IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,057

KIRK A. WOODSON,
Petitioner,

-- vs. --

WILMA MARTIN, ET AL.,
Respondent.

BRIEF BY THE FLORIDA ASSOCIATION OF REALTORS AS AMICUS CURIAE ON BEHALF OF THE RESPONDENT

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

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INTRODUCTION

Petitioner, Kirk A. Woodson, the Plaintiff below, is referred to as "Woodson."

Respondent, Wilma Martin, a Defendant below, is referred to as "Martin."

References to the Appendix attached to Petitioner's Initial Brief on the Merits are designated "Woodson Aff."

STATEMENT OF INTEREST

The Florida Association of REALTORS® (FAR) was founded in 1916 and has become the largest non-profit trade association in the State of Florida with a membership of approximately 60,000 real estate salespersons and brokers. In accordance with Article II of its Articles of Incorporation, FAR's purpose is "to serve the REALTOR community by providing, promoting and delivering programs, products and services which will enhance members' skills and ability to operate their business profitably and ethically, to advance the real estate industry, and to preserve and extend the right to own, use and transfer real property."

Not every real estate licensee is a REALTOR. The term "REALTOR" is a trademark of the National Association of REALTORS. Individual licensees may choose to join a local Board or Association of REALTORS, and, if so, he or she becomes a member of both the FAR and the National Association of Realtors. While all real estate licensees in Florida must adhere to the real estate license law found in Chapter 475, *Florida Statutes*, and the rules promulgated by the Division of Real Estate, members of the Florida Association of Realtors must also follow the National Association of Realtors' *Code of Ethics*. With the goal of enhancing the protection and promotion of the client's interest while treating all parties honestly, the *Code of Ethics* imposes stringent standards of conduct on REALTORS in many areas that are unregulated by law. The *Code of Ethics* is enforced by a formal hearing process involving peer review.

The purpose of this brief is to express to the Court FAR's belief that existing law and industry practice adequately discourages wrongful behavior by real estate licensees and protects the interests of the public. Creating additional liability by making an exception to the economic loss rule for intentional torts is unnecessary and would

negate the benefits of the rule in limiting the parties to a contract to the remedies negotiated for in the contract.

STATEMENT OF THE CASE & FACTS

The Florida Association of Realtors accepts the Respondent's statement of the facts.

SUMMARY OF ARGUMENT

The primary purpose of tort liability is to permit an injured person to recover their damages suffered when someone breaches a duty owed them and to punish the wrongdoer to deter him or her from acting wrongfully in the future. If a party to a contract commits fraud or breaches the agreement, the other party may seek economic redress through contractual remedies and causes of action. Permitting the injured party to be made whole under contract theories and to receive additional damages based on tort theories results in unjust enrichment. Tort liability based on a contract is not needed to deter wrongful behavior of persons who are regulated by the State. If a real estate agent who is involved in the transaction commits fraud, he or she is punished by liability to the principal and by disciplinary action by the Florida Real Estate Commission (FREC). FREC was created to protect the public interest, and its disciplinary ability is a favored method for

deterring wrongful behavior by persons whom the State has licensed. A licensee who has committed fraud or other wrongdoing is publicly disciplined, may be fined and may lose his or her livelihood and reputation. Such action has a broader societal benefit than the mere award of damages to a single injured party.

The real estate licensee's role is to bring a buyer and seller together to negotiate a sales transaction. Persons who wish to act as a real estate licensee must be licensed by the State of Florida. Before a license is issued, a prospect must successfully complete state-prescribed pre-license training and pass an examination. The State does not train or test potential licensees on building construction, pest inspection or meeting certain, prescribed standards of appraisal. Instead, the State requires a separate license for professionals who are involved in those fields. The licensee is not expected to be a guarantor of property condition or value.

During the pre-purchase process, buyers will see a variety of properties and hear numerous oral statements from sellers' agents and others regarding the properties. To permit buyers to learn more about a property they are interested in purchasing, most standard

form sales contracts used by real estate licensees in Florida, including the FAR/BAR Contract used in this transaction, provide for inspection rights and require or suggest that the buyer obtain the services of an appropriate expert when evaluating property condition. If the buyer, with an eye to merger clauses and the statute of frauds, considers the property condition to be important, then he or she will keep the inspection rights and repair obligations in the offer. If that buyer then fails to exercise the rights bargained for, he or she should not later be permitted to hold others responsible for disappointed expectations. Allowing such recovery would unjustly enrich the buyer who could have protected him or herself. Instead, a person who exercises poor judgment in bargaining for the benefit of the contract or failing to exercise diligence should be required to live with the results.

ARGUMENT

I. THE ECONOMIC LOSS RULE SHOULD BE PRESERVED; HOWEVER, IF AN EXCEPTION IS MADE, THE EXCEPTION SHOULD EXCLUDE LIABILITY FOR REPRESENTATIONS MADE IN JUSTIFIABLE RELIANCE ON A PARTY TO THE CONTRACT.

The purpose of the economic loss rule is to reign in the ever-expanding web of legal liability theories and to limit causes of action arising from a contract to traditional contractual remedies. Our society has become increasingly litigious as we try to find creative ways to make others responsible for our own mistakes. Allowing plaintiffs who are unhappy with the results of a contract for which they bargained to sue persons who are not parties to the contract on non-contract theories has resulted in clogged courts, time-consuming and financially and emotionally draining litigation and delayed administration of justice.

> Contract law ... is designed to enforce the expectancy interest of the parties and tort law ... imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others. ... The basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault or to one who is better able to bear the loss and prevent its occurrence.

Casa Clara Condominium Association v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993). The primary purpose of tort liability is to permit an injured person to recover their damages suffered when someone breaches a duty owed them and to punish the wrongdoer to deter him or her from acting wrongfully in the future. If a party to a contract commits fraud or breaches the agreement, the other party may seek economic redress through contractual remedies and causes of action. Permitting the injured party to be made whole under contract theories and to receive additional damages based on tort theories results in unjust enrichment. It is the general duty of each party to a contract to learn and know the contents of the contract before he or she signs and delivers it. 11 Fla. Jur. 2d, Contracts, §14. In this case, and in all cases in which a buyer bargains for price and property inspection rights, economic loss could have prevented by simply utilizing negotiated rights, making the property inspections specified in the contract and exercising repair or cancellation provisions as appropriate.

A. The Role of Johnson v. Davis and Contractual Remedies

In the case of Johnson v. Davis, 480 So. 2d 625 (Fla. 1985), this Court discarded the idea of caveat emptor in residential real estate transactions and imposed on sellers of residential property the affirmative duty to disclose to the buyer all facts that materially affect the value of the property and are known to the seller but not readily observable by or known to the buyer. This duty makes sellers as liable for nonfeasance regarding disclosure of such material facts as they are for fraudulent concealment, but it is a limited duty. It does not apply in commercial settings, Haskell Co. v. Lane Co., 612 So. 2d 669 (Fla. 1st DCA 1993), rev. dism., 620 So. 2d 762 (Fla. 1993); Futura Realty v. Lone Star Building Centers, 578 So. 2d 363 (Fla. 3d DCA 1991), rev. denied, 591 So. 2d 181 (Fla. 1991), or to latent defects of which the seller is not aware or to minor or cosmetic problems reasonably believed to not be indicative of a major defect or a continuing or reoccurring problem, Slitor v. Elias, 544 So. 2d 255, 258 (Fla. 2d DCA 1989). Cases brought under Johnson usually allege fraud in the inducement and relief is granted using contract remedies. Two appellate courts have extended the Johnson holding to the home seller's real estate agents. Rayner v.

Wise Realty Co., 504 So. 2d 1361 (Fla. 1st DCA 1987); Revitz v. Terrell, 572 So. 2d 996 (Fla. 3d DCA 1990). But, the 5th District Court of Appeal has held that Johnson applies only to the home seller and not to persons who are not in privity as buyer and seller and have no fiduciary, special or longstanding relationship with the plaintiff. Kovach v. McLellan, 564 So. 2d 274 (Fla. 5th DCA 1990).

The lower court's holding in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), is compatible with the Kovach decision. Since sellers are legally responsible for the representations of their agents, buyers who are wronged by an agent may look to the seller for redress. A principal is liable for the misrepresentations or misconduct of his or her agent that are committed within the scope of the agent's employment. Gates v. Utsey, 177 So. 2d 486 (Fla. 1st DCA 1965). Most statements concerning the property are going to be considered within the scope of the real estate licensee's employment. The 5th District Court of Appeal, citing Gates, stated:

> It is clear that statements made by an agent within the scope and course of his employment may be attributable to the principal, even though the agent may not be specifically directed by the principal to make that statement. If, as alleged, appellee's agent, the real estate broker, represented to a potential buyer of the property that the property extended to the oceanfront, it would appear that such portrayal of the property would be

> within the scope of the agent's authority, just as would any other description of the property made in attempting to induce someone to buy it.

Held v. Trafford Realty Co., 414 So. 2d 631 (Fla. 5th DCA 1982). If a representation regarding property quality by a seller's agent is false and induces a buyer to enter into a contract, the buyer can seek contractual remedies from the seller and the seller can in turn seek damages from the agent with whom he or she has a contract. This is an orderly approach to contractually-based litigation. It is mindful of the relationships between the parties, i.e., that the buyer has a contractual relationship with the seller but not with the seller's agent and that the seller has a contractual relationship with the agent. Everyone has the chance to be protected and punished by their respective contracts even if the economic loss rule prohibits suits against non-parties who commit intentional torts.

B. Real Estate Licensees Must Rely on the Statements of the Seller in a Real Estate Transaction.

When the licensee does not reside in the property, he or she can only know facts that can be observed and that the residents reveal. In the sale of residential real estate, this Court's ruling in Johnson

v. Davis controls questions of disclosure. Standard W of Woodson's contract contains a warranty that mirrors the Johnson v. Davis ruling. Under Standard W, the seller warrants that "there are no facts known to Seller materially affecting the value of the Real Property which are not readily observable by Buyer or which have not been disclosed to Buyer." Johnson does not obligate the seller to disclose or warrant latent defects of which he or she was not aware, nor does the holding "does not convert a seller of a house into a guarantor of the condition of the house." Slitor v. Elias, 544 So. 2d 255 (Fla. 2d DCA 1989). The Slitor court recognized that just because someone lives in a home, it does not follow that he or she automatically becomes an expert on all problems associated with the home.

When a real estate licensee is asked to list a home for sale, it is for the purpose of assisting in the sales and marketing aspects of the transaction. The licensee will typically walk through the property with the seller, pointing out ways to improve the home's appearance and curb appeal. The licensee does not conduct a thorough inspection of the property like a home inspector would, as he or she is primarily looking for visible, obviously unappealing

features that can be corrected prior to sale or that can be taken into account when establishing an asking price. While the licensee may ask the seller if he or she knows of any material facts affecting the property value, there is no duty imposed on the licensee to discover hidden defects in the property. The licensee can make an independent inspection of the property, but such an inspection may only reveal obvious defects of the sort that a buyer would be able to discover using ordinary diligence.

Though Johnson does not require written disclosure, it is common practice for listing brokers to submit a written disclosure form to the sellers with whom they work. The form prompts the sellers to list material facts affecting the value of the property. The brokers then provide this form to buyers to fulfill the seller's Johnson disclosure requirement. [1] If this Court adopts the Academy of Florida Trial Lawyers' suggestion that a representation by a seller's agent should be actionable in tort if the agent failed to

[1] The Florida Association of Realtors has tried unsuccessfully for the past four years to pass legislation mandating a state-prescribed disclosure form to assist sellers to comply with Johnson. Such a form would protect the public by triggering the seller's memory and avoiding the problems that may arise when an intermediary tries to relay verbal disclosures to prospective buyers.

exercise reasonable care or competence in obtaining or communicating the information, Br. of Academy of Fla. Trial Lawyers, at 14, it must consider the impact of this standard on the average real estate transaction.

The trial attorneys' argument imposes a negligence standard, which is precisely what this Court rejected in Casa Clara. Licensees currently are subject to a standard of fair dealing and honesty toward the party whom they do not represent as agent and to the public in general. The trial attorneys' suggested standard goes far beyond the current law. Will this new standard require real estate licensees to affirmatively investigate the truth or falsity of all of a seller's statements regarding the property? There is presently no such duty under Florida law. Licensees are not trained or tested on matters of building construction or pest infestation and would be required to hire experts to verify the truth or falsity of the seller's disclosures regarding those matters.[2] Licensees may list 20 or more

[2] Chapter 475, Fla. Stat. (1995), does not require a real estate licensee to know whether a building is structurally sound, whether its systems are up to code or whether there is fungus or pest infestation in the attic. Such matters are more properly placed in the hands of experts who hold state licenses in the relevant area of practice. The State of Florida has recognized the licensee's lack of expertise in these areas and has enacted legislation designed to

homes in an average month. To have to follow up with this amount of detail on each property would add tremendously to the cost of servicing the listing and would likely result in increased commission rates to cover the added burden.

What duty does will the suggested standard impose on the licensee who merely hands a developer's brochure or seller's written property disclosure statement to a prospective buyer without making any oral representations at all? If information contained in the brochure is false, will the licensee be held liable for communicating the false information to the buyer? The State of Florida teaches real estate licensees in an agency relationship that their principal "must furnish accurate and truthful information ... The broker is entitled to rely on this information unless, of course, the broker knows it to be false or in error." Florida Real Estate Commission, Florida Real Estate Commission Handbook 2-18 (3d ed. 1993). Under principles of contract law, licensees who are not in an

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assist buyers in learning about property conditions that may not be readily observable and are beyond the licensee's scope of expertise. For example, if a seller has had a termite or roof inspection made and the real estate licensee knows about or possesses the resulting reports, he or she must give the reports to the buyer on the buyer's written request. § 475.42, Fla. Stat. (1995). If the buyer wants more information, he or she may put these concerns into the contract.

agency relationship should also be permitted to rely on the seller's statements where the contract for brokerage services provides that the seller will comply with the disclosure law and will be truthful in all representations made to the broker and to prospective buyers.

Exposing a licensee to personal liability for merely communicating available information will severely restrict the flow of information to consumers. It is important to permit buyers access to all available representations about a property, including seller's statements and public records. The buyers may sort through the information and determine what is and is not important to them in making the purchase decision. Then, they may protect themselves from false representation by placing appropriate inspection and verification contingencies in the contract. Exercising their contractual rights will enable them to verify the information that is most important to them and may give them protective contractual privity with the professionals who work on their behalf to evaluate the property. A licensee faced with a choice of hiring experts to verify the seller's statements and charging a higher commission to cover the experts' charges or making no statements concerning the property other than those he or she can independently verify will

likely choose the latter course. Silence will eliminate statements of fact and opinion that may have otherwise have proven valuable to buyers. While it is no surprise that the trial lawyers would like to expand the exposure of real estate licensees to liability, it would not be in the public interest to do so.

In addition to statements made in reliance on the seller's representation, this Court must consider the practice of puffing. Real estate licensees, like other sales professionals, often utilize the recognized sales tool of puffing, which is making statements of opinion regarding the quality or value of the property. When a licensee who is working with a seller meets a buyer, the licensee will usually spend considerable time talking about the benefits of the homes he or she is trying to sell. This is a sales technique that is intended to attract a buyer to property features that meet his or her needs.

Statements regarding property quality are generally considered unactionable puffing. In the case of Wasser v. Sasone, 652 So. 2d 411 (Fla. 3d DCA 1995), statements were made that a building "was a very good building," had "normal type of maintenance'" and was "an excellent deal." It was later discovered that the building

allegedly had defects that made these statements false. The court, however, said that the seller's puffing or statements of opinion did not relieve the buyer of the duty to investigate the truth of those statements and did not constitute a fraudulent misrepresentation.[3] While there are circumstances under which puffing would be actionable,[4] this practice is generally acceptable and must be considered if new standards of care are imposed on licensees. The buyer should not be entitled to rely on puffing.

The Florida legislature has codified the concept that buyers should not rely on oral representations in real estate-related statutes. The condominium statute requires condominium developers to include the following statement in conspicuous type in all prospectuses or offering circulars:

> *3. ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE*

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[3] Id. at 413. Cf. United States v. Pearl Stein, 576 F.2d 531, 540 (3d Cir. 1978) (statements that the company is "nationally known" and that the product "among the finest...in the world" are not cognizable under the federal mail fraud statutes).

[4] See Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (Fla. 2d DCA 1968) (a statement of opinion may be treated as one of fact when there is a fiduciary relationship between the parties, when there has been some artifice or trick employed by the representor, when the parties do not in general deal at "arms length", or when the representee does not have an equal opportunity to determine the truth or falsity of the fact represented).

> *REPRESENTATIONS OF THE DEVELOPER.* REFER TO THIS PROSPECTUS (OFFERING CIRCULAR) AND ITS EXHIBITS FOR CORRECT REPRESENTATIONS.

§ 718.504, Fla. Stat. (1995) (emphasis added). A similar statement appears in the cooperative unit sales statutes. See § 719.504(1)(b)3, Fla. Stat. (1995). This statutory notice is consistent with the practice of all prudent consumers to obtain all important representations and promises in writing and with standard contract clauses relieving both parties from responsibility for representations made prior to contract.

Florida's Attorney General is bound to enforce Florida law, which presumably would preclude action by a condominium buyer on an oral representation of a developer or developer's agent that was contradicted by the written prospectus. Yet, in his brief, the Attorney General opines that a buyer should be able to rely on such oral representations. He sounds the alarm that precluding an action for fraud in the inducement under the economic loss rule "effectively extends contract remedies back to a time before a contract existed," injecting "a non-bargained-for term into a later contract." Br. Att'y Gen. at 7. He also states that standard forms used by local real estate licensees are very unlikely to put a buyer on notice that tort

claims based on pre-contract misrepresentations are waived as a matter of law; however, the most widely used forms in the state contain clear statements that "no prior or present agreements or representations shall be binding ... unless included in this Contract."[5] When the buyer includes these terms in their offer, they

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[5] The Florida Bar and the Florida Association of Realtors, FAR/BAR Contract for Sale and Purchase, Standard V (1995); see Florida Association of Realtors, FAR Residential Sale and Purchase Contract, ¶13 (1995). See also, Dade County Association of Realtors, Contract for Sale and Purchase, ¶ 30 (1995) ("This Contract ... sets forth the entire agreement between Buyer and Seller and contains all of the covenants, promises, agreements, representations, conditions and understandings."); Jacksonville Beaches, Clay County and Ponte Vedra Associations of Realtors, Deposit Receipt and Purchase and Sale Agreement, ¶ 20 (1995)("there are no agreements, promises or understandings between these parties except as specifically set forth herein"); Naples Area Board of Realtors, Marco Island Board of Realtors and Collier County Bar Association, Naples Area Board Of Realtors Contract, ¶ 25 (1995) ("Buyer's decision to buy was based upon buyer's own investigation of the property and not upon any representation, warranty, statement or conduct of the seller, or broker, or any of the sellers or brokers agents. All representations and warranties, if any, must be written into this contract; otherwise, there are none.").

It should be noted that the opinion to which the Attorney General cites in support of his propositions, Op. Att'y Gen. Fla. 96-20 (1996), criticized the FAR contract for putting the buyer on notice through the use of clear language and bold type that "Except for brokerage agreements, no prior or present agreements or representations will bind Buyer, Seller or Broker unless incorporated into this Contract" and for including a negotiable clause, consistent with the economic loss rule, that the buyer will not hold the real estate broker liable for the broker's representations regarding the property's condition. It should also be noted that the

are charged with knowing terms of the offer and should not be able to later recover damages in contradiction to the terms of their own contract.

If intentional torts become actionable despite the economic loss rule, making an exception for nonparties who have relied on the statements of a party is even more compelling in light of the ability of the state to protect the public interest in cases of even innocent misrepresentation. If this Court exempts from tort liability a non-party real estate licensee who justifiably or in good faith relies on the statements of the seller when making representations regarding the property, the public interest against false representations will still be served through state disciplinary action. A state-regulated real estate licensee is strictly liable to the State for representations made in violation of the license law. Discipline of licensees is not dependent upon any court action or inaction. Under section 475.25, Fla. Stat. (1995), the Florida Real Estate Commission imposes sanctions on any real estate licensee who:

Attorney General rendered his opinion 96-20 after this Court granted him leave to file an amicus brief in the Woodson case. The Attorney General then enjoyed the singular luxury of issuing an opinion that he could cite to in his own brief as authority in support of his opinion.

> "**(b)** Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.
>
> **(c)** Has advertised property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content."

FREC's role of imposing sanctions "upon an errant broker or salesman obviously [is] necessary to protect the public because of his peculiar legal status and duties." Florida Real Estate Commission v. McGregor, 336 So. 2d 1156 (Fla. 1976). Unlike civil litigation between two private parties, disciplinary proceedings against a real estate broker involve the public interest and should be dealt with as such. (See, e.g., Curry v. Shields, 61 So. 2d 326 (Fla. 1952); Shelton v. FREC, 120 So. 2d 191 (Fla. 2d DCA 1960). From a business perspective, real estate licensees are generally far

more concerned about disciplinary action by FREC, which could result in the loss of their livelihood and professional reputation (which in real estate is crucial) than with civil liability, which only costs them or their insurance company money. Disciplinary actions are reported by FREC in a newsletter, the *FREC News and Report*, sent to all Florida real estate licensees. While other news of interest is also reported, licensees generally read the disciplinary section first to see if anyone they know has violated the license law. Since a great deal of the real estate business consists of networking and referrals, having one's name appear in the FREC Report is considered highly embarrassing and damaging to one's business and reputation. In addition to appearance in the industry publication, the results of disciplinary proceedings are public record. Anyone may call the Division of Real Estate and find out whether a particular licensee has been disciplined. Because the real estate business depends so highly on referrals and personal reputation, the public infamy that results from being disciplined by FREC is sufficient motivation for most licensees to work very hard to comply with the law. If this Court interprets the economic loss rule as precluding litigation against nonparty licensees who make a

misrepresentation in justifiable reliance on the seller, the purpose of the economic loss rule will be served without diminishing the interest of the public against any type of misrepresentation in a business transaction.

Real estate licensees who do not reside on the property cannot be intimately familiar with all of the past and present problems associated with the property. Instead, they, like the buyer, must rely on statements of the seller and facts that they can readily observe. If this Court accepts the arguments of Woodson and his amici, justified reliance on a seller's lies may result in personal liability to the nonparty licensee. This is unfair because the elements of knowledge and intent that are necessary to sustain a cause of action for fraud in the inducement are missing when a licensee must rely on the seller's statements and has no reason to believe the statements are false. To require a real estate licensee to be an expert on building construction or pest infestation so that he or she could discern the truth of the seller's representations regarding the property would go beyond the state-prescribed capabilities and requirements of a real estate licensee. While the trial attorneys' argument may be sensible in a situation where the

person is making a statement based upon his or her personal knowledge, it is inappropriate in a context where the licensee must rely on the statements of one who is in a better position to know the truth or falsity of the representation. Instead, the Slitor rationale should be extended to protect the real estate licensee who does not live in a home that he or she has listed for sale and must rely solely on the seller's representations and conditions that the licensee can readily observe and the economic loss rule should preclude suits against nonparties who commit torts in reliance on the statement of a party.

II. STATEMENTS BY A REAL ESTATE LICENSEE CONCERNING THE VALUE OF A PROPERTY OR IN REGARD TO ITS QUALITIES AND CHARACTERISTICS ARE STATEMENTS OF OPINION AND ARE NOT REPRESENTATIONS THAT ARE ACTIONABLE IN FRAUD.

To prevail on a claim of fraud in the inducement, a plaintiff must prove justifiable reliance on a false statement of material fact by one who knew the statement was false and intended the listener to rely on it. Woodson cannot prevail on his claim because the statements he allegedly relied on were statements of opinion and because a party who relies on a misrepresentation must prove that it exercised some diligence in investigating the misrepresentation. Statements of opinion are not actionable in fraud under the law relating to sales puffing unless the maker had a fiduciary or confidential relationship with the representee, had exclusive or superior knowledge or prevented further investigation of the facts underlying the statement. Adams v. Prestressed Systems Industries, 625 So. 2d 895, 897 (Fla. 1st DCA 1993). None of these exceptions is present in this case.

In addition, such statements by real estate licensees are not violations of Chapter 501, Part II, Fla. Stat. (1995). Contrary to

Woodson's assertion, real estate licensees are not subject to Florida Statutes regulating Deceptive and Unfair Trade Practices. § 501.212(5), Fla. Stat. (1995). The acts of fraud and mispresentation are covered under section 475.25(1)(b), Fla. Stat. (1995), and any violation of 475.25(1)(b) is prohibited under section 475.42(1)(f), Fla. Stat. (1995). Therefore, there is no statutory duty to breach under chapter 501, Part II, Fla. Stat. (1995).

A. Real Estate Licensees Are Not Educated, Trained or Tested in Building Construction or Wood-Destroying Organism Detection and Their Statements Regarding Such Matters Are Statements of Opinion.

Some of the statements upon which Woodson claims justifiable reliance concerned claims that the home was well-built and of quality construction. Martin allegedly discussed the value and quality of construction, the condition of the property, the absence of any history of water leakage, that the roof had not been repaired since completion of construction, that the stain on the bedroom ceiling was champagne, that the mismatched paint on the window was the result of the seller finishing a painting job herself and that

Martin had substantial personal knowledge of the home because she had seen it constructed and had frequently visited the property after its completion. (Woodson Aff. at 1, 2, 11). Woodson makes no claim that Martin ever represented herself as a licensed contractor. However, he claims that her statements that she was knowledgeable about the relative quality of several area builders' workmanship, had broad background of experience in the industry and had observed the quality construction of the particular home made him believe she had superior knowledge.

As long as a real estate licensee makes no claim to being a licensed contractor or certified pest control operator, who would be expected to have superior knowledge of a particular condition, the real estate licensee's statements regarding property quality or characteristics in such specialized matters should be regarded as statements of opinion. To become a real estate licensee in Florida, one must be at least 18 years of age, hold a high school diploma or its equivalent, be honest, truthful, trustworthy and of good character, have a good reputation for fair dealing and complete an education course prescribed by the Florida Real Estate Commission. § 475.17, Fla. Stat. (1995). The pre-licensing education course

consists of the basic fundamentals of real estate principles and practices, basic real estate law and real estate license law. The course covers such topics as real property rights and forms of ownership, real estate contracts, title transfer, title insurance, closing and escrow, brokerage, real estate financing and ownership. Fla. Admin. Code R. 61J2-3.008. There is no training on or testing of the licensee's knowledge about building quality and construction or about pest control or inspection. If the prospective licensee passes the end-of-course examination on these topics and is otherwise acceptable to FREC, he or she will receive a real estate license.

Chapter 475 regulating real estate licensees does not require any training or education to assist licensees in determining the condition of a house. Persons who are considered to be qualified to render opinions on property condition are regulated under Chapters 489 and 482 of the *Florida Statutes*. Chapter 489, *Florida Statutes*, requires licensure for persons engaged in building, roofing, heating, cooling, plumbing, electrical, mechanical, pool and spa and septic tank construction, servicing and repair. Even persons who sell contracting services must be licensed under Chapter 489. Chapter 482 regulates persons who engage in pest control in Florida. The

term "pest control" includes the "identification of or inspection for infestation or infections in, on, or under a structure, lawn or ornamental." § 482.021(20), Fla. Stat. (1995). Other than persons who are licensed under Chapters 489 or 482, persons who hold themselves out as being in the business of home inspection would also be considered as persons who could render a superior opinion. Licensees have no way of knowing any more than a consumer whether the construction is faulty or whether there are wood-destroying organisms hiding within the walls; in fact, it is probable that many sellers would not know this information. Typically, real estate licensees are relying on statements given to them by the sellers when making claims relating to the property condition. Unless a real estate licensee claims to be qualified under Chapters 489 or 482, or claims to be a professional home inspector, any statements regarding matters that are regulated by these statutes should be considered unactionable statements of opinion.

Statements of opinion can become actionable where the representor has exclusive or superior knowledge to that of the representee. A real estate licensee who does not hold a specialized license, has not lived in the property and must rely on the

statements of a seller regarding property condition who is required by Johnson to disclose all facts that materially affect the property value has no more exclusive or superior knowledge of the property than does the buyer. If Martin had claimed she was a licensed building or general contractor, or a professional home inspector, her statements could be considered worthy of reliance. The public is charged with knowing the laws of the State. Buyers should be expected to be able to discern the difference between statements made by a person who are licensed experts in the field and statements made with an eye to a sale. Since Martin did not hold a contractor's license or hold herself out as a professional home inspector, she could not have exclusive or superior knowledge of the property condition. Without exclusive or superior knowledge on the part of the representor, a party who relies on a misrepresentation must exercise diligence in investigating the misrepresentation.

Even though Woodson purports belief in Martin's representations and expertise, he went ahead and included inspection rights in his offer. He utilized a standard form contract that limits the seller's responsibilities regarding the property condition and provides that the buyer must inspect the property to

enforce those warranties. Yet, Woodson appears to claim that the contract and its inspection and warranty provisions were unfair. Woodson used the standard FAR/BAR Contract for Sale and Purchase. This contract, prepared jointly by the Florida Bar and the Florida Association of REALTORS® has been in existence for more than 20 years. The provisions of the contract are approved by officials at the highest levels of each organization. The purpose of the FAR/BAR contract is to create a contract in which both buyers and sellers are equally protected, and for years has been considered the standard by which to judge all real estate contracts in the state of Florida. Hundreds of thousands of real property sales transactions have been closed using this contract. When a member of the public enters into a real estate transaction using the FAR/BAR Contract, that person will enjoy the benefit of extensive, time-tested provisions setting forth the responsibilities of both the buyer and the seller regarding the condition of the house.

The general function of a contract's inspection and repair clauses is to define the property conditions covered by the seller's warranty and to give the buyer the opportunity to inspect and require repairs pursuant to the warranty. Woodson's offer contained

not one, but two inspection opportunities — one for termite infestation and related damages and one for verification that the property meets the seller's contractual warranty. It clearly contemplated the possibility that the property may have termite infestation or damage and that certain items may not be the condition warranted. It provided a remedy, including the right to have these items inspected and repaired. While Woodson argues that he was prevented from having an inspection, it appears from his brief that the only time he attempted to discuss inspections was before and after the contractual inspection period. Woodson's failure to obtain contracted-for inspections is not justification for reliance on a statement of opinion or even on a misrepresentation. If a buyer bargains for inspection rights, then chooses to ignore the rights, the buyer should not be able to claim justifiable reliance on any pre-contract representations that could have been verified by the exercise of those rights. There will always be people who make bad business decisions — the law should not protect these individuals from their own poor judgment.

Standard D governs termite inspections. This clause gives the buyer a chance to have a Florida Certified Pest Control Operator

inspect the property for termite infestation or existing damage from infestation. If either or both are found, the buyer may inspect again for the purpose of having a licensed or general contractor estimate all damages due to termites, whether visible or not. The offer that Woodson made to the sellers gave him until 5 days before closing (the time for delivery of title evidence) to conduct such inspections. Woodson's brief and supporting affidavit contain no claim that he conducted a termite inspection or that he sought names of Certified Pest Control Operators or licensed builders or general contractors from the seller's agent for the purpose of conducting a termite inspection. Even though he failed to conduct the inspection that he bargained for, he now seeks damages from the seller's agent because she allegedly failed to tell him that the property was so infested and damaged.

Standard N contains the seller's warranty that "as of 10 days prior to closing, the ceiling, roof (including the fascia and soffits) and exterior and interior walls do not have any VISIBLE EVIDENCE of leaks or water damage and that the septic tank, pool, all major appliances, heating, cooling, electrical, plumbing systems and machinery are in WORKING CONDITION." The buyer is given

the option of having inspections of those items made "by an appropriately Florida licensed person dealing in the construction, repair or maintenance of those items. ..." The buyer must report in writing to the seller any items that do not meet the seller's warranties "as to defects together with the cost of correcting them, prior to the Buyer's occupancy or not less than 10 days prior to closing, whichever occurs first. Unless Buyer reports such defects within that time Buyer shall be deemed to have waived Seller's warranties as to defects not reported." The clause then requires the seller to make appropriate repairs or replacements.

Both of these clauses places the buyer on notice that a licensed professional is necessary to make proper determinations regarding property condition matters. Woodson argues that he did not obtain a home inspection for two reasons: first, because the seller's agent advised him prior to contract that no inspection was necessary, (See Woodson Aff. at 6), and second, because the seller's agent did not, after contract, provide him with the names of any home inspectors, (See Woodson Aff. at 12-15).

While Woodson argues that he relied on the assurance that no inspection was necessary, he did not delete the contractual

inspection rights of Standard N from his offer in reliance on those assurances. In fact, Woodson continued to question the sellers' agent about the condition of the property while he waited for the sellers to accept his full price offer. He had several opportunities to change the terms of his offer or to walk away from the transaction without penalty. First, when the sellers failed to respond to his offer within the time frame he specified; second, when the sellers returned not a signed contract but a counter offer. The sellers inserted a new closing date in Woodson's offer. Such a change is normally considered a counter offer and would have given him a chance to reject the contract, but he apparently was satisfied with its terms and with the bargain he had made.

Woodson also argues that he could not inspect the property because Martin failed to give him the names of any inspectors. The completed contract contained a bargained-for agreement that the seller warrant certain property conditions, which Woodson could inspect anytime up to 10 days before closing. While he claims he repeatedly asked the seller's agent about the inspectors, nothing prevented him from obtaining inspector names from the licensee with whom he was working, from friends or acquaintances or from

the telephone book. Since Woodson received the agreement on August 6 with a closing date of September 15, he had approximately a month in which to schedule the inspection in accordance with the contract. His brief is strangely silent about events that transpired during the time allowed for his inspection. After the inspection period expired, however, his wife told the seller's agent "that there would be no deal without an inspection" (Woodson Aff. 13). While Woodson's brief and affidavit focus on the sellers' and Martin's lack of cooperation in permitting an inspection before and after the inspection period, the documents do not address why Woodson did not pursue the inspection during the time allowed under the contract or why he did not follow the advice of his broker, who advised him that the property had an apparent leak and should be inspected. (Woodson Aff. 5). When he tried to schedule an inspection after the inspection period passed, it was Martin's duty to tell him that he no longer had the right under his contract to conduct the inspection.

Florida law recognizes the importance of holding the parties to a contract to the exercise of ordinary diligence. In Steinberg v. Bay Terrace Apartment Hotel, 375 So. 2d 1089 (Fla. 3d DCA 1979), and

Welbourn v. Cowen, 104 So. 2d 380 (Fla. 2d DCA 1958), the courts held that even when there is a misrepresentation, it is not actionable where the truth might have been discovered by the exercise of ordinary diligence. When a buyer has a contractual right to have property inspected, ordinary diligence would dictate following through with that right; therefore, even a deliberate misrepresentation should not be grounds to rescind a contract under those circumstances. Under Adams, Steinberg and Welbourn, Woodson's lack of diligence in holding the inspection he contracted for should bar his claim against Martin.

B. Real Estate Licensees Are Qualified to Give Opinions of Value, but Are Not Trained, Tested or Required to Make Appraisals that Meet Any Particular Standard of Reliability.

Part I of Chapter 475, *Florida Statutes*, permits a real estate licensee to appraise property, but does not establish any standards or guidance about how to form an opinion of the value of real property. Part II of Chapter 475, *Florida Statutes*, regulates certified, registered and licensed appraisers. It imposes specific requirements on those who desire to provide appraisals for lending

institutions and others who desire an appraisal based on national valuation standards. Persons who are licensed under Part II are referred to as "appraisers" as opposed to persons who are licensed under Part I as brokers, broker-salespersons and salespersons.

Section 475.611, Fla. Stat. (1995), defines an appraisal as the services provided by certified, licensed or registered appraisers who render "an unbiased analysis, opinion, review, or conclusion relating to the nature, quality, value, or utility of specified interests in, or aspects of, identified real property." Appraisers must follow the Uniform Standards of Professional Appraisal Practice (USPAP), which are standards developed by the national Appraisal Foundation.

One of the primary tasks of a listing agent is to establish the market value of the home. The appraiser law specifically permits real estate brokers and salespersons to, in the ordinary course of business, perform a comparative market analysis and/or give an opinion of the value of real estate. § 475.612(2), Fla. Stat. (1995). This is usually accomplished by looking up recent sales figures for comparable homes in the area, taking into account any features that make the subject home unique. However, the opinion of a non-

appraiser may not be referred to or construed as a "certified appraisal," nor may it constitute an appraisal report in connection with any federally related transaction.[6] § 475.612(1), Fla. Stat. (1995). A real estate licensee who is not a certified appraiser may give an opinion of value, but it is just that — an opinion.

Opinions of individuals differ. Even though Martin's opinion of the home's value was the same as that of an appraisal firm, Woodson claims she misrepresented the value. Pet'r. Br. at 5. Real estate licensees who list property are obligated to establish the asking price that they believe the market will bear. If a certified appraisal is involved, valuation standards are set by the State of Florida, but opinions of value by real estate licensees who are not appraisers are not subject to specific standards. While legislation that would clarify this matter has been proposed, the Florida Legislature has not seen the situation as one that needs to be

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[6] A "federally related transaction" is defined under the appraisal statutes as "any real estate-related financial transaction which a federal financial institution's regulatory agency or the Resolution Trust Corporation engages in, contracts for, or regulates, and which requires the services of a state-licensed or state-certified appraiser." § 475.611(1)(j), Fla. Stat. (1995). This definition currently encompasses most transactions on property with a sales price of $250,000 or more.

addressed.[7] At present, real estate licensees in Florida may use any method they desire to come up with their personal opinion of value for real property.

Statements by seller's agents concerning the value of a property, even if false, are statements that the customer should and could easily confirm on their own from readily available external sources. On April 16, 1996, the United States Court of Appeals, ruling in United States v. Brown, 79 F.3d 1550 (11th Cir. 1996), overturned fraud convictions based on such statements. The appeal came from the United States District Court for the Southern District of Florida, which held that the defendants, who were officers of General Development Corporation (hereinafter referenced as GDC), were guilty of defrauding and conspiring to defraud home buyers. [8] The conviction was based on GDC's practices of selling, to customers residing in the "snow belt states," southern Florida homes at prices significantly higher than those of non-GDC homes in the same neighborhood. See Id. at 1554.

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[7] The proposals would have required all Chapter 475 licensees to comply with the USPAP standards when determining property value.
[8] GDC itself pled guilty to fraud. 79 F.3d 1550 (11th Cir. 1996)

As part of its plan, GDC did not inform consumers that they were paying more for homes that were largely identical to the homes next door. Instead, GDC salespeople told buyers that the homes were safe investments when, in truth, due to the price disparity, GDC homes were not good investments. Id. The testimony against the officers showed that GDC agents would drive alternate routes to their property to avoid competitors' signs, remove competitors' real estate literature from the guest rooms where GDC prospects stayed at GDC's expense and have their employees eat dinner with and escort the buyers around the Florida location to avoid interaction with competitors. See Id. at 1561.

As a criminal case, the Brown court could review the evidence only to determine whether a reasonable juror could find guilt beyond a reasonable doubt. The evidence had to be viewed in the light most favorable to the government with all reasonable inferences drawn in favor of or supporting the verdict. Id. at 1555. (citing U.S. v. Fundt, 896 So. 2d 1288 (11th Cir. 1990)). The appellate court took as a fact that the defendants instituted, continued or altered official GDC programs with the intent to disguise the investment potential of GDC homes. Id. at 1556.

Even with those standards, the appellate court threw out the convictions. The court recognized that a reasonable person is permitted to rely on the recommendations of a particular person when there is a special relationship of trust, such as fiduciary relationship between the parties. Id. at 1557. But, it found that no fiduciary relationship or special relationship of trust had been established between the buyers and sellers or seller's agents. This is the same situation as the Woodson case, in which there was no fiduciary duty between Woodson, as the buyer, and Martin, as the seller's agent. The Brown Court pointed out that there is no general affirmative obligation to disclose the sales price disparity between the seller's house and the competitor's house. Id. at 1558.

Despite the blatant acts, the court concluded that

> [R]easonable jurors could not find that a person of ordinary prudence, about to enter into an agreement to purchase a GDC home in Florida, would rely on the seller's own affirmative representations about the value or rental income of the GDC homes. Therefore, a "scheme to defraud" within the meaning of the federal criminal statutes has not been proved.

Id. at 1559. Such representations, even if false, were statements that the customer should and could easily confirm on their own from readily available external sources. In addition, the court found that

this matter did not fall under the statutory exception for "sale of distant property," where the buyer has no chance to investigate the property's condition and value, because the GDC buyers had the chance to visit the property before purchasing and to investigate the property's condition or value. Id. at 1560. While this case clearly deals with a federal cri,minal statute, the principles upheld by the Brown court are appropriate in the Woodson case.

Martin gave her opinions regarding the property condition and value prior to Woodson making an offer. She did not claim to be a licensed or certified professional in these areas. Woodson, having heard her statements, included inspection rights in the offer. Given the terms of his own offer, he cannot justify reliance on her opinions. When a contract specifies that certain items of the house must be in a particular condition, explains what that means, provides for a right to have the property condition inspected and requires that representations be reduced to writing, a buyer who chooses to ignore all these contractual provisions should not be rewarded. If the buyer is unable to read and understand the basic purchase contract, he or she should hire an attorney to explain his rights. There will always be people who make bad business decisions

and the law cannot and should not protect these individuals from their own poor judgment.

C. The Real Estate License Law Prevents Unwarranted Reliance by Consumers on the Statements of Licensees by Identifying Whether or Not the Licensee Holds a Confidential Relationship With the Consumer.

In Florida, licensees may work as seller's agents, buyer's agents, dual agents or transaction brokers.[9] Agents are considered fiduciaries of their principal with all the attendant duties of loyalty, confidentiality, disclosure, accounting, notice and the use of skill, care and diligence. Exercise of these duties in favor of the principal may be adverse to the interest of the other party in the transaction. The other party is owed a duty of fairness and honesty, but the agent is under no duty to protect or promote the interest of that party.

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[9] Transaction brokers do not represent either party as agent and have no fiduciary duties other than the duties of accounting and use of skill, care and diligence. Transaction brokers must treat both parties honestly and fairly and must disclose to each party all known facts materially affecting the value of the property. Section 475.01(1)(k), Fla. Stat. Transaction brokers disclose their role to the parties either prior to acting as a transaction broker or before first substantive contact, which is defined the same as for seller's agents disclosing to buyers. § 475.25(1)(q), Fla. Stat. (1995) and Fla. Admin. Code R. 61J2-10.037.

Agency relationships in real estate are evolving, with more and more real estate licensees working as buyer brokers in recent years. Buyer brokers help their clients find suitable properties, advise them as to market value, help them negotiate their contract and see the transaction through to closing. To enable consumers to understand the different relationships and avoid confusion, all licensees are required to disclose their agency or transaction brokerage status in writing at the time of first substantive contact with any person with whom the licensee has not established an agency relationship. § 475.25(1)(q), Fla. Stat. (1995).

Agency status disclosure is made on a form prescribed by the Florida Real Estate Commission. The Commission crafted the form to ensure that buyers and sellers know, before writing a contract or revealing confidential information, whom a licensee represents and what type of representation is available. It ensures that a buyer understands that the seller's agent represents and is loyal to the seller's interest. See § 475.25(1)(q), Fla. Stat. (1995); Fla. Admin. Code R. 61J2-10.036.

Under Florida Admininsitrative Code Rule 61J2-10.036(2)(a), seller's agents must make their disclosure to the buyer before or just immediately prior to the first of any of the following events:

> **1.** Showing the property.
> **2.** Eliciting confidential information from a buyer concerning the buyer's real estate needs, motivation, or financial qualifications.
> **3.** The execution of a contractual offer or lease agreement by the buyer.
> **4.** For the seller's agent, first substantive contact shall not include:
>
> **(I)** A bona fide "open house" or model home showing which encompasses (2) (a) 1. above only; however, whenever an event described in (2) (a) 2. or (2) (a) 3. above occurs, disclosure must be made.
> **(II)** Preliminary conversation or "small talk" concerning price range, location and property styles.
> **(III)** Responding to general factual questions from a prospective buyer concerning properties which have been advertised for sale or lease.

Buyer's agents have similar disclosure duties to the seller and seller's agent.[10]

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[10] In the case of a dual agent, the legislature has limited the duty of full disclosure to the parties by providing that, unless otherwise instructed in writing by the appropriate party, the dual agent will not disclose that the seller will accept a price less than the asking or listed price, that the buyer will pay a price greater than the price submitted in a written offer, the motivation of either party for selling, buying or leasing the property, or that either party will agree to financing terms other than those offered. Both parties must sign state-prescribed Dual Agency Consent and Dual Agency Confirmation forms prior to contract. § 475.25(1)(q), Fla. Stat. (1995).

Although the disclosure rules and law were different at the time Woodson purchased his home, it is clear that he was represented by a broker. His father was a licensed real estate broker in another state and referred him to a Tampa area broker whom Woodson retained to represent his interest. (Woodson Aff. 1). Buyer's agents do not have fiduciary duties to the seller and are expected to use their skill to help advance the buyer's position to the detriment of the seller. If a buyer's agent breaches his or her fiduciary or contractual duty, the buyer has a contractual cause of action against the agent.

In their amicus brief, the American Association of Retired Persons and the Consumer Federation of America theorize that if buyers do not have an agent representing them, they are at a disadvantage. While that might be true, the consumer has the choice to obtain or not obtain representation in a real estate transaction. If a buyer chooses not to be represented by an advocate and is by that choice placed at a disadvantage, then the buyer should expect to live with the results of that choice rather than attempting to hold the seller's agent responsible for looking out for his or her special interests.

Conclusion

The economic loss rule should be kept intact to prevent tort liability arising from contractually-based transactions. However, if lawsuits based on intentional torts are permitted, an exception should be carved for a nonparties' justifiable reliance on a party to the contract. Real estate licensees are hired to bring the parties together and negotiate a sales transaction. They do not have the training to be considered experts on property condition, and must rely on what they are told by either sellers or experts. Their statements regarding property condition and value should be considered nonactionable statements of opinion. Consumers have the opportunity to hire appropriate experts and make independent investigation to verify all oral representations regarding a property. They have the ability to place their concerns in the contract and provide for contractual protection. For these reasons, the economic loss rule should not be utilized to protect the nondiligent consumer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail on this 8th day of May, 1996 to the persons listed below.

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