O/a 1-5-88

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

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COPPOLA ENTERPRISES, INC.,	FOURTH DISTRICT COURT
Petitioner,	CASE 4-86-1646
vs.	SUPREME COURT CASE NO. 70,813
HELEN ALFONE,	
Respondent.	

APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
TO THE SUPREME COURT OF FLORIDA

BRIEF OF PETITIONER

Arthur C. Koski
Attorney for Petitioner
Florida Bar No. 131868
4800 North Federal Highway
Suite 304-A
Boca Raton, Florida 33431
Telephone (305) 395-6707

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PREFACE

The following designations, abbreviations and symbols will be used in this Brief:

Petitioner, Defendant, COPPOLA ENTERPRISE, INC., (COPPOLA)

Respondent, Plaintiff, HELEN ALFONE, (ALFONE)

Defendant, ARVIDA REALTY SALES, INC., (ARVIDA)

Transcript (T)

Record on Appeal (R)

STATEMENT OF THE FACTS

In 1978 COPPOLA was a developer of a residential housing complex in Boca Raton, Florida, known as the Village of Woodbridge (WOODBRIDGE).

WOODBRIDGE was located in a master development known as Boca West, Palm Beach County, Florida.

On or about April 18, 1978, ALFONE and COPPOLA entered into a Purchase Agreement whereby ALFONE was to purchase Lot 53 in WOODBRIDGE for the purchase price of One Hundred Five Thousand Six Hundred Ninety Dollars ($105,690.00). (R891-896) ALFONE on said date placed a deposit of One Thousand Dollars ($1,000.00) in escrow. Thereafter, ALFONE paid into escrow with ARVIDA the added sums of Four Thousand Two Hundred Eighty Four Dollars ($4,284.00) and Five Thousand Two Hundred Eighty Four Dollars ($5,284.00) upon the start of construction of the unit. The total deposit placed by ALFONE was Ten Thousand Five Hundred Sixty Eight Dollars ($10,568.00).

Pursuant to the Purchase Agreement, COPPOLA agreed to sell ALFONE that certain Lot 53 in WOODBRIDGE, together with a single family home to be constructed thereon by COPPOLA, and upon closing ALFONE was obligated to pay the designated purchase price of One Hundred Five Thousand Six Hundred Ninety Dollars ($105,690.00).

The Purchase Agreement had an anticipated closing date of "Winter 1978-1979", and further provided that ALFONE was to obtain mortgage financing in the amount of Eighty Four Thousand Five Hundred Dollars ($84,500.00) from Washington Federal.

After execution of the Purchase Agreement ALFONE elected to pay cash for the unit and made an affirmative decision not to proceed with the mortgage financing. (T-January 16, 1986, Vol. II, p. 45 and 46; T-January 17, 1986, Vol. III, p. 132 and 136)

The construction of the unit was subsequently delayed and a Certificate of Occupancy was finally received on June 26, 1980. (R926 - 928)

On or about July 1980, COPPOLA, through his attorney Gillespie, attempted to notify ALFONE that a closing on the parties' contract was tentatively scheduled for July 30, 1980. (R929-940) A further letter from COPPOLA'S counsel in August, 1980, requested that ALFONE close the subject transaction within ten (10) days from the receipt of said letter, pursuant to the terms of closing contained within the parties' contract. (R897-902) ALFONE replied to the aforesaid letter, through her attorney, Van Dusen, indicating that ALFONE was not able to obtain financing to close the transaction and requesting additional time for closing. (R903-904) COPPOLA denied this request and placed the unit back on the market for sale on September 4, 1980. (R962-963)

At the time COPPOLA placed the unit back on the market to the general public, COPPOLA had no specific purchaser, or buyer, in hand or available to COPPOLA for a sale of this unit. On September 25, 1980, an offer was procured through ARVIDA and COPPOLA executed a Purchase Agreement with a third party and the unit was subsequently sold on October 7, 1980, to that purchaser

for the sales price of One Hundred Seventy Thousand Dollars ($170,000.00).

STATEMENT OF THE CASE

This action was instituted by ALFONE and against COPPOLA on October 7, 1980, by filing a Complaint, in which ALFONE sought from COPPOLA:

(1) Specific Performance by COPPOLA under the parties' Purchase Agreement; and

(2) Damages from COPPOLA based upon COPPOLA'S alleged breach of contract measured on the benefit of bargain theory.

COPPOLA answered ALFONE'S Complaint, denying liability for specific performance or damages, and setting forth numerous Affirmative Defenses, as well as a Counterclaim alleging that ALFONE had breached the subject contract and, therefore, that COPPOLA was entitled to retain ALFONE'S deposit as liquidated damages under the parties' contract.

The Plaintiff, by Stipulation, dismissed the Complaint for Specific Performance and proceeded to trial on the issue of breach of contract.

Two Appeals were heard by the Fourth District Court on the interpretation of the Stipulation and a trial on the merits was ordered on both occasions.

On January 16 and 17, 1986, and on February 14, 1986, a Non-Jury Trial was held before the Honorable Hubert Lindsey in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

On May 27, 1986, as amended on June 19, 1986, Judge Lindsey entered a Final Judgment in favor of ALFONE for "benefit of

bargain" damages in the amount of Sixty Four Thousand Three Hundred Ten Dollars ($64,310.00) together with prejudgment interest in the amount of Forty Three Thousand Two Hundred Ninety Five and 38/100 Dollars ($43,295.38).

An Appeal was taken from that decision by COPPOLA arguing that the Trial Court did not find COPPOLA guilty of the required "bad faith" in the breach of the Purchase Agreement and thus the assessment of "benefit of bargain" damage was in error.

The District Court affirmed the decision of the Trial Court and in its opinion stated:

> "Although the language of the case law is somewhat confusing we believe the law of damages, as enunciated by the Supreme Court, authorizes an award of damages to a contractual vendee to include the profit made by the vendor on the sale of the property to a subsequent purchaser even though there is no proof of fraud or bad faith. See Gassner v. Lockett, 101 So. 2d 33 (Fla. 1958)."

The Petitioner respectfully argues that proof of bad faith is required for a purchaser to recover "benefit of bargain" damages resulting from a breach of an executory contract for the sale of real property, or in the absence of bad faith the factual circumstances must fall within recognized exceptions to the bad faith requirement.

ARGUMENT

ARE BENEFIT OF BARGAIN DAMAGES ALLOWED TO A VENDEE UNDER A CONTRACT FOR SALE OF REAL PROPERTY IN THE ABSENCE OF BAD FAITH WHERE THE VENDOR CONVEYS TITLE AFTER THE BREACH OF CONTRACT?

The task of this Court in the matter at bar is the resolution of the readily apparent confusion in this jurisdiction relating to recovery for loss of profits from a proposed sale of real property where the seller fails to convey.

> "In Florida and many other jurisdictions, the courts follow the English rule announced in Flureau v. Thornhill, whereby in the absence of bad faith, the damages recoverable for breach by the vendor of a contract to convey title to real estate are the purchase money paid by the purchaser together with interest and expenses of preparing to purchase." Vogel v. Vandiver, 373 So. 2d 366, 367 (Fla. 2nd DCA 1979)

Flureau v. Thornhill, 2W Bl. 1078 (1776) was an English case wherein the court refused to permit "damages in the loss of so good on a bargain" and limited recovery to the amount the purchaser has paid plus his "interest and costs." This is the basic English rule accepted and followed in Florida. This rule has long standing acceptance in Florida.

In 1916 this Court decided Eaton v. Hopkins, 71 Fla. 615, 71 So. 922 (1916). Even in the early 1900's varying thoughts existed as to measures of damage.

> "There is undoubtedly a diversity of opinion among the courts and text-writers as to the correct measure of damages in cases of this kind." Eaton at page 925.

The Eaton court was faced with a seller who both conveyed to a first grantee in 1902 who did not record and then a second grantee in 1904. The Supreme Court recognized that the general

damage measure in an action upon the covenant of the warranty was the consideration paid plus interest. The Court also discussed two possible exceptions to the general rule.

The first exception was described as follows:

> "Where, however, the vendor conveys the property a second time under circumstances that would charge him with knowledge of the fact that he previously conveyed the property, and the latter purchaser places his deed of record prior to the recording of the first conveyance, and thereby takes the paramount title.....the measure of damages to be applied is that of adequate compensation for the actual injury sustained, or damages for the loss of the bargain." Eaton at page 924 and 925.

The second Eaton exception is described in page 925;

> "Whether the vendor is actuated by bad faith in refusing to convey the land in one case or carelessly or in bad faith conveys the land a second time, thereby defeating the first conveyance which was not placed of record, the results to the vendee are the same."

Thus the Florida position on damages was set forth. The general rule is a return of deposit plus interest. However, where there is either (a) bad faith in refusing to convey, or, (b) a careless or bad faith conveyance which defeats the first conveyance, the damage will be "benefit of bargain".

Ten years later in 1926 the Supreme Court again visited the issue in Key v. Alexander, 108 So. 883 (1926). In that matter Key contracted to buy from Alexander for One Thousand Seven Hundred Fifty Dollars ($1,750.00), placed an One Hundred Dollar ($100.00) deposit and waited for a thirty (30) day closing. Key alleged a refusal by Alexander to convey because the value of the property had increased to Two Thousand Five Hundred Dollars ($2,500.00). The Supreme Court reiterated the rule in Florida;

> "The law is well settled that in an action brought by the vendee against the vendor upon a valid contract for the sale

> of land when the vendor has breached such contract, the general rule as to the measure of damages is that the vendee is entitled to such purchase money as he paid, together with interest and expenses of investigating title. This rule, however, does not apply where there is a want of good faith in the vendor, which may be shown by any acts inconsistent with the utmost good faith. In such cases, or in cases where the vendor had no title but acting on the supposition that he might acquire title, he is liable for the value of the land at the time of the breach with interest." Key at page 885.

The Court then went on to acknowledge Flureau and discuss the basic philosophy that the rule with these exceptions is designed to prevent a fraudulent act from resulting in a profit to the perpetrator. Key was completely in accord with both Flureau and Eaton.

Shortly after Key, the Supreme Court further reiterated the Florida position in Liberis v. Carmeris, 146 So. 220 (1932). Liberis quoted Key in the main opinion and upon rehearing amplified on the general rule and exceptions:

> "In that case it was decided that a person breaking a valid contract to convey land is liable for the value of the bargain at the time of the breach with interest from the date, where the contract was entered into through a want of good faith on the part of the vendor in his entering into an undertaking to deliver a title which he did not have or which he refuses to deliver, as agreed, on the pretext that his wife will not join in the agreed conveyance." Liberis at page 222.

Liberis recognized that "benefit of bargain" damages were available where there was bad faith or a willful refusal to convey based upon a flimsy excuse that the vendor's wife would not sign the deed. The Court reasoned that the latter position evidenced bad faith.

The issues of benefit of bargain and good faith were also addressed in Harper v. Bronson, 139 So. 205 (1932) and Walton

Land and Timber Co., v. Long, 185 So. 839 (1939). In Walton at page 841 the Court concluded that:

> "In the sale of realty, if the vendor is in default, and if he knew or should have known that he could not comply with his undertaking, he is liable to full compensatory damages, including those for loss of the bargain.....
>
> In all of the Florida cases applying the above rule there was a want of good faith in the vendor. In each instance the vendor did not have title to the land at the time he contracted to sell the same or the vendor contended his wife refused to execute the deed."

The Walton court refused to award benefit of bargain because there was no evidence at to a want of good faith.

In 1939 (after Walton) Florida still followed the English rule but recognized the exceptions for bad faith, a careless or bad faith conveyance, or a situation where the vendor knew or should have known that he could not perform.

Nineteen years passed with the English rule intact. In 1958 the Supreme Court issued an opinion in Gassner v. Lockett, 101 So. 2d 33 (1958). This opinion is taken by many to be a further exception to the English rule. This may be true, however, the Petitioner suggests that Gassner merely restates the dicta in Eaton. In Gassner the Supreme Court allowed a vendee to prevail because a mistaken second conveyance of the vendor prevented conveyance to the vendee. This situation is clearly that scenario set forth by the Eaton court at page 924 and 925. Thus, Gassner preserves the English rule rather than modifying it.

At this point it should be noted that the chronology of events is critical to the application of the English rule of damage. In the absence of bad faith, the exception to the general rule of English damage applies only when there is an

intervening sale to a second vendee which prevents the consummation of the sale to the first vendee. In the case at bar there is no such intervening sale. Rather, the appellate court has attempted to utilize the subsequent sale by COPPOLA to Kayton as an intervening sale to engage the mechanisms of the Gassner holding. This is an improper expansion of Gassner. It was not the Kayton sale which prevented the sale to ALFONE. According to the trial court and appellate court the breach of the Purchase Agreement occurred when COPPOLA refused to grant an extension to ALFONE for financing. Without arguing the correctness of the finding as to the breach, it is obvious and apparent that the sale to Kayton took place after the breach. Thus, the imposition of benefit of bargain damage can only be imposed upon a finding of bad faith as the other exceptions to the general rule do not apply. Those exceptions restated are discussed in;

1) Eaton - a) A second conveyance under circumstances charging vendor with knowledge of the first conveyance.
   b) A careless or bad faith second conveyance defeating the first conveyance.
2) Key - a) Vendor had no title.
3) Liberis - a) Vendor had no title.
   b) Flimsy excuse for not conveying.
4) Walton - a) Vendor knew or should have known he could not comply with the undertaking.
5) Gassner - a) A mistaken sale to a second vendee preventing the conveyance to the first vendee.

There are no Florida decisions after Gassner which expand the general rule. Rather each decision after 1958 preserves the basic concept of Flureau.

Resnick v. Goldman, 133 So. 2d 770 (Fla. 3rd DCA 1961) awarded a purchaser a return of his deposit and expenses incurred and cited Key and Gassner.

In 1967 the Third District reviewed Southern Realty and Utilities Corp., v. Gettlemen, 197 So. 2d 30 (Fla. 3rd DCA 1967) and citing Key, Liberis, Gassner and Resnick stated:

> "The law cited by the appellant appears to be correct that upon a breach of one of these covenants without a showing of fraud the grantee would only be entitled to his out of pocket loss." Southern Realty at page 32.

Again the Third District faced the issue in Stupner v. Cacace, 231 So. 2d 525 (Fla. 3rd DCA 1970). By dicta the court held that benefit of bargain would be allowed if (1) there was a lack of good faith on the vendor or (2) the vendor benefited from any mistake that may have been made. This analysis is the proper interpretation of Gassner.

In the case of Horton v. O'Rourke, 321 So. 2d 612 (Fla. 2nd DCA 1975) the Second District correctly stated the general rule again;

> "In Florida and many other jurisdictions, the Courts follow the English rule announced in Flureau v.Thornhill whereby in the absence of bad faith the damages recoverable for breach by the vendor of an executory contract to convey title to real estate are the purchase money paid by the purchaser together with interest and expenses of investigating title." Horton at page 613.

Horton states accurately the ongoing law in Florida. In the case at bar the Fourth District has issued a ruling which specifically admits that COPPOLA was not guilty of bad faith. Thus, unless the Fourth District is able to find another exception to the general rule within which to place COPPOLA, its decision must be found to be in direct conflict with Horton, and contrary to the law of Florida since 1916. See also the discussion contained in Cricket Club v. Dunn, 366 So. 2d 522

(Fla. 3rd DCA 1979) recognizing a required finding of fact on bad faith.

In 1979 the Second District issued a clear and concise opinion in Vogel v. Vandiver, 373 So. 2d 336 (Fla. 2nd DCA 1979). On page 367 the Vogel court stated;

> "We reverse on the ground that the "loss of bargain" damages awarded by the trial court were inappropriate in the absence of bad faith on the part of the vendor."

and more appropriately as compared to COPPOLA;

> "While there is no question that appellants have breached their contract with the appellees, there was no showing of fraud or sinister motive as required to justify "loss of bargain" damages.

Vogel is an expected step in the progression of the English rule and its exceptions in the Florida courts. It sets forth the general method of calculation of damage and recognizes the ability of a vendee to recover "benefit of bargain" damages if bad faith is proven. Vogel had no need to discuss the ability of the vendee to recover "benefit of bargain" damage under a mistake benefiting the vendor (Gassner), a second conveyance with knowledge by vendor of the first conveyance (Eaton), a careless or bad faith second conveyance defeating the first (Eaton), a vendor having no title (Key), a "flimsy" excuse for not conveying (Liberis), or a vendor knowing he cannot comply with the undertaking (Walton).

The COPPOLA decision by the appellate court is clearly in contrast to the holding of Vogel. There again was no bad faith on the part of COPPOLA. There was no sinister motive. In fact the record reveals a good faith attempt by COPPOLA to allow ALFONE the opportunity to close.

All of the evidence indicates good faith on the part of COPPOLA. COPPOLA entered into the Purchase Agreement in April of 1978. COPPOLA notified ALFONE of the mortgage requirement on May 17, 1978 (COPPOLA'S Exhibit 7, R946-947). COPPOLA relied on ALFONE'S representation that it would be a cash sale (COPPOLA'S Exhibit 6, R943-945)(T-Vol. III, Line-45). COPPOLA notified ALFONE of the status of construction (COPPOLA'S Exhibit 5 and 8; R942; R948-950). COPPOLA prosecuted the construction of Lot 53 in a reasonable manner once the building permit was obtained (COPPOLA'S Exhibit 11 and 3; R955-957; R926-928). Once the Certificate of Occupancy was issued COPPOLA properly notified ALFONE of the closing (COPPOLA'S Exhibit 4; R929-940). All of the above acts are consistent with good faith.

COPPOLA'S actions are rational. ALFONE changed her mind in November 1979, wanting to close for cash instead of a mortgage and failed to advise COPPOLA. (T-Vol. III, Line-144-145). ALFONE listed the property for resale in March of 1980, prior to any ownership, and failed to advise COPPOLA. ALFONE applied for a mortgage and was rejected in the summer of 1980 and failed to advise COPPOLA.

COPPOLA notified ALFONE on three (3) occasions of the requirement to close based upon ALFONE'S prior representations; to wit, July 21, August 8 and August 12, 1980.

Notwithstanding the mailing of the July 21, 1980 letter, Gillespie, COPPOLA'S attorney, did on August 8, 1980 and on August 12, 1980, forward additional correspondence to ALFONE by certified mail. (R897-902)

ALFONE by her testimony acknowledged receipt of all three (3) items of correspondence. ALFONE did not remember when she received the July 21, 1980 letter, but ALFONE acknowledged receipt. (T-Vol. III, Line-151).

At the very latest, ALFONE received all of Gillespie's letters on August 20, 1980. COPPOLA was still at this time under the impression that ALFONE would be closing for cash, but ALFONE knowing that her intention had changed from mortgage to cash and back to mortgage had not, as of August 20, 1980, notified COPPOLA of her need for a mortgage. On each of these dates, COPPOLA was willing to convey to ALFONE. On August 25, 1980, ALFONE, attempted to renegotiate and by the very language of her attorney's letter stated she needed to get a mortgage. It was only after receiving this information that COPPOLA on September 4, 1980, requested ARVIDA to place Lot 53 back on the market for sale. The subsequent contract to the new buyer, Kayton, was dated September 25, 1980, and the sale consummated on October 7, 1980. The testimony of GEORGE COPPOLA, President of COPPOLA clearly indicated that the decision to resell was based upon ALFONE'S failure to comply with the Purchase Agreement and that Kayton was procured by ARVIDA well after the decision was made on ALFONE'S failure to obtain mortgage financing. (See also T-Vol. I, Line-109). In the absence of bad faith, benefit of bargain damages should not be allowed.

COPPOLA was reasonably relying upon the letter sent by ALFONE'S attorney, Van Dusen, that ALFONE needed forty five (45) days within which to obtain a mortgage. COPPOLA was not advised

of ALFONE'S ability to pay cash for the unit but was merely advised that ALFONE needed additional time in which to obtain a mortgage. (T-Vol. III, Lines-45, 64, 67 and 69).

COPPOLA'S actions are not the sinister motivations or fraudulent acts which have previously been referenced by the Vogel decision.

It is surprising that the Fourth District has adopted the "COPPOLA position". In Bosso v. Neuner, 426 So. 2d 1209 (Fla. 4th DCA 1983) and Wolofsky v. Behrman, 454 So. 2d 614 (Fla. 4th DCA 1984) the Fourth District twice recognized that Vogel and Horton properly reflected the law that bad faith is a requirement of benefit of bargain damage. As recently as 1985 in Blue Lake Apartments, Inc., v. Gowing, 464 So. 2d 705 (Fla. 4th DCA 1985) the Fourth District utilized the Eaton "second conveyance" exception to award benefit of bargain damages. At page 709 the court said:

> "Since Blue Lakes sold Gowing's unit to a third party prior to trial the court awarded loss of bargain compensatory damages instead of specific performance."

Once more in 1985 the Fourth District in DeToro v. Dervan Investments Limited Corp., 483 So. 2d 717 (Fla. 4th DCA 1985) the proper measure of damages was enunciated on page 722;

> "Loss of bargain damages which is the difference in value between the price the purchaser has agreed to pay and the value of the property on the date of closing may be recovered by the purchaser where evidence of bad faith exists."

The court also went on to define bad faith using the term "sinister motive" which was present in the Vogel decision.

Other recent cases on the subject include Depp v. Runyan, 468 So. 2d 486 (Fla. 2nd DCA 1985) wherein another definitive statement of the requirement of bad faith was made by the Second District. That same Second District further enunciated the English rule in Howard v. Metcalf, 487 So. 2d 43 (Fla. 2d DCA 1986) and J.R. McNeal v. Marco Bay Associates, 492 So. 2d 778 (Fla. 2nd DCA 1986). The Howard opinion stated that bad faith was essential to a recovery of benefit of bargain. McNeal used the Gassner decision as a citation but concluded that the seller was guilty of bad faith.

The Third District has also recently confirmed Vogel in Port Largo Club, Inc., v. Warren, 476 So. 2d 1330 (Fla. 3rd DCA 1985). Port Largo recites the necessity of bad faith and relies on Vogel and Key.

The Fifth District has also supported the English rule in Noord v. Katz, 481 So. 2d 1228 (Fla. 5th DCA 1986). Noord cites Gassner as authority but the dicta of the case implies the necessity of bad faith.

In Clone, Inc., v. Orr, 476 So. 2d 1300 (Fla. 5th DCA 1985) the appellate court awarded benefit of bargain damage utilizing the "second conveyance" theory. The vendee contracted to buy a condominium from the vendor-developer. The developer then sold the unit to another buyer. The first vendee sued. Clone is directly on point with the Eaton case and its second conveyance theory. Again it should be stressed that COPPOLA is not a case involving a second conveyance as the breach.

As has been shown all District Courts of Appeal in this state have followed with consistency the English rule and its "exceptions" through recent decisions.

It appears, however, that the Fourth District has attempted to recede from the English rule of late. In Shakeshober v. Florida Resort Development Corp., 492 So. 2d 816 (Fla. 4th DCA 1986) the court used a different measure of damage;

> "The measure of general damage in this state, in an action by a vendee against a vendor, in the absence of bad faith, is the return of the deposit plus interest together with any special damages, such as expenses, and, where applicable, the payment of any actual profit made by the seller on the resale."

Although Shakeshober cites Gassner, Bosso, Vogel and Horton the language "and, where applicable, the payment of any actual profit made by the seller on the resale" is not supported by the evolution of the English rule and its exceptions from 1916 to 1986 in Florida. The Shakeshober decision was sound since the facts showed that the vendor erroneously sold the vendee's unit to another vendee. This again is the exception identified in Eaton and set forth in Gassner.

There appears to be no further comment on the English rule by the Supreme Court since Gassner in 1958.

However, the Supreme Court did deny a review of Shakeshober in March, 1987. (See docket #69459)

The Fourth District decision in COPPOLA does, however, necessitate a reiteration of the English rule by this Court. The appellate decision in this matter represents a radical departure from the adopted law of Florida and would establish a harmful precedent encouraging frivolous litigation.

If the appellate court seeks to rely on Gassner then the Gassner exception to the bad faith requirement must be present. Gassner does not stand for the proposition that a benefit of bargain damage can be imposed merely because a vendor has made a profit on a subsequent sale. Gassner requires a mistaken sale to a second vendee preventing the performance to the first vendee to activate the benefit of bargain theory. To expand the Gassner "mistaken sale" theory to impose benefit of bargain damage where a vendor conveys after a breach in good faith is without precedent in this state and is manifestly against the law of damages as developed since 1776.

COPPOLA was found to have breached the Purchase Agreement. The appellate court concluded that there was no bad faith. COPPOLA conveyed the real property after the good faith breach. Given this factual basis the proper measure of damage to ALFONE is the return of the deposit and interest, together with costs of investigating title. In the absence of bad faith and in the absence of the exceptions set forth in Eaton, Key, Liberis, Walton or Gassner the general rule (the English rule) must prevail.

SUMMARY

In Summary, the Petitioner respectfully argues that the appellate court has improperly relied upon the holding of Gassner. The Gassner decision is one involving a mistaken sale to a second vendee which prevented performance to the first vendee. The imposition of benefit of bargain damages based upon the Gassner holding is improper in that in the instant case COPPOLA was found to have breached the contract in good faith. The sale by COPPOLA which is referenced by the appellate court took place after the breach. The factual basis of Gassner is not present in the subject matter which would invoke the Gassner rule allowing benefit of bargain damages. Further, there is no precedent in the State of Florida to allow benefit of bargain damages where a good faith breach occurs and where the exceptions specified in the cases cited in the main brief are not present.

CONCLUSION

The Petitioner respectfully requests that the decision of the appellate court be reversed and this cause remanded to the trial court for further proceedings specifically limiting the Respondent's damage to a return of deposit, interest thereon and costs incurred in investigating the title.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by HAND to Mark Shumaker and Jay M. Levy at 6401 Southwest 87th Avenue, Suite 200, Miami, Florida 33173 on this 20 day of October, 1987.

Arthur C. Koski
Attorney for Petitioner
Florida Bar No. 131868
4800 North Federal Highway
Suite 304-A
Boca Raton, Florida 33431
Telephone (305) 395-6707