IN THE SUPREME COURT OF FLORIDA

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

Defendants/Petitioners,

vs.

CARLOS M. ABLANEDO, et al.,

Plaintiffs/Respondents.

CASE NO. 67,848

INITIAL BRIEF OF PETITIONERS

Appeal from the District Court of Appeal,
State of Florida, Fifth District

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PRELIMINARY STATEMENT

Plaintiffs in the lower court will be referred to herein as Plaintiffs or Respondents. Defendants in the lower court will be referred to herein as Defendants or Petitioners. Reference to the appendix and record will be either by name of the witness followed by citation (Name A- and R-) or by simple reference to the record followed by citation (A-) and (R-).

STATEMENT OF THE CASE

The Petitioners, FIRST INTERSTATE DEVELOPMENT CORPORATION, OCEAN WOODS, INC. and THOMAS WASDIN, were involved in a housing project located in Cape Canaveral, Florida known as Ocean Woods. The Respondents were all purchasers of housing units in Ocean Woods, which was a planned unit development consisting of single family houses, cluster homes and villas. The approved plans called for some 300 plus units and at the time of trial approximately 270 units had been completed.

A dispute arose in 1980 between Petitioners and Respondents over control of the homeowners' association and a recent increase in maintenance fees. In subsequent proceedings all claims against the Petitioners were disposed of in their favor except an amended count which raised new issues alleging, among other things, that Petitioners had fraudulently represented that the development was an ocean-front project, that a nature trail and other recreational facilities were to be provided, and that Respondents were to have control of the homeowners' association (R 1202-1204; A-38).

The case went to trial by jury on the fraud count and the lower court directed a verdict as to all alleged frauds other than the alleged representations concerning the nature trail and ocean-front development (R 1431, Lines 1-16; A-42). The lower court also directed a verdict for Petitioners on the Respondents' request for punitive damages. The jury returned verdicts for the 50 Respondents for an aggregate of $304,600.25 in compensatory damages based upon the two issues presented to the jury (R 2253-2302).

An appeal was taken by the Petitioners to the District Court of Appeal, Fifth District, as to the final judgment based on the jury verdict and the Respondents cross-appealed the directed verdict as to punitive damages. The Fifth District Court of Appeal determined that the lower court erred in submitting the nature trail fraud issue to the jury, but that there was no error in submission of the ocean-front project fraud issue to the jury. The District Court affirmed the judgment because it said Petitioners should have requested separate verdict forms for each issue rather than general verdict forms. The Fifth District Court of Appeal also held that the lower court had committed error in striking the claim of the Respondents for punitive damages and remanded the cause for a new trial on the issue of punitive damages only. First Interstate Development Corp. v. Ablanedo, 476 So.2d 692 (Fla. 5th DCA 1985) (A-1).

This Court accepted jurisdiction of the petition for review filed herein by the Petitioners on the basis that this Honorable Court has discretionary jurisdiction to entertain this case on the merits since the decision of the District Court of Appeal, State of Florida, Fifth District, in First Interstate Development Corp. v. Ablanedo, supra, expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. The discretionary jurisdiction of this Honorable Court is based upon Article V, Section 3(b)(3) of the Florida Constitution, as well as Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

This action was commenced by the Respondents on October 22, 1980, by filing an eight count complaint against Petitioners and Ocean Woods Homeowners Association, Inc. (R 1790-1967). Petitioners promptly moved

to dismiss the complaint and strike certain portions thereof (R 1968-1971), and by order of the Court dated January 20, 1981, Petitioners' motions were granted and the complaint was dismissed (R 1972-1973).

On January 29, 1981, Respondents filed their amended complaint (R 1974-1983; A-22) after which Petitioners again moved to dismiss (R 1984-1986). On May 4, 1981, the trial court entered its order dismissing count three of the amended complaint with prejudice and denying the motion as to all other counts. (R 1987). On May 27, 1981, Petitioners filed their answer to the remaining seven counts of the amended complaint, along with affirmative defenses (R 1989-1993; A-32).

Respondents moved for a temporary injunction with respect to count five of the amended complaint on May 15, 1981 (R 1988) and on July 14, 1981 a temporary injunction was granted as to the assessment and collection of certain maintenance fees. (R 1998-1999). In a series of motions to vacate, modify and hold parties in contempt, the temporary injunction was finally vacated, thereby rendering count five of the amended complaint fully litigated. (R 2005-2018; 2016-2019; 2020-2025; 2052-2056; 2057-2070; 2071-2077; 2079; 2080-2081; 2085).

On January 8, 1982, Respondents moved to add additional parties plaintiff to the amended complaint (R 2088) which motion was granted on February 23, 1982 (R 2089). On June 1, 1983, Respondents moved to amend count four of the amended complaint, the fraud count, to add for the first time alleged misrepresentations concerning the ocean-front, the nature trail and other recreational amenities. (R 2202-2204; A-38). Petitioners agreed to allow the amendment by stipulation filed June 8, 1983 (R 2209; A-41).

On October 5, 1983, Petitioners moved for summary judgment as to all remaining counts of the amended complaint (R 2219-2245). After a hearing on the motion, the court entered an order filed November 10, 1983, granting Petitioners' summary judgment as to counts one, three, five and six of the amended complaint (R 2447). By stipulation of the parties, it was agreed that count eight (accounting) would be tried before the court after the conclusion of the jury trial on the remaining counts two, four and seven.

Prior to the trial Petitioners filed a motion to impose sanctions against certain of the listed Plaintiffs who had failed to appear for deposition (R 2439-2443). By order filed November 10, 1983, the claims of those Plaintiffs were stricken and judgment was entered against them (R 2444-2446).

On October 31, 1983, jury trial on Counts two, four and seven of the amended complaint was commenced and continued until November 9, 1983. At the start of the trial, Respondents withdrew count two of the amended complaint from consideration. During trial, the trial court granted a directed verdict for the Petitioners as to count seven (R 1430; Lines 17-21; A-42) and also granted a directed verdict as to any claim for punitive damages related to count four (fraud) (R 1429; Lines 21-26 and 1430; Lines 1-2; A-42). The fraud count was presented by Respondents as four distinct issues and misrepresentations; to wit: the promise of a nature trail; the promise of an "ocean-front" development; the promise to provide recreational facilities; and the promises regarding control of the homeowner's association. The trial court granted directed verdicts for Petitioners on the issues of the recreational facilities and control of the homeowners association (R 1431, Lines 1-16; A-42).

Finally, the trial court granted a directed verdict on all counts as to the following Plaintiffs, to wit: William S. and Mary Winchester; Marvin E. Banks, Jr.; Frank D. and Linda G. Harris; Eleanor Morgan Labuda; Nick J. and Deborah J. Billias; Ethel M. Frank; Eleanor Nelson; Carl A. Asp, III; Norris L. and Dolzaleen Fisher; Lucy Vann; Roderick F. Woods; Harry A. and Mary S. Kadan. (R 1677; Lines 4-12). At the conclusion of the trial, after 1 hour and 10 minutes of deliberation, the jury returned verdicts in favor of the Respondents and against Petitioners, OCEAN WOODS, INC. and FIRST INTERSTATE DEVELOPMENT CORPORATION, and against Petitioner, THOMAS E. WASDIN, on four verdicts (R 2253-2302).

On November 18, 1983, Petitioners filed motions for new trial (R 2454-2456; A-17) and for directed verdict notwithstanding the verdict (R 2450-2453; A-13). The motions were denied by order of the Court filed December 30, 1983 (R 2473; A-21). The verdicts were reduced to final judgments in the aggregate amount of $304,600.25, which were rendered on December 30, 1983. (R 2471-2472; A-5). On January 5, 1984, Petitioners filed their notice of appeal of the final judgment and order denying new trial with the District Court of Appeal, Fifth District (R 2474).

STATEMENT OF THE FACTS

BACKGROUND

The Petitioners in this case, OCEAN WOODS, INC., FIRST INTERSTATE DEVELOPMENT CORPORATION, and THOMAS WASDIN, were involved in a housing project located in Cape Canaveral, Florida and known as OCEAN WOODS. The project was originally conceived by Petitioner, FIRST INTERSTATE DEVELOPMENT CORPORATION, which was the original owner of the property which was to be developed (R 1187, 2780-2807). Ocean Woods was designed as a planned unit development and Appellant, FIRST INTERSTATE DEVELOPMENT CORPORATION was originally responsible for obtaining the zoning approval from the City of Cape Canaveral. (R 1190) Following initial project approval, FIRST INTERSTATE DEVELOPMENT CORPORATION sold the land and the project to Petitioner, OCEAN WOODS, INC., under an oral per-unit sales contract. (R-1192). Petitioner, OCEAN WOODS, INC. then proceeded to develop the project, purchasing the land from FIRST INTERSTATE in stages as development progressed (R 1192-1193). Petitioner, THOMAS C. WASDIN was at all times the president of Petitioner, OCEAN WOODS, INC. (R 1320).

The Respondents herein, as well as the other Plaintiffs who were at various times parties to the lawsuit were all purchasers of units in Ocean Woods. These purchases were made during the years 1978 through 1981. (R 1-1179). In most cases, the units were purchased directly from Petitioner, OCEAN WOODS, INC. (R 1-1179) However, nine of the Plaintiffs at trial purchased from non-associated third parties. (Asp - R 278; Nelson - R 370; Harris - R 813; Banks - R 834; Labuda - R 995; Winchester - R 1061; Billias - R 1091; R. Wilkerson - R 941; Hecht - R 1174).

The property which is the subject matter of this litigation is a parcel of land located in Cape Canaveral, Florida between Atlantic Avenue and the Atlantic Ocean. (R 2966). The project was developed as a planned unit development consisting of single family homes, cluster homes and villas. (R 2966). In large part, the open areas of the development have been left in their natural state to create a natural type environment (R 2966). The approved plans call for some three hundred plus units and at the time of trial approximately 270 units had been completed or were under construction (R 1583). The original plans in 1973 called for very limited recreational facilities (R 2795), but once OCEAN WOODS, INC. took over the project the recreational facilities to be provided were increased substantially. (R 1564-1570). At the time of trial, the following recreational amenities had been provided or were in the final stages of construction: a nature trail along the south boundary, a nature trail from the eastern end of Ridgewood Avenue to the Ocean along the north boundary, two swimming pools, tennis courts, racquetball courts, a club house, a putting green, shuffleboard courts and a beach picnic area (R 2966 and other references cited below). In addition to all of the above, OCEAN WOODS, INC., has an option to purchase the land immediately to the east of the planned unit development (R 1577-1578).

THE LAWSUIT

In the summer of 1980, a dispute arose between Respondents and Petitioner, OCEAN WOODS, INC., over control of the homeowners association and a recent raise in maintenance fees. (R 302-304). A pool side meeting was held with representatives of the homeowners and the developer present. (R 302-304, 127-130; A-51). Subsequent meetings were

unable to resolve the dispute, so in October, 1980, the homeowners formed a litigation committee and filed suit against the developer (R 1790-1967). It is very important to note that the only concerns addressed in the initial complaint were those of control of the homeowners association and maintenance fees (R 1790-1967; A-22).

As set forth in the statement of the case, the case proceeded for several years through various hearings and proceedings to determine who had the right to control the homeowners association and make assessments. In December 1981, most of these preliminary matters were resolved in favor of the Petitioners (R 2085).

For the next eighteen months there was very little activity in the suit and the case was still framed as a suit for control over the association and maintenance fees. (R 1974-1983). Then, in June 1983, Petitioners amended their complaint to raise some entirely new issues and allegations. (R 2202-2204; A-38) For the first time, Respondents were claiming that Petitioners had fraudulently represented certain aspects of the development including that it was an ocean-front project, that a nature trail and other recreation facilities were to be provided, and that the Appellees were to have control of the homeowners association (R 2202-2204). It was these newly raised fraud issues which now formed the basis of the upcoming trial.

THE TESTIMONY

As the Court is well aware from the size of the transcript in this case, the trial covered eight days of argument and testimony involving many issues, some of which are not the subject of this appeal. The remainder of this statement of facts will be devoted only to the one issue of alleged fraud with respect to the "ocean-front" concept. The

disposition of the other issues is reflected in the statement of the case.

"THE OCEAN FRONT"

The "ocean front" issue arises from paragraph 36(d) of the amended Count IV, wherein it is alleged that Petitioners represented to Respondents "that the entire project was a 'beach front' project..." (R 2202-2204). Amended Count IV goes on to allege that this representation was intentionally made to induce the Respondents to purchase, that the Respondents relied thereon in making their purchase, and that Respondents suffered damages as a result thereof. (R 2202-2204)

The testimony offered to prove the existence of the representation by Respondents was of several distinct types. First, there was a class of Respondents who testified that they were told that Ocean Woods was a "beach front" development by various members of the OCEAN WOODS, INC., sales staff. (Jakeway R 48; Harrington R 117; Gerron R 151; Richard R 195; Craven R 246; McDonald R 336-337; Finigan R 407; Wood R 417-418; Slattery R 433; Boatman R 449; Holmes R 462; Szczepanik R 493; Evans R 550-557; Rutkowski R 578; Roseland R 607; Qualls R 627; MacConnachie R 713; Forrest R 721; Kemp R 744; Newman R 754; Spellman R 785; Ablanedo R 795; Rooney R 875; Crosby R 898; Bragg R 913; A. Wilkerson R 929; Coleman R 954; Latzios R 980; Dorofee R 1022; Johnson R 1038; Rodriquez R 1132; Buckey R 1144; King R 1166; Pelham R 1303).

Second, there was a group of Respondents who testified that they had no conversations on this subject, but who relied exclusively on the advertising brochure (R 2709-2711) which they believed represented the planned unit development as having 600 feet of ocean frontage (Boyles R 319-334; Sanders R 526-547; Hatchett R 636-650; Hackney R 680;

Stenglein R 764; Levinson R 864; Manning R 886; Bassett R 965; Lloyd R 1103; Dunn R 1126; Connors R 1155; Donnelan R 1241). One of the Respondents claimed he was told that the property fronting the beach "would be developed by Ocean Woods" at some unspecified later date (McAra R 1007). Two of the Respondents failed to state what representation was made, but simply testified "I thought" that the property at the beach was included in the planned unit development (Scholar R 358; Miller R 733).

Within the first class of Respondents, those who had oral conversations concerning the boundaries of the planned unit development, there was an interesting sub-class who claimed to have been told that some type of construction different from the rest of Ocean Woods would be located on the beach front tract (A-60). Some of these Respondents claimed to have been told that high rise condominiums were planned for the beach front property. (Slattery R 433; Evans R 551; Bassett R 965; Latzios R 980; McAra R 1007). Others claimed to have been told that there were no plans at that time, but that whatever was built would be different from the rest of Ocean Woods (Jakeway R 48; Harrington R 117; Gerron R 151; Richard R 195; Wood R 417-418; Boatman R 449; Rutkowski R 578). One of the Respondents even testified that he was told "there were no plans for development at that time". (Bragg R 914) Another of the Respondents testified that she was told that Ocean Woods, Inc. did not even own the land (McDonald R 336-337).

Petitioners contradicted the testimony as to oral representations by the testimony of the Ocean Woods, Inc. sales staff to the effect that they never told anyone that the property next to the beach was part of the Ocean Woods planned unit development (Cross R 1217-1219; Foy 1530-1534). The sales brochure which all of the Respondents claimed to

have received does not use the term "ocean-front project" or "ocean-front development". (R 2708; A-46) The filmed video presentation clearly marks the boundaries of the planned unit development so as not to include the ocean-front parcel in question, and in fact that parcel was clearly labeled for future apartment construction. (R 2966, Lewis R 1439). The maps in evidence do not show the ocean front parcel as a part of the planned unit development (R 2584, R 2809). Testimony from some of the Respondents themselves showed that in the summer of 1980 they not only did not believe the ocean-front property was included in their development, but specifically told the Petitioners that they did not want that property to be a part of the planned unit development (Asp R 302-304; Harrington R 127-130; A-51). Two of the Plaintiffs who testified at trial claimed to have been misled about the boundaries to the project when in fact they purchased their units after the suit was filed (R. Wilkerson R 941-950; Hecht R 1174-1179). Petitioners pointed out the alleged misrepresentations were raised for the first time in June, 1983, almost three years after the initial suit was filed (R 2202-2204). Petitioners also offered the testimony of two owners, both of whom had been Plaintiffs, who stated that no representations were made about the beach-front being included in the planned unit development and that that was not what the lawsuit had been about (Benedict R 1444-1449; Haynes R 1450-1456). Lastly, eight of the Respondents testified that they had been misled by the Petitioners despite the fact that they purchased their units from non-associated third parties. (Frank R 215; Asp R 278; Nelson R 370; Harris R 813; Banks R 834; Labuda R 995; Winchester R 1061; Billias R 1091).

DAMAGES

On the issue of damages, Respondents offered the testimony of an appraiser, Christopher Edwards, but only as to the issue of damages from the alleged "ocean-front project" representation (R 1256-1300). The majority of Mr. Edwards' testimony was properly excluded on the grounds that Mr. Edwards had not done any appraisals and did not have a sufficient factual basis upon which to base an opinion. (R 1259-1260; A-80) Over objection, however, Mr. Edwards was allowed to testify that properties in Ocean Woods planned unit development would be worth less if the ocean-front parcel were not a part of the planned unit development (R 1296, Lines 9-18; A-80).

The only other testimony offered by Respondents as to damages was the lay opinions of the Respondents themselves. Over continuing objection, each Respondent was allowed to testify as to the amount he or she paid for their unit and then venture a speculative guess as to what they believed it was actually worth based on the alleged representations and what they know today. (R 42-1320) In every case, the Respondents testified that the actual value of their property was less than what they paid for it (R 42-1320). Some of the Respondents made an effort to apportion their damage testimony between the various alleged misrepresentations, but most did not (R 42-1320; Richard R 209, Lines 7-18).

Petitioners offered the testimony of an expert appraiser, Francis R. Horn, who testified that in every case, the actual market value of the Respondents' units without regard to amenities or the lack of "ocean-front" (as defined by the Respondents) was equal to or greater than the amount paid for the unit at the time of sale (R 1456-1524). In

cross examination of Mr. Horn, Respondents were allowed to introduce, over objection, the market value at the time of trial of the ocean-front parcel (R 1511-1512; A-77).

THE VERDICTS

At the conclusion of the case, and after only about 1 hour of deliberation, the jury returned verdicts in favor of the Respondents and awarded them damages. (R 1775, R 2253-2302). In every case, the jury awarded the Respondents exactly fifteen percent (15%) of the purchase price of their Ocean Woods unit. (Mathematical computation based on purchase price testimony.)

SUMMARY STATEMENT

A. BACKGROUND

The Petitioners seek review of the decision of the District Court of Appeal, State of Florida, Fifth District, in FIRST INTERSTATE DEVELOPMENT CORP. V. ABLANEDO, 476 So.2d 692 (Fla. 5th DCA 1985). The Fifth District Court affirmed the award of compensatory damages against the Petitioners on one fraud issue, but held there was error for the lower court to have submitted another fraud issue to the jury. The Fifth District Court applied the so called "two-issue" rule in determining that it did not need to set aside the jury verdict upon finding that one of two fraud issues should not have been submitted to the jury. The Court also held that the lower court committed error in directing a verdict for the Petitioners on the issue of punitive damages and remanded the cause to the lower court for a new trial on the issue of punitive damages only. This brief on the merits is filed by the Petitioners following the Order of this Court accepting jurisdiction which was rendered on March 4, 1986.

B. SUMMARY OF ARGUMENT AS TO REVERSAL OF DIRECTED VERDICT ON ISSUE OF PUNITIVE DAMAGES--POINT ONE (Page 17 of Brief).

The Petitioners submit that the Fifth District Court's decision in the instant case which reversed the directed verdict for the Petitioners on the issue of punitive damages expressly and directly conflicts with decisions of this Court and of the Third and Fourth District Courts of Appeal on the same point of law. The Fifth District Court held that the lower court must allow a claim for punitive damages to go to the jury in each case where a fraud claim is allowed to go to the jury and that the trial court is not allowed to determine as a threshhold issue on a

motion for directed verdict whether there is any legal basis in the evidence for the recovery of punitive damages.

C. SUMMARY OF ARGUMENT AS TO REMAND FOR TRIAL ONLY ON ISSUE OF PUNITIVE DAMAGES--POINT TWO (Page 19 of Brief).

The Fifth District Court of Appeal, after reversing the lower Court's directed verdict for the Petitioners on the issue of punitive damages, then remanded the cause for a new trial on the issue of punitive damages only. This decision expressly and directly conflicts with the decisions of other district courts of appeal in Florida which hold that the general rule and better practice require that if punitive damages are to be awarded they must be awarded by the same jury that awards compensatory damages.

D. SUMMARY OF ARGUMENT AS TO POINTS III, IV, V, VI and VII.

This Court, once it accepts jurisdiction on the ground of conflict, has the duty and responsibility to consider the entire case on the merits and decide the points in question as though the case had originally came before this Court. Friddle v. Seaboard Coast Line Railroad Company, 306 So.2d 97 (Fla. 1975), and Baking Industries, Inc. v. Rayglo, Inc., 303 So.2d 625 (Fla. 1974). The Petitioners, therefore, seek review of the following issues:

1. Point III (Page 22 of Brief)--The Fifth District Court of Appeal erroneously applied the "two-issue" rule in refusing to reverse a verdict even though it held that one of two alleged frauds was erroneously submitted to the jury. The "two-issue" rule does not apply because the two alleged frauds were separate and distinct from each other and required separate proof of damages.

2. Point IV (Page 26 of Brief)--The Fifth District Court of Appeal erred in not reversing the failure of the trial court to direct a verdict on the one remaining alleged misrepresentation--that the Ocean Woods project was a "beach front" development--since the Respondents failed to prove the four essential elements of a fraud case.

3. Point V (Page 32 of Brief)--The Fifth District Court of Appeal erred in its affirmance of the trial judge's decision which allowed the Plaintiffs to testify as to the value of their property as affected by certain alleged misrepresentations. The allowance of such testimony in the instant case resulted in speculative, subjective testimony as to the effect of off-site conditions relating to such property.

4. Point VI (Page 40 of Brief)--The trial court erred in admitting evidence of the value of the ocean-front tract of land owned by one of the Petitioners because the testimony was not relevant to any issue and was presented solely to show the Petitioners had a "deep-pocket" and could afford to pay substantial damages.

5. Point VII (Page 41 of Brief)--The trial court erred in allowing an expert witness to testify that the properties of the Respondents in his opinion were worth less because they were not in a beach front project even though the witness was not allowed to testify as to the amount of such damages because he had not made a proper appraisal of the properties.

ARGUMENT

POINT I.

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.

The Fifth District Court of Appeal in its opinion in the instant case has emasculated the power of the lower court to determine at the close of all of the evidence in a jury trial involving fraud cases whether there is any legal basis for the recovery of punitive damages. This decision directly and expressly conflicts with the decision of this Court in the case of Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936), where this Court said, at 172 So.222:

> "The province of the Court in all cases of claims for punitive or exemplary damages is to decide at the close of the evidence, as matter of law, the preliminary question whether or not there is any legal basis for recovery of such damages shown by any interpretation of the evidence favorable to the plaintiff and relied upon by him to support his claim therefor..."

The Fifth District Court of Appeal did not consider whether or not the conduct of the Petitioners was so outrageous as to sustain an award of punitive damages. Instead, the District Court held, in essence, that the trial judge cannot make a threshhold determination as to whether the evidence supports the award of punitive damages, with the clear-cut admonition that punitive damages are solely for the jury to decide in each fraud case.

This Court, in Como Oil Company, Inc. v. O'Laughlin, 466 So.2d 1061 (Fla. 1985) considered a case in which the Fourth District Court of Appeal had reversed a directed verdict for the defendant on the issue of punitive damages. The Supreme Court reinstated the directed verdict for

the Defendant on the issue of punitive damages, thereby adhering to its previous decisions that the question of punitive damages is a threshhold decision to be made by the trial court.

In Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978), this Court said, at Page 435:

> "When claims for punitive damages are made, the respective provinces of the court and jury are well defined. The court is to decide at the close of evidence whether there is a legal basis for recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff..."

This Court also held in Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982) that in each case the lower court must, at the close of the evidence, determine if there is any legal basis for recovery of punitive damages.

The Fifth District's decision in the instant case also is in conflict with the case of Schief v. Live Supply, Inc., 431 So.2d 602 (Fla. 4th DCA 1983), pet. for rev. denied, 440 So.2d 352 (Fla. 1983), in which the Fourth District Court of Appeal held erroneous an instruction by the trial court that a finding of fraud, in and of itself, would support an award of punitive damages. The Fourth District Court of Appeal said, at page 603:

> "The lower court's modification of the standard jury instruction, in essence, determines that all fraudulent conduct is necessarily accompanied by "malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of other." Consequently, all causes of action sounding in fraud would therefore be amenable to claims for punitive damages. Obviously, this position is incorrect and cannot be reconciled with Florida law. Whether a fraudulent act is sufficiently outrageous so as to justify an award of punitive damages is a question for the jury. Therefore, a distinction should be made, as does Standard Jury Charge 6.12 (without modification), as to the kinds of fraud that will allow the imposition of punitive damages. It was error for the trial court to instruct the jury and authorize that a finding of fraud, in and of itself, may support an award of punitive damages. We reverse and remand for a new trial on the issue of punitive damages."

The Third District Court of Appeal, in Tuel v. Hertz Corporation, 296 So.2d 597 (Fla.3d DCA 1974), cert. den. 312 So.2d 750 (Fla. 1975) affirmed a directed verdict for the defendant on the issue of punitive damages, stating that it would not substitute its judgment for the trial court's in the light of the record before that appellate court. The Third District thus articulated the appropriate standard of review in cases where the lower court grants a directed verdict on the issue of punitive damages. This decision vividly contrasts with the Fifth District's opinion in the instant case which dispenses completely with the role of the trial judge in determining whether a fraudulent act is sufficiently outrageous so as to justify an award of punitive damages.

The only alleged fraud before the lower Court, as determined by the Fifth District Court of Appeal, was the representation that Ocean Woods was to be an ocean-front development. The various Respondents had many different conceptions of what the term "ocean-front development" meant, but they all understood their units would not be on the ocean and that ocean access was promised, which was provided by the developers. There was no evidence whatever of malicious and outrageous aggravation by the Petitioners in this case. Therefore, the trial court was eminently correct in not submitting the issue of punitive damages to the jury.

ARGUMENT

POINT II

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.

In ordering a new trial solely on the issue of punitive damages, the Fifth District Court of Appeal is in conflict with decisions of other Florida District Courts of Appeal which hold that the general rule

and better practice requires that, if punitive damages are to be awarded, they must be awarded by the same jury that awards compensatory damages. This rule finds special significance in the instant case where fifty plaintiffs recovered $304,600.25 in compensatory damages based solely upon the highly speculative opinion testimony of only the plaintiffs who were testifying as to an alleged fraud which even to this date they have failed to articulate.

In Baynard v. Liberman, 139 So.2d 485 (Fla. 2d DCA 1962), the plaintiff had recovered a judgment for compensatory damages which the defendant had appealed. The plaintiff cross-appealed an order striking his claim for punitive damages and sought to have the judgment for compensatory damages affirmed with a remand for trial limited to only punitive damages. The Court said, at Page 488:

> "In the Plaintiff's brief and at oral argument, counsel asked for affirmance of the Judgment previously rendered for Plaintiff in the amount of $35,000.00, but further requested that the action be remanded for a new trial, on the question of punitive damages only. In other words, he seeks an affirmance of the Final Judgment entered, but wishes an additional trial as to one specific element of damage. There is authority for granting a new trial on the question of damages only. We are of the opinion that we are without power to remand for a new trial, to be limited to one particular item of damage claimed originally. For this reason alone, if for no other, the cross appeal must fail."

In DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3d DCA 1970), cert. den., 238 So.2d 105 (Fla. 1970), the plaintiff recovered a judgment for both compensatory and punitive damages. On appeal the Court found that the record did not support the award for compensatory damages. Initially the Court reversed only the award of compensatory damages and remanded for a trial on that issue alone, but upon rehearing modified its earlier decision by requiring a new trial on both compensatory and punitive damages.

In Gillette v. Stapleton, 336 So.2d 1226 (Fla. 2nd DCA 1976), the plaintiff had recovered both compensatory and punitive damages. The Second District Court of Appeal, in ordering a new trial as to compensatory damages, also ordered a new trial for punitive damages, saying, at Page 1227:

> "Although we do not decide whether sufficient evidence was adduced to support an award of punitive damages, the judgment on the issue of punitive damages must be reversed and remanded for a new trial. The general rule is that better practice and procedure requires that "if punitive damages are to be awarded it must be by the same jury that awards the compensatory damages..."

In White v. Burger King Corp., 433 So.2d 540 (Fla. 4th DCA 1983), the Fourth District Court of Appeal determined that while certain errors committed by the lower court did not vitiate a compensatory award against one defendant that the justice of the cause required a new trial on all issues including punitive and compensatory damages against all defendants.

In Jenkins v. Arab Termite and Pest Control, 422 So.2d 922 (Fla. 2d DCA 1982), pet. for rev. den., 434 So.2d 887 (Fla. 1983), the Second District Court of Appeal (after reversal by the Supreme Court) affirmed a remittitur of punitive damages which provided that a new trial would be held as to all issues, including compensatory damages, unless the remittitur was accepted.

In Adler v. Seligman of Florida, 438 So.2d 1063 (Fla. 4th DCA 1983), the Fourth District reversed an award of compensatory damages and determined that the award of punitive damages also should be reversed, stating, at Page 1068, that the weight of authority is against a remand which would force the fact finder to assess a punitive award even in the face of established liability for compensatory damages.

The Fifth District Court of Appeal also should have remanded the cause for a new trial on compensatory damages as well as punitive damages because the various Respondents in many instances testified that their damages related to four separate and distinct alleged frauds: Nature trial, ocean-front development, recreational facilities and control of the homeowners' association. At the conclusion of the evidence, the lower court granted a directed verdict as to the alleged frauds relating to recreational facilities and control of the homeowners' association. The Fifth District held that the issue of alleged fraud in regards to the nature trial should not have been submitted to the jury. Therefore, although only one fraud claim--"ocean-front development"--should have gone to the jury, the jury had before it testimony by the Respondents as to their damages arising out of the four separate and distinct frauds. Some of the Respondents testified as to damages from the separate frauds and some testified generally as to damages from all or part of the alleged frauds.

ARGUMENT

POINT III.

THE "TWO ISSUE" RULE SHOULD NOT BE SO APPLIED AS TO SUSTAIN A VERDICT ON ONE FRAUD CLAIM WHERE THE TESTIMONY RELATES TO TOTAL DAMAGES FROM SEPARATE, INDEPENDENT FRAUD CLAIMS, ONE OF WHICH SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

The Plaintiffs at the jury trial in the instant case testified as to lump sum damages resulting from four distinct frauds: nature trail, ocean-front development, recreational facilities and control of the homeowners' association. In some instances, the Plaintiffs allocated their damages among the four alleged frauds. The lower court directed a

verdict for the Defendants on the claims relating to control of the homeowners' association and recreational facilities. The Fifth District Court of Appeal held that the nature trail issue should not have been submitted to the jury. Therefore, the jury could only lawsully award damages arising from the ocean-front representation. If the verdicts are allowed to stand, the Plaintiffs have recovered for all four alleged frauds, although they were entitled to recover for only one such fraud.

The Fifth District Court of Appeal refused to reverse the jury verdict because it had affirmed the one alleged fraud of ocean-front development, holding that the Petitioners were, therefore, precluded by the "two issue" rule from questioning the verdict.

The "two issue" rule is based upon this Court's decisions in Whitman v. Castlewood Inter. Corp., 383 So.2d 618 (Fla. 1980) and Colonial Stores, Inc. v. Scarborough, 355 So.2d 1181 (Fla. 1978).

In Whitman, the Plaintiff in a shooting incident had presented two theories of liability, one based on negligence and the other based on agency. This Court refused to reverse the verdict even though there was no competent evidence to support an agency theory, holding that it was incumbent upon the Defendant to request special verdicts as to each theory.

In Colonial Stores, Inc.. the Plaintiff had filed a two count complaint based on false imprisonment and malicious prosecution. This Court held that since there was sufficient evidence of malicious prosecution, the District Court of Appeal, based on the "two issue" rule, was right in not considering the sufficiency of the evidence to sustain the false imprisonment count.

The "two issue" rule applies only in cases where there are two theories of liability, either of which standing alone, will support a verdict for the amount of damages claimed. In those cases where there are two theories of liability for one claim of damages, it is only natural that a defendant is not prejudiced by an erroneous submission of one of the two theories to the jury, provided there is no error with respect to the other issue. An entirely different situation arises where there are separate and distinct measures of damages.

In the present case, each of Plaintiffs' two claims required separate proof of the damages allegedly suffered with respect to each claim. A finding of liability on one claim would not entitle Plaintiffs to the total amount of damages claimed. The Plaintiffs improperly lumped their damage testimony together, including valuations as to matters which were later stricken from the case. Unlike the Whitman and Colonial Stores cases, it cannot be presumed that Defendants were not prejudiced by the improper submission of the nature trail issue to the jury. There is not a separate theory of liability which, standing alone, would support the award of the damages claimed. Special verdict forms or interrogatories would be of no use because there was no separate proof of damages on the separate claims. Plaintiffs elected to prove one joint damage for two separate claims, and the improper submission of one of those claims to the the jury requires that the entire verdict be set aside.

As is fully set forth in the record, each Plaintiff testified to one figure with respect to his opinion of "actual" value of his

property. As is also fully set out in the record, this "actual" value figure necessarily took into consideration the lack of ocean-front, the nature trail, the other amenities and even the lack of control. Plaintiffs had the burden of proof and chose not to apportion the damages or testify as to separate damages with respect to each alleged misrepresentation.

At the close of Plaintiffs' case, the trial court granted Defendants a directed verdict with respect to the issues involving the recreational amenities and control of the homeowners' association. The Fifth District Court of Appeal has now determined that the "nature trail" fraud should not have been considered by the jury. Having failed to prove damages separately for each separate claim, it was impossible for the jury to reach a verdict based solely on the "ocean-front" fraud claim. In the light most favorable to the Plaintiffs, the evidence relating to "actual" value was an inseparable mixture of matters which were proper for the jury to consider and matters which were improper for the jury to consider. Plaintiffs had the burden of proving the respective values with certainty and definiteness. Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887). Plaintiffs failed to satisfy this burden by not providing a substantial or competent factual basis by which the jury could disregard the damages claimed for the three stricken claims or separate the damages on the remaining claim. Accordingly, the judgments entered herein must be reversed and, at the minimum, the cause must be remanded for new trial.

ARGUMENT

POINT IV.

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".

Paragraph 36(d) of the amended complaint dated May 27, 1983 (R 2202) alleged that Petitioner represented to the Plaintiffs/Respondents "that the entire project was a 'beach-front' project when in truth and in fact 'the Plaintiffs had only limited access to the beach and ocean'." The proof offered by Respondents failed to establish as a matter of law that such a promise was a fraudulent misrepresentation upon which relief could be founded, and the lower court committed error by refusing to grant the Petitioners' motion for a directed verdict on this issue.

Not one single witness was able to relate to the jury, even in non-dollar terms, how he or she had been injured by the alleged misrepresentation as to the "ocean-front". The Plaintiffs testified in terms of unspecified additional common areas; access to the ocean by walking through back yards and around buildings that every Plaintiff concedes were not yet even planned; a hoped for extension of a road that was never promised; etc. (R 1-1346). There is no dispute that access to the ocean has been provided for Ocean Woods planned unit development, and testimony about the possibility of some additional future access is nothing more than conjecture and speculation based upon what each Plaintiff hoped or assumed would be built on the ocean front.

In short, the objective description of the alleged injury, as well as the subjective assignment of a dollar value thereto was nothing more than conjecture and speculation. Such conjecture and speculation is not

a substitute for the substantial competent evidence required by law to prove damage and injury.

This case, as presented to the jury, was an action for damages based on the alleged fraudulent misrepresentations of the Petitioners that the Ocean Woods planned unit development would be an ocean-front development. At the conclusion of the Plaintiffs' case, at the close of the evidence, and again following the trial, Petitioners moved for a directed verdict in their favor on the fraud claim based primarily on the failure of the Plaintiffs to prove any damages. The trial Court's refusal to grant these motions constitutes reversible error.

As the Florida courts have consistently held, there are four essential elements which a Plaintiff must prove in order to establish a claim for fraud. These four elements are:

(A) A false statement concerning a past or presently existing material fact, or a promise to perform a future act made with present intent not to perform.

(B) Defendant's knowledge that the representation is false at the time it is made.

(C) Intent by the Defendant that the representation induce the Plaintiff to act upon it.

(D) Injury to the Plaintiff acting in reliance on the representation. Blake v. Munce, 426 So.2d 1175 (Fla. 5th DCA 1983); Shee-Con, Inc. v. Al Seim Appraisal Services, Inc., 427 So.2d 311 (Fla. 4th DCA 1983). Morebb Development Corp. v. Purty Nellies's, Inc., 402 So.2d 1345 (Fla. 4th DCA 1981). The Respondents failed to present substantial competent evidence at trial to establish any of these four essential elements.

Any representations which were made by the employees of Petitioner, OCEAN WOODS, INC., as to the "beach-front" were not representations as to past or presently existing material facts, and were nothing more than a promise of future performance. Under the law of this State, such a promise of future performance can only be the basis of an action for fraud if the Plaintiff alleges and proves that the promise was not carried out and that at the time the promise was made the Defendant had no intention to perform that which was promised. Home Seeker's Realty Corp. v. Menear, 102 Fla. 7, 135 So. 402 (1931); Bernard Marko & Associates, Inc. v. Steele, 230 So.2d 42 (Fla. 3rd DCA 1970); Morebb Development Corporation v. Purty Nellie's, Inc.; 402 So.2d 1345 (Fla. 4th DCA 1981). The Respondents in this case failed to prove that the promise was not carried out and failed to prove that at the time it was made there was no intent on the part of the Petitioners to provide a "beach-front project". As set forth in the statement of facts, the testimony of the Respondents as to exactly what was promised regarding the "beach-front" was a hopeless quagmire of confusing and contradictory statements.

With respect to the element of inducement required for fraud, Petitioners concede that the promise of a "beach-front project" was made for the purpose of inducing Respondents, in some small part, to purchase a unit at Ocean Woods. Petitioners would point out, however, that Respondents failed to prove that this promise was a material inducement to them to purchase their unit. The test for materiality is whether, except for the perpetration of the alleged fraud, the Plaintiff would

have refused to enter into the contract. Great American Ins. Co. v. Suarez, 92 Fla. 24, 109 So. 299 (1926); Canal Authority v. Ocala Mfg. Co.; 356 So.2d 1060 (Fla. 1st DCA 1979) App. dismd. without op. 368 So.2d 1863 (Fla.). On direct examination, none of the Respondents offered testimony as to the materiality of this specific misrepresentation regarding the "beach-front". Respondents had the burden of proving the materiality of this specific misrepresentation and they failed to offer any substantial or competent evidence to carry their burden.

Despite all of the other shortcomings in the Respondents' evidence on the "beach-front" issue, by far the most glaring omission is the total lack of any proof of injury as a result of the representations and the reliance thereon by Respondents. Actual damages and proof thereof are essential as a matter of law in establishing a claim for fraud. National Equipment Rental, Ltd. v. Little Italy Restaurant & Delicatessen, Inc., 362 So.2d 338 (Fla. 4th DCA 1978). A false statement, material to the transaction, made with knowledge of the falsity and relied upon by the Plaintiffs is not enough to establish fraud. There must be proof of actual damages and injury before there can be any recovery for fraud. Charter Air Center, Inc. v. Miller, 348 So.2d 614 (Fla. 2d DCA 1977) cert. den. 354 So.2d 983 (Fla.). Proof of damages is the very essence of an action for fraud and deceit. Casey v. Welch, 50 So.2d 124 (Fla. 1951).

As is fully discussed elsewhere in the brief, the only evidence of actual damages suffered by the Respondents comes from the testimony of the Respondents themselves.

Both parties conceded at trial that the proper measure of damages in an action for fraud as to real estate is the difference between the actual value of the land and its value if the alleged misrepresentation had been true (R 1771, Lines 2-7), Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887). Respondents, however, failed to testify as to any facts which would support an award of damages under the Williams standard.

It is fundamental that misrepresentations, if not accompanied by injury or damage, are moral, not legal wrongs. Actual damages and the measure of them are essential as a matter of law in establishing a misrepresentation. National Equipment Rental, Ltd. v. Little Italy Restaurant & Delicatessen, Inc., 362 So.2d 338 (Fla. App. D4 1928). The injury sustained must be of a financial or pecuniary nature. Pryor v. Oak Ridge Development Corp., 97 Fla. 1085, 119 So. 326 (1928).

In order for damages to be reasonable for misrepresentations, the extent of the pecuniary injury or loss must be proved with sufficient certainty to form a basis for the verdict of the jury. West Florida Land Co. v. Studebaker, 37 Fla. 28, 19 So. 176 (1896). Thus, where a purchaser seeks damages for a misrepresentation as to matters affecting the value of property purchased by him, he must prove, with certainty and definiteness, the value at the time of purchase and what such value would have been had the representation been true. Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887). Assuming, as Respondents' counsel argued, that the sales price is evidence of the value as represented, DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3rd DCA 1960) cert. den. 238 So.2d 105 (Fla.); the Plaintiffs only satisfied half of their burden with regard to proving damages.

The only evidence offered by Respondents as to the actual value of their property, or the value without the representations, came from the self-serving guesses of the Respondents themselves. As is fully discussed in Point V, this testimony should not have been allowed and therefore could not form the basis for an award of damages in this case. Once this testimony is excluded, the record is totally void of any proof of damages and Defendants are entitled to judgment as a matter of law.

Assuming, for the sake of argument, that the Respondents' speculative testimony as to actual value was admissible, this evidence was still insufficient as a matter of law to form the basis for an award of damages. Plaintiffs claiming damages to their land by alleged misrepresentations must show the nature of the damage, the effect of the misrepresentations to their land and the relationship of same to market value. A mere unsupported conclusion as to market value is insufficient for this purpose. Tennessee Gas Transmissions Co. v. Zirjack, 244 S.W. 2d 837 (Tex. Civ. App. 1951); Texas Electric Service Co. v. Wheeler, 550 SW 2d 297 (Tex. Civ. App. 1976).

As set forth in Point V, the testimony of the Plaintiffs with regard to actual value contained little apportionment with respect to the specific issues. Additionally, the apportionments that were made regarding the "ocean-front" were unsupported conclusions stated as a percentage of the total amount claimed as damages. Not one single Plaintiff was able to give any factual basis or even any logical chain of reasoning to support his conclusionary opinion. Where the witness cannot tell the jury how he worked out mental adjustments in making a percentage adjustment to value, his testimony is inadmissible. Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970).

In conclusion, the Respondents failed to prove the four essential elements of fraud by substantial competent evidence. The evidence and testimony fail to establish exactly what promises were made to the Respondents, the failure to perform these unspecified promises, an intent on the part of the Petitioners not to perform at the time the promises were made, and most certainly that any of the Respondents have suffered any damage at all with respect to any promise made concerning the ocean-front. In the absence of such evidence, it was error for the trial court to refuse to grant Petitoners' motion for directed verdict with respect to the "ocean-front" issue. See 6345 Collins Ave., Inc. v. Fein, 95 So.2d 577 (Fla. 1957).

ARGUMENT

POINT V.

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

The lower court, over timely objections of the Defendants, allowed each of the Plaintiffs to testify as to the value of their property as affected by the alleged misrepresentations. The typical Plaintiff testified as to the purchase price of his unit, including extras, and then was permitted, over objection, to testify as to the value of his property assuming certain misrepresentations were made to him by the Defendants (including in some instances misrepresentations as to which the Court below subsequently granted the Defendants directed verdicts). The difference between the purchase price (the represented value) and the lower value testified to by the Plaintiffs as the value of their units because of the misrepresentations was asserted by the Plaintiffs as their damages due to such misrepresentations. The jury apparently decided to award all Plaintiffs exactly 15 percent (15%) of the purchase

price of their units which, in some instances, was greater than the difference testified to by the Plaintiffs.

The Petitioners accept the general rule in Florida that an owner of real estate may testify as to the value of his property, but they assert that there are limitations and qualifications to the general rule, among them the following:

1. The person testifying must be the owner of the property at the time an opinion of value is given; and,

2. The owner may testify only as to the value of his property and not to depreciation in value of his property due to some off-site situation; and,

3. The rule presumes that the owner knows the value of his property because he has lived there and knows the type of construction and the purchase price; and,

4. The rule was never intended to apply to situations where the owner would be required to know how his property was affected by the lack of certain amenities.

The valuation date in the case of each Plaintiff was the date of his purchase and on such date the Plaintiffs were contract vendees and not owners of the property. In fact, in most cases, construction had not commenced on the units purchased by the Plaintiffs when they purchased such unit. In Freedman v. Cholick, 379 P.2d 575 (Sp.Ct.Or. 1963) the Court refused to allow a contract vendee to testify as to the value of land which he is buying under a contract, saying:

> "The reason for the rule which permits a nonexpert owner to testify to value is the supposed familiarity an owner-occupier has with the neighborhood and the land values

therein.... The rule is of doubtful wisdom, and has not been extended in this state to corporate ownership.... We see no reason to extend to a person who merely exercises an option the testimonial status of an owner."

The basis of the general rule allowing owners to testify is set forth in Salvage & Surplus, Inc. v. Weintraub, 131 So.2d 515 (Fla. 1st DCA 1961) as follows, at Page 516:

"Appellant contends the evidence was admissible under the rule which permits an owner of property to testify as to its value though not qualified as an expert. That rule as applied to an individual owner of property is based upon his presumed familiarity with the characteristics of the property, knowledge or acquaintance with its uses and purposes, and experience in dealing with it."

Since the general rule permitting an owner to testify as to the value of real estate is bottomed on the owner's familiarity with the land, he is not permitted to testify as to the depreciation in the value of the remainder of his land caused by a road project, absent a showing that the owner had some peculiar means of forming a correct judgment as to value beyond what is presumed to be possessed by men generally. In State, by and through State Highway v. Donnes, 609 P.2d 1213 (Sp.Ct. Montana 1980), the Court said, at Page 1214:

"The landowner concedes that she was permitted to testify to the value of land for the purposes it was then being used, but contends that the trial court should have permitted her to go an additional step and testify to the depreciated value of the ranch land after the condemnation. The landowner can, of course, testify as to the reasonable value of the land according to the uses it is then being put, but ownership alone does not qualify one to testify as to its value for other purposes. In such event the landowner must have some peculiar means of forming an intelligent and correct judgment as to the value of the property in question beyond what is presumed to be possessed by men generally.... The landowner contends that the trial court erred in not permitting her to testify to the resulting depreciation in value of the ranch caused by the taking of the 80.3 acres. We determine however, that in light of the landowner's testimony, the ruling of the trial court was correct."

"The landowner made an offer of proof to the effect that the depreciation of the property in total, based on the total cow-calf operation, was $40,000. In not permitting the landowner to testify as to this, the trial court ruled that she had failed to lay a proper foundation, but that if she could do so at any time during the trial, such testimony would be permitted. She offered no additional foundation."

"It is clear that the landowner possessed no peculiar means of forming an intelligent and correct judgment as to the value of the property beyond what is presumed to be possessed by men generally. She did not testify to the value of the remaining land after the take. She testified that she did not personally operate the ranch, but rather her lessee operated the ranch. Although she testified at length concerning solutions or cures to the problem created by the interstate dividing the ranch land, she was unable to estimate the necessary costs to make the corrections. Nor could she assign a monetary value to the effect of the change in operations, as it related to the total value of the ranch. Indeed, when asked her opinion as to the value of the remaining land after the take, she testified it was too difficult to give such an opinion and declined to do so. Under these circumstances, the ruling of the trial court was correct."

The Respondents failed to present sufficient factual data from which a jury could make a rational estimate of their loss. Their testimony was inherently speculative in nature because they could not state any rational basis for their opinion. The admissibility of opinion evidence of property value by an owner rests upon the assumption or a record showing that the owner is particularly familiar with the property and knows the usages to which the property is adopted, and when this assumption or special knowledge is negated by the owner's own testimony, his opinion loses its probative value and should be rejected. Ward v. Deck, 419 S.W. 2d 286, (Sp.Ct. of Appeals, Mo. 1967).

The owner's testimony must be reviewed on appeal to determine whether there is a satisfactory explanation given for the conclusion

reached. It is submitted that each of the Respondents plucked from the air their opinion as to the depreciated value of their property and that not one of them presented a fair and logical basis for their opinion as to such value.

A bold assertion by the owner as to the amount of lost profits has no evidentiary value unless supported by figures showing the firm's established profits and losses. Tri-State Systems, Inc. v. Village Outlet Stores, 217 S.E.2d 399 (1975). An owner is only allowed to express an opinion in a reasonable way and in accordance with the proper standards for determining fair market value.

An owner's testimony must be based on rational, logical and substantial data. In the case of United States v. Sowards, 370 F.2d 87 (U.S. Ct. of Appeals, 10th Cir. 1966), the United States had brought an action to condemn certain coal properties. The Court set aside a jury verdict for the owner because of the speculative nature of the opinion testimony of the owner and said, at Page 92:

> "...Qualified and knowledgeable witnesses may give their opinion or estimate of the value of the property taken, but to have probative value, that opinion or estimate must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation...."
>
> "It is the general rule that an owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value.... But the owner's qualification to testify does not change the 'market value' concept and permit him to substitute a 'value to me' standard for the accepted rule, or to establish a value based entirely upon speculation...."

Should this Court allow the Respondents to testify as to value of their properties as affected by the alleged misrepresentation, it would

be permitting them to testify as to speculative matters even an expert would not be allowed to testify to in the trial. In Division of Admin., Etc. v. Samter, 393 So.2d 1142 (Fla. 3rd DCA 1981), the state acquired part of a parcel for a street to pass over the southern end of I-75. The landowner contended that the untaken portion of the parcel would be damaged by the to-be-adjoining embankment. The owner's expert appraiser testified that the said severance damages he testified to were based on sales likewise burdened by an embankment. But, the expert testified, the only comparable property with an embankment was not similar in any other respect. The Third District Court of Appeal held that the appraiser's testimony should not have been admitted, saying at Page 1145:

> "Lukacs' attempt to convert the thus irrelevant to the hopefully relevant by applying a stated percentage of difference between the two parcels runs afoul of the principle that--in this field as in every other,...no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning.... It is clear that the 50% figure used to compensate for the admitted dissimilarities in the properties came only from the top of Lukacs' head. Under this doctrine, it could therefore not be employed as a basis for admission of his opinion of value. Any other conclusion would totally destroy the comparability rule...
>
> "The result of what happened below is that Lukacs was permitted to state that the instant parcel sustained some severance damage only because the value of completely dissimilar property had been diminished by the same kind of structure. Such a determination is contrary to the most basic rules of evidence. Apples may not be compared to oranges, even when an expert evaluates the botanical distinctions between them."

In Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2nd DCA 1963), an easement for an electrical transmission line was condemned across certain lands. The Court held that evidence that a prospective purchaser would not buy or would offer less because of the effect of fear and unsightliness was inadmissible as too speculative.

Even an otherwise qualified real estate appraiser cannot provide essentially speculative and conjectural testimony as to the value of property. In Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970), the Court said at Pages 881 - 882:

> "The testimony of Miller, the petitioner's only expert witness at the trial on the subject of the compensation to be awarded to the appellants, as his testimony is explained in the above-quoted excerpts, was, in our opinion, inadmissible in evidence for the reason that his testimony was essentially speculative and conjectural and falls within the ban of the decisional law of this state, under the constitutional guarantee of "full compensation" when property is taken in eminent domain proceedings.
>
> "One of the basic rules of evidence in this state and other jurisdictions is that testimony that is essentially speculative and conjectural is inadmissible to prove the value of property. This court had occasion to invoke that rule in Williams v. Simpson, 209 So.2d 262 (Fla.App. 1968), involving the analogous field of valuation for tax purposes. Regarding the testimony of the tax collector's appraiser, we said:
>
> > 'The Appellants contend that Osborn's appraisal, admittedly based upon "ultimate potential for commercial usage" which Osborn estimated would not come into being for five years and further based upon the assumption that the property should and could be rezoned, was an appraisal based upon speculation and conjecture and, therefore, is not competent evidence to be considered in determining valuation for tax assessment purposes. We agree.'
>
> "In our opinion, Miller's valuation testimony in the case at bar is much more speculative and conjectural than was Osborn's in the Williams case. In his testimony, quoted above, Miller admitted in effect that in his appraising he used no authorized formula for his mental adjustments--testifying: "It's just a matter of adjustment on the part of the appraiser.* * *"; that he had found no information in the standard recognized appraising manuals as to how to compute his mental adjustments of value; that "I can't tell you" how much he went up on one and down on the other "to make them come out to 110 per cent"; that he could not tell the jury how he worked out the mental adjustments. In the light of this evasive and secretive testimony, when admitted in evidence before the jury, the position of the appellants was made almost untenable, for there was no way to rebut a secret, purely subjective, formula that existed, if at all, only in the mind of a partisan appraiser. A jury verdict, based in whole or in part upon such testimony, is necessarily in derogation of the constitutional guarantee of "full compensation."

In Staninger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. 1st DCA 1966) the appellate court agreed with the trial judge that evidence as to the probability and cost of removal of land use restrictions was too speculative as to be admitted, since they could not be stated with reasonable probability. The Court said, at Page 488:

> "The second point of law to be considered concerns the refusal of the trial court to permit appellants' witness Taylor who appeared solely as an expert on the issue of valuation, to give his opinion as to the cost and reasonable probability of the removal of the private covenants and restrictions by legal proceedings. Such testimony was properly excluded.
>
> "Such inquiry assumes, without any basis, that legal proceedings attacking the validity would be successful and that the costs, including counsel fees, could be stated with reasonable certainty. Not only was the witness not qualified to testify on these points, but such testimony is so speculative as to be inherently inadmissible. In Yoder v. Sarasota County, 81 So.2d 219 (Fla. 1955), the owner sought to prove the value of the property in the future, 'if properly filled,' for a particular use stated to be its most profitable use. The lower court held such evidence to be too speculative and on appeal the Supreme Court of Florida said:
>
>> 'It is not proper to speculate on what could be done to the land or what might be done to it to make it more valuable and then solicit evidence on what it might be worth with such speculative improvements at some unannounced future date. To permit such evidence would open a floodgate of speculation and conjecture that would convert an eminent domain proceeding into a guessing contest...'

Finally, the Respondents were testifying in the Court below as to the value of their property as affected by what was built or not built on properties of other persons. This they are not allowed to do. As the Court said in Harbond, Inc. v. Anderson, 134 So.2d 816 (Fla. 2nd DCA 1961), at Page 819:

> "It may be said generally that for a witness to testify as to the value of realty he must have had an adequate opportunity to apprise himself of the realty's worth and should know the particular property to be valued and the value of land in the vicinity or of the same class...

"An owner, ordinarily, by reason of ownership, is qualified to testify to the value of his own property. A corporate officer may testify as to value of property of the corporation where, because of his management of its affairs, and personal knowledge of the property, he is thereby qualified, as was plaintiff's witness here.... However, the fact of ownership does not of itself qualify one to testify to value of other lands."

Accordingly, the opinion testimony of the Respondents should have been excluded, and the judgment based on such testimony must be reversed and the cause remanded for entry of judgment for the Petitioners.

ARGUMENT

POINT VI.

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.

During the cross-examination of Petitioners' expert witness, Francis R. Horn, counsel for Respondent inquired as to the market value of the eleven plus acres of land located to the east of the Ocean Woods planned unit development (R 155-1512). Over the objection of Petitioners' counsel, Mr. Horn was allowed to testify that the value of that particular piece of land was "Three Million Six Hundred and Thirty Thousand Dollars" (R 1512; Lines 8-9). The allowance of this testimony constituted reversible error by the trial court.

The question of the value of this parcel of land was totally irrelevant to any issue before the Court. As previously stated, the only values which were in question were the actual and represented values of the individual Ocean Woods units. Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887). The particular property in question was not even a part of the Ocean Woods planned unit development (Testimony of Mr. Biery R 654-655). The value of this particular piece of land has

nothing to do with any of Mr. Horn's testimony as to valuations of the Ocean Woods units, nor was it in any way related to any other evidence introduced at trial. In fact, the Court specifically excluded the exact same testimony when Respondents attempted to elicit it from Richard Stottler during their case in chief (R 1354). At that point, counsel for the Respondents stated that the relevance was limited to the question of punitive damages (R 1354). As a directed verdict was granted for the Petitioners on the punitive damage issue, the testimony could not have been relevant on that ground.

In truth, the value of this parcel of land was offered for the sole purpose of establishing a deep pocket and to show that Petitioners had the ability to pay a substantial judgment (R 1354). The evidence was calculated to inflame the passions of the jury, and it cannot be said that the evidence failed to have its intended effect.

In conclusion, the evidence of value should have been excluded, and given the highly prejudicial nature thereof, the judgment must be reversed and the cause remanded for a new trial.

ARGUMENT

POINT VII.

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

During the trial, Respondents offered the testimony of a real estate broker, Christopher M. Edwards, as an expert, on the issue of damages relating to the alleged "ocean-front" misrepresentations (R 1256-1300). While most of Mr. Edwards' proferred testimony was properly excluded, the trial court, over Petitioners' objection, did allow the witness to give the following opinion:

"Q. All right. Now, Mr. Edwards, there's been some question whether or not that eleven point five acres (east of Ridgewood Avenue) was part of the development or not; or, instead, that the homeowners just had an easement to the ocean.

Based on your education, training and experience, would properties over to the west side of Ridgewood Avenue, would those properties be worth less without the eleven point five acres being included in the planned unit development in the year 1978, 1979, and 1980?

A. Yes, sir." (R 1296, Lines 9-18).

This testimony should not have been allowed, was highly prejudicial to the Petitioners, and its allowance amounts to reversible error.

Under Florida, law, expert testimony is only admissible if the witness is shown to have the knowledge, training and experience to qualify as an expert; if the testimony will assist the jury in understanding the evidence or determining a fact in issue; and only if the testimony can be related to the evidence at trial. Florida Statutes 90.702(1983). In the present case, the testimony of Mr. Edwards should have been excluded on all three grounds.

Mr. Edwards was offered as an expert real estate appraiser to testify on the issue of property valuation as it related to the ultimate issue of damages for fraud. To be qualified to give such testimony, the witness must have apprised himself of the worth of the land, must know the particular property to be valued and must know the value of land in the vicinity or of same class. Harbond, Inc. v. Anderson, 134 So.2d 816 (Fla. 2d DCA 1961). During voir dire of the witness, Mr. Edwards conceded that he had made no residential appraisals in Cape Canaveral or nearby Cocoa Beach (R 1259), that he had made no appraisals of the

individual units in Ocean Woods (R 1260; Lines 1-2), and at no time did he even indicate that he was aware of the actual purchase prices paid by the Respondents. Since the Petitioners established that Mr. Edwards had no basis on which to express an opinion, his testimony should have been excluded. Florida Statute 90.705(b)(1983).

Apart from the lack of qualification to testify as an expert in this case, the opinion given by Mr. Edwards also went outside the scope of any issue before the Court. The only issue upon which expert testimony could assist the jury was the issue of valuation. As agreed by both parties, the proper measure of damages was the difference, if any, between the actual value of Respondents' units and the value of those units as allegedly represented by Petitioners (R 1771; Lines 2-7), Williams v. McFadden, 23 Fla. 143, 1 So.618 (1887). Petitioners would concede that expert testimony from a qualified witness as to either the actual value or the value as represented would have been proper, but Mr. Edwards' testimony did not address either of these valuations. Mr. Edwards' testimony that units would be worth less if the Ocean Woods planned unit development did not extend all the way to the ocean for the entire 600 foot width in no way assists the jury in determining the actual value or the value as represented. Whether the units were worth more or less in some abstract manner was not an issue for the jury to decide, and it was error for the trial court to allow the testimony on this non-existent issue.

Apart from Mr. Edward's lack of qualification to testify and apart from the fact that the testimony given did not relate to an issue before the Court, the testimony was also objectionable due to its purely conjectural and speculative nature. It is well settled that an appraiser is not permitted to give testimony that is founded upon nothing more

than conjecture and speculation. Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970); Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2d DCA 1963); Division of Administration v. Samter, 393 So.2d 1142 (Fla. 3DCA 1981); Williams v. Simpson, 209 So.2d 262 (Fla. 1st DCA 1968). Without any knowledge of the amounts actually paid by the Respondents, and without any other knowledge of value of the units, Mr. Edwards was in effect allowed to tell the jury that the actual value of these units would be less without the 600 feet of ocean-front. Of necessity, this testimony is nothing but conjecture and speculation. Mr. Edwards was simply expressing a purely subjective opinion about matters of which he had no personal knowledge or expertise, and the allowance of this speculative testimony was highly prejudicial to the Petitioners.

Respondents' theory of damages in this case, as reflected in the argument of Respondents' counsel (R 1705A) and the testimony as to value of the individual Respondents, was to the effect that the value as represented was the actual purchase price of the units, and the actual value of the property was something less than this purchase price. By allowing Mr. Edwards to give his abstract opinion of value differences, Respondents were able to have an "expert" tell the jury that their theory of damages was correct. This "expert", who could not take one single unit and, assuming any set of facts imaginable, testify that the unit owner paid more or less than it was worth on the date of purchase, was allowed to testify that all the units were worth less, and in effect put a rubber stamp on the testimony previously given by the unit owners. While one can never know the weight actually afforded Mr. Edwards' testimony by the jury, the potential prejudice from having an "expert"

give such clearly impermissible testimony is too great to be considered harmless error. Accordingly, the judgment must be reversed on this issue alone, and the case remanded for new trial.

CONCLUSION

The decision of the Fifth District Court of Appeal in First Interstate Development Corp. v. Ablanedo, supra, which reversed the directed virdict for the Petitioners on the issue of punitive damages, is in conflict with prior decisions of this Court and sets forth improper standards as to when the issue of punitive damages should be submitted to the jury.

The decision in First Interstate Development Corp. v. Ablanedo should also be reversed because it improperly remanded the cause for a new trial on the issue of punitive damages only in violation of the general rule and better practice which requires that if punitive damages are to be awarded they must be awarded by the same jury that awards punitive damages.

The Plaintiffs brought this suit claiming fraud, but failed to prove one of the essential elements of a fraud claim, that of damages. The only testimony which could possibly support an award of damages was the inadmissible opinion testimony of the Plaintiffs. Striking this testimony from the record there is absolutely no proof of damages. Even allowing this testimony to stand, the opinions of the Plaintiffs were too speculative and conjectural to form a legal basis for an award of damages. Accordingly, the judgment should be reversed and the lower court directed to enter judgment for the Petitioners on the fraud issue.

At a very minimum, there were in many instances, no proof of

PAGE(S) MISSING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief of Petitioners has been furnished by U. S. Mail to SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32304, with a true and correct copy being furnished by hand delivery to KENNETH STUDSTILL, ESQUIRE, Attorney for Respondents, 503 Palm Avenue, Titusville, Florida 32796, on this 24th day of March, 1986.

JOHN M. STARLING, ESQUIRE