SUPREME COURT OF FLORIDA

EDWARD B. CAUFIELD, et al.,	*	
	*	
Petitioners,	*	
	*	
vs.	*	CASE NO.: 1999-95
	*	5th District - No. 98-2960
	*	District Court of Appeal
CANTELE, GINO, et al.,	*	
	*	
Respondents.	*	
	*	

* *

FIRST AMENDED BRIEF OF AMICUS CURIAE , THE ACADEMY OF FLORIDA TRIAL LAWYERS, ON BEHALF OF APPELLANT

ANDERSON & ARTIGLIERE, P.A.
4927 Southfork Drive
Post Office Drawer 6839
Lakeland, Florida 33807
(863)644-6478
Counsel for Amicus Curiae
The Academy of Florida Trial Lawyers

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I certify that the size and style of type used in this Brief is 14 point True Type® Times New Roman.

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Jon H. Anderson, Esquire
Attorneys for Amicus Curiae, AFTL

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SUMMARY OF ARGUMENT

This case involves an important access to justice issue. When parties to a written contract anticipate the possibility of future disputes and agree that the prevailing party should recover attorneys' fees in disputes which "arise out of " their contractual relationship, the courts of this state should honor their agreement. The lower court's decision reveals how parsing such provisions divests parties of valuable contract rights, rewards those who breach their written agreements and deprives the citizens of this state of access to justice.

This court charted a clear course favoring the enforcement of contractual attorney's fee provisions in Katz v. Van Der Noord, 546 So. 2d 1047 (Fla. 1989). The Fourth District followed this course when it decided Kelly v. Tworoger, 705 So.2d 670 (Fla. 4th DCA 1998). Both decisions recognize that it is good public policy to encourage parties to allocate the risks of future conflicts in their contracts, and it better public policy to enforce such contract provisions when conflicts actually arise. Unfortunately, the decisions of other courts reveal that old habits die hard.

The lower court's decision can only be reconciled with Katz and Kelly if no contract existed or the resolution of the case did not involve an interpretation of their contractual obligations. Clearly, however, the contract did exist, and the plaintiff's stated claim, though not artfully drafted, depended upon an interpretation of the

parties contractual obligations.

Most contractual claims do not involve damages in amounts which justify contingent representation. On the contrary, parties who have the good sense to get their agreements in writing often find that it is difficult, if not impossible, to procure representation. If a damaged party must pay attorney's fees of ten thousand dollars to win damages of five thousand dollars, it only makes sense to prosecute the claim if the attorney's fees can be recovered under the parties' contract. This is particularly true when the parties are of disparate financial means. Most parties believe that a contractual attorney's fee provision like the one involved in this case allows them to be made whole. If asked what additional language would be necessary in their contracts to insure that the prevailing party would, indeed, be permitted to recoup attorney's fees, these parties would not know how to answer.

Katz and Kelly give parties the benefit of their written agreements. The lower court's decision accomplishes just the opposite. This case is an excellent opportunity for the Florida Supreme Court to respond to the Fifth District's invitation to clarify its position regarding prevailing party attorney fee clauses. This court should rise to the challenge.

ARGUMENT

Introduction

The Fifth District's decision limits the rights of sellers and purchasers of homes in Florida because it deprives them of an important benefit of their agreements–the right to be made whole when litigation arises out of their contracts. The Academy of Florida Trial Lawyers regards this as a significant issue for consumers, and joins in this appeal in an effort to vindicate valuable contract rights and improve access to Florida's justice system.

This issue has broad ramifications since its resolution may affect the rights of the parties in other legal contexts as well. Any decision of this Court on this issue may impact cases involving attorney's fee entitlement under Florida Statute §627.428 in cases involving fraud in the inducement, churning or twisting arising from the sale of insurance policies (or other insurance products) such as Koehler v. Merrill Lynch Co., Inc. 706 So.2d 1370 (Fla. 2nd DCA 1998); and Perlman v. Prudential Insurance Company of America, Inc., 686 So. 2d 1378 (Fla. 3rd DCA 1997). The public policy considerations in such cases are similar, but are even more in favor of permitting recovery of attorney's fees due to the economic disparity between the parties.

In Perlman v. Prudential, supra, the Court held that even though the insured was entitled to rescission of a life insurance policy due to the Defendant's fraudulent

inducement, that remedy did not require refunding all the premiums paid vecuase the insured received "meaningful 'value' during the contract's existence" 686 So.2d at 1380. Therefore, even though it was determined that fraudulent inducement had occurred, the contract was not deemed to be a nullity for all purposes. In view of the public policy considerations underlying Florida Statute §627.428, a prevailing insured in such a situation should still be entitled to an award of attorney's fees. While this Court need not directly resolve the statutory construction issue in this case, that potential ramification should be considered by the Court.

The Trial Court's Error

The trial court erred when it denied the Caufields' motion for attorney's fees after the voluntary dismissal of the Canteles' lawsuit. The Canteles' claims and associated defenses all arose out of the parties' contractual relationship, and an award of attorney's fees was appropriate under this Court's decision in Katz v. Van Der Noord, 546 So. 2d 1047 (Fla. 1989). The Trial Court denied the Caufields' motion for attorney's fees because the Canteles' misrepresentation claim did not arise out of the parties' contract. The Fifth District affirmed.

Katz overturned a Fifth District decision[1] and held that a contractual provision authorizing the recovery of attorney's fees is enforceable even though the contract has

[1] Van Der Noord v. Katz, 526 So.2d 940 (Fla. 5th DCA 1988).

been rescinded. The Florida Supreme Court reasoned as follows:

> **We hold that when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable**. The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist. It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract. This analysis does no violence to our recent opinion in Gibson v. Courtois in which we held that the prevailing party is not entitled to collect attorney's fees under a provision in the document which would have formed the contract where the court finds that the contract never existed.
>
> In the instant case, it is undisputed that the parties entered into a contract. While the Fifth District Court of Appeal later held that the contract had been rescinded by reason of the buyer's repudiation, the buyer was nevertheless entitled to recover attorney's fees from the sellers under the prevailing party attorney's fee provision of the contract.

(Katz, 526 So.2d at 1049, Emphasis supplied)

Katz was followed by this Court's decision in David v Richman, 568 So. 2d 922 (Fla. 1990), reiterating the principle that attorneys fees are not recoverable where a contract never existed. Justice Ehrlich explained David as follows:

> Citing to the Third District Court's decision in Leitman v. Boone, 439 So.2d 318 (Fla. 3d DCA 1983), David maintains that the contract at issue is merely unenforceable rather than nonexistent

> and therefore, an award of attorney's fees based thereon is proper. In Leitman, an award of attorney's fees based upon a prevailing-party provision in a deposit receipt form was reversed because the court determined that no contract had ever existed. The district court went on to distinguish between such a situation and one in which a valid contract is merely found to be unenforceable, concluding that attorney's fees are recoverable in the latter situation. Recently, in Katz v. Van Der Noord, 546 So.2d 1047, 1049 (Fla. 1989), this Court recognized this distinction, and held that **when litigation ensues in connection with a validly formed contract, attorney's fees may be recovered under a prevailing-party provision of the contract even though the contract has been rescinded or held to be unenforceable.**
>
> (David, 568 So.2d at 924, Emphasis supplied)

Justice Kogan dissented, arguing that the majority opinion ignored modern contractual expectations and the intentions of the parties to the contract.

The Fourth District recently followed Katz when it considered whether a seller of real property may recover attorney's fees against the buyer after the voluntary dismissal of a nondisclosure case. Kelly v. Tworoger, 705 So.2d 670 (Fla. 4th DCA 1998). In Kelly, the buyer had sued the seller for damages for nondisclosure under Johnson v. Davis, 480 So. 2d 625 (Fla. 1985). The parties' contract contained the typical attorney's fee provision which authorized the prevailing party to recover attorney's fees for "litigation arising out of this contract...." The buyer voluntarily dismissed the complaint after being reminded of several pre-closing disclosures, and the seller sought an award of attorney's fees under the contract. Approving an award

of attorney's fees to the seller, the Fourth District reasoned that the seller's duty to disclose arises out of the contract between the parties, and the breach of this duty amounts to a breach of the underlying contract. The Kelly decision distinguished its earlier decision in Location 100, Inc. v. Gould S.E.L. Computer Systems, Inc., 517 So.2d 700 (Fla. 4th DCA 1987), and questioned whether Location 100 remains good law after Katz, reasoning as follows:

> This case is distinguishable from Location 100, Inc. v. Gould S.E.L. Computer Systems, Inc., 517 So. 2d 700, 706 (Fla. 4th DCA 1987), where this court held that attorney's fees incurred in defense of a fraudulent inducement claim could not be awarded under an attorney's fee provision in the contract that was supposedly induced by fraud. Location 100 relied on Dickson v. Dunn, 399 So. 2d 447 (Fla. 5th DCA 1981), which reasoned that a cause of action for fraudulent misrepresentation "arose out of the alleged misrepresentation inducing [one party] to enter into the sales contract and not out of the contract itself." See also Fleischer v. Hi-Rise Homes, Inc., 536 So. 2d 1105 (Fla. 4th DCA 1988); Hopps v. Smith, 520 So. 2d 673 (Fla. 5th DCA 1988).
>
> Unlike Location 100 and Dickson, this case involves not fraudulent misrepresentation, but non-disclosure under Johnson. Whether seeking rescission or damages, a Johnson action arises from a breach of a duty imposed by the law on the parties to the contract. Johnson was a departure from traditional fraud law, reflecting a philosophy that the law should encourage parties to a residential home sale contract to conduct themselves ethically. In Johnson, the supreme court observed that "the law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct

demands it." 480 So. 2d at 628. The language of the contractual provision should be construed to include lawsuits arising out of the violation of disclosure obligations which the law imposes on a party to the contract. We therefore affirm the award of attorney's fees against Ines Kelly under the contract.

Even though we have distinguished Location 100, we question whether that case remains good law in light of Katz v. Van Der Noord, 546 So. 2d 1047 (Fla. 1989). Katz quoted with approval a portion of a third district case

> Likewise, the enforcement of a contract may be prevented by equitable considerations, such as that the contract was fraudulently induced. In such a case, since a contract exists, even though later declared to be void or voidable, certain of its provisions may be operative.

Id. at 1049 (quoting Leitman v. Boone, 439 So. 2d 318 (Fla. 3d DCA 1983)). Katz went on to hold that when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable. The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist. It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract. [citation omitted]

Although Katz spoke of an attorney's fee provision in the context of a rescission action, its rationale is equally applicable to an action at law for fraudulent misrepresentation. The same deceptive conduct might justify relief under either cause of action. **If the attorney's fee provision of a contract is to be construed objectively,**

> **it would seem that "litigation arising out of this Contract" should include, in addition to breaches and nonperformance of the contract, those situations where the party was fraudulently induced into entering the contract, because such conduct is morally more repugnant than a simple breach. The distinction drawn by Dickson and Location 100 - - that a misrepresentation inducing a contract does not "arise" out of the contract - - is at odds with the concept of justice that underlies the holding in Katz**.

(705 So.2d 672-3, emphasis added)

Kelly's reasoning and approach are consistent with this Court's decision in Johnson and Katz. After a thorough analysis of the development of nondisclosure law and related public policy, Johnson created as a new and distinct cause of action for home purchasers who are victimized by the sellers' failure to disclose latent defects. In Billian v. Mobil Corporation, 710 So.2d 984 (Fla. 4th DCA 1998), the Fourth District described nondisclosure claims as "unique," describing them in the following language:

> Johnson carved out of the law of fraud a unique place for non-disclosure cases involving the sale of a home. A traditional cause of action for fraud turns in large part on the state of mind of the tortfeasor. For example, in a fraudulent misrepresentation case, a plaintiff must prove that a defendant knew a statement was false or that the defendant made a statement knowing he was without knowledge of its truth or falsity; in addition, the plaintiff must demonstrate that in making a false statement, the defendant intended that another rely upon it. See, e.g., Fla. Std. Jury Instr. (Civ.) MI-8.

Unlike the cause of action for fraudulent misrepresentation, a non-disclosure case under Johnson does not focus on the seller's state of mind motivating the non-disclosure. Johnson creates a duty to disclose where a seller knows of certain facts under circumstances giving rise to the duty. The factfinder is not required to delve into the murky area of the seller's intent underlying a non-disclosure. In this regard, the state of mind requirement under Johnson is analogous to that in a negligent misrepresentation case, where one who "supplies false information" exposes himself to liability if "he fails to exercise reasonable care or competence in obtaining or communicating the information." Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 337 (Fla. 1997) (quoting Restatement (Second) of Torts §§ 552 (1977)). The practical effect of Johnson is to encourage disclosure in those transactions where a seller might be in doubt as to whether a set of facts should be revealed to potential buyers.

Nothing in the supreme court's holding in Johnson indicates that actionable non-disclosure must be accompanied by the same intent to defraud required in other types of fraud cases. See Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (Col. 1960); Thacker v. Tyree, 171 W. Va. 110, 297 S.E.2d 885 (W. Va. 1982). Johnson is consistent with the modern view that the theoretical basis of liability for non-disclosure is not an outgrowth of the law of fraud, where a non-disclosure of material information would be characterized as a type of misrepresentation. Over 60 years ago, Dean Keeton articulated the principle upon which Johnson is founded:

It would seem that the object of the law in [non-disclosure] cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it. . .. This duty to speak does not result from an implied representation by silence, but exists because a

> refusal to speak constitutes unfair conduct. . .. The question is one of fair conduct, just as negligence is a question of fair conduct.
>
> W. Page Keeton, Fraud - - Concealment and Non-Disclosure, 15 Tex. L. Rev. 1, 31-32 (1936). The supreme court in Johnson acknowledged its departure from outdated concepts contained in the law of fraud when it observed that "the law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." 480 So. 2d at 628; see Gilchrist, 696 So. 2d at 339.

The Fifth District tried to circumvent Katz and Kelly by labeling the Cantele case as a misrepresentation case, and it is true that the Canteles' complaint sought both tort and contract remedies. The Canteles apparently abandoned[2] their contract claim during a hearing before the Trial Court, leaving only the misrepresentation claim pending at the time of dismissal. Even if Katz does not allow the recover of

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[2] The pleadings in the case show that the Canteles' contract claims survived until a point when the parties had both requested a jury trial. The Fifth District opinion describes the disposition of the claim as follows:

> Both parties requested a jury trial, and the cause was set for trial. The court held a hearing on the motions to dismiss and to strike. In an order, the court recited that the Canteles had announced in court that their single count complaint was restricted to a claim for intentional misrepresentation, and that the relief sought was limited to monetary damages for correcting the latent defects in the sewer treatment plant. The court then ordered: " the single count Complaint shall be considered and solely treated as a Complaint based upon a theory of intentional misrepresentation and a prayer for monetary damages for correcting alleged latent defects in the wastewater treatment plant."
>
> (24 Fla. Law W. D. 2520)

contractual attorney's fees by a party who prevails in a misrepresentation claim arising out of the sale and purchase of a residence, Kelly certainly permits the recovery of fees by a party who prevails in a nondisclosure case. The Caufields' right to recover attorney's fees under the contract arose when the Canteles dropped or abandoned their nondisclosure claim. By ignoring the fact that the Caufields prevailed on the nondisclosure claim, the Fifth District was able to dispose of the case under Location 100, avoiding the issues addressed in the Fourth District's decision in Kelly. Although this approach succeeded to the extent that the Caufields were deprived of their contractual remedy, it did not do justice between the parties.

The Fifth District opinion distinguishing this case from Katz reasoned as follows:

> In this case, **the Canteles completely dropped their breach of contract cause of action against the Caufields, and elected to proceed solely on a tort-fraudulent misrepresentation claim. Under controlling prior case law out of this court, that does not constitute litigation arising out of the contract**. **The Canteles were not seeking to rescind the contract as in the Katz case, but simply to recover damages for alleged false representations. Tort suits and contract suits still remain separate entities, n7 and until the Florida Supreme Court holds otherwise, we continue to follow the rule that a suit for damages for a false or fraudulent misrepresentation made orally or external to a contract, concerning property purchased pursuant to the contract, is not litigation arising out of the contract entitling the prevailing party to attorney's fees**.

(24 Fla. Law W. D 2522, Emphasis supplied)

Harkening back to the days when simpler rules prevailed, the Fifth District questioned the Fourth District's reasoning and decision in Kelly and implied that Katz confused an area of the law which has previously been clear, writing as follows:

> ...the litigation arose out of the alleged misrepresentation inducing appellees to enter into the sales contract and not out of the contract itself.
>
> 399 So. 2d at 447. See also Pharmacy Management Services, Inc. v. Perschon, 622 So. 2d 75 (Fla. 2d DCA 1993); Location 100, Inc. v. Gould S.E.L. Computer Systems, Inc., 517 So. 2d 700 (Fla. 4th DCA 1987), rev. denied, 528 So. 2d 1182 (Fla. 1988); Keys Lobster, Inc. v. Ocean Divers, Inc., 468 So. 2d 360 (Fla. 3d DCA), rev. denied, 480 So. 2d 1295 (Fla. 1985).
>
> This fairly simple rule underwent modification in Katz v. Van Der Noord, 546 So. 2d 1047 (Fla. 1989). In that case, the Florida Supreme Court held that a purchaser under a real estate contract who prevailed in litigation against the sellers could recover an attorney's fee award under the contract even though the contract was rescinded as a result of the litigation. Taking this a step further, Judge Gross wrote in Kelly v. Tworoger, 705 So. 2d 670 (Fla. 4th DCA 1998), that a seller of a condominium unit could recover attorney's fees under the real estate contract where the cause of action later dismissed by the purchaser concerned the seller's failure to disclose a latent defect, and under the contract, the seller had a duty to disclose this defect n6 . He theorized that litigation arising out of a contract should include, in addition to breaches of contract and nonperformance, those situations where a party is fraudulently induced into entering the contract. However, Judge Gross distinguished Location 100, Inc. and did not

> proclaim a conflict with it and the other misrepresentation cases cited above.

When it so ruled, the Fifth District took an entirely different approach than it had when asked to construe similar language of a comprehensive general liability insurance policy in Hagan v. Aetna Casualty and Surety Company, 675 So.2d 963 (Fla. 5th DCA 1996). There, the court observed as follows:

> Aetna's policy involved in the action contained the following exclusion:
>
> > This insurance does not apply . . . to bodily injury . . . **arising out** of the . . . operation, use . . . of any automobile . . . operated by . . . the insured.
>
> The term "**arising out** of" is broader in meaning than the term "caused by" and means "originating from," "having its origin in," "growing out of," "flowing from," "incident to" or "having a connection with" the use of the vehicle. National Indemnity Co. v. Corbo, 248 So. 2d 238 (Fla. 3d DCA 1971).
>
> (Hagan, 675 So.2d 963, 965)

If the term "arising out of" is more broad than "having its origin in," then it would seem inappropriate for the Fifth District to conclude that the Canteles' claims and the Caufields' defenses did not arise out of their contract.

The Fifth District's fond memory of the state of the law before Katz may be accurate to the degree that contractual claims for attorney's fees were regularly denied on the basis of a perceived bright line between contract and tort theories of recovery. However, the view that contract provisions authorizing the recovery of attorney's fees

do not cover nondisclosure cases, that tort and contract claims are cleanly divided, and that attorney fee claims are measured by the state of the pleadings at the end of the case regardless of the beginning are all predicated upon bad public policy.

Since Katz was decided, this Court, asked to determine the scope of an arbitration clause of a contract, approved an Arizona decision which held:

> ... If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract."
>
> (Seifert v. U.S. Home Corporation, 24 Fla. Law W. S 544 (Fla. 1999), Citing Barmat v. John and Jane Doe Partners A-D, 155 Ariz. 519, 523, 747 P.2d 1218, 1222 (1987))

Contract law operates to protect the parties' economic expectations. Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1246 (Fla. 1993). When only economic harm is involved, the question becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies." Id. at 1247. When parties do bargain for adequate contract remedies, and apportion the risks of economic loss through an attorney's fee provision in a contract for sale and purchase of real estate, Florida Courts should implement public policy by rewarding their foresight and giving effect to the parties' agreement.

This Court recently took steps to stop lower courts from using the economic loss rule to dismantle the civil justice system in cases involving only economic damages. Moransais v. Heathman, 24 Fla. Law Wk. S308 (Fla. 1999). When it took these steps, the Court based its action upon a desire to preserve the common law, holding as follows:

> We agree with the observations of those who have noted that because actions against professionals often involve purely economic loss without any accompanying personal injury or property damage, extending the economic loss rule to these cases would effectively extinguish such causes of action. See Schwiep, supra note 6, at 40 ("If the doctrine were genuinely applied to bar 'all **tort** claims for economic losses without accompanying personal injury or property damage,' the rule would wreak havoc on the common law of **torts.**"); Blanche M. Manning, Legal Malpractice: Is it **Tort or Contract?**, 21 Loy. U. Chi. L.J. 741, 742 (1990) ("Because attorney malpractice rarely results in personal injury or property damage, the damages plaintiffs seek most often in malpractice claims against attorneys are for economic or pecuniary losses allegedly caused by the attorney's failure to exercise adequate care."). This is not what this Court had in mind many years ago when it applied the economic loss rule in Florida Power & Light.
>
> While provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve per se to bar an action for professional malpractice. Further, the mere existence of a contract between the professional services corporation and a consumer does not eliminate the professional obligation of the professional who actually renders the service to the consumer or the common law action that a consumer may have against the professional

> provider. While the parties to a contract to provide a product may be able to protect themselves through contractual remedies, we do not believe the same may be necessarily true when professional services are sought and provided. Indeed, it is questionable whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting. In any case, we conclude that the principles underlying the economic loss rule are insufficient to preclude an action for professional malpractice under the circumstances presented here.
>
> CONCLUSION
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> Accordingly, we hold that the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature and the aggrieved party has entered into a contract with the professional's employer. We also hold that Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party. Accordingly, we quash the decision below and approve Southland.

Real estate misrepresentation and nondisclosure cases involve the same economic realities as those which motivated this court to act in Moransais. These cases are difficult. Typically, the factual issues are contested, expert testimony is required to determine the nature and extent of latent defects, the damages are limited to the difference between the value of the home as represented and the value of the home as it exists, the defendant may argue that any award should be mitigated by the

value of the plaintiff's occupancy, and the chances of pleading and proving punitive damages are slim. Not surprisingly, even attorneys who are sympathetic to aggrieved buyers are reluctant to accept such cases on a contingency basis. More often than not, the damages recoverable approximate the attorney's fees for prosecuting the case. Under these circumstances, whether or not the plaintiff's misrepresentation or nondisclosure case arises out of contract becomes an access to justice issue.

Ironically, these practical problems are exacerbated by the Fifth District's decision in Caufield. Caufield leaves the victim of misrepresentation or nondisclosure in a worse position than the party whose contract was canceled before breach. See Gray v. O'Shaughnessy, 574 So.2d 288 (Fla. 5th DCA 1991)(Aggrieved party to previously canceled contract may recover attorney's fees associated with breach discovered after cancellation).

At least one other jurisdiction has approved and followed the Florida Supreme Court's decision and rationale in Katz. In Oral Roberts University v. Anderson, 11 F.Supp.2d 1336 (N.D. Ok. 1997) the Federal District Court sitting in Oklahoma's Northern District followed Katz, approving an award of contractual attorneys fees despite the prior termination of the contract, reasoning as follows:

> Defendants' argument presents the question of whether the termination of a contract containing an attorneys' fees provision prevents a party prevailing in litigation from recovering attorneys' fees.

As stated above, in Oklahoma attorneys' fees are recoverable as damages only where they are specifically provided for by contract or statute. Magnum Foods, 36 F.3d at 1509. In the instant matter, the Agreement between ORU and Defendants expressly contemplates the recovery of reasonable attorneys' fees by the prevailing party in the event of litigation. The Oklahoma Supreme Court has not decided this issue, but cases from both Oregon and Florida provide persuasive reasoning that attorneys' fees are properly awarded to the prevailing party in an action brought after the term of a contract has expired. See Usinger v. Campbell, 280 Ore. 751, 572 P.2d 1018, 1023 (Or. 1977); Katz v. Van Der Noord, 546 So. 2d 1047, 1049 (Fla. 1989).

In Usinger, the plaintiffs sued for specific performance of an earnest money agreement, the trial court denied specific performance and dismissed the complaint, and the plaintiffs appealed. Usinger, 572 P.2d at 1019. On appeal, the court found that "the resolution of this case . . . depends on whether the Usingers carried their burden of persuasion and showed . . . that McPherson granted them an extension [of time]." Id. at 1022. After reviewing the record de novo, the court saw "no reason to disturb the trial court's finding on the issue that defendant did not grant the plaintiffs an extension of time for payment as provided in the earnest money agreement and did not waive the time essence clause." Id. The plaintiffs final argument in Usinger was that the defendant should not have been awarded attorneys' fees under the earnest money agreement because the defendant "'elected to rescind the earnest money agreement.'" Id. at 1023. n4 The court held as follows:

In this case, the plaintiffs contend there was a contract and ask for specific performance. This requires the defendant to come into court and defend, also relying on the contract by starting that it was not performed in accordance with its terms. Defendant does not disaffirm the contract but relies

on the exact terms thereof. Therefore, the provision in the contract providing for attorney fees applies.

Id. (emphasis added). n5

n5 The Court notes that the Florida Supreme Court has gone even further with regard to the availability of attorneys' fees under a contract, holding as follows:

We hold that when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable. The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist.

Katz v. Van Der Noord, 546 So. 2d 1047, 1049 (Fla. 1989). Since there has been no claim for rescission in the present case, the Court need not reach the question of whether attorney's fees are available where a contract has been rescinded or held to be unenforceable.

Similarly, in the instant case, Plaintiff sought a declaration of the rights of the parties under the Agreement. Defendant Metroplex counterclaimed seeking specific performance of the Agreement. Plaintiff neither disaffirmed the Agreement, nor sought to rescind the Agreement. To the contrary, Plaintiff at all times relied on the terms of the Agreement and the expiration of the specified option period. Thus, Defendants' argument that "there is no option agreement upon which ORU can rely" for recovery of attorney's fees must fail. As this Court held previously, with the expiration of the option term, Defendants lost the right to seek any remedies under the Agreement. Defendants, however, still sought specific performance and argued that the option had not terminated. By prevailing in this litigation, ORU is entitled to recover its reasonable

> attorneys' fees in accordance with the terms of the Agreement.

As Justice Kogan pointed out in his dissent in David, Florida courts should honor modern contractual expectations. The Canteles and Caufields allocated the risks and benefits of their relationship through a contract which included a provision for attorney's fees to the prevailing party in any dispute arising out of the contract. Allowing the Canteles to escape contractual liability for attorney's fees in a nondisclosure or misrepresentation case is to ignore modern contractual expectations and to deny the Caufields the benefit of their bargain.

CONCLUSION

For the reasons stated above, this Court should reverse the Fifth District decision and remand for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of February, 2000, to: Robert Bruce Snow, Esquire, 112 North Orange Avenue, Brooksville, Florida 34601; Donald R. Peyton, Esquire, Peyton Law Firm, P.A., 7317 Little Road, New Port Richey, Florida 34654-5519.

ANDERSON & ARTIGLIERE, P.A.

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JON H. ANDERSON
Florida Bar #196935
RALPH ARTIGLIERE
Florida Bar #236128
Post Office Drawer 6839
Lakeland, Florida 33807-6839
(863) 644-6478
Attorneys for Amicus Curiae, AFTL