

IN THE SUPREME COURT OF FLORIDA

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

Defendants/Petitioners,

CASE NO. 67,848

CARLOS M. ABLANEDO, et al,

Plaintiffs/Respondents.

FILED
JUL 11 1978
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REPLY BRIEF OF APPELLEE/CROSS/APPELLANT

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

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PRELIMINARY STATEMENT

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

All references to the Record on Appeal will be made with and "R" followed by the appropriate page number. All References to the Reply Appendix will be made with and "RA" followed by the appropriate page number.

ARGUMENT: REPLY BRIEF

POINT I

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

Plaintiffs agree with the general statement of the law set out below and extracted from Wackenhut Corp. v. Canty, 359 So.2d 430, 435-6 (Fla. 1978) (RA-12-28), which is relied upon by Defendants:

...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 an interpretation of the evidence favorable to the plaintiff. Winn & Lovett Grocery Co. v. Archer, 126 Fla. 380, 171 So. 214, 222 (Fla. 1936). A legal basis for punitive damages exists where torts are committed in an outrageous manner or with **fraud**, malice, wantonness or oppression. (Emphasis added).

Our position is not contrary to, but is rather consistent with, the law as stated above. The duty of the Judge is to determine at the close of the evidence whether the tort was committed under one of the following conditions:

1. In an outrageous manner, or
2. With fraud, or
3. With malice, or
4. With wantonness, or
5. With oppression.

The Trial Court below having allowed the question of fraud to go to the jury, ipso facto, decided the threshold issue of the legal basis for punitive damages. Thus, in all situations when there is sufficient evidence of fraud to permit a jury to decide the issue, there is sufficient evidence for the jury to consider punitive damages.

The Defendants' reply to the Plaintiffs' argument that punitive damages should have been delivered to the jury based on the facts of the case in no way changes the facts as set out in the record. Time and time again the Plaintiffs testified the closing documents, Declaration of Restrictions, Homeowners Association, etc. were never delivered to them before closing, but were delivered only months after they had moved into their units. (R-49,50; 117,118; 154; 358,359 for example). In addition, there was the continuing course of conduct by the Defendants, which is exemplified by Exhibit 15, an advertisement, which is clearly fraudulent. It is true that the issues of control of the Homeowners Association, maintenance fees and installation of other amenities were all removed from the consideration of the jury by the Court as an issue of damages for the jury to consider. (R-1431). Even so, the matters set forth in Plaintiffs' original Brief, page 56, 57, are not irrelevant and outside the record. They are very much a part of the record, and the record itself shows extensive facts far and beyond the

summary set forth by the Plaintiffs therein. All the evidence was before the jury, and certainly could have and should have been considered by the jury in considering the issue of punitive damages against the Defendants, even though the Court did strike two elements from the fraud issue. The testimony itself stands before the jury and could certainly be considered on the question of maliciousness. In other words, the Court did not strike the testimony, per se, it simply struck two elements of the Fraud Count as they related to compensatory damages. That testimony, together with Exhibit 15, is persuasive evidence Defendants' course of action was not a mistake or inadvertent, but was rather elaborate in scope and definitely intentional.

The Plaintiffs' argument that this was a commercial fraud scheme is firmly supported by the documents, which were introduced into evidence. Specifically, Exhibits 2, 3 and 4. None of this is outside the record, it certainly should be considered by the jury as evidence the Defendants were malicious and outrageous in their fraudulent conduct. Furthermore, the Defendants in their argument against the Plaintiffs on this particular point, ignore the fact that the record is replete time and time again with verbal representations beyond the documents and beyond the brochure. (Exhibit 16).

On page 1677 of the record, the Trial Court did instruct the jury they were not to consider any representations made concerning the control of the Homeowners Association or concerning the amenities. That was consistent with the Court's directing a verdict with respect to those two aspects of the fraud. However, it is clear from the record, the testimony

itself was not stricken. There was no motion made that the testimony be stricken and certainly no order was entered striking testimony for all purposes. Therefore, the testimony itself remained in the record and should have been considered by the jury on the issue of punitive damages.

Assuming, for the sake of argument, that the testimony with respect to control of the Homeowners Association and the Construction of Amenities was stricken from the record for any and all purposes, the facts left before the jury were more than sufficient for the jury to award punitive damages. Griffith v. Shamrock Village, 94 So.2d 854, 858 (S.Ct. 1957), states that punitive damages are allowable for even a breach of slight care.

The Defendants cite the case of Dunn v. Shaw, 303 So.2d 6, (Fla. 1974), as authority for their position the issue of punitive damages should not have been delivered to the jury. Again, Dunn seems to be a case in favor of the Plaintiffs. In reversing the District Court of Appeals, the Supreme Court used the following language, page 7:

...It appears to us the fraud of misrepresentation could have been malicious and outrageous and that the District Court characterization of such conduct to the contrary was an evidentiary conclusion that invaded the province of the jury....

The District Court in Dunn relied upon by Defendants was most definitely reversed.

The Defendants next addressed the appropriateness of the Plaintiffs' position that Section 817.41, Florida Statutes, applies in this case. There is no dispute that at the end of the case, Plaintiffs successfully moved for the pleadings to conform

to the evidence. (R-1378, 1379). The Defendants concede in their Answer Brief the Plaintiffs included a requested instruction with respect to Section 817.41. The Defendants then indicate that having received the proposed jury instruction, they 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-1303-1304). The motion in limine was never ruled upon. (See the entire record). The Trial Court in Vance v. Indian Hammock Hunt and Riding Club, Ltd., 403 So.2d 1367, 1369, (4th DCA 1981), ruled in its pretrial order that the plaintiffs could not proceed under Section 817.41(1), Florida Statutes, because (1) plaintiff had not specifically pleaded the Statute in the complaint; and (2) had it been pleaded, plaintiffs would still have had to prove all the elements of common law fraud and inducement, including reliance. The Fourth District Court of Appeals held, page 1369, as follows:

...This ruling, as well as two of the three reasons for it, was in error. First, while it would be better pleading practice, plaintiffs were not required to specifically designate or refer to Section 817.41(1), Florida Statutes, in order to maintain an action under it, so long as they pleaded sufficient facts to bring the allegations of the complaint within the Statutes....

There is no doubt the Plaintiffs in this case pled fraud. There is no doubt that Plaintiffs successfully moved to have the pleadings conform to the evidence. Thus, the Plaintiffs have plead sufficient facts to bring the allegations of the complaint within the Statute. This would be true even if the motion in limine had been granted.

The Vance case, in addition to what has been stated heretofore, is also authority that the Plaintiffs should have received punitive damages for reasons other than Section 817.41(1) of the Florida Statutes. On page 1372 of Vance we find the following language:

...By Statute, punitive damages (in addition to actual damages proven, are allowable for a violation of Section 817.41, Florida Statutes. Likewise, punitive damages are recoverable in an action for fraud in inducement. Ashland Oil, Inc. v. Pickard, 269 So.2d 714 (Fla. 3rd DCA 1972), punitive damages are justified where torts are committed with **fraud**, actual malice or deliberate violence or oppression or when the defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others. Wynn and Lovett Grocery Company v. Archer, 126 Fla. 308, 171 So. 214 (1936)....(Emphasis added).

In conclusion, the Plaintiffs reiterate that the question of punitive damages should have been considered by the jury and the Trial Court erred in its ruling with respect thereto.

POINT II

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

The quote attributed to the Plaintiff, Mr. Darrell L. Webb, on page 28 of the Defendants' Answer Brief to the Plaintiffs' Cross Appeal was, indeed, brought out under direct examination of Mr. Webb. The fact, of course, makes no difference in the legal argument originally expressed in the Plaintiffs' Cross Appeal under this point. The Plaintiffs respectfully refer the Court to their earlier argument in their initial brief as those arguments apply to the case of Pryor v. Oakridge Development Corp., 119 So.

326 (Fla. 1928), and Great American Insurance Co. of New York v. Suarez, 92 Fla. 24, 109 So. 299 (1926). Suarez applies only to an insurance contract. The defendant insurance company made an effort to plead misrepresentation as grounds for not abiding by its insurance contract. The court merely stated in that particular case and under those facts if the insurance company would not have issued the policy, had it known the true facts, then the misrepresentation was material, and it would not have to abide by the terms of the policy. The misrepresentation is, in effect, a dependent covenant, and the defense as used in Suarez is actually an extension of contract law as it relates to rescission. But as to whether or not a misrepresentation is material does not, indeed cannot, depend upon the subjective attitude of the parties. Materiality of a misrepresentation depends upon whether there has been some pecuniary damage to the value of the property (which may very well be shown by the testimony of the owner). Early in the instant case Defendant, FIRST INTERSTATE, successfully objected to the Plaintiffs' inquiry as to whether or not the unit would have been purchased, if the Plaintiff-witness had known the true facts. The objection was sustained on the grounds the question was immaterial. (R-120). Over the course of the trial for whatever reason, Plaintiffs' counsel and Defense counsel occasionally made identical inquiries of the Plaintiffs. However, the Court was correct in its initial ruling. Obviously, DARRELL L. WEBB's speculation that he might possibly have purchased the unit anyway, should not have been dispositive of his case as a matter of law, because the statement by DARRELL WEBB is not relevant or

material to the issue of pecuniary loss.

Defendants cite the case of Morris v. Ingraffia, 18 So.2d 1 (Fla. 1944), (RA-9-11), as authority for their position that Mr. Webb should have had a directed verdict entered against him. To begin with, Morris v. Ingraffia is not a fraud case. Indeed, it is a case asking the court for rescission of a contract. True, the rescission is based upon certain misrepresentations, but rescission is an extraordinary remedy for breach of contract. In any event the language used in Morris, page 3, is":

...It is stated that a fact is material when if the representation had not been made the contract or transaction would not have been entered into. Conversely, a representation is not material, when it appears that the contract or transaction would have been entered into notwithstanding it....

The Plaintiffs have no argument with the law as cited above as it applied to the facts of that case involving the rescission of a contract. In a case of that nature the misrepresentation is a dependent covenant upon which the contract is based and upon which, of course, a rescission would be allowed. In many cases of fraud, certainly rescission would be allowed also. On the other hand, there could be certain cases of misrepresentation, which could be fairly compensated by damages. In any event, Morris v. Ingraffia, is not authority for the Defendants' position of the materiality of the fraud, and the Plaintiffs stand by the argument in their initial brief with respect to the case of Great American Insurance Co. of New York v. Suarez.

It should be pointed out that Mr. Webb's statement as quoted on page 28 of the Defendants' Reply Brief and in the record,

that, "I think possibly I still would have bought it." (R-1049, 1050), simply does not viciate the pecuniary loss testified to by Mr. Webb, and therefore the directed verdict against him was in error and should be reversed.

With respect to the Plaintiffs Harry A. Kadan and Mary S. Kadan, the Plaintiffs adopt their original argument in their initial brief. The Plaintiffs suggest that the legal arguments as applied to Mr. Darrel L. Webb's case is also applicable to Mr. Kadan's case.

With respect to Plaintiffs, Fishers and Woods, the Plaintiffs' position is the same as it was in its initial cross appeal. Nothing in addition to Plaintiffs' earlier discussion has been added by the Defendants in their answer brief to the cross appeal. Nothing said in this brief can change the facts as set forth in the record and Plaintiffs' position is that the facts, together with the law, do not justify a directed verdict against Plaintiffs, Fishers and Woods. A party is not conclusively bound by a statement he makes in his testimony at the trial. Jennings v. Ray, _____ So.2d _____, 11 FLW 357 (Fla. 5th DCA, Feb. 6, 1986).

The Plaintiffs agree with the Defendants that the measure of damages in a fraud case can be the "benefit of the bargain" or the "out of pocket" rule. In either case the fact of damages, of course, must be proven. However, a reading of the case cited by the Defendants, DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532, (Fla. 3rd DCA 1970), (RA-1-5), does not stand for the proposition that damages must be proven with definiteness and certainty, and unless proven to that extent, there can be no recovery. The

exact phrase used in Defendants' brief is failure to prove damages with definiteness and certainty prohibits recovery in fraud. DuPuis does not stand for that proposition.

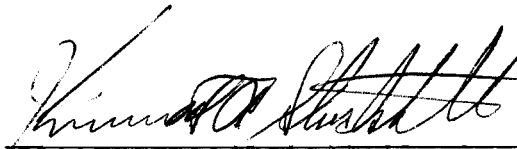
In conclusion with respect to the Plaintiffs Fisher, Kadan and Webb, the expert's testimony, together with the benefit of the bargain rule, clearly shows the Plaintiffs proved damages, and that the amount of damages would be a question for the jury.

Next on page 31 of their answer brief, the Defendants address the eight Plaintiffs who received a directed verdict against them, who had not purchased their units directly from the Defendants. The Plaintiffs have no quarrel with the Defendants' position 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). However, there would seem to be no logical reason for the Defendants' conclusion that the rule must necessarily fail when the person allegedly making the misrepresentations did not set the price which was paid. It is irrelevant and immaterial whether the actual sellers intended to defraud the Plaintiffs. The fact remains the Plaintiffs were defrauded by the Defendants and as discussed in the initial brief, there is no requirement Plaintiffs must show the Defendants benefited from their fraud or that the actual sellers acted in concert with the Defendants. If the Defendants' theory is correct, a defrauder could always avoid liability simply by operating through a third party. Obviously, the law does not contemplate such a result. The Defendants would not be in the situation they are in today had they not

perpetrated the fraud on these eight Plaintiffs as well as the rest of the Plaintiffs involved in this case. The Trial Court was in error to direct a verdict against these eight Plaintiffs. There is no law in Florida that one must benefit from the fraud to be liable for fraudulent conduct. East Caribbean Dev. & Inv. v. K-K Auto Serv., 435 So.2d 364 (4th DCA 1983) (RA-6-8), is, however, authority privity between the parties is not required for a legally valid claim of fraud.

CONCLUSION

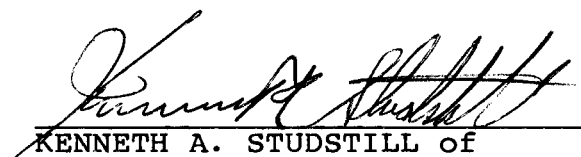
By the arguments and authorities cited herein, Appellees respectfully request this Court to affirm the verdicts in favor of the Appellees, reverse the directed verdicts against the Appellees and remand this cause to the Trial Court for a new trial on the issue of punitive damages only with respect to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



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to John M. Starling, Esquire, 509 Palm Avenue, Titusville, Florida 32796, by hand delivery this 13 day of May, 1986.


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