

D.A. 2-5-92

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THE SUPREME COURT OF FLORIDA

CASE NO. 77,997

MARIE Y. BIDON and
ELIZABETH MOMPLAISIR
APPELLANTS

vs

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATIONS,
FLORIDA REAL ESTATE COMMISSION
APPELLEE

APPEAL FROM THE DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

APRIL 24, 1991

REPLY BRIEF

✓ JOHN B. ROGERS, P. A.
Attorney for Appellants
1881 University Drive
Suite 206
Coral Springs, FL 33071
(305)752-9198

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Appellee relies upon three points in support of their position. Appellants respond to each as follows:

Appellee's argument is that Appellant's substantive rights did not "vest" until entry of judgment. Therefore, their position is that entry of judgment is a condition precedent to recovery.

However, Section 475.483(1)(a) specifically allows for recovery without judgment where the licensee has died. If the licensee died prior to October 1, 1988, but the commission did not waive entry of judgment until after such date, one wonders which law would be applied under the Attorney General's reasoning. Would the event (the death of the licensee) control or the ministerial act of waiving judgment by the commission govern.

It is inconceivable that the legislature considered "vesting of substantive rights" when enacting Chapter 475. It is obvious from the language of the statute that the concentration was upon reimbursing claimants for misappropriated funds by real estate brokers and salesmen. It is potentially clear that any limitations in recovery considered were as set forth in the initial part of 475.484(1)(a), to wit: "to the unsatisfied portion of such person's judgment or \$25,000.00, whichever is less" The terminology "actual or compensatory" damages having been added thereafter, requires one to define such terms to ascertain if the "unsatisfied portion or \$25,000.00" language has really been affected at all.

Black's Law Dictionary, Fourth Edition (West Publishing Co. 1951), defines "actual damages" as follows:

"Real, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one hand to "nominal" damages, and on the other to "exemplary" or "punitive" damages. (emphasis added)

It further states that actual damages are synonymous with "compensatory damages" and with "general damages".

Under "compensatory damages" is found the following:

"such as will simply make good or replace the loss caused by the wrong" (emphasis added)

Under "general damages", the following definition is found:

"General damages are such as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct and proximate result, or such as necessarily results from the injury, or such as did in fact result from the wrong" (emphasis added)

The use of the terms "actual or compensatory damages" cannot, in consideration of the foregoing, be construed as limiting the terms "unsatisfied portion of such person's judgment or \$25,000.00, whichever is less". The sole limitation is the payment to any claimant of a maximum of \$25,000.00, or \$50,000.00 against any one broker or salesman. Sec. 475.484(4) It would be applicable herein.

The BREVDA and WILLIAMS cases cited by Appellee are clearly distinguishable and should not be considered as controlling. In BREVDA, the court was concerned with the repeal of Section 960.19 (Attorney's Fees) of the Florida Crime Compensation Act, which repeal occurred after the man was injured, but prior to his contracting for legal services.

Firstly, payment of benefits under the act was provided "as a matter of moral responsibility" (Section 960.02). Payment of benefits under Chapter 475 was provided "as reimbursement" to any person adjudged to have suffered monetary damages by reason of specified acts by licensed real estate brokers or salesman. Reimbursement connotes a responsibility accepted contractually, as a matter of law, nor philosophically, as a moral obligation.

Secondarily, repeal of Section 960.19 involved the dissecting out of a specific attorney's fee provision of a statute. The October 1, 1988 legislative change involved an addition to existing law to limit what was meant by the term "actual or compensatory damages" in its prior enactment.

Thirdly, the BREVDA court found that there did not exist any "voluntary contractual relationship between the parties" (P890-891) and the right to fees was an inchoate procedural right rather than a substantive right. Conversely a voluntary contractual right arose in this case when the act of conversion occurred.

The most important analysis in BREVDA involved the Court's evaluation of the effect upon a substantive right following repeal of a statute, wherein they cited the following from MITCHELL v. DOGGETT, 1 Fla. 356 (1847).

"The law existing at the time the contract is made enters into and forms a part of the contract; and to alter the rights given to either party by that law, is to impair the obligation of the contract".

Thus, the existence of a contractual right is a critical point. Returning to the BREVDA - WILLIAMS cases, the court in BREVDA discussed the similarities/dissimilarities between the

Workers' Compensation Law and the Crime Compensation Act, and stated at page 890:

"the acceptance of the Workers' Compensation Law by the employer, the employee, and the insurance carrier is deemed as constituting a contract between the parties that embraces the provisions of the law at the time of the injury" (emphasis added). SULLIVAN v. MAYO, 121 So2d 424, 428 (Fla. 1960).

The employee does not sign the written contract between the employer and the insurance carrier, but is the beneficiary thereof. They do not have an "immediate right to present enjoyment", but do have an "equitable" right to the future enforcement of a demand, "or a fixed right to future enjoyment", immediately upon an injury occurring, thus falling within the definition of a vested right. AETNA INSURANCE CO. v. RICHARDELLE, 528 S.W.2d, 290, 284 (Tex. Civ. App. 1975); CITY OF SANFORD v. McCLELLAND, 121 Fla. 253, 163 So. 513, 514-515 (1935).

The Appellee did not sign the written contract between the Appellants and the licensee, but it is no less involved as a party than is the insurance company in a Workers' Compensation case. In both instances, indemnification is the controlling principle. Indemnification and "reimbursement" are synonymous.

When an injury occurs, the rights of the employee become vested. When the "act" of conversion occurred, the right of Appellants became vested.

CONCLUSION

The act of conversion by the broker, occurring six months prior to the October 1, 1988 legislative change, is controlling, and vested rights in Appellant's at the time the act was committed.

The monetary limitations within the statute are contained in Section 475.484, and are \$25,000.00 per claimant, \$50,000.00 aggregate against one broker.

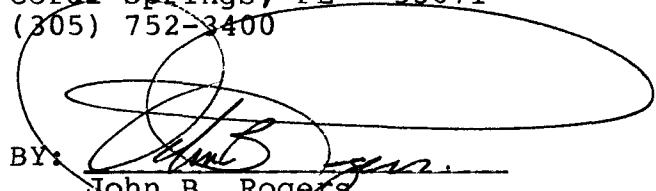
Appellants received \$15,000.00 and \$10,000.00 respectively as reimbursement from the Fund. This did not "make good" or "replace" their losses which "did in fact result from the wrong", as their "actual and real loss" included the costs of filing fees, service of process costs, court reporter fees and transcript costs, witness fees, certified copies of documents and attorney's fees.

Appellants are entitled to their actual damages up to a maximum of \$25,000.00 each.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was served by mail on JOSELYN M. PRICE, ESQUIRE, Assistant Attorney General, Attorney for Appellee, 400 West Robinson, Suite 212, Orlando, FL, 32801, this 9th day of December, 1991.

JOHN B. ROGERS, P.A.
Attorney for Appellants
1881 University Drive
Suite 206
Coral Springs, FL 33071
(305) 752-3400

BY: 
John B. Rogers
Fla. Bar #222828