow their recreational facilities to be used by outsiders. (R-301, 304) (A-56,57). Mr. Asp specifically stated he believed he was buying property that contained the amenities set forth in Exhibit 16. (R-283, 284). Mr. Harrington found out at the meeting or got the impression at the meeting that there was going to be a development of the ocean frontage property, different from what he apparently envisioned, and those people were not going to be part of the Homeowners Association. (R-127, 130). It was at that meeting he first learned Ocean Woods did not include the property (11.5 acres) east of Ridgewood Avenue. (R-127).

Mr. Edwards, the Plaintiffs' expert, was qualified to and did testify that the property owned by the Plaintiffs in Ocean Woods would have been worth more at the time of their purchase, if the 11.5 acres had been included in the project.

On page 12 of their brief, Defendants contend the only other testimony offered with respect to damages was by the Plaintiffs themselves. The Plaintiffs did, in fact, testify in each and every case with respect to the purchase price of their unit. However, they did nothing more than what the law of the State of Florida and every other jurisdiction permits, namely, testify as to the actual value of their property, because they were the

owners. It was only after witness number thirty three, Charles Stenglein, testified that the Plaintiffs answered any other question than what was the actual value of their property at the time they purchased. After the testimony of Mr. Stenglein, there was a conference, and it was the Defendants' position that counsel's question as to actual value at the time of purchase should not be in the form which it had been previously asked. The Defendants conceded that the Plaintiffs could testify as to present value of their own property, and that they could also give an opinion as to the value of their property some time in the past. (R-776, A-69). However, the defense attorneys at that point said Plaintiffs were somehow going a step further in having the people testify on a hypothetical matter. (R-776) (A-69). The Plaintiffs had never testified on hypotheticals, except in answer to Defendants' questions. Defendants' counsel asked the court to order the Plaintiffs' attorney to frame the question as to actual value in the form of a hypothetical, and the court ordered the Plaintiff to do so. (R-775). After Mr. Stenglein testified, the defense counsel made this statement for the record, "If the Plaintiffs' attorney wants to ask a hypothetical question, that's all right." (R-789) (A-7Ø). Examination of the entire record would show, that the reduction in value attributable to the lack of a nature trail was de minimus. For instance, Mr. Jakeway stated he valued the absence of the ocean front to be at least 9Ø% of the difference in price and the actual value. (R-83,84). Again Mr. Harrington testifed the main reason for the difference in the value between the purchase price and actual

value was due to the fact it wasn't an ocean front project. (R-140). But he did testify there was some damage as a result of no nature trail. (R-139). In many instances Plaintiffs testified not only in their capacity as owner, but explained that at the time of purchase they had shopped the market and had compared prices for similar units, and that they were prepared to give an actual value based upon their personal knowledge as to what the market was at that time. This is not expert testimony, but it is testimony based upon something more than mere ownership. (R-163, 435, 1243 for example). Several of the Plaintiffs testified they had been damaged because they did not receive what they had paid for. For instance, Plaintiff Harrington gave a full and complete explanation of his opinion of this type of this type of damage. (R-142). The Plaintiff Szczepanik also gave a clear explanation of her damage, explaining that she did not get what she had paid for. (R-519-520,525-526) (A-59,61). Gale Rutkowski explained she was damaged by not getting what she had paid for and explained how not having ocean frontage would affect the value of her property. (R-588-590) (A-63).

On page 12 of their brief, the Defendants state their expert appraiser, Francis R. Horn, testified that in every case involving the Plaintiffs' property, the actual market value of the Plaintiffs' units without regard to amenities or the lack of ocean front was equal or greater than the amount paid for the unit at the time of sale. Mr. Horn stated that market value is what a willing buyer would pay to a willing seller. (R-1506, 1507). Mr. Horn admitted the actual price paid for a piece of property is very good evidence of market value. (R-1507). Mr.

Horn stated that the easement, which now exists from the Ocean Woods project across First Interestate's property to the ocean is worthless. (R-1509). Mr. Horn defined an easement is simply the right to go over someone's property and is not a fee interest in anybody's property. (R-1509, 1510). Mr. Horn testified that if the 11.5 acres ocean frontage had been included in the project, that the market value would be greater for each of the Plaintiff's units. (R-1513). Mr. Horn further testified the purchase price would include a buyer's interest in the 11.5 acres, if it was represented to the buyer that the ocean front parcel was part of the Ocean Woods project. (R-1518). Mr. Horn, agreed and testified that a buyer deserves what he bargains for, irrespective of cost. (R-1518). The Defendants further set out in their Statement of the Facts that their expert, Mr. Horn, was allowed to introduce over objection the market value at the time of trial of the ocean front parcel. The record does not show there was an objection when the question was asked of the expert with respect to his opinion on the particular parcel in question. (R-1512 and 1511). In addition defense counsel stated to the court present value of the Plaintiffs' property in this case was material. (R-1467).

The Plaintiffs deem it appropriate to include facts about the "nature trail". Norma Cross testified the nature trail was to be finished, so the owners of the property could have access to the beach before the project was completed. (R-1227). She described this nature trail to be one for jogging, running and biking. She also testified potential buyers were told there

would be a nature trail across the north boundary all the way to the beach with a perpetual access to the beach. (R-1217). A reading of the entire record will show that this is not the case even today. Tom Wasdin in his testimony confirmed that the statement of justification, Exhibit number 25, would be the type of instrument that would contain a nature trail, if one had been planned for the project. (R-1324). He also confirmed that in fact there was no nature trail across the north boundary. R-1324). Mr. Wasdin further testified the nature trail, which did exist in some form at the time of trial was not suited for bicycle riding over all of it. (R-1327). He also admitted the nature trail had not been properly maintained, and that the city caused absolutely no problem with respect to the nature trail on the south side. (R-1327). Beth Foy testified she told potential buyers the nature trail would be on the north boundary, and that people could run, ride a bicycle and walk on it to the beach. (R-1534). Mr. James Lewis, who took the videos of the nature trail, testified the first time he'd ever noticed any nature trail signs was approximately two weeks before he testified in the trial. (R-1558, 1557). The nature trail on the north side is grown up, and one cannot get through to the beach on it, (R-1571). Tom Wasdinn testified the original statement of justification was done by First Interstate and it was used by Ocean Woods for the development. (R-1576, 1577). Mr. Wasdin further testified there was no easement from Ridgewood Avenue to the beach for the benefit of the Homeowners Association until August of 1983. (R-1598). The trial began October 31, 1983! This easement was conveyed by First Interstate to the Homeowners

Association, which First Interstate controls, (R-1194-1195). The Homeowners Association, being controlled by First Interstate, could easily convey this easement back to First Interstate. An easement across property is not perpetual access.

Mr. Biery, who is President of First Interstate Development Corporation, testified the nature trail would have been in the statement of justification, or it was the type of thing that would have been in there had it been planned. (R-654). Biery also testified he prepared the statement of justification under the name of Porta de Sol, but that it was now called Ocean Woods. (R-655). Biery testified there are no plans to sell the 11.5 acres, no contract, etc., (R-668), and that the 11.5 acres on the ocean did not belong to the Ocean Woods project. (R-668,669) (A-66).

The Plaintiffs would further add to the Statement of Facts that with respect to jury instructions, the Trial Court always ruled in favor of the Defendants. (R-1622-1652, 1662, 1663). Also, the Defendants agreed to the general verdict form, instead of requesting special interrogatory verdict forms. (R-1652).

SUMMARY OF ARGUMENT

The trial of this case of fraud lasted from October 31, 1983 to November 9, 1983. At the conclusion of the trial, the jury found for the Plaintiffs and against the Defendants. However, before submitting the case to the jury, the Trial Court directed a verdict with respect to the Plaintiffs' prayer on the issue of punitive damages, and it is the Plaintiffs' contention on appeal that the issue of punitive damages in a **fraud case** is not a

threshold question for the court to decide, but rather must be submitted to the jury in every case of fraud. Since every Appellate Court in this State has held that in a claim for fraud punitive damages is an issue for the jury, this argument could not possibly be a basis for this Court's exercising its discretionary jurisdiction.

As to Defendants' argument concerning the appropriateness of the 5th District's reversing the Trial Court's striking the Plaintiffs' prayer for punitive damages, and then remanding the cause for a new trial on the issue of punitive damages only, Plaintiffs' submit that because of this Court's holding in Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976) (A-119), which established the principle of law that an award of punitive damages need not bear a reasonable relationship to the actual or compensatory damages awarded, the cases cited in support of Defendants' position are no longer viable and the post-Lassiter decisions are not in conflict with each other. The overwhelming majority of the case law, including at least one decision of this Court, Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985), is against the defendant's position and in favor of affirming compensatory damages and remanding for a new trial on punitive damages alone.

The Plaintiffs' position comports with logic and reason as well as the law. The decision in favor of Defendants under this point would inter alia abolish the interest earned to date on the original judgment, and it could never be recouped. Furthermore, this particular issue was not raised in the original briefs by the Defendants, and was therefore untimely raised in the

Defendants' Motion for a New Hearing after the 5th DCA had rendered its decision. The delay may very well have prejudiced the rights of the Defendants in their decision whether or not to pursue a new trial on punitive damages only. The issue of punitive damages was not submitted to the trial jury of the unrelenting efforts of the Defendants in this case, and it would be a bad policy, which would allow those who induced error to benefit thereby on appeal. Such a ruling would foster and encourage unprincipled counsel to make untenable legal arguments in the trial court to create error upon which they could then take advantage on appeal.

The 5th DCA in its opinion found that, of the two allegations, which were submitted to the jury on the issue of fraud, the one about a nature trail, should not have been submitted. However, since there a was general verdict, which was not objected to by the Defendants, the 5th DCA refused to set aside the compensatory verdict. The 5th DCA found there was clearly sufficient evidence to support the jury's determination concerning the misrepresentation by Defendants the development was ocean front. The Plaintiffs contend there was sufficent evidence to support the trial court's decision not to direct a verdict on the issue of the nature trail, and that that particular allegation of fraud was properly submitted to the jury. On the other hand, if it was improperly submitted (as opined by the 5th DCA), the verdict as rendered by the jury should not be disturbed because of the "Two Issue Rule", which requires an Appeal Court to assume the verdict was reached on the

basis of the theory which is free from any error. Variety Childrens Hospital v. Perkins, 382 So.2d 331 (Fla. 3rd DCA 1980).

There was no error in the trial court submitting to the jury the fraud allegation the project was "beach front". Each and every element of fraud was clearly proven by the Plaintiffs. Each Plaintiff testified they were told that the project extended to the Atlantic Ocean, when, in fact, it did not. Each Plaintiff was handed and relied upon Exhibit 16, a brochure which clearly indicated in more than one place that the project extended from State Road A1A to the Atlantic Ocean. In addition, both the Plaintiffs' expert and Defendants' expert, testified that the Plaintiffs' property, irrespective of the purchase price, would be worth more if the project extended to the Atlantic Ocean as it was represented. The Plaintiffs themselves testified to the contract price of their individual parcel and as to the value of their property as it actually existed. The proper measure of damages in an action for fraudulent misrepresentation concerning real property is the difference between the actual value of the property and its value had the represented facts regarding it been true. West Florida Land Co. v. Studebaker, 37 Fla. 28, 19 So. 176,179. Therefore, there was overwhelming evidence of this aspect of the fraudulent transaction perpetrated by Defendants against the Plaintiffs. With respect to Plaintiff's testimony as to the value of their own property, the rule has long been established in Florida as in every other jurisdiction that an owner may testify as to the value of his own property.

During the trial, Defendants' expert in answer to Plaintiff's question, gave his opinion as to the value of the

ocean front tract located east of the Ocean Woods planned unit development, which was the particular tract, which was fraudulently represented as being part of the Ocean Woods development. His opinion was entirely appropriate, since the extraordinarily high value of the property provided a strong motive for the Defendants not to include it in the Ocean Woods Project and was certainly relevant to show the accuracy of the Plaintiffs opinion as to the damages caused by the failure of the Defendants to include that particular property in the project. True, the focus of damages in this case was on the value at the time Plaintiffs made their purchase, but the value before and after purchase is certainly relevant. In addition, Defendants' counsel represented that present day values are material, because this fraud was a continuing tort.

The opinion of Plaintiffs' expert, a qualified real estate broker experienced in appraising, which was limited to expressing the obvious - namely that the individual units in a project would have a higher value if the project was contiguous to the Atlantic Ocean, was legally relevant and therefore admissable.

ARGUMENT

POINT I

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH REVERSED A DIRECTED VERDICT FOR THE PETITIONERS ON THE ISSUE OF PUNITIVE DAMAGES EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

Contrary to Defendants' contentions, Florida Appellate Courts are unanimous in holding that in actions involving **fraud**, the issue of punitive damages is not a threshold question to be determined initially by the trial court, but rather must **always** be presented to the jury for its consideration.

This principle was firmly established in Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 221 (Fla. 1936), a case heavily relied upon by the Defendants, where this Court stated:

> ...Exemplary damages are given solely as a punishment where torts are committed with **fraud**, actual malice, or deliberate violence or oppression,... (emphasis added)

In Wackenhut Corp. v. Canty, 359 So.2d 430, 435 (Fla. 1978), another nonfraud case cited by the Defendants in support of their position, this Court in rendering its decision said the following:

> ...A legal basis for punitive damages exists where torts are committed in an outrageous manner or with **fraud**, malice, wantonness or oppression.... (emphasis added)

The exact language set out above is repeated in a more recent decision of this Court in Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982), another nonfraud case cited as support for Defendants' position.

Como Oil Company, Inc. v. O'Laughlin, 466 So.2d 1061 (Fla.

1985) is again another nonfraud case relied upon by the Defendants. This case merely holds what the Plaintiffs concede, that in a **negligence** case the issue of whether the acts of the tort feasor are sufficiently outrageous to warrant submission of the question of punitive damages to the jury is a threshold issue for the court to decide.

Defendants cite only one **fraud** case as authority for their position the issue of punitive damages is a threshold decision of the trial court, and that is Schief v. Live Supply, Inc., 431 So.2d 602 (Fla. 4th DCA 1983), pet. for rev. denied 440 So.2d 352 (Fla. 1983). (A-131). That case does not hold the trial court in a case of fraud can strike a punitive damage claim. It merely holds it is error for the trial court to insert the word "fraud" in the standard punitive damage instruction, so as to mislead the jury to believe punitive damages should **always** be awarded in fraud cases. The Third District in Schief stated on page 603:

> ..Whether a fraudulent act is sufficiently outrageous so as to justify an award of punitive damages is a question for the jury....

Schief is one of the cases cited by the Fifth District below as authority in opposition to the Defendants' position under this point. (A-131). The Fourth District in Hutchens v. Weinberger, 452 So.2d 1024, 1025 (4th DCA 1984), (A-115), interpreted Schief observing:

> ...As we noted in **Schief**, whether the fraudulent act is sufficiently outrageous is a question for the jury....

The last case cited by Defendants in support of their argument, is Tuel v. Hertz Corporation, 296 So.2d 597 (Fla. 3d

DCA 1974), a standard automobile negligence case. Plaintiffs' do not disagree with the Defendants' argument that in a case of that nature the issue of punitive damages would be a threshold issue for the judge to determine.

The whole question of whether punitive damages is a threshold issue for the trial court in fraud cases was put to rest in Walsh v. Alfidi, 448 So.2d 1084,1087 (Fla. 1st DCA 1984) (A-150). There the First District states as follows:

> ...Whether a fraudulent act is "sufficiently outrageous so as to justify an award of punitive damages is a question for the jury." **Schief v. Live Supply, Inc., supra,** at 603; **Tinker v. De Maria Porsche Audi, Inc.**

In summary, all Florida Appellate Courts have held that fraudulent acts are, ipso facto, sufficient to warrant consideration, but not necessarily the assessment, by the jury of punitive damages so as to eliminate the need for any initial inquiry by the trial court as to the propriety of punitive damages.

POINT II

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH REMANDED THE CAUSE FOR A TRIAL ON THE ISSUE OF PUNITIVE DAMAGES ONLY EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF OTHER FLORIDA DISTRICT COURTS OF APPEAL.

Since the issue, of whether the court below erred in ordering a new trial solely on the question of punitive damages was first untimely raised in Defendants' unsuccessful Motion for Rehearing and not addressed in their briefs they cannot assert it now as a basis for this Court to accept jurisdiction. The failure of the Defendants to assert their position on this issue in a timely manner has prejudiced the Plaintiffs in that Plain-

tiffs, had they timely known of the Defendants' position under this Point, could have voluntarily dismissed the crossclaim upon which Plaintiffs ultimately prevailed in the 5th DCA. A voluntary dismissal cannot be entered after a decision on the merits. Rule 9.350, Fla. R. App. P. Since Plaintiffs were denied the opportunity to evaluate their position vis-a-vis to this particular issue and perhaps decide to accept the compensatory award and abandon their pursuit for a new trial on punitive damages only, they have lost a valuable option. In addition, Defendants' could become insolvent or their assets intentionally wasted, and a new trial on all damages would truly result in a pyric victory. Last, but not least, a decision in favor of Defendants under this Point would abolish the interest earned to date on the original Judgment. Up to March 6, 1986, that interest amounted to a sum in excess of $82,000.00. The lost interest could never be recouped. It would be a bad policy which would allow those who induced error to benefit thereby.

Even if timely presented, Defendants' position is without merit since all the relevant cases cited by Defendants were decided prior to Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), which established the principle of law that an award of punitive damages need not bear a reasonable relationship to the actual or compensatory damages awarded. (A-119). Lassiter was reaffirmed by this Court's decision in Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039, 1042-3 (Fla. 1982), where it was acknowledged:

> ...We were right to disavow the rule that punitive damages must bear some reasonable relation to compensatory damages, Lassiter v.

> International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976), because the amount of compensation for loss is an entirely separate matter from the amount of punitive damages. Punitive damages apply to wrongdoing, not covered by the criminal law, where the private injuries inflicted partake of public wrongs. They are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff. Ingram v. Pettit, 340 So.2d 922 (Fla. 1976); Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1974); Florida Railway & Navigation Company v. Webster, 25 Fla. 394, 5 So. 714 (1889)....

Since there is no necessary nexus between compensatory and punitive damages, it is not necessary to have both punitive and compensatory damages considered by the same jury. Of the cases cited by the Defendants, DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3rd DCA 1970) is one of only two cases which actually hold it is better practice and procedure for one jury to determine both compensatory and punitive damages. However, as previously pointed out, this case was decided prior to Lassiter, supra, and in DuPuis the reversal initially was on **compensatory** damages only. It was only upon a rehearing that the Court determined it would be better to order a new trial on all damages.

The wisdom of DuPuis and Gillette v. Stapleton, 336 So.2d 1226 (2nd DCA 1976), another pre-Lassiter case cited by Defendants, can only be understood when viewed in the light of the then existing law, which required some reasonable relationship between compensatory and punitive damages. The necessity of such a relationship made it seem reasonable to require one jury to consider compensatory and punitive damages. However, in light of Lassiter, DuPuis and Gillette are anachronisms.

The other pre-Lassiter case cited by the Defendants, Baynard v. Liberman, 139 So.2d 485 (Fla. 2d DCA 1962), is actually no support for their position that the Fifth District should have reversed and ordered a new trial on both compensatory and punitive damages. If the case holds anything at all, it is that the Plaintiff's cross-appeal below should have failed in its entirety, since the Plaintiffs did not ask for a new trial on compensatory damages as well as punitive damages. Baynard indicates that if the plaintiffs there had wanted a new trial on punitive damages, it would have been necessary for them to have requested a new trial on compensatory as well as punitive damages, and because they failed to do so, their prayer for a trial solely on the issue of punitive damages was denied.

If the reasoning of Baynard was applied in the case sub judice, at most, the opinion below should be modified to an affirmance of the compensatory damages, and a denial of the cross-appeal. However, Baynard has no application to the case at bar, since after Lassiter, punitive and compensatory damages need not have any relationship to each other and thus can be independently determined by separate juries.

The first post-Lassiter case cited by the Defendants, White v. Burger King Corp., 433 So.2d 540 (4th DCA 1983) provides them little support. Though the Fourth District did remand the case for trial on all isues, which included punitive damages, it is apparent from the decision the Fourth District felt punitive damages must be reconsidered in light of Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), which dramatically

changed the law on punitive damages as they related to that case, and was not rendered until after the trial of White. It was likewise necessary for the Jury on remand to reconsider compensatory damages in White since the trial court erred in failing to properly instruct the jury on the Plaintiff's theory of damages.

Another post-Lassiter case cited by the Defendants, Adler v. Seligman of Florida, Inc., 438 So.2d 1063 (Fla. 4th DCA 1983), does not support defendants' position. This case merely states that under no circumstances is a jury to be instructed that they **must** bring back a punitive damage award. And that's true even in the fact of an established liability for compensatory damages. The issue there was whether there is such a thing as a mandatory punitive damage award, and the Fourth District answered in the negative. A jury may very well decide not to award punitive damages, even though the evidence would support such an award.

The questionable vitality of the cases cited by Defendants is further illustrated by the fact that Schief v. Live Supply, Inc., 431 So.2d 602 (Fla. 4th DCA 1983) (A-131); Walsh v. Alfidi, 448 So.2d 1048 (Fla. 1st DCA 1984) (A-150); and Tinker v. De Maria Porsche Audi, Inc., 459 So.2d 487 (Fla. 3rd DCA 1984) (A-137), all of which are cited in the opinion below, were remanded for a new trial exclusively on the issue of punitive damages. (A-5).

Tinker shows even the Third District no longer follows its own holding in DuPuis supra. In a more recent case, not involving fraud, Hartford Accident and Indemnity Co. v. Ocha, 472 So.2d 1338 (Fla. 4th DCA 1985) the court likewise remanded for a new trial only on the issue of punitive damages. (A-108). This

very Court has acknowledged the wisdom of this practice in Bankers Multiple Line Ins. Co. v. Farish 464 So.2d 530, 583 (Fla. 1985), where it ordered: (A-88)

> We therefore approve affirming the compensatory damages but quash that part of the district court's opinion reversing the order for a new trial on punitive damages and remand with directions to grant a new trial on the issue of whether punitive damages should be imposed, and if so, the amount thereof....

The Defendants are urging this Court to disregard the overwhelming majority of decisions in this State on the grounds that the best rule would require the same jury to decide both compensatory and punitive damages. To allow the Defendants to now defeat the Plaintiffs compensatory verdict leads to the unjust result that the Defendants would be benefiting from their own error. The Defendants' arguments to the trial court to strike the punitive damage claim in the Plaintiffs' case were specious and obviously erroneous. Yet it was the Defendants' unrelenting effort to cause error in their favor which ultimately caused the trial court to strike the Plaintiffs' punitive damage claim. (R-1378,1379,1429). Would it be a sound legal rule to now allow the Defendants to capitalize on the error they created? The answer must be no. Such a ruling would not only be legally questionable, but definitely against public policy. It would foster and encourage unprincipled counsel to make untenable legal arguments in the trial court in order to create error which they then could take advantage of on appeal.

If this Court should be inclined to rule in favor of the Defendants under this point, then the trial court should be

directed to impanel the original jury which decided the compensatory damages and allow them to now decide the punitive damages. And if the trial court, after being directed, found reimpanelling the original jurors to be impossible, (because of death, etc.), then and only then should a new jury be impanelled, and it should be advised fully of the compensatory award and instructed to reach a verdict only on punitive damages. No rule would be a **good rule** that rewarded the party creating error.

Nothing in the preceding paragraph should be construed to mean the Plaintiffs agree in any way with the Defendants' position under this point. On the contrary, the Plaintiffs' position is that this Court should follow the sound reasoning of the overwhelming case law, which has been cited by the Plaintiffs hereinabove.

The Supreme Court should not invoke its discretionary jurisdiction, because the opinion of the Fifth Disctrict Court of Appeals, when viewed in light of the most recent Supreme Court and District Court opinions presents no conflict.

POINT III

THE "TWO ISSUE" RULE APPLIES IN THIS CASE BECAUSE DEFENDANTS FAILED TO OBJECT OF A GENERAL VERDICT.

The Defendants' argument under this point makes an assumption, which the Plaintiffs are not willing to concede: that the 5th DCA decision the trial judge erred in allowing the issue of the "nature trail" to go to the jury is correct. Plaintiffs contend the evidence in the trial below supports the trial court's decision with respect to the nature trail.

Since the Plaintiffs presented sufficient evidence of all

four essential elements of fraud with respect to the "nature trail" there was no error in the trial court's failing to grant the directed verdict requested by the Defendants. Even if the Plaintiffs had completely failed to present sufficient evidence of fraud with respect to the "nature trail", there was overwhelming evidence as to other frauds which independently would support the verdict. Additionally, the Defendants failed to request special interrogatory verdict forms in order to require the jury to allocate the damages as to particular aspects of the fraud proven by the Plaintiffs. Since the Defendants below approved the general verdict form, they have waived any objection to a general verdict by the jury which is amply supported by one or more theories. (R-1652) Middleveen v. Sibson Realty, 417 So.2d 275,276 (5th DCA 1982).

As further evidence of the Defendants total absence of any intent to construct a nature trail, the following was introduced at the trial. Defendant, TOM WASDIN, confirmed that the Statement of Justification, Exhibit No. 25, would be the type of instrument that would mention a nature trail, if one had been planned for the project. (R-1234) (A-19). He also said this Statement of Justification was used by Oceanwoods for the development, it having been originally written by First Interstate Development Corporation. (R-1576, 1577) Mr. Wasdin further testified there was no easement from Ridgewood Avenue to the beach for the benefit of the homeowners in Oceanwoods until August of 1983, shortly before the trial. (R-1598) The president of Defendant, First Interstate Development Corporation, stated

the nature trail would have been in the Statement of Justification or it was the type of thing that would have been in there, had it been planned. (R-654) The President of First Interstate, Mr. Biery, also testified he prepared the Statement of Justification under the name of Porta del Sol, but that it was now used under the name of Oceanwoods. (R-655) Norma Cross, a sales representative for Defendant, Oceanwoods, testified the nature trail was to be finished so the owners of the property could have access to the beach before the project was completed. (R-1227) She described the nature trail to be one for jogging, running and biking. Beth Foy, another sales representative of Defendant, Oceanwoods, testified she told people the nature trail would be on the North boundary and the people could run, ride a bicycle and walk on it to the beach. (R-1534) Tom Wasdin confirmed that, in fact, there is no nature trail across the North boundary. (R-1324) He admitted the nature trail which had been constructed on the South boundary, and was in existence at the time of trial, was not suitable for bicycle riding over all of it. (R-1327). He even testified that the southern boundary nature trail had not been properly maintained and that the city caused absolutely no problem with respect to the nature trail on that side. (R-1327).

Strong evidence there was never any intent to construct the nature trail as represented to the Plaintiffs is the simple fact that the nature trail on the south side as it exists today is not of the quality, which even the Defendants have admitted, the nature trail was supposed to have been. (R-125,140,193,194, 195) More than one Plaintiff testifed the South boundary nature trail was only recently constructed or attempted to be constructed.

For example, Plaintiff Sholer, testified the nature trail on the south side had been somewhat cleared within the last month before the date of the trial. (R-366). Of course, this is consistent with the Defendant, Tom Wasdin's, own testimony.

Another Plaintiff, Mrs. Boatman, testified the nature trail as it exists now, and she had been there the day she testified, was so bad she couldn't even take the dog down it; she said it had all grown up. (R-455) Plaintiff, Gale Rutkowski, testified the nature trail on the North did not exist and the one on the South was very small and had been there only about two weeks. (R-583) Surely, these Plaintiffs' statements together with the Defendant's own testimony is more than merely some evidence of lack of intent to construct the nature trail as promised.

If the Defendants had not been fraudulent and had they been acting in good faith and with good intentions as they maintain, the South trail would be of the same quality as the North trail was supposed to have been.

The question of the proof of intent in a fraud action was visited upon by the 4th DCA in Great American Ins. Co. v. Coppedge, 405 So.2d 732 (4th DCA 1981), where it was said:

> Intent, being a state of mind, is not subject to direct proof and can only be inferred from the circumstances. Skold v. State, 263 So.2d 627 (Fla.3d DCA 1972). Thus, if there was any reasonable evidence upon which a jury could legally predicate a determination of intent, the trail court correctly denied the appellant's motion for directed verdict. Tiny's Liquors, Inc. v. Davis, 353 So.2d 168 (Fla.3d DCA 1977).

It is also important to remember that fraud can be committed by representations made under circumstances in which the repre-

sentor ought to have known, if he did not know, of the falsity thereof. See Alexander Properties, Inc. v. Graham, 397 So.2d 699, 706 (4th DCA 1981).

Finally, it is significant that the nature trail, which was shown in the film at trial was constructed 2 1/2 years after this lawsuit was filed and only after the matter was set for trial. In fact, the evidence clearly showed the construction of this so-called "nature trail" had not even been completed during the trial below. The "nature trail" was constructed merely for purposes of the trial.

The Defendants are asking this Court to speculate as to what damages the jury awarded for the differing fraudulent misrepresentations of the Defendants. The Defendants having failed to ask for special interrogatory verdicts, cannot now claim error. The record reflects that the Defendants approved of the single general verdict form. (R-1652) Defendants advance an erroneous theory that if the issue concerning the nature trail was improperly considered by the jury, then the entire general verdict cannot stand and must be reversed. The "Two Issue Rule" adopted by the Florida Supreme Court in Colonial Stores, Inc. v. Scarborough, 355 So.2d 1181 (Fla. 1977), and reiterated by the same Court in Whitman v. Castlewood Intern. Corp., 383 So.2d 618 (Fla. 1980), demands the opposite result. In Middleveen v. Sibson Realty, 417 So.2d 275, 276 (5th DCA 1982), the Fifth District recites the "Two Issue Rule" as follows:

> Where a general verdict form is submitted to the jury without objection, reversal is improper where no error is found as to one of several issues submitted to the jury on which

the verdict may be properly based.

It is important to examine the law with respect to setting aside a jury verdict. The appellate court will assume the verdict was reached on the basis of the theory which is free from any error. Variety Children's Hospital v. Perkins, 382 So.2d 331 (Fla. 3rd DCA 1980). Further speaking on this question, the 3rd DCA in Bermil Corporation v. Sawyer, 353 So.2d 579, 583 (3rd DCA, 1977), (A-93), stated:

> Finally, it must be stated that any party seeking to have a jury verdict set aside admits, for purposes of that proceeding, all material facts as testified by the opposing party together with all inferences favorable to the opposing party, which might reasonably be drawn from the evidence as a whole. Thompson vs. Jacobs, 314 So.2d 797, (1st DCA, 1975).

Under the law cited above the verdict must stand. Even if there was a total lack of evidence with respect to the "nature trail", which constitutes a small portion of the Plaintiffs damages, the ample and overwhelming evidence concerning the misrepresentations that the Oceanwoods Project was an oceanfront project, in and of itself, provides the necessary evidence to support the verdict as indicated by the testimony of each and every Plantiff.

If the record demonstrates any theory upon which the jury could lawfully have reached its verdict, that verdict must stand. Kaplin v. Ciavarella, 349 So.2d 700 (4th DCA, 1977). (A-118).

Surely the evidence in this case is overwhelming, that the Plaintiffs were damaged monetarily. The testimony of Chris Edwards alone would show they suffered some pecuniary loss. (R-1296). In Florida Public Utilities Company v. Wester, et al, 7

So.2d 788 (Fla. 1942), we find the following language with respect to the quality of proof as it applies to market value, on page 790:

> ...It is often impossible to place what is a current market value on such article, but the law does not contemplate that this be done with exact mathematical exactness. The law guarantees every person a remedy when he has been wronged....
>
> When the wrong is shown, it becomes the duty of court and jury to apply a test that will reasonably compensate the person wronged rather than one that makes it impossible to do so. The principle of res ipsa loquitur may be used to aid the result even though not technically applicable.

There is no merit to Defendants' contention under this Point.

POINT IV

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GRANT A DIRECTED VERDICT FOR THE DEFENDANTS WITH REGARD TO THE ISSUE OF ALLEGED MISREPRESENTATIONS THAT THE PROJECT WAS "BEACH-FRONT".

Since under the authorities cited in Point V, the uncorroborated testimony of a Plaintiff landowner as to the value of his property is admissable and sufficient to establish damages, the Court did not err in failing to direct a verdict, based upon Plaintiffs failure to prove damages by substantial competent evidence. If we can judge by the action of the jury in the trial below in rendering 50 verdicts in the space of 70 minutes, Plaintiffs certainly and persuasively proved their damages.

The Plaintiffs are in complete agreement with the Defendants in their assertion that where a purchaser seeks damages for a misrepresentation as to matters affecting the value of property

purchased by him, he must prove the value at the time of purchase, and what such value would have been had the representations been true.

To prove the value of the units at the time of purchase had the representations been true, the Plaintiffs testified to the purchase price of their units. That testimony was unimpeached and uncontradicted. That evidence is certainly sufficient to establish the first of the two values necessary in computing the damages for fraudulent misrepresentations concerning real property.

Contract price is strong evidence of the value of the property as represented. West Florida Land Co. v. Studebaker, 19 So.176 (Fla. 1896), (A-154), Haynes v. Cumberland Builders, Inc., 565 S.W.2d 887, (Tenn. App. 1979), (A-170), Lyon v. Shelter Resources Corp., 253 S.E.2d, 277 (N.C. App. 1977), (A-201).

Defendants in their argument under Point IV, again assert that the testimony of the Plaintiffs alone is not sufficient to establish the actual value of the units. It is well established under Florida law that the uncorroborated testimony of a Plaintiff if reasonable on its face and if believed and accepted by the jury can carry the burden of proof, Florida Publishing v. Copeland, 89 So.2d 18 (Fla. 1956). What the Defendants complain of, is what they perceive as a lack of detail to support the opinions given by the Plaintiffs as to the value of their property. As is established by Plaintiffs in their argument under Point V of this Appeal, any lack of foundation or explanation goes merely to the weight and not the admissibility of the

testimony. The Defendants contend that where a witness (in this case by implication, the Plaintiffs themselves) cannot tell the jury how he worked out mental adjustments in making a percentage adjustment to value, his testimony is inadmissable, and in support of that statement cites Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970). Walters is not relevant since it dealt with the testimony of an expert. There is no question that in the State of Florida a non-expert plaintiff-landowner can testify with respect to the value of his own property.

In their final argument in this point, Defendants strain credulity in asserting that on the basis of the testimony presented in the trial below, none of the Plaintiffs were able to relate how they were injured. Every single witness, including the experts who testified for both parties, established that the value of the Plaintiff's property was diminished by virtue of it not being an oceanfront project. This argument is more fully answered in Point V. From the entire record, only one conclusion is reasonable and that is each and every Plaintiff did not receive the benefit of his bargain, and as a result, suffered significant pecuniary damages. Strickland v. Muir, 198 So.2d 49 (4th DCA 1967) (A-133), Sorensen v. Gardner, 334 P.2d 471 (Ore. 1959) (A-206).

Defendants erroneously contend the test for materiality is "whether, except for the perpetration of the alleged fraud, the Plaintiff would have refused to enter into the contract", relying on Great American Ins. Co. v. Suarez, 109 So. 229 (Fla. 1926) (A-105), and Canal Authority v. Ocala Mfg. Co., 365 So.2d 1060 (Fla. 1st DCA 1979) App Dis w/o op. 368 So.2d 1363 (Fla.) to support

that proposition. In Suarez, the insurance company set up fraud as an affirmative defense to payment under the insurance policy. With respect to this issue the opinion states:

> There is no standard by which it may be determined whether fraud charged is material. **If set up as a defense,** it must related specifically to the contract or the subject-matter in litigation, and if it can be shown that the alleged fraud was such that if it had not been perpetrated the contract of insurance would not have been executed in the manner that it was if the fraud had not been perpetrated, then it cannot be said to have been material. (Citation omitted)(emphasis added)

Ocala Mfg. Co., supra, is not authority for the Defendants' contention on materiality and, indeed, does not seem to be relevant to any issue in this case.

The real test of materiality, which is set out below, is found in Pryor v. Oakridge Develpment Corp., 119 So.2d 326, 329 (Fla. 1928), (A-127), which is cited by the 5th DCA in Foodfair v. Anderson, 382 So.2d 150 (5th DCA 1980):

> One of the necessary elements of fraud to constitute ground for rescission as stated by Mr. Pomeroy, II, Pomeroy Equity Jurisprudence, Section 887, is the affirmation of a fact, and this fact, to be material, must affect the value of the property or cause loss to the purchaser.
>
> "The last element of a misrepresentation, in order that it may be the ground for any relief, affirmative or defensive, in equity or at law, is its materiality. The statement of facts of which it consists must not only be relied upon as an inducement to some action, but it must also be so material to the interests of the party thus relying and acting upon it, that he is pecuniarily prejudiced by its falsity, is placed in a worse position than he otherwise would have been. The party must suffer some pecuniary loss or injury as the natural consequence of the conduct induced

> by the misrepresentation. In short, the misrepresentation must be so material that its falsity renders it unconscientious in the person making it to enforce the agreement or other transaction which it has caused. Fraud without resulting pecuniary remedial jurisdiction, equitable or legal; courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral. If any pecuniary loss is shown to have resulted, the Court will not inquire into the extent of the injury; **it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable."** (emphasis added)

In a more recent affirmation of this principle the 4th DCA in Vance v. Indian Hammock Hunt and Riding Club, LTD., 403 So.2d 1367, 1371 (4th DCA 1981), (A-144), a relevant portion of which is set out below:

> ...[T]he determination of whether a fact is "material" can only be made in the frame of reference of the definition of what a material fact is; that is, it must be something which a buyer or seller of ordinary intelligence and prudence would think to be of **some** importance in determining whether to buy or sell. (emphasis added)

Thus it is apparent that in order to satisfy the element of materiality it is not necessary for the Plaintiffs to prove but for the misrepresentation concerning the fraud, they would not have purchased their units. Before leaving this point, Plaintiffs must respond to the argument made by the Defendants on page 28 of their brief, that any representations with respect to the beach front were nothing more than a promise of future performance. The record belies the efficacy of that argument.

In addition to what most Defendants were told, each received Plaintiffs' Exhibit 16 and relied thereon in making his decision to purchase the property. Exhibit 16 is subject to only one

reasonable interpretation, and that is there was a misrepresentation by the Defendants that the project would extend to the Atlantic Ocean. (A-16). Also, see Plaintiffs' Exhibit 15. (A-15).

POINT V

WHETHER THE LOWER COURT ERRED IN ALLOWING THE PLAINTIFFS TO TESTIFY AS TO THE DAMAGES TO THEIR PROPERTY CAUSED BY ALLEGED MISREPRESENTATIONS

Since owners of property are competent to testify as to the value of their property, there was no error in permitting the Plaintiffs to testify as to the damages they suffered as a result of Defendants fraudulent misrepresentations. Defendants acknowledge the general rule in Florida that a property owner may testify as to the value of his property, but assert that there are limitations and qualifications to the general rule based on case law from foreign jurisdictions with factual situations more removed from the instant case than the jurisdication of their origin is from Florida.

Defendants contend an owner cannot be a contract vendee at the time of his purchase and still testify as to the value of his property on the date of purchase. For the proposition that a contract vendee is not an "owner" under the rule permitting an owner to testify to the value of his property, the Defendants rely on Freedman vs. Cholick 379 P.2d 575 (Ore. 1963). In that case, the plaintiff paid the defendant $250.00 for an option to purchase downtown commerical property for $115,000.00. The Defendant was unable to deliver title. The court quite properly ruled that merely exercising an option did not make a person an

owner for the purposes of permitting testimony as to the value of the property.

Having a fee simple absolute interest in an existing residence is not the only definition of an "owner" for purposes of the general rule permitting non-expert testimony as to the value of real property. The Courts look to the familiarity of the "owner", with the property in question, in determining his competence to render an opinion and not to his exact interest in the property or the state of completion of any structure appurtenant thereto.

A survey of cases illustrate this. In Wall v. Thalco, Inc., 614 S.W.2d 8Ø3 (Tenn., App. 1981), an equitable owner was permitted to testify as to the value of real property because he was contractually entitled to reconveyance of that property. The California Court in Meyer v. Benko, 127 Cal.Rptr. 846 (Cal. App. 1976), a case involving a breach of contract to sell real property, permitted the contract purchaser to testify as to the rental value of that property on the theory he was an equitable owner of the property. Likewise in Junction City Water Control District v. Calvert, 493 P.2d 76 (Ore. Ap. 1972), it was held that it was not error to permit a contract purchaser to testify to the "before" and "after" value of his his property. In Jowdy v. Guerin, 457 P.2d 745 (Ar. App. 1969), the Arizona Court, acknowledging the well settled law that an owner may testify concerning the value of his real and personal property even though he is not qualified as an expert, found that the Plaintiff in that case was an "owner" within the meaning of that rule even though she had merely a vendor's interest in the property through

a special Warranty Deed after it had been conveyed to parties who were Defendants.

Defendants boldly declare that an owner is not permitted to testify as to the depreciation value of the remainder of his land caused by a road project absent a showing of a special knowledge by the owner as to its value beyond that which is presumed to be possessed by men generally, citing State, by and through State Highway v. Donnes, 609 P.2d., 1213 (Mont. 1980). Plaintiffs question the value of Donnes since the instant case does not, first of all, involve depreciation and, secondly, has nothing to do with a road project.

Plaintiffs' theory of damage is based upon fraud at the time of the Plaintiffs' purchase of property. The measure of damages is the value of the property as represented minus its actual value on the date of purchase. No depreciation took place which reduced the value as a result of some succeeding act occurring after the purchase.

In Donnes, the Court rejected the testimony of the owner of the ranch property who did not operate the ranch because of her decided lack of knowledge concerning the relevant issues of valuation. In that case, the owner even declined to give her opinion as to the value of the remaining land after the condemnation when she was asked.

In any event, even accepting Donnes as authority for the proposition that an owner cannot testify as to the depreciation of his property, contrary authority can be found. In Waites v. South Carolina Windstorm and Hail Underwriting Association, 307

S.E.2d 223 (S.C. 1983), the Supreme Court of South Carolina reaffirmed its prior holding in Howell v. State Highway Department, 166 S.E. 129 (S.C. 1932) in which a land owner was permitted to testify as to the amount by which his remaining land had depreciated as a result of the Highway Department's condemnation to a portion of his land to build a road.

The Defendants' major objection to the testimony, as to the value of their property presented by the Plaintiffs, was their alleged failure to present "sufficient factual data from which a jury could make a rational estimate of their loss". Defendants claim that the Plaintiffs' testimony was "inherently" speculative in nature because they could not state any rational basis for their opinion". The Plaintiffs take exception to any assertion that they were unable to provide a rational basis for their opinions as is borne out by the record.

To persuade this Court that the Plaintiffs' testimony as to the value of their property should be rejected, the Defendants rely upon a Missouri Appellate Court decision of Ward v. Deck, 419 S.W.2d 286 (Mo. 1967). There the Missouri Court rejected the testimony of the owner of the leasehold in question, because he had no experience in using the premises as a location for a liquor store and his previous business was not shown to have been comparable in any respect to that which he was undertaking to establish. Additionally it appears that he was testifying as to the value to him rather than market value.

Another case of dubious value relied upon by the Defendants is Harbond, Inc. v. Anderson, 134 So.2d 816 (2d DCA, 1961). The facts of that case and the law as enunciated therein bear no

relationship to the case at bar. In Harbond, the Second District rejected as incompetent the testimony of a corporation president as to the value of parcels of land not owned by either the president personally or by the corporation. **In the instant case, no Plaintiff sought to state an opinion as to the value of any property other than that which he or she was an owner.**

The generally accepted rule of law which applies to the instant case, is that an owner of property by merely virtue of being an owner is competent to give testimony as to the value of property as represented and its actual value. In Holcomb v. Hoffschneider, 297 N.W.2d 210 (Iowa 1980) (A-173), the Supreme Court of Iowa held that an owner in a fraud action is a competent witness to testify as to the market value of property and went on to say:

> Likewise, he is competent to give his opinion on what the property would have been worth if it had been as represented. (citations ommitted) He may also state his opinion on the difference between the two values. (citations omitted) 297 N.W. 2d, at 213.

In a later decision, the same Court in Kimmel v. Iowa, a realty company, Inc., 339 N.W.2d, 347 (Iowa 1983) reiterated this notion and held that owners in a fraud action against real estate brokers could properly testify as to the value of the property as represented and its actual value.

In a case more factually similar to the one at bar, Haynes v. Cumberland Builders, Inc., 565 S.W.2d 887, (Tenn. App. 1979), (A-170), the Tennessee Court upheld a lower court decision against a claim by the appellant that the damages awarded to the plaintiff were contrary to the evidence submitted and contrary to

the applicable law. In that particular case, the only evidence of damage in a fraud action against a seller who misrepresented the true boundary line of a residence was the testimony of the property owner.

In that case the Plaintiff testified as to the contract price of his property and its actual value considering the true boundaries of said property. The Court noted that the agreed sale price made under false representations of a boundary is evidence of the value which the property would have had if the representations were true. This, of course, is the exact theory which the Plaintiffs put forth in the Court below and is well supported by West Florida Land Company v. Studebaker, 19 So. 176 (Fla. 1896), (A-154).

The Tennessee Court in Haynes went on to hold that the owner was competent to testify as to the actual value and that the Plaintiff sufficiently established his damages.

A similar result was reached by the Supreme Court of Oregon in Osbourne v. Hay, 585 P.2d 674 (Ore. 1978). In that case, the purchaser of a motel was permitted to testify as its value. The Supreme Court of Oregon rejected the Defendant's request to apply Freedman v. Cholick, 379 P.2d 575, (Ore. 1963) to that case. Freedman is, of coursse, a case heavily on the Defendants in their brief in the case at bar. In Osbourne, as in the case at bar, damages were established by the contract price minus the market value established by the sole testimony of the purchaser.

The same law that applies in fraud cases applies to breach of contract cases. In Lyon v. Shelter Resources Corp., 253

S.E.2d, 277 (N.C. App. 1979), (A-201), the North Carolina Court rejected an assertion similar to that of the Defendants in the instant case that the Court erred in failing to direct the verdict in their favor because the Plaintiff failed to prove damages.

In Lyon, the Plaintiff testified what the contract price was and further testified to a reduced value of the house due to its defective condition. The North Carolina Court held that the contract price was strong evidence of the value of the mobile home as warranted and that the Plaintiff was competent to testify as to the value of the home in the defective condition.

Lavalle v. Aqualand Pool Company, Inc., 257 N.W.2d, 324 (Minn. 1977), (A-188), was a breach of contract action seeking to recover the diminished value of property due to a defective swimming pool installation. The highest court in Minnesota held that the owner of real property was competent to testify concerning the value it would have had if the pool was constructed according to the contract and its value as actually constructed even though the defendant's testimony as to the diminution in value differed from defendant's experts.

The overwhelming weight of authority in the United States is that a land owner is competent to testify to the value of his land and the weight to be given to his testimony is a question for the jury. Williams v. Oldroyd, 581 P.2d 561, (Utah 1978). Denver Urban Renwal Authority v. Berglund-Cherneco, 553 P.2d 99 (Colo. App. 1976), Junction City Water Control District v. Calvert, 493 P.2d 76 (Ore. App. 1971), Jody v. Guerin, 457 P.2d 745 (Ar. App. 1969), Simmons v. State of Maine, 234 A.2d 33

(Maine 1967).

By the great weight of authority, not only is an owner of property, merely by virtue of being the owner, competent to testify as to the value of his property, he is not required to strongly support his opinion. In Territory of Hawaii v. Adelmeyer, 363 P.2d 979, 987, (Hawaii 1961), the Hawaiian Supreme Court stated:

> Although the State cites two cases from the same jurisdiction for the proposition that an owner's testimony of value alone, being a bare opinion unsupported by explanation or experience, cannot support a verdict, the great weight of authority is to the contrary. An owner, by virtue of his ownership, and consequent familiarity with the land and the real estate market, is generally held to be qualified to give his opinion of the land, the weight to be given as testimony being a question for the jury.

Similarly, the Supreme Court of Minnesota in Jackson v. Buesgens, 186 N.W.2d 184, 186-7 (Minn. 1971), (A-184), rejected the litigant's challenge to the foundation for the Plaintiff/Owner's testimony concerning the diminution in value of their home occasioned by water seepage, saying:

> We have held that a testimony of an owner as to the value of his property may be received, and a lack of foundation goes to the weight of the testimony but not to its admissability.

As to the requirement for some basis for an owner's opinion, the Arizona Court in Santa Fe Pacific Railroad Company v. Cord, 482 P.2d 503, 514 (Ar. App. 1971), stated:

> It is well established law that an owner of property is **competent to testify as to its value and that any explanation as to how he arrived at that value merely goes to the weight of the evidence.** (emphasis added)

As is apparent, an owner is not required to have the same degree of factual support to support his opinion as would an expert testifying to the same opinion. In Lyon v. Shelter Resources Corp., 253 S.E.2d 277, 286 (N.C. 1979), (A-2Ø1), the North Carolina Supreme Court stated:

> "Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value **even though his knowledge on the subject would not qualify him as a witness, were he not the owner."** (citation omitted)(emphasis supplied)

The Arkansas Supreme Court in Arkansas State Highway Commission v. Scott, 571 S.W. 2d 6Ø7, 61Ø (Ark. 1979), a condemnation case, reiterated a previous holding asserting:

> "...[W]e have reiterated the well established principal law that a landowner's testimony is competent and admissable as to the value of his property **regardless of his lack of knowledge of property values,** if a satisfactory explanation is given for his conclusion.

The same Court in Arkansas State Highway Commission v. Taylor, 6Ø2 S.W.2d 657 (Ark. 198Ø) reaffirmed the widely held principal of law that a landowner does not have to show that he was acquainted with the market value of the property or tht he was an expert on values and that his opinion as to the value of the land he owns would be stricken only if it is demonstrated that "there is no fair or logical basis if support for it and **not if the basis is only weak or questionable.** (Emphasis added).

This objection by the Defendants is all the more interesting, since during the course of the trial, the defense counsel conceded that the general rule of law allowed an owner to testify as to the value of his own property. (R-58, 776) Many of

the Plaintiffs explained that their opinion with respect to actual value at the time of their purchase was based upon more than mere ownership. For example, Plaintiff, Gerron, testified she had shopped the market for similar property. (R-162) There were also others, see (R-435, 546, 1243).

Before buying, all the Plaintiffs were exposed to a thorough explanation of the project, which included the showing of a model unit. (R-1213,1214,1527,1528,1531).

Obviously, the testimony of each Plaintiff with respect to his opinion valuation of the value of his property was supported by the Plaintiffs' expert, Chris Edwards, when he testified that their property, irrespective of price, would be worth more if the 11.5 acres of land on the ocean had been included in the project. (R-1296) Of course, the Defendants' expert, Mr. Horn, testified to the same effect. (R-1513) It is further apparent from the entire record and specifically, Mr. Horn's testimony, that these Plaintiffs did not receive the benefit of their bargain. Mr. Horn testified that the purchase price quoted a buyer of a unit in Oceanwoods would include some interest in the 11.5 acres of the oceanfront property if that buyer had been told that the 11.5 acres of the oceanfront property was part of the project. (R-1518) Mr. Horn clearly stated that the buyer deserves what he bargained for irrespective of costs. (R-1518)

An examination of any Plaintiff's testimony will show damages were proven. For example, Plaintiff, Wayne Sanders, testified he was told the project would contain ocean frontage. (R-528,529,530); that there would be a nature trail suitable for exercise and jogging, constructing of which would start

immediately. (R-529) He received Exhibit No. 16, read it, and relied upon it. (R-530) The purchase price of his unit was $39,000.00. (R-533) The actual value of his unit was $32,000.00. (R-533) Mr. Sanders testified he could have bought a place for less elsewhere. (R-545) As a matter of fact, he said he could have bought a place with the same amenities which he ultimately realized he had in some other project for as low as $32,000.00. (R-546) In Mr. Sanders case, he was asked and he testified that he would not have paid the purchase price on the property which he had bought.

It is apparent from the record in its entirety and the specific record of Mr. Sanders' testimony that he established a purchase price of his unit which is according to the law, strong evidence of the value of the property as represented (misrepresented). West Florida Land Co. v. Studebaker, 19 So.2d 176, 179 (Fla. 1896). (A-154). Then he testified as to the actual value. It is obvious Mr. Sanders and the other Plaintiffs were damaged since they did not receive the benefit of their bargain.

POINT VI

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING PLAINTIFFS TO INTRODUCE EVIDENCE AS TO THE VALUE OF THE OCEAN-FRONT TRACT LOCATED EAST OF THE OCEAN WOODS PLANNED UNIT DEVELOPMENT.

Since the Defendants failed to make a timely, specific objection to the introduction of the testimony complained of, or any objection at all for that matter, they cannot now assert on appeal that the introduction of that evidence was error. Atlanta & A. B. Ry. Co. v. Kelly, 82 So. 57 (Fla. 1919). The record

below reflects as follows:

Q. Well, let me ask you this. I show you Exhibit Number One, you see Ridgewood Avenue here: (By KENNETH A. STUDSTILL, counsel for Plaintiffs)

A. Yes. (By Francis Horn, Defendant's Appraiser)

Q. Are you familiar with how that is reflected in the Official Records, along this line?

A. No, I'm not, I haven't read anything about the eleven point five acres.

Q. All right, you don't have any opinion, then, as an expert as to the value of that eleven point two acres?

MR. STARLING: Your Honor, may we approach the bench.

(Thereupon, discussion was held at the bench between the Court and Counsel, out of the hearing of the Jury and the Court Reporter, after which the following proceeding were had:)

Q. (By Mr. Studstill) Is it your testimony that you have no opinion as to the value of that eleven point five acres?

A. I said I hadn't looked at the property, I could find out; it's eleven acres to the ocean, oceanfront property, it has a very high value to it.

Q. A very high value? In your opinion, what would that eleven point five acres be valued at? (emphasis added)

A. If you could tell me approximately how many units or the density?

Q. Fifteen units per acre.

Q. All right, I can compute it. That a hundred and sixty-five units; is that correct?

Q. Right.

A. I have about Three Million Six Hundred and Thirty Thousand Dollars based on a unit price

of Twenty-two Thousand Dollars per unit.

Even if a contemporaneous objection had properly been made, the evidence would still be admissable to show the Defendant's motive for perpetrating the fraud. The extraordinarily high value of the property provides a strong motive for them not to include it in the Oceanwoods project and in addition, certainly is relevant to show the accuracy of the Plaintiffs' opinion as to the damages caused by the failure of the Defendants to include the oceanfront property in the project. Since the evidence is uncontradicted that the Plaintiffs would have an undivided interest in the common areas, which would include the 11.5 acre oceanfront parcel, it is plain to see that the figure of 3.5 Million Dollars would certainly corroborate the fact of damage and their estimates of the financial loss that they have suffered.

Though the focus on damages in this case was on the value at the time of purchase, the value before and after purchase is certainly relevant. This is specially true in view of the fact the Defendants elicited, over the objection of the Paintiff, the current market value of the Plaintiffs' units. (R-5Ø3A) Furthermore, even Defendant's counsel represented to the Court present day values are material because this was a continuing tort. (R-1467)

POINT VII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING PLAINTIFFS' EXPERT WITNESS, CHRISTOPHER M. EDWARDS TO TESTIFY AND GIVE AN OPINION AS TO DAMAGES.

Since Christopher M. Edwards was qualified and accepted by

the Court as an expert, there was no error in permitting him to testify and render an opinion in this case. Defendants point out quite correctly that expert testimony is admissable only if (1) the witness is shown to have knowledge, or experience to qualify as an expert, (2) the testimony will assist the jury in understanding the evidence or determining a fact at issue and (3) the testimony can be related to evidence at trial.

A review of the record reveals that Christoper M. Edwards has the requisite education training and experience to qualify as an expert, thus he satisfied the first prong of the test.

The central questions before the jury were first, whether or not the Plaintiffs were damaged by not having the oceanfront property included in their project and second, if they were in fact damaged, the amount of damage suffered. Thus, Christoper M. Edwards' opinion that the Plaintiff's property was worth less without inclusion of the 11.5 oceanfront acres in the plan unit development was relevant to determine the threshold question of whether or not they had in fact been damaged.

The next prong of the test for the admissability of Christoper M. Edwards' testimony is whether or not the testimony will assist the jury in understanding the evidence or determining a fact in issue. This is actually the most difficult prong of the test that the Plaintiffs must satisfy. Any fool would know if oceanfront property was part of a project, that fact alone would enhance its value. The proper objection, which was not made by the Plaintiffs, would have been that this evidence is so obvious it was not the proper subject of expert testimony. However, since that particular objection was not made, that

objection was waived.

The final prong which must be satisfied in order for a Court to admit Christoper M. Edwards' testimony is whether or not the testimony could be related to evidence at trial. The central issue in this case and the one to which the majority of evidence was directed, was whether or not the Defendants property values were diminished by the absence of the 11.5 acres oceanfront from their project.

Thus, it can be seen that each and every prong has been satisfied by the Plaintiff, and Christoper M. Edwards' testimony was properly admitted.

The substance of Defendant's objection to Edwards' testimony is that he was not prepared to present evidence as to the actual value of each of the Plaintiffs units at the time of purchase and the value of each unit as represented. Since he did not render an opinion as to the dollar amount of the value as represented and as it actually was at the time of purchase, it was not necessary for him to have apprised himself of the information which would have properly permitted him to render such an opinion.

Defendants claim that because Edwards did not prepare himself to render an opinion as to the dollar value of the Plaintiffs' damages, his opinion must necessarily have been speculative and therefore, inadmissable. Edwards' testimony was of limited scope and established the obvious - property is worth more if it is contiguous to beachfront. Certainly there is nothing speculative about something so obvious.

IN THE SUPREME COURT OF FLORIDA

FIRST INTERSTATE DEVELOPMENT CORPORATION, a Florida corporation, OCEAN WOODS, INC., a Florida corporation, THOMAS WASDIN, et al,

Defendants/Petitioners,

CASE NO. 67,848

CARLOS M. ABLANEDO, et al,

Plaintiffs/Respondents.
_____/

INITIAL BRIEF OF APPELLEE/CROSS/APPELLANT

APPEAL FROM THE DISTRICT COURT OF APPEAL STATE OF FLORIDA, FIFTH DISTRICT

KENNETH A. STUDSTILL of
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POINTS ON CROSS APPEAL

POINT I

THE TRIAL COURT ERRED IN STRIKING THE PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES.

POINT II

THE TRIAL COURT ERRED IN DIRECTING THE VERDICTS AGAINST CERTAIN PLAINTIFFS AS SET OUT IN THE RECORD AND IN ITS AMENDED FINAL JUDGMENT DATED JANUARY 12, 1984.

SUMMARY OF ARGUMENT - CROSS APPEAL

Every Appellate Court in this State has held that in a claim for **fraud**, the issue of punitive damages is not a threshold question for the court to decide, but rather must be submitted to the jury in every case. However, even if the question of punitive damages was properly a threshold issue, the trial court committed error by striking the punitive damages claim, because the egregious factual situation clearly satisfied any threshold level. The largest investment most of us every make is to purchase a house. Plaintiffs were primarily buying personal residences. They were purposely misinformed about what they were buying. The developers were obviously sophisticated and set up an elaborate corporate structure in an effort to avoid liability.

The Plaintiffs should have had their punitive damage claim considered by the jury pursuant to Section 817.41, Florida Statutes, if for no other reason. That Statute involves false advertising, and surely the Plaintiffs proved a case of false advertising. The case of Vance v. Indian Hammock Hunt and Riding Club, Ltd., 403 So.2d 1367,1369 (4th DCA 1981), (A-144), held

that punitive damages would be allowable in a false advertising case if one actually proved fraud. Vance also holds that specific allegations with respect to false advertising are not necessary, provided all the elements under that section are proven. Exhibit 16, which was a brochure delivered by the Defendants to potential buyers as advertisements and as an inducement to obtain sales constitutes advertising, and in the context of this case, it constitutes false and misleading advertising.

The trial court also erred in directing verdicts with respect to several of the Plaintiffs. Those Plaintiffs can be divided into three separate catagories. The first is Daniel Webb, who in his cross-examination testifed he might very well have purchased the property even had he known of the fraud. Other than that, Mr. Webb testified explicitly to all elements of a fraud. The test of materiality is not whether a party would have entered into the contract, but for the fraud, but rather is whether there had been some pecuniary damage. Three other Plaintiffs received a directed verdict against them, because in their testimony they obviously became confused and essentially testified that the property, which they purchased, was worth the purchase price. In this case the Plantiff's personal belief in the value of his property should not have been determinative of that issue, since we also have testimony of an expert. Furthermore, a party is not conclusively bound by a statement he makes in his testimony at the trial. Jennings v. Ray, ___ So.2d ___, 11 FLW 357 (Fla. 5th DCA, Feb. 6, 1986).

The trial court directed a verdict against nine other Plaintiffs, who essentially testified as to all the elements of

fraud, the same as the Plaintiffs who received favorable verdicts from the jury. There was one difference, however, and that was that these Plaintiffs had purchased their property from a first buyer from the Defendant. In other words, the Defendants perpetrated the fraud, but they were not the sellers. The Plaintiffs' position is that one can be liable for fraud without being a party to the contract or deriving any benefit therefrom. The fact the Defendant in these instances did not, as a matter of record, benefit, does not change the fact that the Plaintiffs were injured and suffered damages due to Defendants' fraud. Privity is not required. East Caribbean Dev. & Inv. v. K-K Auto, 435 So.2d 364 (4th DCA 1983) (A-1Ø2).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN STRIKING THE PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES

Plaintiffs adopt and incorporate herein their argument in answer to Point I of Defendants' initial brief.

At the end of their case, Plaintiffs successfully motioned for the pleadings to conform to the evidence. (R-1356, 1359). The Defendant Ocean Woods' attorney successfully moved the Court to strike any claim for punitive damages. (R-1378,1379, 1429). The Defendants in their argument to strike the punitive damage claim, cited Schief v. Live Supply, Inc., 431 So. 2d 6Ø2, (R-1378, A-131). Schief, does not, as a matter of law hold that the trial court in a case of fraud can strike a punitive damage claim, but rather stands for the proposition that it is error for

the trial court to insert the word "fraud" in the standard punitive damage instruction, so as to mislead the jury to believe punitive damages should always be awarded in fraud cases. The trial court seemed to agree with the Plaintiffs in its comment about Schief during the course of the trial. (R-1392). Neverthless, because of the unrelenting erroneous argument of Defendants, the trial court ultimately erred in striking the punitive damages claim. (R-1378,1379)

Defendants also cited the case of Dunn v. Shaw, 303 So.2d 6,7 (Fla. 1974), (A-100), as authority for the court to strike Plaintiffs' claim for punitive damages. (R-1377). Dunn is authority for quite the reverse. While Dunn does not specifically hold that the issue of punitive damages should always be delivered to the jury in a fraud case, it certainly implies it. In reversing the District Court, (which held that the issue of punitive damages was improperly submitted to the jury), the Supreme Court delcared:

> It appears to us the fraud of misrepresentation could have been malicius and outrageous and that the District Court characterization of such conduct to the contrary was an evidentiary conclusion that **invaded the province of the jury.** (emphasis added)
>
> The Court went on to say:
>
> The jury under the trial judge's instructions was well within its province to find the stock fraud misrepresentation justified award of punitive damages. 303 So.2d 7

In Adams v. Whitfield, 290 So.2d 49, 51, (Fla. 1974), (A-84), this Court again dealt with the question of punitive damages. In a case involving malicious prosecution, the Court stated:

> An award of punitive damages also required only proof of legal malice, not necessarily actual malice, and this is true whether the cause of action is for malicious prosecution, **for some other tort**, or for breach of contract.
>
> Exemplary [punitive] damages are given solely as a punishment where torts are commited with **fraud**, actual malice...therefore in any case punitive damages may be awarded based upon legal malice, which may be inferred from, among other things, gross negligence indicating a wanton disregard for the rights of others. (emphasis added)

Adams equates fraud with a basis for punitive damages. If the tort itself is fraud, it would seem inescapable that the issue of punitive damages should be decided by a jury.

However, even if the question of punitive damages in the case at bar was properly a threshold issue for the court, there was error because of the egregious factual situation clearly satisfied any threshold level. The Plaintiffs were deceived about the project with respect to whether or not it was going to be a project which actually bounded on the Atlantic Ocean. (R-27Ø9-2711) (A-16). The brochure intoduced at trial as Exhibit 16 detailed the nature trails and all the other amenities, and the Plaintiffs testified they read it, believed it, and purchased their units for more money than they would have otherwise. (R-57, 189, 361 for example). (A-16).

In addition to the Plaintiffs' testimony, defense witnesses testified that in no instance was a Plaintiff told the brochure could be or was misleading. (R-1223,1225,154Ø,1541). The Plaintiffs were told they would be members of a homeowners association that would be in control of the project, (R-59, 735 for example),

when actually the documents indicated exactly the reverse. (R-2592, 2628-2636) (A-46). They were not told that First Interstate Development Corporation would be in control of the project until the last unit was sold. (R-2592, 2628-2636) (A-46). Contrary to what Plaintiffs were told, the homeowners association would not even be in existence until the last unit was sold. (R-2592) (A-46), (R-49, 5Ø for example). Despite the prohibitions in Exhibits 2, 3 and 4, the maintenance fees were raised contrary to the developer's own documents. (R-11Ø) (R-151).

The Defendants' perpetrated commercial fraud. For most people, the largest investment they ever make is to purchase their house. Plaintiffs were primarily buying their personal residences, and in every instance according to the Plaintiffs' testimony and according to the objective evidence adduced in this trial, these Plaintiffs were purposely misinformed about what they were buying. (R-42-1244) The developers in this instance were obviously sophisticated and set up an elaborate corporate structure so as to avoid liability. The evidence shows time and time again the interlocking activities of First Interstate and Ocean Woods, Inc. (R-1186-1211; 651-676; 132Ø-135Ø). Surely, punitive damages should have been considered by the jury in this case, and the trial court erred in striking Plaintiffs' demand therefor.

Later, the Plaintiffs futilely renewed their efforts to have their punitive damage claim considered by the jury, based on Section 817.41, Florida Statutes, portions of which are set out below. (R-1615-1621).

> (1) It shall be unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.
>
> (6) Any person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney's fees, and may be awarded punitive damages in addition to actual damages proven. This provision is in addition to any other remedies prescribed by law.

The case of Vance v. Indian Hammock Hunt and Riding Club, Ltd., 403 So.2d 1367, 1369, (4th DCA 1981), (A-144), held that punitive damages would be allowable in a false advertising case, if one actually proved fraud. Plaintiffs in the instant case abundantly proved fraud.

While it is true Plaintiffs did not specifically allege a cause of action was brought pursuant to Florida Statute, Section 817.41(1), Vance holds the specific allegation to be unnecessary, provided all the elements under that section are proven. Specifically, Vance states:

> At the commencement of the trial the Court ruled that plaintiffs could not maintain a cause of action under Section 817.41(1), Florida Statutes, because plaintiffs had not specifically pleaded the Statute in the complaint, two, had it been pleaded, plaintiffs would still have had to prove all the elements of common fraud and inducement, including reliance, and three, in any event, Section 817.41(1), Florida Statutes, as applied to sales advertisement of land registered pursuant to Chapter 498, Florida Statutes had been preempted by the provisions of Chapter 498.
>
> This ruling, as well as two of the three reasons for it, was in error. First, while it

> would be better pleading practice, plaintiffs were not required to specifically designate or refer to Section 817.41(1), Florida Statutes, in order to maintain an action under it, so long as they pleaded sufficent facts to bring the allegations of the complaint within the statute. . . 4Ø3 So.2d at 1367.

Vance, together with Section 817.41(1), Florida Statutes, makes it clear that punitive damages should have been an issue for the jury independent of the fraud claim.

Surely, Exhibit 16, which was a brochure delivered by Defendants to potential buyers as advertisments and as an inducement to obtain sales, constitutes advertising, and in the context of this case it constitutes false and misleading advertising. That brochure is referred to as advertising in the record and was distributed for the purpose of inducing people to purchase according to admissions by Tom Wasdin. (R-2343, 1333, 1343, 1528, 1529).

POINT II

> THE TRIAL COURT ERRED IN DIRECTING THE VERDICTS AGAINST CERTAIN PLAINTIFFS AS SET OUT IN THE RECORD AND IN ITS AMENDED FINAL JUDGMENT DATED JANUARY 12, 1984.

The directed verdicts essentially fall into three separate categories. The first category involved only one Plaintiff, Darrel L. Webb, and was apparently granted on the basis that on cross-examination Mr. Webb testified he would have purchased the property anyway, even if he had known the fraud. The Court appeared to feel this testimony eliminated the materiality of the fraud and therefore granted a directed verdict. No case law holds a plaintiffs must show he would not have proceeded with the contract to prove fraud. As established in Plaintiffs' argument

in answer to Defendants initial brief under Point IV, except when fraud is set up as a defense to payment of an insurance policy, the test of materiality is not whether a party would have entered into the contract but for the fraud, but rather is whether there has been some pecuniary damage to the value of the property. Pryor v. Oakridge Development Corp., 119 So. 326 (Fla. 1926), (A-127). Vance v. Indian River Hammock Hunt and Riding Club, Ltd., 403 So.2d 1367 (4th DCA 1981), (A-144). Mr. Webb testified explicitly to all elements of a fraud, including pecuniary damage, so a directed verdict was clearly error with respect to him. (R-1046-1050) (A-73). Mr Webb testified he received the brochure, Exhibit 16, and he read it and he believed it. (R-1040) (A-71). He relied upon the information set forth in the brochure in making his purchase. (R-1041) (A-71) The sales representatives of Ocean Woods repeated basically what was in the brochure. (R-1041,1046) He testified he relied upon what Norma Cross told him about the project being oceanfront. (R-1048) (A-75). He testified the purchase price of his home was $42,590,000, and that the actual value without ocean frontage in the project would be $35,000.00. (R-1049) (A-72).

On cross-examination Plaintiff, Darrell Webb, indicated that if the project had ocean frontage at the time he purchased, he felt the property would be worth $45,000.00. (R-1052) (A-78). Mr. Webb testified the purchase price was $42,590.00. (R-1049) (A-72). West Florida Land Co. v. Studebaker, 19 So. 176 (Fla. 1896), (A-154) establishes that the purchase price is strong, but not conclusive, evidence of the value of the property as represented, (misrepresented). Mr. Webb felt his property would

have been worth more than what he paid, if he had had ocean frontage. (R-1052) (A-78). On the other hand, since he didn't have ocean frontage, he clearly stated that his property was worth only $35,000.00 in his opinion. Mr. Webb did not recieve the benefit of his bargain, and it was error for the Trial court to direct a verdict against him. Strickland v. Muir, 198 So.2d 49 (4th DCA 1967). (A-133). Sorensen v. Gardner, 334 P.2d 471 (Ore. 1959). (A-206).

The second category of Plaintiffs against whom the court directed a verdict included Noris L. Fisher and Dolzaleen Fisher, Unit 82; Harry A. Kadan and Mary S. Kadan, Unit 17: Lucy Vann and Roderick F. Woods, Unit 34. Norris Fisher testified consistently with the other Plaintiffs with one exception, (R-440-445), when he said that his property was actually worth $39,000.00, and the purchase price was $39,000.00. (R-440-445, 495) There was no cross-examination of Mr. Fisher, and it was on the basis of this final answer with respect to the actual value of his property, that the Court granted a directed verdict. (R-1429).

Harry Kadan testifed to all the elements constituing fraud, stating that the purchase price was $28,500.00 (R-1055), and that the actual value of his own property without ocean frontage would have been $23,500.00. (R-1053-1057) However, on cross-examination Mr. Kadan became obviously confused and stated he had not been defrauded, and that he got a bargain, when he purchased this property. (R-1060-1061)

Roderick F. Woods on behalf of himself and Miss Vann testified as the other Plaintiffs had, with the exception he

obviously became confused with respect to the total purchase price of his property, when he tried to testify that the base was $29,400.00 and tried to change it to $37,400.00 to reflect the $8,000.00 in extras he ordered. (R-707-710). The Court ruled he had testified it was $29,400.00 purchase price, (R-707-710), and he shortly thereafter testified the actual value of his property at the time of purchase was $29,400.00, the same as his purchase price. An examination of this testimony would convince anyone that the Court below did not give him an opportunity to explain his answers. There was no cross-examination of Mr. Woods.

Plaintiff's personal belief as to his damage should not be determinitive of that issue, since we also have the testimony of an expert. (R-1296) A party is not conclusively bound by a statement he makes in his testimony at the trial. Jennings v. Ray, ____ So.2d ____, 11 FLW 357 (Fla. 5th DCA Feb. 6, 1986). With respect to Harry Kadan, his direct examination did not say anything that was unusual or different from the other Plaintiffs to establish a case of fraud against the Defendnats. (R-1053-1057). The trial court apparently agreed with defense counsel that Mr. Kadan's cross-examination essentially negated his earlier testimony. Mr. Kadan's cross-examination should go only as to the weight of his testimony on his case in chief and not as a total negation of his testimony in the direct examination, especially since it resulted from his obvious confusion. It introduced a factual issue, which should have been determined by the jury. The point is that the use of the word "defrauded" by defense counsel and the obvious confusion of the witness, could have easily mislead the witness to say things he did not

understand the legal significance of. (R-1060).

The third category of Plaintiffs against whom the Court directed a verdict include Carl A. Asp, Unit 146; Marvin Ellis Banks, Jr., Unit 19; Nick J. Billias and Deborah P. Bilias, Unit 131; Jimmie Bocook and Eleanor Morgan, Unit 111; Ethel M. frank, Unit 137; Frank D. Harris and his wife, Linda G. Harris, Unit 65; Eleanor Nelson, Unit 144; and William E. Winchester and his wife, Mary Winchester, Unit 7. Defendants made their motion for directed verdict on the basis that this category of Plaintiffs had not purchased directly from the developer, but had purchased from third parties. (R-1370) The Court reasoned in directing the verdict with respect to this group of Plaintiffs, that there was no evidence that these Plaintiffs in purchasing their property were led to believe by the actual seller, that they were buying into and oceanfront project or into a project with a nature trail. (R-1429,2476,2477) There is no law in Florida that one has to be either a party to a contract to commit a fraud or benefit from the fraud. East Caribbean Dev. & Inv. v. K-K Auto Serv., 435 So.2d 364 (4th DCA 1983) (A-102), is, however, authority privity between the parties is not required for a legally valid claim of fraud.

In the case at Bar each one of the Plaintiffs testified consistently with the other Plaintiffs, that they had read the brochure, had been induced by its misrepresentations and the misrepresentations of the people representing the developer to purchase the proeprty, even though they purchased it from a third party. (R-278-300; 370-383; 205-224; 701-710; 813-821; 834-843;

995-1000; 1061-1066).

With respect to the last eight Plaintiffs, the Trial Court was not cited a single case by the Defendants, which supported their position.

The Supreme Court of Oregon in Sorensen v. Gardner, 334 P.2d 471 (Ore. 1959) (A-206), considered a case in which a builder had sold a house to one Tillen, who subsequently sold the house to the Plaintiffs. Plaintiff then brought an action for false representations made by the defendant builder. The court stated, page 474, 475:

> The other ground of the motion namely, that the Defendants were third parties without any interest in the transaction, is ruled by Boord v. Kaylor, 100 Or. 366, 375, 197 P. 296, 299, where this Court quoted with approval the following statement of the law from 20 Cyc. 43: "While in a majority of cases defendant has been a gainer by reason of his fraud, it is not essential to his liability that he should obtain any benefit or advantage from the transaction into which he has led plaintiff."...The questions whether the representations were made with their falsity and with the intention that they should be relied on by the Plaintiffs and whether the Plaintiffs were induced by them to purchase the property were for the jury....

Obviously, the above case is sound authority one can be liable for fraud without being a party to the contract or deriving any benefit therefrom.

Another case, Hyma v. Lee, 60 N.W. 2d 920, 923 (Mich. 1953), (A-179), this notion was reiterated:

> In 37 C.J.S., Fraud. Section 44, page 297, decisions with reference to this phase of the case are summarized as follows:
>
> It is not essential to actionable fraud that the guilty party should derive any benefit from his misreprsentation of concealment, or

> that he should collude with another who does derive benefit. This rule applies even though defendant was himself a loser. The gravamen of the action is injury to plaintiff, not benefit to the defendant."

It is apparent from the record, each one of the Plaintiffs in this category was injured by the fraud perpetrated by the Defendants. (R-281, 285; 223; 380, 820, 821; 840, 841; 999; 1064-1066; 1096).

In Anderson v. Tway, 143 F.2d 95, 101 (6th Cir. 1944), (A-159), the following language is found:

> There is no novelty in the doctrine that one who is guilty of fraud may be compelled to reimburse the defrauded party even though he has not himself benefited through the fraud. (Citations omited)

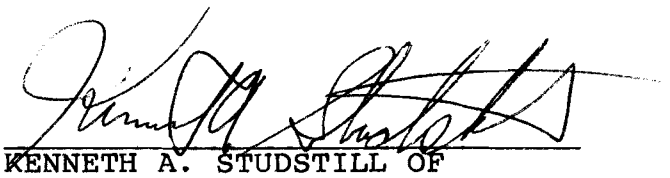
The supreme Court of Minnesota in Lehman v. Hansord Pontiac Co., 74 N.W.2d 305, (Minn. 1955), (A-193), states as follows, page 311.

> The gravamen of the charge is to be found in the deception practiced upon the plaintiff, and the damage suffered by him, not that the defendant has gained an advantage. Whether the person making the representation received any benefit from the deceit is unimportant nor is it necessary that he should collude with the party who has benefited....One of the essential elements is that the party induced to act has been damaged, and, of course, that acting in good faith he relied on the false representations to his damage. Harm must have come to him, and the deceit and the injury or the damage must concur. Damage is the essence of the action of deceit and an essential element to make the right violated actionable.

From the law cited in this section, the Trial Court erred in granting the directed verdict with respect to these eight Plaintiffs.

CONCLUSION

By the arguments and authorities cited herein, Appellees respectfully request this Court to affirm the verdicts in favor of the Appellees, reverse the directed verdicts against the Appellees and remand this cause to the Trial Court for a new trial on the issue of punitive damages only with respect to those Plaintiffs who received a compensatory verdict and judgment in the trial below, and a new trial on all damages for those Plaintiffs against which the Trial Court entered directed verdicts.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to John M. Starling, Esquire, 509 Palm Avenue, Titusville, Florida 32796, by hand delivery this 11 day of April, 1986.

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