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,	)	
vs.	)	CASE NO. 67,848
CARLOS M. ABLANEDO, et al.,	)	
Plaintiffs/Respondents.	)	

PETITIONERS' REPLY BRIEF AND ANSWER BRIEF TO CROSS APPEAL

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

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 Respondents in their answer brief urge this Court to adopt a rule of law that in every fraud case submitted to a jury the plaintiff is entitled to have the jury also consider the award of punitive damages against the defendant. The Respondents thus contend the trial judge lacks the power in fraud cases to determine on a motion for directed verdict whether there is any legal basis in the evidence for the recovery of punitive damages.

The decision of the Fifth District Court of Appeal in the instant case clearly agreed with the position of the Respondents. This decision directly conflicts with Schief v. Live Supply, Inc., 431 So.2d 602 (Fla. 4th DCA 1983), pet. for rev. denied, 440 So.2d. 352 (Fla. 1983). In Schief, the Fourth District Court of Appeal held that only certain types of fraudulent conduct would allow the imposition of punitive damages and that a jury instruction to the contrary was reversible error. If the trial judge finds that evidence of outrageous conduct is not present in the evidence, he is duty-bound to grant a directed verdict for the defendant on the issue of punitive damages.

In both Como Oil Company, Inc. v. O'Laughlin, 466 So.2d 1061 (Fla. 1985) and White Construction Co. v. Dupont, 455 So.2d 1026 (Fla. 1984) this Court held that the degree of negligence necessary for punitive damages is willful and wanton misconduct equivalent to criminal manslaughter. Although Como, supra, involved a tort other than fraud, this Court upheld the trial court which had granted a directed verdict

against the plaintiffs on the issue of punitve damages. In White, supra, also a non-fraud case, this Court reversed the trial court's refusal to grant a directed verdict to the defendants on the issue of punitive damages.

In Harris v. Lewis State Bank, 482 So.2d 1378, (Fla. 1st DCA 1986), the First District Court of Appeal, in discussing the circumstances in which punitive damages may be recovered in a fraud action, said at Page 1385:

> "....A person who has sustained a pecuniary loss as a result of fraudulent misrepresentations may recover punitive damages from the wrongdoer, provided there has been an award of compensatory damages, where the fraud is characterized by malicious and outrageous aggravation, or where the fraud is accompanied by an unlawful taking or trespass on the part of the defendant. Allegations that the defendant perpetrated a fraud with willful and wanton disregard of the rights of the plaintiff have been held sufficient to plead an adequate predicate for punitive damages."

Contrary to Plaintiffs' statement that Hutchens v. Weinberger, 452 So.2d 1024 (Fla. 4th DCA 1984), supports their position, the Fourth District Court of Appeal in Hutchens states, at page 1025, that an aggrieved Plaintiff in a fraud case may recover punitive damages only if the defendant acted outrageously. In Hutchens, the trial court's refusal to grant a directed verdict as to punitive damages was affirmed and it is implicit in Hutchens that if the record had not supported the trial judge's decision that the refusal to grant a directed verdict would have been reversed.

In an annotation captioned "Recovery of Punitive Damages in Action by Purchasers of Real Property Charging Fraud or Misrepresentation", 19 ALR 4th Series, Page 801, it is stated at Page 805:

> "Generally speaking, courts awarding exemplary or punitive damages in the fraud field point out that "ordinary" or "simple" fraud alone is not enough for punitive damages;

> additional circumstances of aggravation, as where the fraud is malicious, deliberate, gross, or wanton, are essential for the successful recovery of such damages. The Restatement (Second) of Torts § 908 (1979), followed by the court in Holcomb v. Hoffschneider (1980, Iowa) 297 NW2d 210, 19ALR4th 792, (§9, infra), provides that punitive damages may be awarded for conduct that is outrageous, a product of the defendant's evil motive, or his reckless indifference to the rights of others. The Restatement suggests that the trier of fact, in awarding punitive damages, can properly consider the character of the defendant's act, the nature and extent of the harm suffered by the plaintiff, and the wealth of the defendant. Under the Restatement, reckless indifference to the rights of others and a conscious, deliberate disregard of these rights may provide the necessary inference of intent or state of mind to justify an award of punitive damages."

Although the Fifth District Court of Appeal refused to address on the merits whether or not the trial court erred in directing a verdict for the Petitioners, it is helpful to review the testimony and exhibits contained in the record as to the reasons why the trial judge directed a verdict for Petitioners.

Although the Respondents brought numerous counts and many fraud allegations against the Petitioners, it has now been determined by the lower court and the District Court of Appeal, Fifth District, that the only matter that should have been submitted to the jury was whether or not Petitioners had defrauded the Respondents on the so-called "oceanfront development" claim, and their damages, if any. (A-1).

The position of the Petitioners in their initial brief and at this time is that there was no competent proof in the record of fraud or of any damages sustained by the Respondents. The Petitioner, First Interstate Development Corporation ("First Interstate") purchased in 1971 a tract of land in the City of Cape Canaveral, Brevard County, Florida (R. 1187). First Interstate filed a special zoning request with the City of Cape Canaveral on May 25, 1972, to permit a planned unit

development ("PUD") on 20 acres of the land. (RA-25). The application to the City (RA-23) delineates the boundaries of the PUD as a tract of land 660 feet deep extending from Atlantic Avenue in an easterly direction for approximately 2400 feet to a point on the West right-of-way line of Ridgewood Avenue, if extended Northerly, then in a tapering northeasterly direction to the Atlantic Ocean. (RA-23).

After extensive litigation the City of Cape Canaveral was ordered by the courts to permit development of the project, which was then known as "Puerto Del Sol" (R. 1201). First Interstate elected not to develop the property and entered into an oral contract to sell the PUD to Ocean Woods, Inc. ("Ocean Woods") for $608,000 or $2,000.00 per residential dwelling unit (R. 1192). Richard H. Stottler, Jr. was the secretary of and a 25% shareholder in First Interstate. Four persons unrelated to Ocean Woods owned the other 75% of the stock of First Interstate. Mr. Stottler owned two-thirds of the stock of Ocean Woods and the other Petitioner, Thomas E. Wasdin ("Wasdin") was the president of Ocean Woods and owned one-third of the stock of Ocean Woods.

Many of the Plaintiffs who obtained judgments against the Petitioners said they relied solely on a brochure distributed by Ocean Woods as to the oceanfront representation (R. 2709-2711; A-46; RA 16-18). The only reference in the brochure to the ocean is the small scaled map of the location of the project (A-50) and the following words:

> "Ocean Woods is located in Cape Canaveral, Florida, set among the natural tropical foliage of the area and nestled in a quiet site extending from North Atlantic Avenue to the Atlantic Ocean.... We offer many varieties of outdoor activities such as....a beautiful stretch of white sand beach for which Florida is famous...."

The PUD site map (RA-23) reflects that the site provides ocean access on the north boundary of the PUD.

When the testimony of those plaintiffs to whom oceanfront project representations were made is examined, there is not much additional substance or clarification as to the exact meaning of the representation. Such Plaintiffs testified that one or more of Ocean Woods' employees represented to them that the project was an "oceanfront project." It is undisputed that Ocean Woods Homeowners' Association has been provided a permanent 25-foot easement for access to the ocean in the approximate location as shown on the PUD application (RA-23).

The Plaintiffs, when asked what had been promised to them in the brochure or orally by employees of Ocean Woods, all said they knew and understood that the ocean-front lying to the east of the PUD boundaries would be developed for use as private residences. Some said they were told high-rise apartments would be built on the ocean, and a surprisingly large number said that Ocean Woods personnel told them that it had not yet been decided what was going to be built on the ocean.

The Plaintiffs said that, although they had received access to the ocean, they were damaged because the 11 acres of ocean-front property had not been made a part of the project. They speculated that if the ocean-front site was a part of the project, they could use common areas to be located on such site as additional points of access to the ocean. They also claimed that if all of the ocean-front property was a part of the PUD, it would have made their property somehow more marketable.

All of the Plaintiffs testified that their units were located so far from the beach ($\frac{1}{4}$ of a mile to better than $\frac{1}{2}$ of a mile), they could not see the ocean, and as Defendant's expert witness said, "....the amenity you get from the ocean in this project is the roar and the smell." (R. 1513). All of the witnesses also testified they had

ocean access. So their case amounted to their subjective beliefs as to what the brochure and Ocean Woods' employees said. There is no doubt that the PUD, in fact, is "nestled in a quiet site extending from North Atlantic Avenue to the Atlantic Ocean" as provided for in Exhibit 16 (A-46-50). Since access is provided to the ocean, the statement in the brochure that, "We offer many varieties of outdoor activities such as....a beautiful stretch of white sand beach for which Florida is famous," also is true. It is quite apparent, therefore, that those persons who relied solely on the brochure should not be allowed to recover.

As to those Plaintiffs who were told that the PUD would be an ocean-front development, it is evident that the promise was one to be performed in the future. As to such promises to be performed in the future, the law requires that at the time the statements were made that the person making them had no intention of performing the promise. Even at the trial Ocean Woods was still proceeding in an easterly direction towards the ocean and still had not built all of the units within the PUD boundaries. Ocean Woods had an oral right of first refusal from First Interstate which required First Interstate to give Ocean Woods the right to buy the ocean-front tract before selling it to another party.

Ocean Woods had considered purchasing the property over three years prior to the trial and developing it as part of the PUD, but at meetings of the homeowners in Ocean Woods some of the Plaintiffs expressed their adamant opposition to the site being made a part of the PUD, because they did not want the people who would live on the ocean to have the right to use the recreational facilities built in Ocean Woods. The property was still available at the trial for purchase by Ocean Woods

under its rights of first refusal, but at that time Ocean Woods was still developing the remaining lots in the PUD and had not yet reached that stage of construction.

About the only thing the Plaintiffs were able to articulate about their damages if the project was not ocean-front was the prospective loss of their alleged rights to wander around the common areas that might be created on the ocean-front site. Since they had access to the ocean and all of them knew they were too far from the beach to see the ocean without walking half of a mile or so, the only legal damage they could sustain would be a diminution of additional, prospective rights to use the common property that might be located on the ocean in the development of the ocean-front tract, when, as and if that ever occured.

The Respondents' expert witness admitted that he as an expert was unable, after diligent research, to locate comparable properties and could not express an opinion as to the amount of the loss incurred by the Plaintiffs due to alleged ocean-front misrepresentations. Despite the fact that their own expert could not qualify to testify about the Plaintiffs' alleged losses, the trial court, over the objection of the Petitioners, allowed all of the Plaintiffs to testify as to the dollar amount of their damages arising out of the alleged misrepresentations under the guise that the owners could testify, even if their expert could not, as to their opinion as to the actual value of their property at the time they purchased it. This "actual value" the Plaintiffs testified about was a deduction of from approximately five per cent (5%) to twenty-five per cent (25%) of the purchase price of the unit from Ocean Woods. The jury awarded the Plaintiffs as damages precisely fifteen per cent (15%) of the amounts they paid to Ocean Woods.

Petitioners contend that there was no competent evidence in the record showing outrageous conduct of the Petitioners on which the trial judge could have submitted the issue of punitive damages to the Jury. In fact there was such a paucity of testimony as to damages that the trial court erred in submitting the last remaining fraud issue to the jury.

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.

The Respondents initially state that the Petitioners untimely raised the issue of whether the Fifth District Court of Appeal erred in ordering a new trial solely on the issue of punitive damages. The Petitioners first became aware that a new trial was being ordered solely on the issue of punitive damages when that Court's decision was rendered. The issue was promptly but unsuccessfully raised by the Petitioners in their Motion for Rehearing in the Fifth District Court of Appeal.

The Respondents say they were prejudiced because they could have accepted the trial court's directed verdict against them on the issue of punitive damages by dismissing their crossclaim on that issue. The Respondents had ample opportunity to evaluate the situation and inform the Fifth District Court of Appeal in their reply to the Petitioners' Motion for Rehearing that they desired not to pursue their appeal on their entitlement to punitive damages. Instead, they vigorously pursued their right to punitive damages and a new trial on that issue alone.

The Respondents' claims that they would lose interest accrued on

their judgment and that the Defendants could become insolvent or intentionally waste their assets are not sufficient reasons for this Court to ignore the legal rights of the parties.

In Lassiter v. Intern. Union of Engineers, 349 So.2d 622 (Fla. 1976), which is relied on heavily by the Plaintiffs to support their position that this Court should remand for a new trial only on the issue of punitive damages, it should be noted that this Court and the Fourth District Court of Appeal ordered a new trial on both punitive and compensatory damages. The Fourth District Court of Appeal in its decision on remand after the first appeal to this Court, 325 So.2d 408, (Fla. 4th DCA 1975), stated at Page 410:

> "And now, since we necessarily return the case for a new trial on the matter of compensatory damages, it would be an anomaly not to likewise return the issue of punitive damages. If we said, as we did, that the balance between the two awards was impermissible, what would be the result if we now sustained the punitive damages and the new jury returned a lesser sum for compensatory damages on retrial, as it would be authorized to do? The impermissible imbalance would be even larger with this court barred from appellate correction.
>
> "In sum, we are of the opinion that, after giving full credit to Rinaldi v. Aaron, supra, there remain fully sufficient legal reasons to still cause a new trial on the issue of punitive damages. Believing that the law and justice of the cause so indicate we, in accord with the mandate of the Supreme Court of Florida, reverse the awards of damages, compensatory and punitive, and remand for a new trial as to such issues."

In Bankers Multiple Life Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985) this Court affirmed the award of compensatory damages and ordered a new trial only on the issue of punitive damages. But this Court noted, at page 533, that the basis for or the amount of compensatory damages was not argued. In the instant case the petitioners have challenged at every step the basis for and the amount of compensatory

damages.

In Hartford Accident & Indeminty Co. v. Ocha, 472 So.2d 1338 (fla. 4th DCA 1984), it was the plaintiff, not the defendant, who argued that if punitive damages are to be retried so must the compensatory damages. Obviously the plaintiff was dissatisfied with the amount of compensatory damages awarded to her by the jury. In the instant case the plaintiffs were awarded in excess of $300,000.00 based on extremely fragile testimony as to liability for and the amount of compensatory damages. The Defendants submit that because evidence of so many fraud claims other than "oceanfront" were presented to the jury, which were later determined to be legally insufficient, that justice demands that a new jury be impaneled to consider only the one fraud claim that remains and the appropriate measure of damages relating thereto.

The Plaintiffs suggest that if this Court determines that a new trial on the issue of both compensatory and punitive damages should be held that the trial court should be directed to impanel the original jury to decide the issues. Besides the impracticality of such procedure, and the lack of precedent for it, this approach would result in having a jury which has been exposed to eight days of testimony as to things that have now been largely determined to be irrelevant and immaterial.

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 in their answer brief initially state that they do

not concede that the trial judge erred in refusing to grant the Defendants a directed verdict on the "nature trail" fraud issue, as was determined by the Fifth District Court of Appeal. They fail to point out that they have not filed a cross appeal as to this decision, even though they have raised two other matters in the cross appeal filed herein. This Court, therefore, does not have jurisdiction to consider the Fifth District Court of Appeals' decision on the "nature trail" fraud claims. The Defendants nevertheless state that the decision on the "nature trail" was proper because of the complete lack of competent evidence in the record to support the claim.

Although there was no recorded easement as to ocean access until August of 1983, the record in replete with testimony from the Plaintiffs that a nature trail and ocean access had ben provided from the time that Plaintiffs started moving into their units, albeit at a different location than they had expected.

The issue in Great American Ins. Co. v. Coppedge, 405 So.2d 732 (Fla. 4th DCA 1981) was whether or not a fidelity bond covered the acts of an employee of a hotel, which sued the insurance company on a cross claim arising out of a guests' loss of jewelry. The bond provided that coverage existed only for losses resulting from an employee's fraudulent or dishonest act. The Court in Great American merely held that the evidence was sufficient to raise a jury question on the intent of the employee covered by the fidelity bond.

As pointed out in the initial brief of the Petitioners herein, the Plaintiffs in their testimony sought to establish separate, independent claims of fraud, and not just separate theories of liability as to the same fraud claim.

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".

It is not in dispute that Plaintiffs had the burden at trial of proving each of the four essential elements of fraud with respect to the alleged fraudulent misrepresentation. Contrary to the arguments in Plaintiffs' answer brief, Plaintiffs failed to carry this burden with respect to the "ocean-front" issue.

As set forth in Point V of Defendants' initial brief, the testimony of the Plaintiffs as to "actual" value was not admissible and should not have been considered by the jury. Excluding this evidence from the records, even Plaintiffs would concede that they failed to prove one of the two essential values necessary to establish entitlement to damages. For this reason alone, the judgment must be reversed.

POINT V.

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

It is quite apparent, upon consideration of the arguments of Plaintiffs and Defendants in their prior briefs, that the propriety of allowing owners to testify in the manner permitted in the lower court is a case of first impression in the Florida appellate courts. While Plaintiffs relied heavily on cases from outside Florida, none of these cases reflect the law of this state and none are binding on this court. Furthermore, Defendants see no reason why any of these cases should be adopted as the law of Florida.

Contrary to Plaintiffs' arguments, Florida has never adopted a blanket rule that an owner of property is competent, solely on the basis of his ownership, to testify as to the value of his property. See, Jones v. State, 408 So.2d 690 (Fla. 2d DCA 1982); Washington Federal S&L v. Zuckerman-Vernon Corp, 414 So.2d 219 (Fla. 3d DCA 1982). In stating the rule the courts have been careful to avoid absolutes. Thus, the courts have held that an owner, ordinarily, by reason of ownership is qualified to testify as to the value of his land. Harbond, Inc. v. Anderson, 134 So.2d 816 (Fla. 2d DCA 1961). The basis for the rule in Florida is the owner's presumed familiarity with the characteristics of his property, knowledge or acquaintance with its uses or purposes, and experience in dealing with it. Salvage & Surplus, Inc. v. Weintraub, 131 So.2d 515 (Fla. 1st DCA 1961).

In the present case, the Plaintiffs as owners of the property were allowed to testify as to the value of their property on the date of purchase. However, the Plaintiffs testified not as to a single value, but as to two separate and distinct values at one point in time. Each owner testified as to his purchase price or value as represented and as to a so called "actual" value which in all cases was less than the purchase price. As stated in Harbond, supra., the rule allows testimony as to the value, or a singular opinion of valuation. In fact, no case in Florida has ever allowed an owner to testify as to two values at one given point in time. An examination of the basis for the Florida rule shows why the testimony of an owner must be limited to a single opinion of value at a given point in time.

The Plaintiffs in this case were allowed to give their opinions of value as of the date or instant of purchase. At that point in time, the

only knowledge the owner of the property can be presumed to have is the purchase price and maybe the physical layout of the property. It is illogical to presume familiarity with uses or purposes or experience in dealing with the property at the instant of initial ownership. By allowing the Plaintiffs to testify to a value other than purchase price the court, as a matter of law, allowed Plaintiffs to testify based on factors and considerations which were outside the scope of the Florida rule on owners' testimony. Furthermore, the testimony was allowed without any predicate as to what factors or considerations the Plaintiffs were relying on in reaching their opinions as to so called "actual value."

Apart from stating their purchase price, the Plaintiffs in this case should have been held to the same standard of competence as any other witness who testifies as to the value of land. The Plaintiffs should have been qualified by showing that they had had an adequate opportunity to appraise themselves of the properties' worth and the value of land in the vicinity and of the same class. Harbond, supra. Not one of the Plaintiffs was so qualified prior to expressing his opinion as to "actual" value. Accordingly, none of the Plaintiffs should have been allowed to express an opinion as to "actual" value at the time of purchase.

Plaintiffs in their answer brief make the assumption that the testimony of the Plaintiffs with regard to actual value was simply a statement as to the value of the Plaintiffs' individual units. This is an erroneous assumption and is contrary to the opinions actually elicited from the Plaintiffs. In each case, when expressing an opinion as to "actual" value, the Plaintiffs were not testifying as to the value

of their units, they were testifying as to the alleged depreciation in value caused by events which were to have taken place on property which they did not own. They were testifying to the effect of removal of a portion of the subdivision from the development and the effect of failure to construct certain amenities on property other than their own. This is a far cry from an owner testifying as to the market value of property which he owns and one does not have to look outside of Florida to discover that such testimony is not within the general rule which allows an owner to testify.

In Harbond, supra, the Plaintiff was ruled qualified to testify as an owner of property, but the court specifically held that the fact of ownership did not qualify the Plaintiff to testify as to the value of other unowned lands. Obviously, an owner of property cannot be presumed to know, merely because of his ownership, the value of amenities or lack of amenities which are not to be located on his property. Similarly, there is nothing about ownership which creates a presumption of knowledge as to the impact on value of additions or deletions to the size of a subdivision. Without this presumption, the owner must demonstrate some special knowledge or qualification which the Plaintiffs failed to even attempt.

Plaintiffs ask this court to reject the Florida limitations on an owner's testimony and allow Plaintiffs to substitute their unfounded personal beliefs for the competent proof of damages required by the law. There is simply no need for allowing such speculative and purely conjectural opinion testimony in the current system. Competent value testimony is available through comparable sales, cost of construction or repair and a variety of other well recognized methods. An owner's

testimony should continue to be limited to only matters which can be presumed to be within the owner's knowledge, and only as to the value of the owner's actual property.

The trial court committed error in allowing the Plaintiffs to testify as to "actual" value and the judgments based thereto must be reversed. As there is a complete absence of other evidence with respect to damages, the cause should be remanded with directions to enter judgment for the Defendants.

POINT VI.

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

Plaintiffs have alleged that no objection was made to the testimony of Mr. Horn concerning the value of the oceanfront property. Counsel for the Plaintiffs knows full well that a proper and timely objection was made, it was simply made at the bench and out of the presence of the jury. The record clearly shows the bench conference took place after the question was objected to, but for some reason the court reporter simply failed to include the transcript of this bench conference. There is no other reason for the testimony to be interrupted at that point other than for the objection to the testimony. The objection was on the same grounds as the previous objection during the testimony of Mr. Stottler (R-1354).

That the sole purpose of this evidence was to inflame the jury and provide a deep pocket is evidenced by Plaintiffs' counsel's specific reference to the value on closing (R-1701).

The evidence of value of the oceanfront property was clearly inadmissible and it was highly prejudicial to the Defendants to allow it into evidence. Accordingly, the judgments entered herein must be reversed and the case remanded for a new trial.

POINT VII.

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

The record contains fourteen pages of specific objections to Mr. Edwards' testimony and argument and discussion thereon (R-1261-1270; 1285-1289). These objections, complete with citations of authority, are the same objections raised in the appeal. Once a valid objection to the testimony is made and overruled, it is not necessary for the aggreived party to interpose additional objections at a later point to testimony from the same witness upon a subject falling within the scope of the previous objection and ruling. McCullers v. State, 143 So.2d 909 (Fla. 1st DCA 1962).

Plaintiffs go on to concede that Mr. Edwards' testimony was offered to "establish the obvious" and thus was not the proper subject of expert testimony. Plaintiffs again maintain that no objection was made to the testimony on this ground. The thrust of Defendants' entire objection was that Mr. Edwards' testimony was speculative and conjectural and not the proper subject of expert testimony (R-1261-1270; 1285-1289). On this ground alone the testimony should have been excluded, as Plaintiffs concede.

Plaintiffs have pointed to no case in Florida which allowed an

expert to give such a speculative and conjectural opinion as that rendered by Mr. Edwards. Plaintiffs have also not pointed to any law that would justify allowing an appraiser to testify as to valuation without having performed any appraisals, and without even being familiar with the property to be valued. Most importantly, Plaintiffs have failed to address the fact that the testimony does not relate to an issue in the case.

The only issue upon which Mr. Edwards could testify is that of the value of the Plaintiffs' property at the time of purchase, either as represented or actual. He testified the property would be worth "less" if the oceanfront project were not included, but this opinion is irrelevant. The issue before the court was whether the properties were worth less than the amounts paid by the Plaintiffs. Mr. Edwards admitted he did not know how much the Plaintiffs paid and he was not given these figures in any hypothetical question. His testimony in the abstract was not responsive or probative to any issue in the case and therefore should not have been allowed. Florida Statutes, Section 90.702 (1985).

The extremely prejudicial nature of this testimony is amply demonstrated by the fact that Plaintiffs' counsel used it in closing for exactly the purpose it was admitted, to rubber stamp the testimony of the Plaintiffs that the actual value was less than the purchase price (R-1699). As set forth in Defendants' initial brief, Plaintiffs were able to have an expert rubber stamp their theory of damages in this case with clearly inadmissible testimony. Accordingly, the judgments rendered herein must be reversed and the case remanded for new trial.

CONCLUSION

The trial court properly directed a verdict against the Plaintiffs on their claim for punitive damages. If the Fifth District Court of Appeals' decision to order a new trial on the issue of punitive damages is affirmed, this Court should also direct that a new trial also be held on compensatory damages.

With respect to the "oceanfront project" claim, the Plaintiffs failed to prove the essential elements of fraud. They failed to prove what the representation was, their reliance on it, and that the Defendants did not intend at the time to perform what was obviously something that would occur in the future. The only competent evidence of damages was the opinion testimony of the Plaintiffs. The Plaintiffs were not qualified to give these opinions either as experts or under the limited exception which allows owners of property to testify. Furthermore, the Plaintiffs' testimony did not apportion the loss in value among the four alleged misrepresentations. Following the directed verdict as to two of these four claims, and the Fifth District Court of Appeal's ruling that one of the other two claims should not have gone to the jury, the opinions as to value necessarily included matters which were not proper for the jury to consider and there was no factual basis presented for the jury to be able to separate the admissible from the inadmissible. Striking the Plaintiffs' opinion testimony from the record, there is absolutely no proof of damages. Accordingly, the judgment should be reversed and the lower court directed to enter judgment for the Defendants on all claims.

The allowance of inadmissible evidence in the form of an opinion of

value as to the oceanfront parcel and the opinion of damage as opposed to value from the Plaintiffs' expert were so highly prejudicial to the Defendants as to require that the judgments based thereon be set aside and the case remanded for new trial.

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,	)	
vs.	)	CASE NO. 67,848
CARLOS M. ABLANEDO, et al.,	)	
Plaintiffs/Respondents.	)	

ANSWER BRIEF OF PETITIONERS TO CROSS APPEAL

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

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POINTS ON CROSS APPEAL

POINT I (AS STATED BY PLAINTIFFS)

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

POINT II (AS STATED BY PLAINTIFFS)

THE TRIAL COURT ERRED IN DIRECTING THE VERDICTS AGAINST CERTAIN PLAINTIFFS AS SET OUT IN THE RECORD AND IN ITS AMENDED FINAL JUDGEMENT.

SUMMARY OF ARGUMENT - CROSS APPEAL

As stated in the initial brief of the Petitioners, at Page 17, to which reference is made, a long line of Florida cases have held that the trial judge, even in fraud cases, must determine the preliminary question of whether the conduct of the Petitioners is so outrageous as to sustain an award of punitive damages.

A full consideration of the testimony of all of the parties, as summarized in the Statement of Facts and of the Case (Pages 1-13 of the Initial Brief of Petitioners), leads to the inevitable conclusion that the conduct of the Defendants was not so outrageous that the claim of punitive damages should have been submitted to the jury.

As to the claim for punitive damages asserted against First Interstate, it should be pointed out that all of the Plaintiffs had dealings only with Ocean Woods and that none of them had ever heard of First Interstate until after they had purchased their units.

The trial court properly directed verdicts against thirteen plaintiffs for the reasons set forth in the record because (i) some would have bought the property even though they knew of the alleged fraud, (ii) some testified they were not damaged and (iii) some bought their units from third persons and failed to establish the "represented value" part of the formula for determining damages as an element of their transactions with such third persons.

ARGUMENT: ANSWER BRIEF

POINT I (AS RESTATED BY DEFENDANTS)

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

At the close of the Plaintiffs' case, the Petitioners moved to strike the claim for punitive damages. The trial court, having heard over five days of testimony, granted the motion and removed the issue of punitive damages from the consideration of the jury (R-1378, 1429). Contrary to the three arguments contained in Plaintiffs' brief, the ruling of the trial judge was correct and should be affirmed.

Plaintiffs initially argue that the question of punitive damages was not a proper threshold issue for the trial court to decide. It is interesting to note that Plaintiffs do not cite one single authority that directly supports this legal concept. Instead, Plaintiffs have ignored a long line of Florida cases which have reached exactly the opposite conclusion on the threshold question. In Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936), the Florida Supreme Court held:

> "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 a matter of law, the preliminary question whether or not there is any legal basis for recovery of such damages...."

Not only has the above cited rule of law not been overruled, it has been expressly followed in numerous subsequent decisions of the Florida courts. Webbs City, Inc. v. Hancur, 144 So.2d 319 (Fla. 2d DCA 1962); Florida East Coast Railway Co. v. Morgan, 213 So.2d 632 (Fla. 3d DCA 1968); Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978). There can be no doubt that in Florida, the question of whether punitive damages will be allowed to go to the jury is a proper and necessary legal

question for the trial judge to decide at the close of the evidence.

Assuming that the issue of punitive damages was properly a threshold question for the court to decide, Plaintiffs next argue that the evidence presented was sufficient to overcome the threshold inquiry. However, Plaintiffs, as the party claiming error, have the burden of clearly demonstrating the error for the appellate court. Mills Rock Co. v. Mills, 137 Fla. 607, 188 So. 210 (Fla. 1939).

To be entitled to punitive damages in an action for fraudulent misrepresentations, the Plaintiffs must prove that the misrepresentations were characterized by malicious and outrageous aggravation. Dunn v. Shaw, 303 So.2d 6 (Fla. 1974). The Plaintiffs have failed to point to any relevant evidence of any malicious or outrageous aggravation in the present case.

In their brief, Plaintiffs claim that the sales brochure received by some of the Plaintiffs is evidence of malicious or outrageous aggravation, but there is nothing in the brochure to support this conclusion. (R-2709-2711). Nowhere in the brochure is the term "oceanfront project" or "oceanfront development" used, despite the fact that those are the terms every single Plaintiff used in describing the misrepresentation. In the light most favorable to the Plaintiffs, the tiny location map and some of the language might be misleading or confusing, but that is a far cry from malicious or outrageous aggravation of the claimed misrepresentations.

Plaintiffs also pointed to a variety of other alleged wrongdoings as evidence of malicious and outrageous aggravation of the alleged misrepresentations (See pages 56 and 57 of Plaintiffs' brief). These issues, control of the homeowners association and maintenance fees,

were removed from the consideration of the jury by directed verdict, and the jury was instructed to disregard the evidence relating thereto (R-1431). The ruling of the court on these issues is not the subject of this appeal and, therefore, the evidence referred to is irrelevant and outside of the record. The Fifth District has now determined that the "nature trail" issue should not have been presented to the jury. (A-2). The only outrageousness here is the Plaintiffs' reliance on appeal of evidence which the court and jury could not properly consider at trial.

Similarly, Plaintiffs' arguments of a commercial fraud scheme to avoid corporate liability and take advantage of these poor home buyers is not supported by any evidence in the record. No party who had anything to do with Ocean Woods escaped or avoided liability, and the issue of separate or distinct corporations is not an issue in this appeal. There is no evidence that any of the Plaintiffs were poor, or that this was the largest investment made by any Plaintiff. Plaintiffs are relying upon matters outside the record in an effort to employ sympathy for their position. This is not a substitute for proof of malicious or outrageous aggravation.

Anticipating that Plaintiffs will attempt to rely on different portions of the transcript and testimony in their reply to this brief, Appellants would refer to the facts of the Dunn case cited above. In Dunn, the persons accused of the fraud had occupied a personal and fiduciary relationship with their victims. The victims were shown to be mentally and physically impaired. The defrauding parties had prior convictions for identical types of schemes, and the losses to the victims were complete in that they lost all they invested. Dunn v.

Shaw, 303 So.2d 6 (Fla. 1974). There is nothing in the record of this case which comes close to this kind of fraudulent conduct.

Plaintiffs' final argument on this issue is that they were entitled to punitive damages pursuant to the provisions of Florida Statutes, Section 817.41. The application of this statute was not properly raised in the trial court.

Florida Statutes, Section 817.41, deals with false and misleading advertising and provides certain civil remedies in addition to criminal fines and penalties. There is no dispute that no reference was ever made to this statute in any of Plaintiffs' pleadings. While the case of Vance v. Indian Hammock Hunt and Riding Club, 403 So.2d 1367 (Fla. 4th DCA 1981), does hold that specific reference to the statute is unnecessary, the court specifically held that Plaintiffs must plead sufficient facts to bring the allegations of the complaint under the statute. Nowhere in Count IV of the amended complaint (R-2202-2204) is there any reference to advertising, false or otherwise. There is not even a reference to a written misrepresentation as to the oceanfront issue. Unlike in Vance, there is nothing in the pleadings in this case to provide any notice of a claim for false advertising under Florida Statutes, Section 817.41.

Additionally, any potential claim based on the evidence at trial was precluded by the trial judge at the commencement of the trial. Having received the proposed jury instruction, Defendants filed a motion in limine to exclude any claim based thereon due to the failure to plead and the prejudice from having no time to prepare a defense (R-2303-2304). The motion was granted and evidence on the statutory claim was not allowed (See R-1620).

Finally, even if a claim under Florida Statutes, Section 817.41 had been properly plead, the Plaintiffs would not have been entitled to punitive damages. The jury would first have had to find that there was fraudulent advertising, an issue which was not even put to the jury. Even more importantly, the statute does not eliminate the threshold determination which the trial court must make before submitting punitive damages to the jury. In Vance v. Indian Hammock Hunt & Riding Club, supra, the court held that even under the statute, punitive damages are allowed only where the fraud is accompanied by malicious and outrageous aggravation and cited the Winn and Dunn cases discussed above. Thus, even if a claim were properly plead and proven under the statute, punitive damages would not be proper in this case because of the absence of proof of malicious or outrageous aggravation.

In conclusion, the question of allowing punitive damages to go to the jury is a proper threshold question for the trial court to decide, and based on the lack of proof of malicious or outrageous aggravation, the trial court's decision to strike the claim for punitive damages was correct and must be affirmed.

POINT II (AS RESTATED BY DEFENDANTS)

THE TRIAL COURT WAS CORRECT IN DIRECTING VERDICTS AGAINST CERTAIN OF THE PLAINTIFFS.

Plaintiffs first object to the directed verdict which was granted against Mr. Darrow L. Webb. On direct examination, Mr. Webb testified as follows:

> "Q. Would you have bought your unit, had you known it was not gonna be oceanfront?
> A, I think possibly I still would have bought it." (R-1049, lines 24-25, 1050, line 1).

In Pryor v. Oak Ridge Development Corporation, 119 So. 326 (Fla. 1928) cited by Plaintiffs, the court specifically held that for a misrepresentation to be actionable the misrepresentation must have been an inducement to the contract. Similarly, in Great American Ins. Co. of New York v. Suarez, 92 Fla. 24, 109 So. 299 (1926) the court held that if it can be shown that the contract would have been executed even if there had been no fraud, then the fraud cannot be material. In Morris v. Ingraffia, 18 So.2d 1 (Fla. 1944), the Supreme Court again held that a representation is not material when the contract or transaction would have been entered into notwithstanding the fraud.

As with all the other elements of fraud, Plaintiff had the burden of proving materiality. The direct proof offered by Plaintiffs show that Mr. Webb would have purchased his unit even if there had been no fraud. Plaintiffs' attempt to infer materiality based on other portions of Mr. Webb's testimony is no substitute for his direct and clear testimony that he would probably have purchased his unit anyway. By his own direct testimony, the alleged representations were not material to Mr. Webb and the trial court was correct in granting Defendants a directed verdict on this claim.

Plaintiffs next object to the directed verdict which was granted against Harry A. Kadan and Mary S. Kadan. Only Mr. Kadan testified, and on cross examination he stated:

> "Q. Did Tom Wasdin or his company defraud you in any way?
> A. Not at that time (R-1060, lines 19-22).
> Q. Mr. Kadan, are you telling this jury that Tom Wasdin defrauded you, sir?
> A. I'm not saying that at all." (R-1061, lines 3-5).

There was no redirect examination by Plaintiffs' counsel. There is no confusion apparent in the transcript and certainly no effort was made to clarify his answers or explain them. It is absurd for counsel to argue that a jury can award a person damages for fraud when that same person tells the jury that no one defrauded him. Opposing counsel has cited no authority for his position because no such authority exists. Mr. Kadan's further testimony that he got his monies' worth and that he got a bargain (R-1060-1061) only add further emphasis to his statement that he was not defrauded. The jury cannot have the right to disregard the Plaintiff's testimony that no wrong was done to him and then award him damages for that same wrong.

Plaintiffs also object to the directed verdicts which were granted against the Fishers and the Woods. Mr. Fisher testified on direct examination that he paid thirty-nine thousand dollars ($39,000.00) for his unit and that that was the actual value of it at the time of the purchase (R-445-446). Mr. Woods testified on direct examination that he paid twenty-nine thousand four hundred dollars ($29,400.00) for his unit and that the actual value of his unit at the time of purchase was also twenty-nine thousand four hundred dollars ($29,400.00) (R-708-710). Plaintiffs argue that these witnesses were confused but this testimony was given on direct examination by Plaintiffs' own counsel. The record

does not demonstrate any confusion, and in fact, the court assisted Mr. Woods with his testimony to clear up any possible ambiguity (R-709). While the answers given may not have been the answers Plaintiffs' counsel wanted to hear, there is nothing in the record to indicate that the answers were anything other than simple, honest, direct answers to the questions asked.

It is fundamental in Florida that actual damages and the measure of them are essential as a matter of law in proving a claim for fraud. National Equipment Rental, Ltd. v. Little Italy Restaurant & Delicatessen, Inc., 362 So.2d 338 (Fla. 4th DCA 1978). Whether damages for fraud are measured by the "benefit-of-the-bargain" or the "out-of-pocket" rules, Plaintiffs are required to prove the actual value of the property at the time of purchase. Strickland v. Muir, 198 So.2d 49 (Fla. 4th DCA 1967). Failure to prove damages with definiteness and certainty prohibits recovery in fraud. DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3d DCA 1970) cert. den. 238 So.2d 105 (Fla.). With respect to Plaintiffs Woods and Fisher, there was no evidence presented that would establish any damage or injury with the degree of certainty required by law.

It is interesting to note that Plaintiffs' counsel refers to the testimony of Mr. Fisher and Mr. Woods as statements of their "personal belief." This is precisely the argument that Defendants have made in their appeal and Defendants would readily concede that this is the proper characterization of the value testimony of all the Plaintiffs. Plaintiffs were not testifying as to market value at the time of the transaction as required by law but were testifying to "personal value," a concept which has no relevance under any accepted theory of damages

for fraud.

Plaintiffs argue that the fact that Fisher and Woods testified that there was no difference between actual and represented value should not prevent recovery because there was also the testimony of an expert for the jury to consider. However, the testimony of Mr. Edwards, Plaintiffs' expert, does not satisfy the requirements of definiteness and certainty required by law with regard to proof of damages.

Mr. Edwards did not testify as to any values of the Fisher and Woods properties. Mr. Edwards merely testified that the properties would be worth less (R-1296). He did not say less than purchase price, less than represented value, less than anything, nor did he relate his opinion to any specific point in time. As set forth by the Florida Supreme Court in West Florida Land Co. v. Studebaker, 37 Fla. 28, 19 So. 176 (1896), where the evidence wholly fails to fix the actual value of the land, or the time at which the assessments of value were made, it is too uncertain and indefinite to form the basis of an award of damages for fraud.

In short, the only evidence of damage in the record is the testimony of Mr. Fisher and Mr. Woods which establish without question or contradiction that they suffered no damage or injury as a result of any of the alleged misrepresentations. In the absence of any proof of injury, the directed verdicts against Woods and Fisher were required as a matter of law, and the trial judge must be affirmed.

Plaintiffs also object to the trial court's granting of directed verdicts against eight Plaintiffs who did not purchase from the Defendants. These eight Plaintiffs purchased from persons who were not parties to the suit and who were not even called as witnesses. Contrary

to the arguments set forth in Plaintiffs' brief, the reason for these directed verdicts was not the simple lack of privity between the Plaintiffs and Defendants. The reason for the directed verdicts as to these eight Plaintiffs was their failure to offer any proof on the value of the property at the time of purchase as represented. Each of these Plaintiffs testified to their purchase price and gave their "personal belief" of the actual value at the time of purchase. However, where there is a lack of privity between the purchaser and the party allegedly committing the fraud, this testimony is not sufficient to support an award of damages.

While it is true that the purchase price of the property is strong, but not conclusive evidence of the value as represented, West Florida Land Co. v. Studebaker, 37 Fla. 28, 19 So. 176 (1896), this rule must necessarily fall when the person allegedly making the misrepresentations did not set the price which was paid. In the present case, there is not one single bit of evidence that the Defendants were ever aware of the price being asked by these third parties. In fact, one of the eight Plaintiffs, Linda Harris, admitted that she could have bought the same unit from the Defendants for some twenty thousand dollars ($20,000.00) less than she agreed to pay some third party (R-833). Not one of the third party sellers testified. There was no evidence of how these sellers arrived at their purchase price, whether it included the nature trail and the oceanfront, or any other matter that went into the determination of their selling price. Each of the eight Plaintiffs was asked whether they knew what their seller had included in the purchase price (See for example R-231), and not one of these eight knew how the purchase price was determined by their respective sellers (R-231). In

other words, there was no testimony as to value of the property as represented and no testimony which would support an inference that the purchase price reflected this value. If it were proven that each seller was acting under the same alleged mistaken beliefs as the Plaintiffs, then it may be possible to infer that the selling price was equal to the value as represented. Plaintiffs, however, ask that the jury be allowed to infer that the sellers shared the same beliefs so that they could then infer that the sales price was equal to the value as represented. Such an inference upon an inference is impermissible under the law of Florida. Simmons v. Pittman, 138 So.2d 765 (Fla. 1st DCA 1962); McCormick Shipping Corp. v. Warner, 129 So.2d 448 (Fla. 3d DCA 1961); Voelker v. Combined Ins. Co., 73 So.2d 403 (Fla. 1954). Accordingly, there was a complete lack of proof as to one of the essential elements of the damages formula. That the trial court understood this problem of pyramiding inferences is reflected in the court's ruling at page 242 of the record, and subsequent rulings on each of the eight Plaintiffs.

Since the Plaintiffs failed to offer competent proof that any of these eight Plaintiffs had been damaged by any alleged misrepresentations, the Defendants were entitled to directed verdicts as a matter of law, and the judgment appealed from should be affirmed with respect to said directed verdicts.

CONCLUSION

The question of whether to allow the issue of punitive damages to go to the jury was a proper threshold question for the trial court to consider. There was a complete lack of evidence of malicious or outrageous aggravation of any of the alleged misrepresentations and Plaintiffs have failed to demonstrate that the trial judge abused his discretion in striking the claim for punitive damages. A claim under Florida Statutes, Section 817.41 was not raised in the pleadings and was properly excluded by timely motion in limine. In any event, the statutory claim does not eliminate the threshold question or the burden of proof with respect to punitive damages. Accordingly, the decision of the trial court should be affirmed on this point.

Finally, the trial court was correct in granting directed verdicts against Plaintiffs, Webb, Fisher, Kadan, Woods, Asp, Banks, Billias, Bocook, Frank, Morgan, Harris, Nelson and Winchester, primarily because of the failure of these Plaintiffs to prove any damages by their own testimony.

With respect to the issues raised by Plaintiffs in their cross appeal, the decision of the trial judge should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Petitioners' Reply Brief and Answer Brief to Cross Appeal 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 5th day of May, 1986.

John M. Starling

JOHN M. STARLING, ESQUIRE