JML:nbb(L:19C)

IN THE SUPREME COURT OF FLORIDA

CASE NO: 70,813

COPPOLA ENTERPRISES, INC.,

Petitioner,

vs.

HELEN ALFONE,

Respondent.
_____/

On Petition for Review on the Ground of Express and Direct Conflict of Decision of the District Court of Appeal, Fourth District

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BRIEF OF RESPONDENT ON MERITS

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CASE NO: 70,813

COPPOLA ENTERPRISES, INC.,

Petitioner,

vs.

HELEN ALFONE,

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_____/

RESPONDENT'S ANSWER BRIEF ON MERITS

I

PREAMBLE

This is a Petition for Review of a decision of the District Court of Appeal, Fourth District in **Coppola Enterprises, Inc. v. Alfone, 506 So.2d 1180 (Fla. 4DCA 1987)** which affirmed the award of the benefit of the bargain measure of damages to a contractual vendee even though there is no proof of fraud or bad faith. Petitioner, COPPOLA ENTERPRISES, INC., Appellant and Defendant below, shall be referred to as "**CE, INC.**". Respondent, HELENE ALFONE, Appellee and Plaintiff below, shall be referred to as "**ALFONE**". The Record on Appeal shall be referred to by the letter "R". The townhouse that is the subject of this lawsuit, Unit 53, at Woodbridge, shall be referred to as "Unit 53". All emphasis shall be that of the Respondent unless otherwise indicated.

II

STATEMENT OF THE CASE

ALFONE sued **CE, INC.** on October 7, 1980 in a three Count Complaint (R 409-421). **ALFONE** sought specific performance (Count I) and damages for breach of a contract for the sale of real

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property (Count II) (R 409-412). **ALFONE** filed a Lis Pendens against the property in conjunction with the filing of a lawsuit (R 422).

CE, INC. answered, denying the pertinent allegations of **ALFONE's** Complaint and defending on the grounds of laches, waiver, default, and discharge (R 423-427). **CE, INC.** counter-claimed for damages alleging a default which was denied by **ALFONE** (R 426-427, 430).[1]

ALFONE and **CE, INC.** entered into a Stipulation filed for record on December 9, 1980. Pursuant to this Stipulation, Count I of **ALFONE's** Complaint for specific performance was dismissed (R 438-439). By Order entered December 9, 1980, the Court discharged the Lis Pendens and ordered trial on "the issue of damages, if any, which may be awarded to **ALFONE**" (R 40).

After two (2) prior judgments in favor of **ALFONE** were reversed[2], the cause was tried nonjury on January 16, 1986, January 17, 1986, and February 14, 1986 (R 1-408). After considering written argument, the Court entered its Final Judgment on May 27, 1986 (R 888-890). The Court found that time was not of the es-

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1. At trial, **CE, INC.** dismissed this claim.

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2. Alfone first received a summary judgment which was reversed because the District Court found a determination of the parties' intent in entering into a Stipulation upon which the Summary Judgment was predicated required the taking of testimony. **Coppola Enterprises, Inc. v. Arvida Realty Sales, Inc., 435 So.2d 922 (Fla. 4DCA 1983)** (R 549-553). **ALFONE's** second Final Judgment received after the Trial Court took testimony on the parties' intent was reversed because the District Court believed its Mandate in the first appeal required a full trial on the merits. **Coppola Enterprises, Inc. v. Alfone, 467 So.2d 425 (Fla. 4DCA 1985).**

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sence of the contract (R 889). The Court found that **CE, INC.'s** termination of the contract to be premature because **CE, INC.** failed to send **ALFONE** notice of defaut required by paragraph 12 of the contract. Consequently **CE, INc.'s** termination of the contract constituted a breach thereof (R 889). **ALFONE** was prevented from closing because of the unreasonable position taken by **CE, INC.** in refusing to allow **ALFONE** a reasonable period of time to raise the balance of the purchase price and by wrongfully the contract (R. 889). The Court found that **CE, INC.'s** action in preventing **ALFONE** from closing demonstrated a failure to exercise good faith (R 889). The Court awarded **ALFONE** loss of bargain damages, in the amount of $65,000.00, return of her deposit, and prejudgment interest (R 889-890).

CE, INC. moved for a new trial which motion was denied (R 968-971, 972). By separate Order, the Court amended certain of its findings of fact (R 973). On July 8, 1986, **CE, INC.** timely appealed the Final Judgment of the Trial Court (R 974).

The District Court affirmed the Trial Court's judgment. **Coppola Enterprises, Inc. v. Alfone, 506 So.2d 1180 (Fla. 4DCA 1987).** The Court held that the law of damages allows the award of damages to a contractual vendee to include the profit made by a vender on a sale of property to its subsequent purchaser even though there is no proof of fraud or bad faith. Id. at 1181. From this decision, **CE, INC.** petitioned for review on the ground of express and direct conflict of decisions. This Court has accepted the Petition and this brief is now filed by Respondent on the merits.

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III

STATEMENT OF THE FACTS

The parties entered into a written contract on April 18, 1978 (Plantiff's Exhibit 1 in Evidence). Unit 53 had an anticipated closing date of "Winter 1978-1979" (R 891). The purchase price was $105,690.00, with a $10,568.00 deposit (R 891). The contract indicated that mortgage financing was to be obtained from Washington Federal (R 891). The closing was to occur upon "ten (10) days written notice from seller to purchaser" (R 893). The contract also contained specific provisions as to purchaser's default (R 895). This clause indicated that

> in the event purchaser fails to pay the balance of the purchase price, when due and within the time limits specified or at closing fails to make the necessary acknowledgements . . . to enable this transaction to be consummated, and shall not correct such default, breach or failure within ten (10) days after seller has given buyer written notice of same, then seller may declare this agreement terminated and retain or procure from the escrow agent all monies theretofore paid by Buyer as liquidated and agreed upon damages (R 895). (Emphasis Added)

The foregoing are the material terms of the contract to this cause.

ALFONE purchased Unit 53 in 1978, giving a deposit of $10,690.00 (R 360). She listed her house in Estancia for sale after entering into the contract for Unit 53 because the unit was supposed to be ready in 1979 (R 362). She planned to move to Unit 53 directly from Estancia (R 364). When Unit 53 was not ready she used the cash from the sale of her Estancia home to

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purchase an apartment at Highland Beach (R 365). She paid cash at Highland Beach because she had no time to find a mortgage (R 389). She had attempted to rent rather than buy a residence, but was unable to find a unit rental because of her twelve year old child (R 388). **ALFONE** grew to like Highland Beach and eventually lost interest in living in Unit 53 (R 366). In February or March, 1980, **ALFONE** decided to sell Unit 53 (R 366).

ALFONE intended to pay the purchase price of Unit 53 from the proceeds of the sale of her hom in Estancia (R 380-381). When the Estancia house was sold, work on the unit had not started (R 386). After **ALFONE** sold the Estancia home, she intended to obtain a mortgage to fund her purchase of Unit 53 (R 390). She applied for a mortgage loan at American Savings and at Boca Raton Federal (R 390, 392). American Savings did not approve her application (R 6).

ALFONE received two certified letters (Plaintiff's Exhibit 4 and 5) from **CE, INC.'s** attorney (R 367). She received these letters after she returned from Philadelphia, at an ice skating competition for her daughter (R 368). Prior to these two (2) letters, **ALFONE** had not received any written notice that Unit 53 was going to close (R 371).

Inez Jenkins is a realtor doing businss in the South Palm Beach County area (R 188-189). She was the selling broker on **ALFONE's** home in Estancia (R 191). **ALFONE's** home went to contract in August of 1979, with a closing to occur on October 18, 1979. The purchase price was $142,500.00 of which **ALFONE's** equity was $131,680.00 (R 191-192). **ALFONE** learned two weeks before

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her closing date that Unit 53 would not be ready on time (R 194--195, 215). Jenkins, at **ALFONE's** request, assisted **ALFONE** in finding a Unit in a condominium located in Highland Beach (R 195, 218). **ALFONE** decided to buy and paid cash for the Highland Beach Condominium, using the money she received from the sale of her Estancia Unit (R 196, 198, 216). She eventually decided to remain at Highland Beach and listed Unit 53 for sale with Jenkins (R 198). Jenkins advised **CE, INC.** of the listing (R 228).

Jenkins made an inspection of Unit 53 with **ALFONE** after March, 1980 (R 201). Jenkins noticed that the bathroom tile went in different directions and there were severe problems with wall and door casings which did not touch the floor (R 202). Jenkins recommended that **ALFONE** not close because of these defects (R 202, 236-237).

Attorney, R. Bowen Gillespie, represented **CE, INC.** in matters related to the Woodbridge Development and Unit 53 therein (R 247-249). Gillespie sent a letter on July 21, 1980, by regular mail, on behalf of **CE, INC.** advising **ALFONE** of a tentative closing (R 250-251, 256, 897-899). The purpose of this letter was to inform **ALFONE** of a closing date, provide her with documentation, and advise her to be available with funds to close (R 262). A proposed closing statement was also enclosed with the letter and reflected an all cash closing. (TR 263-264). The contract reflected that the purchase was to be financed by a mortgage (R 270). The letter of July 21, 1980, was not sent by certified mail and was not returned to Gillespie's office (R 256, 257, 262).

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A second letter, similar in content to the July 21, 1980 letter was sent to **ALFONE** on August 8, 1980 (R 254-255) (Plaintiff's Exhibit 4; R 897-899), because Gillespie had not received a response to his July 21, 1980 letter. The August 8, 1980 letter was received by **ALFONE** on August 20, 1980, after the tentatively scheduled closing date had already passed (R 260, 273--274).

A third letter (Plaintiff's Exhibit 5; R 900-902) was sent on August 12, 1980 to **ALFONE** at her Highland Beach address. Gillespie admitted the effect of this letter was to extend the tentative closing date for ten (10) days to August 22, 1980 (R 258-259). Gillespie stated that **ALFONE** could still close within ten (10) days of receipt of the letter or up to August 30, 1980 (R 274). The return receipt for the August 20th letter is the first indication that **ALFONE** actually received a letter from Gillespie (R 276).

Gillespie admitted that, pursuant to the terms of the Contract, a default could not have occurred until after August 22, 1980 (R 280). Gillespie admitted he did not send a letter pursuant to the contract advising **ALFONE** of a default on her part and giving her ten (10) days in which to cure such default (R 280-281). He was unable to recall any correspondence with **ALFONE** prior to July 21, 1980, setting a closing date (R 278). He was unaware of any letter to **ALFONE** making time of the essence (R 283).

Donald Van Dusen met **ALFONE** through broker, Ines Jenkens (R 289-290). **ALFONE** was having a problem with **CE, INC.** concerning

the purchase of Unit 53 (R 290). He sent a letter, (Plaintiff's Exhibit 6; R 903-904), to Attorney Gillespie stating there were material problems with Unit 53 which would have to be corrected prior to closing (R 292-293, 314). The first time Van Dusen was advised that **ALFONE** was defaulted was by a letter between **CE, INC.** and its broker (Plaintiff's Exhibit 8; R 907-908) (R 294). Van Dusen stated that **ALFONE's** obligation to close never arose because **CE, INC.** never corrected the material defect in Unit 53 (R 304).

Van Dusen, by letter of September 11, 1980 (Plaintiff's Exhibit 9; R 909-911), advised **CE, INC.** that **ALFONE** had not been notified of default (R 299). He never received a response to his letter (R 300). On September 18, 1980, Van Dusen wrote a letter to Gillespie advising that the funds necessary for **ALFONE** to close on Unit 53 was available and he would be able to close on September 20, 1980 (R 300) (Plaintiff's Exhibit 10; R 912--913). The money to close was in place as of September 18, 1980 (R 305).

Frank Angelino has known **ALFONE** for years (R 32). In late August, 1980, **ALFONE** called him, seeking assistance in purchasing a house (R 322, 324). Angelino had $100,000.00 in cash available to assist **ALFONE** in the purchase (R 322-323). His brother Ernest inspected the property and approved the loan (R 322, 323, 330).

George Coppola is an officer of **CE, INC.**. The contract between the parties (Plaintiff's Exhibit 1) was entered into in April of 1978 (R 71). The Unit should not have taken longer than eight (8) months to build (R 97). The building permit was issued

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in September, 1979 (R 71). Construction began on the unit in December, 1979 (R 78). The delay was due to **ARSI's** failure to have full access to the property, which delayed construction financing (R 71). A further delay was attributed to the City of Boca Raton's delay in approving the water and sewer system (R 107). A certificate of occupancy was issued on the unit in June, 1980 (R 926-928). The matter was sent to Attorney Gillespie when the certificate of occupancy issued (R 92-93).

When **ALFONE** in September, 1980 showed no willingness to close, **CE, INC.** ordered the unit to be resold (R 86). At that juncture, **CE, INC.** believed **ALFONE** was not ready, willing, and able to close based upon **ALFONE's** failure to respond to Gillespie's letters (R 86, 105). Coppola relied upon his attorneys to send the ten (10) day default letter required under the contract (R 94).

In his deposition, Coppola, stated **CE, INC.** could have closed with **ALFONE** the week before it entered into the contract with the subsequent purchasers (R 347). **CE, INC.** offered **ALFONE** her deposit back and twenty percent (20%) if and when Unit 53 was sold to get out of the Contract (R 347).

A second contract concerning Unit 53 was entered into on September 25, 1980 by **CE, INC.** with Mr. and Mrs. Kayton (R 99) (Plaintiff's Exhibit 2). **CE, INC.** gave the Kaytons a purchase money mortgage of a short term duration (R 99). The listing price for the unit when it was placed back on the market would have given **CE, INC.** an $81,000.00 profit (R 112).

IV

POINT INVOLVED ON APPEAL

WHETHER BENEFIT OF THE BARGAIN DAMAGES ARE ALLOWABLE TO A VENDEE UNDER A CONTRACT FOR SALE OF REAL PROPERTY WHERE THE VENDOR FAILS TO EXERCISE GOOD FAITH AND CONVEYS TITLE TO THIRD PARTIES AS A DIRECT RESULT OF THE BREACH?[3]

V

SUMMARY OF ARGUMENT

The trial court found as a matter of fact that **CE, INC.** failed to exercise good faith in preventing **ALFONE** from closing. The trial court further found **CE, INC.** to be in breach of the land sale contract. The Court noted in its final judgment that **CE, INC.** had sold the subject property to a subsequent purchaser other than **ALFONE.** While **CE, INC.** argues a different interpretation of the evidence before this Court, the trial court's findings are supported by competent substantial evidence and should be affirmed.

There are two separate reasons why the award of benefit of the bargain damages are sustainable in this cause. First, under traditional English Rule cases, the lack of good faith on the part of **CE, INC.** as found by the trial court is a sufficient predicate upon which to award benefit of the bargain damages. **Key vs. Alexander, 19 Fla. 975, 108 So. 853 (1926); Walton Land and Timber Company vs. Long, 35 Fla. 843, 185 So. 839 (1930).**

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3. Respondent has restated involved on appeal to more accurately coincide with the facts of this cause as found by the Trial Court.

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Second, since the instant case involved a subsequent sale of the subject real property, by the party breaching the contract, such sale allows the award of the benefit of the bargain without regard to the presence of a lack of good faith on the part of the vendor. **Sanford vs. Cloud, 17 Fla. 532 (1880); Gassner vs. Lockett, 101 So.2d 33 (Fla. 1958).** Under either of the two alternatives, the trial court's award of the benefit of the bargain, affirmed by the Fourth District Court of Appeal, is correct. The decision of the Fourth District Court of Appeal should be affirmed.

VI

ARGUMENT

BENEFIT OF THE BARGAIN DAMAGES ARE ALLOWABLE TO A VENDEE UNDER A CONTRACT FOR SALE OF REAL PROPERTY WHERE THE VENDOR FAILS TO EXERCISE GOOD FAITH AND CONVEYS TITLE TO THIRD PARTIES AS A DIRECT RESULT OF THE BREACH.

In the Final Judgment, the Trial Judge determined "**Coppola's** actions in preventing **ALFONE** from closing demonstrated a failure to exercise good faith" (R 889) and awarded **ALFONE** benefit of the bargain damages (R 889). In the instant case, vendor **CE, INC.** failed to sell unit 53 to **ALFONE**, erroneously contending that **ALFONE** was in breach of contract, and sold the property to another purchaser for a price $65,000.00 in excess of the contract price with **ALFONE**. In findings supported by competent substantial evidence the Trial Court found that **CE, INC.** not only breached the contract but also found that "its action in preventing **ALFONE** from closing demonstrated a failure to exercise

good faith". On these findings of fact, **ALFONE** is entitled to benefit of the bargain damages for two (2) separate reasons. First, the Trial Court found **CE, INC.** failed to exercise good faith which is the equivalent of a finding that **CE, INC.** acted in bad faith. See, **Key v. Alexander**, 91 Fla. 975, 108 So. 883 (1926); **Liebris v. Carmeris**, 107 Fla. 352, 146 So. 221 (1933). Second, the reason **CE, INC.** could not close with **ALFONE** was the subsequent sale of the same property to another purchaser. Under either finding, the Trial Court appropriately awarded **ALFONE** the benefit of the bargain measure of damages.

A

The Trial Court found in its final judgment as to the source of the breach of contract:

> **ALFONE** was prevented from closing because of the unreasonable position taken by Coppola in refusing to allow **ALFONE** a reasonable time to raise the balance of the purchase price and by willfully terminating the purchase price. Coppola's actions in preventing **ALFONE** from closing demonstrated a failure to exercise good faith"
>
> (R 889).

The evidence in this cause established that no notice of default was sent to **ALFONE** by **CE, INC.** (R. 280-281, 299). **CE, INC.** without notifying **ALFONE**, placed Unit 53 back on the market and sold it to the Kaytons (R. 99). Although **CE, INC.** never extended financing or offered to extend financing to **ALFONE** to enable her to close, a purchase money mortgage was extended to the ultimate purchasers (R. 99). A ten (10) day notice of closing on Unit 53 from **CE, INC.** was given to **ALFONE** with no prior notice of a poten-

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tial closing after a delay of one and a half years and without reasonable time for **ALFONE** to obtain financing, although the evidence established that **ALFONE** was able to get her financing in place within twenty-four (24) days of the notice of closing (R. 305). With this evidence in the record, the Trial Court's finding that **CE, INC.** breached the contract and that **CE, INC.** lacked good faith is supported by competent, substantial evidence.[4]

A

Before this Court **CE, INC.** traces the history of the English Rule in Florida in support of its contention that only the deposit paid by the vendee and interest thereon are to be returned to the vendee upon the vendor's breach of an executory land sales contract in the absence of bad faith. **CE, INC.** contends that its actions were not in bad faith and consequently the only damages due **ALFONE** were the return of her deposit plus interest. **CE, INC.'s** argument is incorrect because it ignores the Trial Court's finding that **CE, INC.** failed to exercise good faith and further ignores that **CE, INC.** was unable to perform due to the subsequent sale of Unit 53 to the Kaytons. Consequently, **CE, INC.'s** argument is based upon a faulty factual foundation and incorrect.

The English Rule has its origin in **Flureau v. Thornhill**, 2 **W.B. 1078, 96 Eng.Rep. 635 (1776).** In **Flureau**, the Defendant contracted to sell a rent from a leasehold house, but could not

4. **CE, INC.** blatantly reweighs the evidence to reach a result different from that of the Trial Court. It also fails to focus on the issue before this Court: Whether the Trial Court's finding that **CE, INC.'s** actions were not in good faith is supported by the evidence?

pass title. The purchaser declined to receive his deposit back and sued for damages for loss of the bargain. Chief Judge De Grey stated:

> upon a contract for a purchase, if the title proves bad, and the vendor [without fraud] is incapabable of making a good one, I do not think the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost.

Flureau involved a vendor who through no fault of his own, could not pass title. Under these circumstances, the vendee merely obtained a return of the deposit, with interest.[5] As will be demonstrated this rule has been incorporated into Florida Law and retains its vitality even today. This rule is not controlling in the instant cause which does not involve a vendor who through no fault of its own could not pass title. Consequently **ALFONE** is not limited to the return of her deposit.

The English Rule is not without exception. One such exception is where the vendor acts with a lack of good faith or in bad faith. A leading commentator on the law of damages has noted:

> If the vendor, as frequently happens, on sensing a new and more profitable bargain, conveys the land to another person or otherwise disables himself from performing, or if when the time comes to complete the contract he wilfully refuses, these are clear cases of bad faith and render the vendor liable for loss of the bargain. **McCormick, Damages, Section 179 (West 1935).**

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5. Later English decisions make a distinction between the failure to make good title and the vendors failure to take the necessary steps to give the vendee good title. Under the later circumstance, benefit of the bargain damages are awardable. **Engle v. Fitch, 3 Q.B. 314 (1868); Braybrooks v. Whaley, 1 K.B. 435 (1912).**

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With regard to the foregoing rule, Florida law establishes there is no significant difference concerning a vendor who acts in bad faith as opposed to a vendor who fails to act in good faith and any difference in the two standards is only one of semantics.

C

In **Key v. Alexander**, **91 Fla. 925, 108 So. 883 (1926)**, the Court noted that the benefit of the bargain measure of damages is appropriate where there is a want of good faith by the vendor. **See Also**: **Harper v. Bronson**, **104 Fla. 75, 139 So. 203 (1932)**; **Sturner v. Cacace**, **231 So.2d 525 (Fla. 3DCA 1970)**. In **Bosso v. Neuner**, **426 So.2d 1209, 1212 (Fla. 4DCA)**, **pet. for rev. den.**, **436 So.2d (Fla. 1983)** quoting **Vogel v. VanDiver**, **373 So.2d 366 (Fla. 2DCA 1979)**, the Court defined bad faith as "the opposite of good faith" citing **Black's Law Dictionary**, **4th Ed.** In **Wolofsky v. Behrman**, **454 So.2d 614, 616 (Fla. 4DCA 1984)**, this Court noted that the essence of a good faith/bad faith dicotomy is whether the vendor did his best by reasonable efforts to complete the conveyance. This statement represents the sub silencio adoption of McCormick's statement that:

> "Moreover, it seems probable that the American courts of this group will follow the lead of the recent English decisions in making use of the idea that a vendor who fails to 'do his best,' by reasonable efforts and expenditures, to remove the obstacles to the transfer of a complete and marketable title fails in the requirement of 'good faith'".**McCormick, Damages Sec. 179 (West 1935)**

The Third District Court of Appeal in **Port Largo Club, Inc. v.**

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Warren, **476 So.2d 1330 (Fla. 3DCA 1985)**, interpreted **Wolofsky** to mean "in determining whether the vendor acted in bad faith, one looks to whether his actions constituted a lack of good faith". Id. at 1334. Thus, in the instant case, the finding by the trial court of a lack of good faith by **C.E. Inc.** is the equivalent of a finding of bad faith, which renders an award of the benefit of the bargain as the measure of damages appropriate.

D

Under Florida Law, a vendee may recover benefit of the bargain damages against its vendor where the vendor acts in bad faith. In **Key v. Alexander**, **19 Fla. 975, 108 So. 853 (1926)**, the vendor refused to sell property due to his Wife's failure to join in the deed. This Court held that the English Rule first enunciated in **Flureau v. Thornhill** did not apply because:

> If unscrupulous individuals could with impunity make contracts to sell and convey property, receive valuable consideration for such contracts, and then, seeing that the vendee would make a profit by reason of the advance in value of the property contracted to be sold, could upon the mere statement and filmsy excuse that the wife refused to execute the deed of conveyance avoid all liability except the return of the purchase price received with the legal interest thereon, much fraud would be constantly practiced.

Id. at 885.

Consequently, the Court found that the vendor did not utilize good faith and awarded benefit of the bargain damages.

Subsequent decisions of this Court reaffirmed the **Key** rule that benefit of the bargain damages were available where the

vendor acted in bad faith. In **Liberis v. Carmeris**, 107 Fla. 352, 146 So. 220 (1933), this Court was confronted with a factual situation similar to that in **Key**. A sales transaction was not completed because the vendor's wife refused to execute the deed. The vendor then contracted to sell the property to another at a higher price. The Trial Court awarded the vendee benefit of the bargain damages. This Court, relying on **Key** affirmed the Trial Court and found that the vendee's action in attempting to void the contract based upon a mistake in a legal description and then because his wife would not execute the deed, showed a lack of good faith. In **Walton Land and Timber Company vs. Long**, 135 Fla. 843, 185 So. 839 (1930), this Court noted that a lack of good faith is present where a vendor knew or should have known that he could not comply with the contract. In both **Liberis** and **Walton Land**, the award by the trial court of the benefit of the bargain was affirmed.

In the cases that have followed **Key** , **Liberis**. and **Walton Land** and which do not involve a subsequent sale of the same property to a second purchaser, it has been repeatedly held that the benefit of the bargain may not be recovered in the absence of bad faith. No evidence of bad faith was present in the following cases: **Resnick vs. Goldman**, 133 so.2d 770 (Fla. 3DCA 1971) (seller was unable to close due to its failure to deliver buyer marketable title); **Horton vs. O'Rourke**, 321 So.2d 612 (Fla. 2DCA 1975) (seller was unable to close due to its inability to clear a federal tax lien from the title); **Vogel vs. Van Diver**, 373 So.2d 366 (Fla. 2DCA 1979) (seller was unable to close due to inter-

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vening municipal regulation); **Bosso vs. Neuner, supra.** (seller was unable to close due to unanticipated and unavoidable problems with rising costs and an inability to obtain bond monies). A lack of good faith or bad faith sufficient to allow benefit of the bargain damages has been found in the following cases; **Mc-Neal vs. Marco Bay Associates, 492 So.2d 778 (Fla. 2DCA), rev. den. 500 So.2d 544 (Fla. 1986)** (failure to close due to an increase in the value of the property to be sold); **DeToro vs. Dervan Investments Limited Corportion, 483 So.2d 717 (Fla. 4DCA 1985) rev. den. 492 So.2d 1334 (Fla. 1986)** (Usurping of land sales contract by agent); **Port Largo Club, Inc. vs. Warren, 476 So.2d 1330 (Fla. 3DCA 1985)** (failure to allow a twenty four hour delay in closing); **Wolofsky vs. Behrman supra.** (vendors did not do their best to complete conveyance where they refused to close because someone was living in the subject condominium prior to closing). In none of the foregoing cases was a second sale involved.[6] In the instant case the trial court found in the final judgment a lack of good faith on the part of **CE, INC.** Consequently, the trial Court correctly awarded **Alfone** the

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6. Reference must be made to **Shakeshober vs. Florida Resort Development Corporation, 492 So.2d 816 (Fla. 4DCA 1986), rev. den. 504 So.2d 768 (Fla. 1987),** where the vendor sold the subject property to another through negligence and not bad faith. Consequently the trial court did not award the vendee damages predicated on benefit of the bargain. The District Court affirmed based upon the trial court's finding that no bad faith was present. **Shakeshober** is incorrectly decided since no bad faith need be demonstrated where a second sale is present in order to recover the benefit of the bargain.

Likewise, **Howard vs. Metcalf, 487 So.2d 43 (Fla. 2DCA 1986)** is also incorrectly decided because in that cause the Court gave no consideration to the existence of a second sale of the subject property, a liquor license.

benefit of bargain damages.

E

The earliest case in Florida concerned with a "subsequent sale of the same property" fact pattern as is present in the instant case is **Sanford vs. Cloud, 17 Fla. 532 (1880).** Defendant had refused to execute a good and sufficient title in fee simple. This Court one hundred and seven years held as to the measure of damages:

> As the matter is involved in this case, and as it will be necessary to have it passed upon by the jury in the event a case is made by amendment, we deem it proper to state the rule of damages applicable to actions by vendee against vendor for breach of covenant to convey land.
>
> In general he is entitled to purchase money and interest, but this rule does not apply where there is want of good faith of the vendor, shown by his voluntarily conveying the land to another, or by other act inconsistent with the utmost good faith. In such case, or in cases where vendor had no title, although he acted in good faith, he is liable for the value of the land at the time of the breach, with interest on such value from that time.
>
> Id. at 553-554
>
> (Emphasis Added)

Thus this Court's teaching in **Sanford** is that the voluntary conveyance of property subject to a land sales contract automatically constitutes a want of good faith and allows the vendee to recover the loss of the benefit of the bargain.

This Court next considered a fact pattern similar to the

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instant case in **Eaton v. Hopkins**, 71 Fla. 615, 71 So. 922 (1916). There, the vendor sold property to a vendee who did not record the Deed. The vendor subsequently sold the same property to a second purchaser. The first vendee sued the vendor for breach of warranty. The issue before the Court was the appropriate measure of damages. The Court held:

> [t]he measure of damages for a breach of a covenant of warranty . . . is the consideration paid for the land, or what it was worth as determined by the parties, with interest for the time the purchaser has lost the mesne profits;... 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 later purchase places his deed of record prior to the recording of the first conveyance, and thereby takes the paramount title and right of possession and the first vendee is evicted, and sues his vendor for damages for breach of the covenant of warranty and quiet possession, the measure of damages should be adopted . . . is the same as in cases where the vendor has contracted and agreed to convey, and thereafter, having good title and right to convey, declines or refuses to do so, in which case 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'."
>
> Id. at 924-925.
>
> (Emphasis Added)

This Court in **Eaton**, consistent with its prior decision in **Sanford**, held that where the property is conveyed to a subsequent purchaser the benefit of the bargain may be recovered by the first vendee irrespective of the presence or absence of bad faith

on the part of the vendor.

This Court then decided **Gassner v. Lockett, 101 So.2d 33 (Fla. 1958)**, the case which the District Court below considered controlling. There, a vendor sold the same property to two separate individuals and was sued for damages by the first purchaser, deprived of the real property by the sale to the second. The Court held that the vendor was "old, senile, and extremely forgetful...and kept few it any accurate records of his numerous transactions. The record wholly fails,...to show any bad faith in the transactions." Id. at 33-34. The Court nevertheless awarded benefit of the bargain damages.[7]

This Court, acknowledging its prior decisions in **Key** and **Liberus**, held that this cause was governed by a different rule:

> The reason for the rule seems to be that where a vendor acts in good faith he should not be liable for more than the actual loss which might be suffered by the vendee. On the other hand, there is no reason why the vendor should be allowed to benefit from such mistake even though it was made in good faith. Every rule of logic and justice would seem to indicate that where a vendor is unable to perform a prior contract for the sale of lands because of a subsequent sale of the same land, he should be held, to the extent of any profit in the subsequent sale, to be a trustee for the prior vendee and accountable to such vendee for any profit."
>
> Id. at 34.

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7. The instant case presents an even stronger factual situation to justify the Trial Court's award of benefit of the bargain damages since vendor in the present case acted intentionally in depriving **ALFONE** of the purchase of Unit 53, as opposed to, the non intentional conduct of the vendor in **Gassner**.

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Thus, **Gassner** proceeds under the theory set forth in both **Sanford** and **Eaton**, that the subsequent sale of the property by itself and without regard to whether or not the vendor exhibits a lack of good faith in its actions is sufficent to allow for the award of the benefit of the bargain to the first vendee.[8]

Several decisions involving a subsequent sale of real property under an executory contract follow the **Gassner** rule. In **Blue Lakes Apartments, Ltd. vs. Gowing, Inc., 464 So.2d 705, 709 (Fla. 4DCA 1985)**, the Court noted:

> 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. Both the substitution and measure of damages were correct."

In **Clone, Inc. vs. Orr, 476 So.2d 1300 (Fla. 5DCA 1985)**, the award of the benefit of the bargain was affirmed where the subject property was sold to another purchaser for a higher price. Finally, in the instant case the District Court below correctly held in reliance upon **Gassner**:

> The law...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.
>
> Id. at 1181.

As has been demonstrated, the District Court of Appeal did not

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8. Although **CE, Inc.** claims otherwise, this is precisely the factual situation in the instant case. But for the subsequent sale, **CE, Inc.** could have performed by selling the property to **ALFONE**.

err in so holding. The decision should be affirmed.

F

An analysis of Florida Law reveals the following conclusions. Loss of bargain damages are inappropriate where the vendor through no fault of its own is unable to close.[9] This is the basic fact pattern of **Flureau v. Thornhill**, from which the English Rule originates. However, loss of bargain damages are appropriate where the vendor fails to close but is able to do so. In such circumstances, the vendor has not "done his best" to close and consequently exhibits a lack of good faith which is equivalent to bad faith.[10] The following is the correct statement of the law in Florida: Where the seller cannot close, for reasons beyond its control, then there is no bad faith on the part of the seller and benefit of the bargain damages cannot be awarded. However, where the seller fails to close for reasons not beyond its control, then there is a lack of good faith, from which bad faith can be implied and benefit of the bargain damages can be awarded.

The instant case is consistent with the later proposition. The vendor in the instant case failed to close due to reasons

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9. **Horton v. O'Rourke**, supra. (taxi lien prevented clear title); **Vogel v. Vandiver**, supra. (intevening municiple regulation prevented closing); **Bosso v. Neuner**, supra. (unanticipated and unavoidable problems with rise in cost prevented closing); **Resnick v. Goldman, 133 So.2d 770 (Fla. 3DCA 1951)** (inability to deliver marketable title).

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10. Gassner v. Lockett, 101 So.2d 33 (Fla. 1958); Wolofsky v. Behrman, 454 So.2d 614 (Fla. 4DCA 1984); Port Largo Club, Inc. v. Warren, 476 So.2d 1330 (Fla. 3DCA 1985); Detoro v. Dervan Investments Limited Corporation, 483 So.2d 717 (Fla. 4DCA 1985); Blue Lakes Apartments v. George Gowing, Inc., 464 So.2d 705 (Fla. 4DCA 1985); Clone, Inc. v. Orr, 476 So.2d 1300 (Fla. 5DCA 1985).

which were not beyond its control, but simply due to its desire to obtain a profit on the resale. For this reason, the trial judge and the District Court of Appeal correctly awarded **ALFONE** benefit of the bargain damages against **CE, INC.** The final judgment of the trial court and affirmance thereof by the District Court of Appeal should be affirmed.

VII

CONCLUSION

Based upon the foregoing cases, statutes, arguments, and other authorities, Appellee, **HELEN ALFONE**, respectfully requests that this Court affirm the decision of the District Court of Appeal in all respects.

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VIII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief was mailed this 9th day of November, 1987 to: ARTHUR C. KOSKI, ESQUIRE, 4800 North Federal Highway, Suite 304-A, Boca Raton, Florida 33431.

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Attorney for Respondent