

D.A.R. 5-92 025

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THE SUPREME COURT OF FLORIDA

MARIE Y. BIDON and :
ELIZABETH MOMPLAISIR :

Appellants :

vs. : CASE NO: 77,997

STATE OF FLORIDA, DEPARTMENT :
OF PROFESSIONAL REGULATION, :
FLORIDA REAL ESTATE COMMISSION :

Appellee :

APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
CASE NO: 90-02211

ANSWER BRIEF

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CITATIONS	ii-iii
SUMMARY OF ARGUMENT	1
ISSUE I	2-3
WHETHER THE APPELLANTS' SUBSTANTIVE RIGHT TO RECOVER FROM THE REAL ESTATE RECOVERY FUND VESTED UPON THE MISAPPROPRIATION OF FUNDS BY THE REAL ESTATE LICENSEE.	
ISSUE II	4-7
WHETHER THE TERM "ACTUAL OR COMPENSATORY DAMAGES," AS SET FORTH IN THE PRE-AMENDMENT LANGUAGE OF S.475.484(1)(a), FLORIDA STATUTES, INCLUDES ATTORNEY'S FEES, COSTS AND INTEREST.	
ISSUE III	8
WHETHER INDIVIDUALS WHO SUSTAIN DAMAGES IN A REAL ESTATE BROKERAGE TRANSACTION HAVE A CONTRACTUAL RIGHT TO RECEIVE COMPENSATION FROM THE REAL ESTATE RECOVERY FUND.	
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

	<u>Page No.</u>
<u>CASES</u>	
<u>Aetna Insurance Co. v. Richardelle,</u> 528 S.W. 2d 280 (Tex. Cir. App. 1975)	2
<u>Belcher v. First National Bank of Miami,</u> 405 So.2d 754 (Fla. 3d DCA 1981)	2
<u>Bidon v. Florida Real Estate Commission,</u> 578 So.2d 478 (Fla. 4th DCA 1991)	5-6
<u>Bureau of Crimes Compensation v. Williams,</u> 405 So.2d 747 (Fla. 2d DCA 1981), reh. denied (Nov. 16, 1981)	2
<u>City of Sanford v. McClelland,</u> 121 Fla. 253, 163 So. 513 (1935)	2
<u>DeRodulfa v. United States,</u> 461 F. 2d 1240 (D.C. Cir. 1972), cert. denied 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed. 2d 220	8
<u>Division of Workers' Compensation, Bureau of Crimes Compensation v. Brevda,</u> 420 So.2d 887 (Fla. 1st DCA 1982)	2, 8
<u>Koch v. Secretary of Department of Health, Education and Welfare,</u> 590 F.2d 260 (8th Cir. 1978)	8
<u>Richardson v. Belcher,</u> 404 U.S. 78, 98 S.Ct. 254, 30 L.Ed 2d 231 (1971)	8
<u>Tucker v. State Department of Professional Regulation,</u> 521 So.2d 146 (Fla. 5th DCA 1988)	5
<u>FLORIDA STATUTES</u>	
s.475.482	4, 6
s.475.482(1)	6
s.475.482(2)	6
s.475.482(3)	3, 6
s.475.483	3
s.475.484(1)(a)	1, 4, 6, 9
s.475.486	6

TABLE OF CITATIONS
continued

	<u>Page No.</u>
<u>BILLS</u>	
Senate Bill 403, Florida Legislature, Regular Session (1976)	6
<u>LAWS</u>	
Chapter 76-74, Laws of Florida	6
<u>REPORT</u>	
<u>An Examination of the Feasibility of Establishing a Real Estate Recovery Fund as Part of the Florida Real Estate License Law, Florida Board of Regents Contract R5-524, Final Report, F. A. Raffa and F. J. Hitt (April 9, 1976)</u>	5

SUMMARY OF ARGUMENT

The Appellants' substantive right to recover from the Real Estate Recovery Fund vested at the time the summary final judgment or amended summary final judgment were entered, which was after the effective date of the amendment to s.475.484(1)(a), Florida Statutes, i.e., October 1, 1988. Thus, Appellants were precluded by the amended language from recovery of attorney's fees, interest, and costs from the Fund.

The term "actual or compensatory damages," as set forth in the pre-amendment language of s.475.484(1)(a), Florida Statutes, does not include attorney's fees, costs or interest.

Moreover, individuals who sustain damages in a real estate brokerage transaction as a result of the activities of a real estate licensee do not have a contractual right to receive compensation from the Real Estate Recovery Fund, as any financial assistance provided by the Fund is merely gratuitous in nature. Hence, the Fund is not a contractual indemnitor.

ISSUE I

WHETHER APPELLANTS' SUBSTANTIVE RIGHT TO RECOVER FROM
THE REAL ESTATE RECOVERY FUND VESTED UPON THE MISAPPRO-
PRIATION OF FUNDS BY THE REAL ESTATE LICENSEE.

ARGUMENT

A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment. City of Sanford v. McClelland, 121 Fla. 253, 163 So. 513, 514-515 (1935). Division of Workers' Compensation, Bureau of Crimes Compensation v. Brevda, 420 So.2d 887 (Fla. 1st DCA 1982).

"[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must become a title, legal or equitable, to the present or future enforcement of a demand...." Aetna Insurance Co. v. Richardelle, 528 S.W. 2d 280, 284 (Tex. Cir. App. 1975).

Florida appellate courts have rejected the argument which the Appellants previously made - that the right to fees under a statute vests upon the occurrence of the injury. These courts have held that the right to fees under a statute is inchoate and becomes vested only upon a legally proper award pursuant to judgment. Brevda, supra. See also Bureau of Crimes Compensation v. Williams, 405 So.2d 747 (Fla. 2d DCA 1981), reh. denied (Nov. 16, 1981). Additionally, the Third District Court of Appeal has implicitly adhered to this position. See Belcher v. First National Bank of Miami, 405 So.2d 754 (Fla. 3d DCA 1981).

Thus, in applying the cited principle to the instant case, the Appellee asserts that the substantive rights of the

Appellants to recover attorney's fees, costs and interest from the Real Estate Recovery Fund were vested, at the earliest, on the date of the entry of the summary final judgment (November 6, 1989) or of the amended summary final judgment (June 7, 1990) - some one to approximately two years after the effective date of the subject amendment (October 1, 1988), which specifically states that "...except as provided in s.475.483, Florida Statutes, treble damages, court costs, attorney fees and interest shall not be recovered from the Fund." This language precludes the Appellants from securing such in the instant case.

Moreover, Appellants can hardly claim that the above analysis is unreasonable or unjust, since they did not secure an attorney or initiate a civil action against the real estate licensee, and therefore did not incur any obligation for attorney's fees or costs, until after the effective date of the subject amendment.

Indeed, statutory changes in law are presumed to apply prospectively, unless legislative intent to the contrary clearly appears. However, any assertion regarding the prospective application of the subject amendment serves only to bolster Appellee's argument that Appellants were not entitled to attorney's fees, interest and costs from the Real Estate Recovery Fund since the substantive rights of the Appellants vested on the dates of the final judgments and after the effective date of the subject amendment. Hence, the Appellants are precluded from securing attorney's fees, interest and costs under the applicable amended language.

ISSUE II

WHETHER THE TERM "ACTUAL OR COMPENSATORY DAMAGES," AS SET FORTH IN THE PRE-AMENDMENT LANGUAGE OF S.475.484(1)(a), FLORIDA STATUTES, INCLUDES ATTORNEY'S FEES, COSTS AND INTEREST.

ARGUMENT

Prior to October 1, 1988, s.475.484(1)(a), Florida Statutes, provided in pertinent part that the Real Estate Recovery Fund would make payments to individuals "but only to the extent and amount reflected in the [final] judgment as being actual or compensatory damages. The Appellants argue that this pre-amendment language of s.475.484(1)(a), Florida Statutes, is applicable to the instant case and that the Florida Real Estate Commission erred in denying payment of attorney's fees, costs and interest from the Real Estate Recovery Fund. Expanding upon this argument, they contend that, in adopting s.475.484(1)(a) and s.475.482, Florida Statutes (which provides in pertinent part that the Fund will be utilized "as reimbursement to any person or corporation adjudged by a court of competent jurisdiction to have suffered monetary damage"), the Florida legislature intended to compensate individuals for the "totality of the injured party's economic loss to the statutory maximum...." Appellants' argument is without merit since the pre-amendment language of s.475.484(1)(a), Florida Statutes, is inapplicable to the instant case. However, assuming in arguendo that the pre-amendment language were applicable to the instant case, the Appellants still would be precluded from recovering attorney's fees, interest and costs from the Fund.

Appellants' assertion regarding the Commission's failure to pay attorney's fees, costs and interest is made without any reference to or apparent understanding of the historical background of the subject Real Estate Recovery Fund legislation.

In 1975, the Florida Real Estate Commission asked Florida Technological University (FTU) Research Center to conduct a feasibility study on establishing a Real Estate Recovery Fund as part of the Florida Real Estate License Law. In light of the "3-fold increase in escrow deposit losses from 1974 thru (sic) 1975," the Commission was interested in "providing consumer protection against the loss of escrow deposits through mismanagement, fraud, etc." An Examination of the Feasibility of Establishing a Real Estate Recovery Fund as Part of the Florida Real Estate License Law, Florida Board of Regents Contract R5-524, Final Report, F. A. Raffa and F. J. Hitt (April 9, 1976)

In light of the narrowly prescribed focus of this report (i.e., escrow deposit losses) and the fact that the Real Estate Recovery Fund Act stemmed therefrom, Appellee's assertion that the Fund never was intended to indemnify a person for all losses associated with a Recovery Fund claim is proper and well reasoned. Also see the Fourth District Court of Appeal's decision in Bidon v. Florida Real Estate Commission, 578 So.2d 478 (Fla. 4th DCA 1991) and the dissenting opinion of Judge Upchurch in Tucker v. State Department of Professional Regulation, 521 So.2d 146 (Fla. 5th DCA 1988).

The final report of FTU analyzed, in pertinent part, past and potential escrow deposit losses in the State of Florida and

escrow deposit reimbursement programs in 22 states and the District of Columbia. This report noted the escrow loss findings of the Investigative Division of the Department of Professional Regulation and included a draft of the Real Estate Recovery Fund legislation which later became Senate Bill 403 (Chapter 76-74, Laws of Florida, ss.475.482-475.486, Florida Statutes).

An examination of the legislative history of Senate Bill 403 reveals no reference to or evidence of any intention to compensate individuals for attorney's fees, interest or costs.

Additionally, as the Fourth District Court of Appeal noted in Bidon, all claims under s.475.482, Florida Statutes, are divided into two categories and treated in two separate sections: Section 475.482(3) specifically provides that the Commission may pay attorney's fees and court costs for claims made under s.475.482(2). However no similar provision is made under s.475.482(1) or s.475.484(1)(a). Instead, as noted above, claims are limited to the "amount reflected in the judgment as being actual or compensatory damages."

Hence, the historical context of the legislation, the absence of any clearly articulated intent in the legislative history of Senate Bill 403 (creating the Real Estate Recovery Fund Act) to include attorney's fees, costs and interest in the term "actual or compensatory damages," and the absence of any provisions for attorney's fees, costs and interest in s.475.484(1)(a), Florida Statutes [in contrast to and as set forth in other provisions of the Real Estate Recovery Fund Act, i.e., s.475.482(3), Florida Statutes], make the Appellee's

assertion - that the term "actual and compensatory damages" does not include attorney's fees, costs and interest - a more reasoned analysis.

ISSUE III

WHETHER INDIVIDUALS WHO SUSTAIN DAMAGES IN A REAL ESTATE BROKERAGE TRANSACTION HAVE A CONTRACTUAL RIGHT TO RECEIVE COMPENSATION FROM THE REAL ESTATE RECOVERY FUND.

ARGUMENT

In Brevda, supra, the Fourth District Court of Appeal held that laws that compensate victims [of crime] may be deemed essentially gratuitous in nature and "can hardly be considered contractual in nature." Moreover, although such laws create an expectation of public benefits, they do not confer a contractual right to receive the expected amount. See Richardson v. Belcher, 407 US 78, 80-81, 92 S. Ct. 254, 256-257, 30 L. Ed. 2d 231 (1971); Koch v. Secretary of Department of Health, Education and Welfare, 590 F. 2d 260, 263 (8th Cir. 1978); DeRodulfa v. United States, 461 F. 2d 1240, 1256 (D.C. Cir. 1972), cert. denied, 409 U.S. 949, 93 S. Ct. 2;70, 34 L. Ed. 2d 220.

Appellee notes that Brevda, supra, addressed laws that compensate victims who sustain injuries in a criminal context. However, the principle enumerated in Brevda, supra, may apply to victims who sustain injuries in a civil context. That distinction being noted, the Appellee argues that, in the instant case and based upon the above-cited case law, the Fund did not become a party to the contract between the Appellants and the real estate licensee. Hence, contrary to the Appellants' assertion, the Fund is not a contractual indemnitor.

Since no contract existed between the Appellants and the Fund or the Appellee, Appellants' prior assertion that the amendment impaired existing contractual rights is without merit.

CONCLUSION

The Florida Real Estate Commission did not err in denying Appellants attorney's fees, interest and costs under the Real Estate Recovery Fund, because the Appellant's substantive right to recover from the Fund vested after the effective date of the amendment to s.475.484(1)(a), Florida Statutes. Hence, under this amended language, Appellants are precluded from securing attorney's fees, costs and interest from the Fund.

The term "actual and compensatory damages," as set forth in the pre-amendment language of s.475.484(1)(a), Florida Statutes, does not include attorney's fees, costs and interest, as evidenced by an analysis of the historical background and legislative intent and specific language of said provision.

Moreover, the Real Estate Recovery Fund does not confer any contractual right to receive any amount from the Fund upon any individual who sustains injuries in a real estate brokerage transaction; and, hence, the Fund is not a contractual indemnitor.

Respectfully submitted,

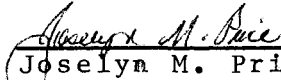
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by Express Mail to John B. Rogers, Esq., 1881 University Drive, Suite 206, Coral Springs, FL 33071, this 21st day of November 1991.



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