IN THE SUPREME COURT OF FLORIDA

KIRK A. WOODSON,

Petitioner,

vs.

WILMA MARTIN, and MACLEAN REALTY, INC., a Florida corporation,

Respondents.

_____/

Case No. 87,057

ON CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

JEFFREY N. KRAMER, ESQ.
FL BAR NO. 354287
The Walnut Building
24 West Third Street
Suite 312
Mansfield, Ohio 44902
(419) 522-7474
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL AUTHORITIES

INTRODUCTION

References in this Reply Brief will be the same as those in Petitioner Woodson's Initial Brief, as set forth in its introduction. In the course of rebuttal argument Respondents' answer brief will be referred to by page and the abbreviation (AB). References to the answer brief's appendix will be designated (RA) References to Petitioner's initial brief will be by page and the abbreviation (IB) and to its appendix as (App.).

CORRECTION TO RESPONDENTS' STATEMENT OF FACTS

Respondents' answer brief misstates two significant facts.

The AB, pg.4, states that omissions are the sole basis of Dr. Woodson's fraud claims against Respondents. To the contrary, it is a number of affirmative misrepresentations, detailed in the Amended Complaint and the affidavit of Dr. Woodson, attached as appendices to the initial brief and answer brief, respectively, that form the basis of Dr. Woodson's claims for fraud in the inducement against Respondents.

The AB, pg.5, states that Dr. Woodson discussed his contractual right to have an inspection of the property with his attorney prior to the closing. This is false. The actual excerpt of deposition testimony demonstrates that on the day of the closing, Dr. Woodson and attorney Watson discussed getting an inspection of the property after the closing. Although the discussion took place just before the closing, the testimony does not suggest that they were discussing contractual provisions for inspection at all. (RA 86-88)

SUMMARY OF ARGUMENT

Four of Respondents' arguments in their Answer Brief, referenced herein by the same Roman Numeral and Capital letter headings as in the answer brief, are addressed in this Reply:

I.B. This court's own strong pronouncements on the necessity for for allowing redress for fraudulent conduct were addressed in Respondents' initial brief. Additional sound public policy reasons for distinguishing between intentional torts and negligence in the application of the economic loss rule are briefly discussed.

I.C.1 Petitioner has damages distinct from those recoverable under any contract/warranty theory against the sellers. These damages arise as a consequence of Respondent Martin's own expert representations about her personal intimate knowledge of the history and quality of construction of the property, its value, and the "new" status of the property.

The value opinion was represented as fact because coupled with representations of expertise and superior knowledge.

The "new" opinion carried legal significance because, according to the defense raised by the sellers to the implied warranty claim still pending against the sellers, only a "new" property is protected by Florida's recognized implied warranty of habitability.

Damages related to repairs, services, or value lost due to defective construction and latent defects in the residence, many of which are distinct from defects addressed in clause N or facts "known to the Seller" under clause W of the sales contract, are not or may not be damages recoverable under the implied warranty of habitability that Martin's representations led Dr. Woodson to believe he would enjoy.

I.C.2 The misrepresentations on which these claims are based are separate and distinct from the contract claims. Although Petitioner's initial brief addresses this issue, additional conditions distinguishable from any contractual warranty protections are explained.

VII. Statements of opinion, even as to value, are actionable fraud under the circumstances presented. Respondents misrepresent or fail to comprehend the timing of the misrepresentations in relation to the formation of the contract. Although an offer was advanced earlier, the contract was not signed and returned, and was thus not binding on either party, until August 6, 1989, by which time all material misrepresentations had been made.

ARGUMENT

I.B. THERE ARE POWERFUL JUSTIFICATIONS FOR LIMITING THE APPLICATION OF THE ECONOMIC LOSS RULE.

A passage from the court's opinion in Besett v. Basnett, 389 So. 2d 995 (Fla. 1980) framed the policy issue plainly:

> "A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two - fraud and negligence - negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresentator." 389 So. 2d at 998.

Why is it so important to our modern society that redress for fraud remain an enforceable legal right? We live in an age of daily commercial dealings between persons who rarely know much about the other party to the transaction through reputation or family history. People move to pursue their livelihoods far from neighborhoods where the history of conduct, character, and financial position of those around them are comfortable, often reliable indicators steering their prudent selection of reliable business people. College, employment, business opportunities, and retirement cause us to relocate among strangers. It is now more the rule than the exception in our daily lives that we do business with complete strangers.

In this society where we must deal with strangers in our most important commercial transactions, preventing unfair economic advantage by fraudulent conduct is a compelling public interest. In reality, contract

terms are often neither freely negotiated nor adequately protective for such misconduct.

Facing responsibility for fraudulent conduct is an important responsibility of our legal system. The basic justification for imposing the will of law upon a society is to set and enforce rules that protect people in their person and their property. Fraud in the inducement is intentional misconduct that can cause tremendous harm, even financial ruin. It can be used to take unfair advantage in almost any economic transaction. Our legal system fails if it expands application of the economic loss rule to effectively immunize fraudulent misconduct from protection by the courts.

The public policy of preventing oppressive economic harm through the vehicle of the fraudulent misrepresentation cause of action is a powerful moral justification for our legal system. We believe in the necessity of a society that submits itself to be ordered and to seek redress through the operation of law. If we carelessly discard the protection of the law for those victimized by such serious misconduct as fraud, we fail that principle. If we allow those ruined or bankrupted by fraud no redress in law, then we can anticipate that some will take the law into their own hands. The economic loss doctrine has no justification that outweighs this basic public policy and social truth.

In the circumstances at hand, if the economic loss rule were to be applied to bar fraudulent inducement claims against a non-party to a contract, it would provide a ready legal vehicle to the unscrupulous in real estate transactions: Sellers could use willing realtors to employ whatever misrepresentations are needed to obtain the signatures of unwitting purchasers on sales contracts. The non-party realtors would be the "foil"

on the seller's sword, deflecting the blow of the sword of justice. The realtor would be immune from tort or contract liability. Sellers would claim that the realtor acted outside of the scope of agency. Realtors would be recognized as sellers' "Teflon" coating. What costly mechanism could the state implement to police the realtors if our legal system renders itself impotent to redress intentional fraudulent inducement of purchasers?

I.C.1 PETITIONER HAS DAMAGES DISTINCT FROM THOSE RECOVERABLE UNDER ANY CONTRACT/WARRANTY THEORY AGAINST THE SELLERS.

Some representative examples of extra-contractual damages resulting from the independent fraud of the realtor are discussed in Petitioner's initial brief. There are, however, several additional damage items that are also separate and distinct from matters addressed or for which no remedy existed in these parties' contract.

Additional extra-contractual damages flowing from Respondents' fraud

The Sheas and their agent, Martin, knew or were on notice of the damage to the master bedroom ceiling from the roof leaks. Indeed, repair records attached to Petitioner's affidavit show two separate invoices for roof repairs to the residence. The Sheas likely also knew of the rotting wood in the windows if the evidence of Julie Shea's repainting the windows to cover up the rot is true. However, many other identified defects in this property that can be clearly established as sub-standard construction may not have been known to the Sheas.

The Sheas, as general contractors, might not have known of all the latent construction deficiencies with the residence. Some might have been

concealed from them by independent subcontractors in the various trades. Without knowledge, liability against them under the contract just will not lie. A residential property need not be of highest quality or perfect to be habitable, so even the implied warranty does not protect Petitioner from much of the loss suffered from reliance on the realtor's outrageous misrepresentations.

Respondent Martin made representations of her own expert qualifications to judge the quality of the construction. Martin represented close enough observation of the home during construction that she could and did make written and verbal warranty of its excellence in construction "throughout". Martin actively and very directly encouraged Petitioner and his wife to rely on her representations as to value, high quality of construction, and excellent condition.

Clause N of the contract addresses only visible water damage, not hidden or latent water leaks. It addresses appliance, machinery, and plumbing defects. It does not address or encompass within its terms the vast majority of latent structural defects detailed within the Second Amended Complaint.

Clause W's warranty addresses only facts suggesting defects that are known to the sellers. Unknown facts or undiscovered construction defects are outside of its terms. The defects set forth in paragraph 63(c), (d), (e), (f), (g), (h), (i), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v) and (y) of the Second Amended Complaint are therefore distinct from the contract protections and attributable to the fraudulent misrepresentations of Respondents Martin and MacLean Realty, Inc.

The misrepresentations about the condition, quality, and character of the house as a "new" residence likewise find no remedy or reference in the contract. The house was represented as "new" in Martin's published flyers on the house and her oral representations to Petitioner during the course of negotiations. That description carries legal significance. Defendants Michael and Julie Shea have asserted that the implied warranty of habitability that provides some measure of protection to purchasers of "new" houses is limited to the first occupant of the house. Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA 1972). Petitioner has argued that Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983) extends the implied warranty of habitability to first purchasers of completed houses bought from the builder/vendor, not merely the first occupant.

If the Sheas prevail on that defense, Petitioner has suffered an additional measure of damages by Martin's misrepresentation of the status of the house as "new". Petitioner relied upon the representation that the house was new. If the implied warranty of habitability does not apply, then he was mislead into not contracting for the further protection that such warranty would have provided or in agreeing to pay a purchase price that would reflect the absence of such protection.

VII. STATEMENTS OF OPINION, INCLUDING OPINION AS TO VALUE, CAN CONSTITUTE ACTIONABLE FRAUD.

Although a number of the representations made by Respondent Martin could be argued as statements of opinion, a number of Florida decisions recognize the exception that where statements of value or opinion are made by a representator with superior knowledge or

representing herself as having special knowledge, expertise, or qualifications above those of the representee, statements of value or opinion may be the basis for a claim of fraudulent misrepresentation. This exception has been principally applied, it seems, in real estate transactions. Both sellers and their realtors have been held liable for such misrepresentations. Willis v. Fowler, 136 So. 358 (Fla. 1931); Ramel v. Chasebrook Construction Company, Inc., 135 So. 2d 876 (Fla. 2d DCA 1961); Beagle v. Bagwell, 169 So. 2d 43 (Fla. 1st DCA 1964); Nantell v. Lim-Wick Construction Co., 228 So. 2d 634 (Fla. 4th DCA 1969). See also Vance v. Indian Hammock Hunt & Riding Club, Ltd., 403 So. 2d 1367 (Fla. 4th DCA 1981); Amazon v. Davidson, 390 So. 2d 383 (Fla. 5th DCA 1980); Revitz v. Terrell, 572 So. 2d 996 (Fla. 3rd DCA 1990).

An exception has also been recognized where the representee does not have an equal opportunity to become apprised of the truth or the falsity of the fact or opinion represented. Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (Fla. 2d DCA 1968).

In the instant case, Petitioner was repeatedly denied an opportunity to inspect the residence by Respondent Martin's succession of absences and excuses for not fulfilling her promise to furnish the names of reliable independent home inspectors that had been requested by Petitioner. This was coupled with a course of reassurances by Martin that such inspection was completely unnecessary because she was providing them accurate and reliable information concerning the condition and value of the residence that she advised was based on her considerable expertise. (IB App. A, pp. 1-8; 10-16 -R796-803; 806-811)

Petitioner could only inspect if Martin unlocked the door. Martin avoided unlocking the door and kept Petitioner from pursuing inspection independently. (IB App. A, pp. 12-13; 14-15) Clearly, Petitioner did not have an equal opportunity to become apprised of the truth or the falsity of the opinions and facts represented by Martin.

Florida courts have held that real estate brokers and agents' relationship to the public exacts a high degree of trust and confidence that amounts to either an informal fiduciary or confidential relationship with attendant legal duties of candor, frankness, and a high standard of fairness in dealing. Nantell v. Lim-Wick Construction Company, 228 So. 2d 634 (Fla 4th DCA 1969); Roberts v. Rivera, 458 So. 2d 786 (Fla. 5th DCA 1984). Accord, Easton v. Strassburger, 152 Cal App 3d 90, 199 Cal Rptr 383 (Cal App. 1984).

This exception is recognized where statements of value are made by persons with superior knowledge or where such statements are made in connection with other fraudulent misrepresentations. Vertes v. GAC Properties, Inc., 337 F. Supp. 256 (S.D. Fla. 1972) at Page 261. It is also recognized for statements concerning quality of construction by one with or professing to have superior knowledge and experience. Ramel, supra; see also Crues v. KFC Corporation, 729 F. 2d 1145 (8 Cir. Fla. 1984) and Emerson Electric Co. v. Farmer, 427 F. 2d 1082 (5th Cir. Fla. 1970).

Martin's representations concerning the value and quality of construction were coupled with material misrepresentations of fact concerning the condition of the property and the absence of any history of water leakage. Martin made additional representations that neither the roof nor other aspects of the property had suffered repairs since

construction was completed. Martin affirmatively misrepresented the source of the water stain on the master bedroom ceiling as caused by champagne, not rain. (RA 3-17; Ib App. A, pp. 1-19)

Promises of future performance made without any intention of performing the promise or made with the positive intention not to perform the promise are actionable fraud. This is a recognized exception to the general rule that fraud is generally premised only on false statements of a past or existing fact. Perry v. Cosgrove, 464 So. 2d 664 (Fla. 2d DCA 1985); Vance v. Indian Hammock Hunt & Riding Club, 403 So. 2d 1367 (Fla. 4th DCA 1981); and Century Properties Inc. v. Machtinger, 448 So. 2d 570 (Fla. 2d DCA 1984).

In this case, Martin promised to furnish the names of qualified inspectors and to assist Petitioner in obtaining a home inspection. Her promises meet this exception. Martin followed these promises with repeated excuses, absences, and reassurances that such was not necessary, until the day Martin finally advised Petitioner that no inspection would be allowed. At that time she also threatened that if he refused to close he would forfeit his substantial escrow.

Her subsequent course of conduct is evidence that her earlier promises were made with a positive intent not to perform them and an ulterior motive to prevent Petitioner from obtaining his own independent inspection of the residence. What Petitioner asserts in his affidavit as Martin's caustic remark immediately following the closing, "The house is yours, you will find out soon enough" further supports an inference of prior knowledge that the house had substantial problems.

Misrepresentations made both before and after the making of the offer, but before acceptance of the offer by Seller, are properly included as inducements to contract because, according to the terms of the contract, the offer was revocable until acceptance was communicated to Buyer.

Respondents' answer brief attempts to limit the actionable misrepresentations to those contained in the written MLS listing and flyers concerning the Parkland Estates residential property (R.815-816, 203). It appears that Respondents assume a contract was created with the advancing of the offer by Petitioner. This is not so.

Professor Corbin's treatise on contracts clarifies the import and effect of an offer as follows:

> "An *offer* is an act whereby one person gives to another the legal power of creating the relation called contract. An *acceptance* is the exercise of the power conferred by the offer, by the performance of some other act or acts".... "an offer creates a power of an acceptance in the offeree." Corbin on Contracts, Vol. 1, §1.11, pp. 29-30. (emphasis in original)

> "When an offer is received, the offeror creates a power of acceptance in the offeree, however, except in the cases that are hereafter discussed, the offeror retains a power of revocation and withdrawal....." "By exercising this power to revoke - by an effective revocation, the offeree's power of acceptance is terminated....."

> "Even though the offeror states when making the offer that the offeree shall have a definitely stated time in which to accept, or states that the offer will remain open for a definite time, the offer is nevertheless revocable at the will of the offeror....." "There is an implied promise not to revoke, but if the parties think that it is effective to deprive the offeror of the power to revoke, they are, as a common law proposition, mistaken." Corbin on Contracts, Vol. 1, §2.18, pp. 215-216.

Williston on Contracts amplifies the operative principle thus:

"As used in this treatise, the term contract is primarily based on two fundamental notions: First, that the obligation of a contracting party is based on its promise and second, that whether a promise or set of promises fall within the definition of contract is dependent upon whether the law will enforce the promise or set of promises. Thus, it is not the circumstances which make a promise or set of promises binding, nor the legal relations between the parties which arise from the existence of a binding promise or promises which constitute the contract, but only such a promise or promises as create binding legal relations." Williston on Contracts, 4th Ed., §1:1, pp. 4-5.

"Acceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain." Id, §6:1, pg. 7.
Accord, Goff v. Indian Lake Estates, Inc., 178 So. 2d 910 (Fla. 2 DCA 1965)

Clause III of the offer (R.199) provided a defined time for acceptance and effective date as:

"If the offer is not executed by and delivered to all parties OR FACT OF EXECUTION communicated in writing between them on or before 7-28-89, the deposit(s) will, at Buyers option, be returned to Buyer and the offer withdrawn. The date of this contract ("Effective Date") will be the date when the last one of the Buyer and the Seller has signed this offer".

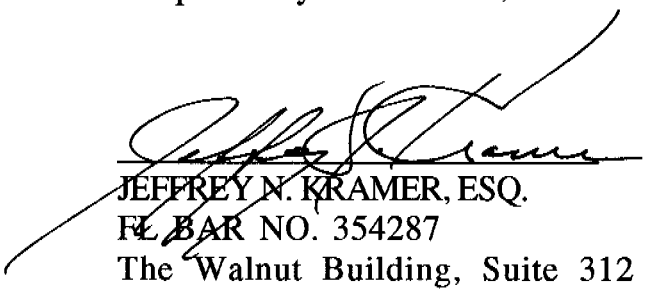
By August 6, 1989, when the contract was finally signed by the Sellers and delivered back to Petitioner Woodson, (R. 807), all material misrepresentations had been made. These included misrepresentations about the source of the water stain on the ceiling of the master bedroom, the lack of any repairs to the roof of the home, the lack of any history of roof leaks, water damage or water intrusion anywhere in the house, and other representations detailed in the Amended Complaint and in the Affidavit of Dr. Woodson. (R.796-814)

CONCLUSION

Respondents' answer brief suggests that maintaining a bright line limiting all economic loss to the field of contract law is the only consideration of any import to this court. On a question of such magnitude, that reasoning is simply too shallow to pass muster as serious debate. The common law was born of experience and collective wisdom, public policy, and practical necessity. Such historical considerations merit even greater consideration today. Florida is not in a position to abandon redress for fraudulent inducement. Fraud in the inducement must remain a remedy to Dr. Woodson and the remainder of Florida's citizens.

Petitioner contends that the better force and measure of the arguments compel answering the certified question in his favor and reversing the trial court's summary judgement against him as a result.

Respectfully submitted,



JEFFREY N. KRAMER, ESQ.
FL BAR NO. 354287
The Walnut Building, Suite 312
24 West Third Street
Mansfield, Ohio 44902
(419) 522-7474
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served on each person/firm listed on the below "Service List" by regular U.S. Mail this 1st day of June, 1996.

JEFFREY N. KRAMER, ESQ.

SERVICE LIST

Marsha G. Rydberg, Esq.
RYDBERG, GOLDSTEIN & BOLVES
500 E. Kennedy Blvd., Suite 200
Tampa, FL 33602

Jodi L. Corrigan, Esq.
Robert L. Rocke, Esq.
ANNIS, MITCHEL, ET AL
One Tampa City Center,
Suite 2100
201 N. Franklin St.
Tampa, FL 33602

Paul P. Jackson
PAUL P. JACKSON - REALTY
14047 Briar Dale Lane
Tampa, FL 33618