IN THE SUPREME COURT OF FLORIDA

M/I SCHOTTENSTEIN HOMES, INC., a Florida corporation,

Petitioner,

vs.

Case No.: SC00-1582
4DCA Case No.: 4D99-2898
Florida Bar No.: 0843008

NASAD AZAM, AFEEIA AZAM, TOM BELL, HOPE BELL, SCOTT M. DOLBEARE, MARY E. RYAN, ASIF ISLAM, REBECCA ISLAM, CHARLES KATZKER, SUSAN KATZKER, LOUIS LAMM, DARA LAMM, EDWARD McCAULEY, JEANETTE McCAULEY, and ARTHUR SHUSHAN,

Respondents.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS OF RESPONDENTS NASAD AZAM, etc., et. al. WITH APPENDIX

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Plaintiffs/Appellants, NASAS AZAM, etc., et. al., certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. NASAD AZAM and SAFEEIA AZAM, Plaintiffs/Appellants.

2. TOM BELL and HOPE BELL, Plaintiffs/Appellants.

3. SCOTT M. DOLBEARE and MARY E. RYAN, Plaintiffs/Appellants.

4. ASIF ISLAM and REBECCA ISLAM, Plaintiffs/Appellants.

5. CHARLES KATZKER and SUSAN KATZKER, Plaintiffs/Appellants.

6. LOUIS LAMM and DARA LAMM, Plaintiffs/Appellants.

7. EDWARD McCAULEY and JEANETTE McCAULEY, Plaintiffs/Appellants.

8. ARTHUR SUSHAN, Plaintiff/Appellant.

9. M/I SCHOTTENSTEIN HOMES, INC., an Ohio corporation, Defendant/Appellee.

10. THE HONORABLE JAMES T. CARLISLE, Circuit Court Judge, Palm Beach County, Florida - Trail Judge.

11. STEVEN C. RUBINO, ESQ., Co-Counsel for Appellants/Plaintiffs in the Lower Court.

12. BARRY G. RODERMAN, ESQ., Co-Counsel for Appellants/Plaintiffs in the Lower Court.

13. S. TRACY LONG, ESQ., Counsel for Appellants/Plaintiffs in the Appellate Court.

14. DIRAN V. SEROPIAN, ESQ., PETERSON, BERNARD, VANDENBERG, ZEI, GEISLER & MARTIN, attorneys for

Defendant/Appellees in the Lower Court and Appellate Court.

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PREFACE

This Answer Brief on the Merits is submitted on behalf of NASAD AZAM, AFEEIA AZAM, TOM BELL, HOPE BELL, SCOTT M. DOLBEARE, MARY E. RYAN, ASIF ISLAM, REBECCA ISLAM, CHARLES KATZKER, SUSAN KATZKER, LOUIS LAMM, DARA LAMM, EDWARD McCAULEY, JEANETTE McCAULEY, and ARTHUR SHUSHAN, Plaintiffs in the trial court and Respondents here.

The Plaintiffs in the lower court are: NASAD AZAM, AFEEIA AZAM, TOM BELL, HOPE BELL, SCOTT M. DOLBEARE, MARY E. RYAN, ASIF ISLAM, REBECCA ISLAM, CHARLES KATZKER, SUSAN KATZKER, LOUIS LAMM, DARA LAMM, EDWARD McCAULEY, JEANETTE McCAULEY, and ARTHUR SHUSHAN, and they will hereinafter be collectively referred to as "PURCHASERS" or by name. PURCHASERS are the Appellees in the instant appeal. The Appellant in the instant appeal is M/I SCHOTTENSTEIN HOMES, INC., and they will hereinfater referred to as "DEVELOPER" or by name. The DEVELOPER is the Defendant in the lower court.

The Lower Court dismissed with prejudice a three count complaint filed by the PURCHASERS against the DEVELOPER for: Count I - Fraud in the Inducement, Count II - Rescission, and Count III - Negligent Misrepresentation. In *Azam v. M/I Schottenstein Homes, Inc*., 761 So.2d 1195 (Fla. 4th DCA 2000), the Fourth District

Court of Appeal reversed the trial court's ruling as to Count I - Fraud in the Inducement, but affirmed the trial court's ruling as to Count II - Rescission and Count III - Negligent Misrepresentation. The Fourth District Court of Appeal noted disagreement with the Third District Court's broad prohibition on a cause of action for fraud based upon statements about the status of matters in the public records as set forth in *Pressman v. Wolf*, 732 So.2d 356 (Fla. 3rd DCA 1999), *rev. denied,* 744 So.2d 459 (Fla. 1999). The DEVELOPER filed a Petition for Discretionary Review with the Supreme Court of Florida based upon a conflict between the rulings of the Fourth District Court of Appeal and the Third District Court of Appeal. The Supreme Court of Florida entered an Order Accepting Jurisdiction, and this appeal has ensued.

For the reasons discussed below, the Fourth District Court of Appeal in *Azam* properly applied the correct rule of law and reached the appropriate result. This Court should accordingly affirm the Fourth District Court's decision in a *Azam*, along with the First District Court's subsequent decision in *Newbern v. Mansbach*, 777 So.2d 1044 (Fla. 1st DCA 2001), and quash the Third District Court of Appeal's decision in *Pressman*. It should remand this case to the lower court for further proceedings.

The following symbols will be used in this Answer Brief on the Merits

(R) - Record on Appeal

(T) - Transcript of the 07/20/99 Hearing on DEVELOPER'S Motion to Dismiss

(A) - Appendix to Answer Brief on Merits

CERTIFICATION OF FONT TYPE

It is hereby certified that the size and type used in this Answer Brief on the Merits is Times New Roman 14, a font that is not proportionately spaced.

POINT ON APPEAL

The *Azam* Court did not err in rejecting the "bright line rule" or "broad prohibition" of *Pressman* that statements concerning the public record cannot form the basis for a claim of actionable fraud against the seller of residential real estate. The *Azam* Court followed the rule of law adopted by the Supreme Court of Florida in *Besett* and *Johnson* restricting the doctrine of *Caveat Emptor* in the State of Florida regarding residential real estate transactions. The *Azam* Court properly applied the Supreme Court of Florida's rulings in *Besett* and *Johnson* in favor of a "case-by-case" determination of whether a purchaser has an independent duty to investigate the representations of the seller.

STATEMENT OF CASE AND FACTS

Between December 1995 and August 1998, each of the Plaintiffs, who are collectively known as the PURCHASERS, entered into a contract with the DEVELOPER for Purchase and Sale of residential real estate. The lots and houses were all located in the Brindlewood Subdivsion at or near Wellington, Palm Beach County, Florida. All of the PURCHASERS have alleged that an in-house real estate agent for the DEVELOPER affirmatively represented to them that two (2) parcels of real estate located directly across the roadway of the Brindlewood Subdivision was a natural preserve and would remain that way after development of the Brindlewood Subdivision.

All of the PURCHASERS have alleged that the character and quality, as a natural preserve, of the two (2) parcels of real estate was an important inducement in entering into the contracts with the Developer. However, there was a Palm Beach County Site Plan dated September 11, 1989 that was on file in the public records which indicated that one of the two parcels was designated to be developed as a school, and the other of the two parcels was designated to be developed for commercial use.

The PURCHASERS have alleged that subsequent to the execution of their contracts and taking title and possession of their lots and house they discovered the actual designation of the two (2) parcels of real estate located directly across the

roadway of the Brindlewood Subdvision. They discovered that the actual designation of the two (2) parcels of real estate located directly across the roadway of the Brindlewood Subdvision was not a natural preserve. The PURCHASERS filed a three count Complaint against the DEVELOPER in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County where they stated causes of action for Count I - Fraud in the Inducement, Count II - Rescission, and Count III - Negligent Misrepresentation. They alleged that the DEVELOPER affirmatively knew of the existence of the Palm Beach County Site Plan, including the actual designation of the two (2) parcels of real estate located directly across the roadway of the Brindlewood Subdvision, at the time they made the representations to each of the PURCHASERS. The PURCHASERS alleged that DEVELOPER falsely and fraudulently represented to them that the two (2) parcels of real estate located directly across the roadway of the Brindlewood Subdvision would remain as a natural preserve for the specific purpose of inducing them to enter into the contracts for purchase and sale of the subject lots and houses. They alleged that due to the DEVELOPER'S superior knowledge and unique position, they were justified in relying upon those representations, which ultimately resulted in damages.

The DEVELOPER filed a Motion to Dismiss the Complaint filed by the PURCHASERS. The Motion to Dismiss set forth three separate grounds for dismissal: the "Harry Pepper Rule" as stated in *Harry Pepper & Associates, Inc. v.*

Lassiter, 247 So.2d 736 (Fla 3rd DCA0, *cert. denied*, 252 So.2d 797 (Fla. 1971), the economic loss rule as stated in multiple cases, and that no cause of action can be based upon a misrepresentation about something that is in the public record as stated in *Pressman*. The Trial Court, relying upon the authority of *Pressman*, entered a Order dismissing the PURCHSERS' entire Complaint with prejudice. The PURCHASERS filed a Motion for Rehearing which was also denied by the Trial Court. The PURCHASERS then filed a timely appeal to the Fourth District Court of Appeal.

The Fourth District Court of Appeal reversed the trial court's ruling as to Count I - Fraud in the Inducement, but affirmed the trial court's ruling as to Count II - Rescission and Count III - Negligent Misrepresentation. The Fourth District Court of Appeal noted the bright-line rule of law used by the Third District Court of Appeal in *Pressman*, and originally set forth in *Nelson v. Wiggs*, 699 So.2d 258 (Fla. 3d DCA 1997). Those Third District Court of Appeal cases stood for the proposition that the availability of adverse information in public records precludes an action for fraud on the part of a buyer of real estate. The Fourth District Court of Appeal declined to follow a bright-line test, and instead ruled that the viability of such a cause of action for fraud against a seller is a factual test that should be determined on a case-by-case basis. They ruled:

> we believe that whether the buyer exercised ordinary diligence in discovering the falsity of such statements should be determined on a case-by-case basis, and not by some bright-line rule. In making this determination, the trier should weigh such factors as the

> reasonableness of the reliance , whether the seller is a developer, and the nature of the public record.

The Fourth District Court of Appeal also agreed by footnote:

> We wholly agree with Judge Gross's concurring opinion in this regard. *See*, *Bessett v. Basnett*, 389 So.2d 995, 998 (Fla. 1980))holding that a "recipient may rely upon the truth of a representation, even though the falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him").

The same rule of law has also been utilized by the First District Court of Appeal in a strikingly similar case. *See*, *Newbern*. Both rulings follow the growing majority rule of law in other jurisdictions.

This Court has now exercised its Discretionary Jurisdiction to resolve which rule of law will apply to the State of Florida.

SUMMARY OF ARGUMENT

The threshold question for the Supreme Court of Florida is: what is the duty of a purchaser of residential real estate to independently investigate the affirmative representations of the seller. The ruling of this Court will substantially effect the respective duties of purchaser and seller in all future real estate transactions within the State of Florida.

The DEVELOPER takes the position that the purchaser of residential real estate does have a duty to independently investigate the affirmative representations of a seller. The DEVELOPER takes the further position that if a purchaser fails to exercise

that duty, and fails to independently investigate the representations of the seller, they are precluded from subsequently bringing an action against the seller for fraud based upon the seller's representations.

However, the DEVELOPER'S position has not been the rule of law in the State of Florida since 1980 when the Supreme Court of Florida decided the case of *Bessett v. Basnett*, 389 So.2d 995 (Fla. 1980). The DEVELOPER'S position flies in the face of the growing trend of authority in the State of Florida, and the other jurisdictions in the United States, which have moved toward full disclosure on the part of the seller of residential real estate regarding anything which materially effects the price, quality, and use of the land. See, *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985).

In order for this Court to reverse the Fourth District Court of Appeal, and the First District Court of Appeal in *Newbern*, it will either have to overturn over twenty years of established law by reversing *Bessett*, or carve out a specific exception of the rule of law established by *Bessett* for representations by sellers regarding matters in the public records. There is no support for such a broad and sweeping exception.

The better reasoned rule of law is that which was stated by the Fourth District Court of Appeal. The purchasers duty to independently investigate the representations of the seller about issues which are a matter of public records should be decided on a case-by-case basis on the facts. There is support for such a rule in established Florida case law, and in the case law cited by the DEVELOPER.

ARGUMENT

Florida, like many states, has traditionally followed the doctrine of Caveat Emptor when it came to sales of residential real estate. *Camardella v. Courtright*, 126 Fla. 536, 171 So. 225 (Fla. 1936, *Greenberg v. Berger*, 46 So.2d 609 (Fla. 1950) *and Gonzalez v. Patane*, 234 So.2d 8 (Fla. 3rd DCA 1970). Thus a purchaser of residential real estate was precluded from a cause of action against the vendor for fraud or rescission when the truth regarding representations by the vendor could have been ascertained by the purchaser from the public records. *Camardella*. at Fla. 538, So. at 226; *Greenberg*. at 609; and *Gonzalez*. at 8. If the information is readily available to both the vendor and purchaser, and the purchaser has failed to use due diligence in investigating that information, then the purchaser cannot then complain about the misrepresentations by the vendor about that information. *See*, *Gonzalez*.

This was the prevailing rule of law in the State of Florida as late as 1977 when the First District Court of Appeal rendered its decision in *Turvey v. Kulazenka*, 341 So.2d 551 (Fla. 1st DCA 1977). That case, like the case at bar, also involved misrepresentations by the vendor about the use of the land which were a matter of public records. *Id*. At 552. In ruling against the purchasers on action for recission and misrepresentation, the Court stated, citing *Beagle v. Bagwell*, 169 So.2d 43 (Fla 1st DCA 1964):

> It is a generally accepted rule of law in Florida that under any standard of conduct, and in the absence of accompanying actual

> deception, artifice or misconduct, where the means of knowledge are at hand and are equally available to both parties, and the subject matter is equally open to their inspection, if one of them does not avail himself of those means and opportunities, he will not be heard to say that he was deceived by the other's misrepresentations.

Id. Thus, the purchaser had a duty to independently investigate the representations of the vendor about character and use of the property which are a matter of public record.

The Supreme Court of Florida changed the rule of law in 1980 when it rendered is decision in *Besett* adopted the law expressed in Sections 540 and 541 of Restatement (Second) of Torts (1976). *Id*. At 997. In doing so, this Court specifically stated, "A person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor." *Id*. This Court further stated, "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 at the hands of a misrepresenter." *Id* at 998. Following *Besett*, the correct rule of law in the State of Florida was expressed as: "a recipient may rely upon the truth of the representation, ***even though its falsity could have been ascertained had he made an investigation***, unless he knows the representation to be false or its falsity is obvious to him. [Emphasis added.] *Id*. Although the Supreme Court of Florida did

not render a list of cases effected by their ruling, it did expressly state, "We disapprove all other decisions inconsistent with our holding." *Id*.

The Fourth District Court of Appeal, where the case at bar arises, expressly adopted the new rule of law set forth in *Besett*, and Sections 540 and 541 of Restatement (Second) of Torts (1976) when it rendered its decision in *Gold v. Perry*, 456 So.2d 1197 (Fla. 4th DCA 1984).

The law in Florida regarding the doctrine of *Caveat Emptor* and its effect upon residential real estate sales continued to evolve. The Supreme Court of Florida, citing their prior ruling in *Besett*, stated that the doctrine of *Caveat Emptor* "does not exempt a seller from responsibility for the statements and representations which he makes to induce the buyer to act, when under the circumstances these amount to fraud in the legal sense. *Johnson v. Davis*, 480 So.2d 625, 627 (Fla. 1985). In *Johnson*, this Court extended this principle to not only affirmative representations by a seller amounting to fraud, but nondisclosures that materially effect the price or use of the land. *Id*. at 628. The Supreme Court of Florida noted, "That is, where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous." *Id*. This Court recognized other decisions in other jurisdictions, as well as Florida, that still cling to the rule that where parties are dealing at arm's length and the facts lie equally open to both parties, with equal opportunity of examination, a mere nondisclosure does not constitute fraud. *Id*. The

Court also recognized that these cases were not in accord with the times, and the growing trend of cases to restrict the doctrine of *Caveat Emptor* rather than extend it. *Id*. The Supreme Court of Florida correctly and expressly acknowledged 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. *Id*. This Court decided this rule should be the rule of law in Florida regarding sales of homes. *Id.* at 629.

Against this historical backdrop, any ruling by the Supreme Court of Florida for the DEVELOPER in this case would represent an erosion of well reasoned precedents already rendered by this Court. It would represent a substantial erosion of the rights of the purchaser, and would, in essence create a shield for the vendor to hide behind, and fraudulently induce purchasers to enter into detrimental transactions for residential real estate. The history of this Court would strongly suggest this is not the type of result that has governed this area of the law.

The case of *Fry v. J.E. Jones Const. Co.*, 567 So.2d 901, 902 (Fla. 1st DCA 1990) appears to be the first case subsequent to this Court's rulings in *Besett* and *Johnson* that involved a residential real estate transaction, and the misrepresentation by the seller of an issue that was a matter of public record. That case, like the case at bar, involved a seller that was also a builder/developer, and a matter of land use on a site plan in the public records. *Id.* at 902. In *Fry*, the First District Court of Appeal

acknowledged the Supreme Court of Florida's prior rulings in *Besett* and *Johnson*, the reasoning behind those rulings, and the evolving state of the law regarding the doctrine of *Caveat Emptor* as the basis of it's decision. *Id*. at 903, 903. The Court in *Fry* found that even though the site plan in the public records was equally accessible by the purchasers, they were not precluded from an action in fraud for failure to conduct an independent investigation of the seller's representations. *Id*. at 903. The Court in *Fry* also made one significant observation which is highly relevant to the case at bar, and the cases used by the DEVELOPER to justify their position.

Citing the *Besett* case, the First District Court of Appeal did note that the purchaser *could* be precluded form an action in fraud against the seller if the falsity was known or obvious to them. *Id*. The specific example cited by the *Fry* Court was if the seller would have shown the purchaser the site plan that accurately represented the status of the land in issue. *Id*.

Three cases decided after *Besett* and *Johnson* demonstrate how the rule of law works in the State of Florida. In *Fry*, the purchaser neither knew, or was the falsity of the seller's representations obvious to him, and was *not* precluded from an action for fraud against the seller. In *Rosique v. Windley Cove, Ltd.*, 542 So.2d 1014, 1015 (Fla. 3rd DCA 1989) the purchaser absolutely knew that the seller's representations were false, and was precluded from any action for fraud or recission. In perhaps the most significant case, as far as the instant case is concerned, in the case of *Nelson v.*

Wiggs, 699 So.2d 258 (Fla 3rd DCA 1997), the purchasers were on constructive notice of the falsity of the sellers representations, in which the falsity of those statements were obvious to the seller, triggering a duty of inquiry, and precluding the purchaser from an action for fraud against the seller.

The *Nelson* case is important because, like the *Fry* case, involved an issue that was a matter of public record, and the *Pressman* case is based upon the Third District Court of Appeal's ruling in *Nelson*. The *Nelson* case differs from the case at bar in that the instant case involves an affirmative representation and the *Nelson* case involves a nondisclosure. When the rule of law is applied to the facts of the *Nelson* case, it is easy to see why the Third District Court of Appeal ruled as they did. The factual issue in the *Nelson* case is the location of the residential real estate in a flood-prone zone, and whether the nondisclosure of this fact by the seller subjected the seller to liability for fraud. The Third District Court of Appeal ruled that it did not. In ruling, the Court noted that the property was located to the west of a flood control levee, that flooding in the east Everglades is a well known fact, and the purchaser was himself a contractor who actually reviewed the building records before entering into the contract for purchase and sale. *Id*. at 259, 260. This was enough to trigger a further duty of inquiry on the part of the purchaser, and failure to do so precluded him from any cause of action against the seller. *Id*. at 261. Thus, the principles of the *Besett* and *Johnson* rulings worked under the narrow factual circumstances that

existed in the *Johnson* case.

However, in 1995, the Third District Court of Appeal recognized an exception to the rule of law that was described by this Court in *Besett* and *Johnson*. *See*, *Wasser v. Sasoni*, 652 So.2d 411 (Fla. 3rd DCA 1995). An "as is" contract for purchase and sale of residential real estate essentially shifts the duty to investigate the representations of the seller back onto the purchaser. *Id*. at 412, 413. Failure of the purchaser to investigate information that is readily available to both parties will preclude the purchaser, as it did *prior* to the *Besett* and *Johnson* cases, from subsequently bringing a cause of action against the seller for fraud. *Id*. at 413.

The contract for sale and purchase in the *Pressman* case involves an "as is" contract. *Id*. at 357.

When you look at the narrow factual circumstances of the *Pressman* case, it is easy to see why the Third District Court of Appeal ruled as they did. The contract for sale and purchase involved an "as is" transaction, giving both the seller and purchaser on equal duties of inquiry. *Id*. The specific representation by the seller involved an "eyesore" building that was in the plain view of the purchaser. *Id*. Not only was the purchaser under a duty to independently investigate the representations of the seller, the potential falsity of the seller's statements were plainly obvious to the purchaser. The purchaser *clearly* should have checked the public records to determine for himself whether the building was going to be torn down. The Third District Court of Appeal,

under the narrow facts of the case, correctly ruled that the purchasers failure to investigate the public records precluded him from a cause of action against the seller.

The unfortunate part of the Third District Court of Appeal's decision is the blank statement citing *Nelson* that "Statements concerning public record cannot form the basis for claim of actionable fraud. *Id*. at 360. Not only is it a misinterpretation of the *Nelson* case, but it a throwback to the previously cited cases that were expressly disapproved by this Court in the *Besett* decision.

The effect of the *Pressman* case is to create a blanket exception to the rule of law set forth by *Besett* and *Johnson* regarding all representations by the seller involving issues that are matter of public record. Under that exception, which would be a substantial deviation from this Court's prior rulings, a purchaser of residential real estate would have a new, completely independent duty to investigate each and every representation by the seller which may or may not be a matter of public record. It would give the seller a way to trap an unwary or inattentive purchaser, which is exactly what the *Besett* case expressly tried to prevent.

The only other gloss to the rule of law established by the Supreme Court of Florida in the *Besett* case is that, in cases involving negligent misrepresentation, the purchaser's failure to independently investigate the representations of the seller, under certain circumstances, can be considered as the comparative negligence of the

purchaser and offset a portion of the damages. *Gilchrist Timber Company v. ITT Rayonier, Inc.*, 696 So.2d 534 (Fla. 4th DCA 1997). The comparative negligence of the purchaser does not appear, at this juncture, to apply to claims of pure fraudulent misrepresentation. In so ruling, this Court reaffirmed its prior holdings in *Besett* and *Johnson*. Any ruling for the DEVELOPER in the instant case would recede from those decisions.

The rulings of the Fourth District Court of Appeal in *Azam*, and the First District Court of Appeal in *Newbern*, follow the rule of law set forth in *Besett* and Johnson, and even accounts for the possibility of comparative negligence as set forth in *Gilchrist Timber Company*. Under the particular factual circumstances of each of those cases, the rule of law was correctly applied. As the Fourth District Court of Appeal aptly stated, the rule must be applied to each case on a factual, case-by-case basis. These cases are the better reasoned cases, that account for the rule of law, and all of its exceptions, that has been described in this Answer Brief on the Merits. The only exception which the PURCHASERS in the instant case take to the Fourth District Court of Appeal's ruling is that it should have also permitted them to plead causes of action for recission and negligence.

Under the facts of the instant case, the contract for sale and purchase were warranty sales, not "as is" sales. As such, there is nothing to trigger any duty on the part of the PURCHASERS to independently investigate the public records to

determine if the land across the roadway would remain as the "natural preserve" that was represented by the seller's in-house real estate agent. At the time of the contracts the land did, in fact, appear to be the "natural preserve" that was represented by the seller's in-house real estate agent. If there had been a crane or construction equipment on the land, or if the seller had given the PURCHASERS a copy of the site plan at issue, it would have placed them on constructive notice of the potential falsity of the seller's representations. That would have triggered a duty on the part of the PURCHASERS to independently investigate the public records to determine if the land across the roadway would remain as the "natural preserve" that was represented by the seller's in-house real estate agent. That is not what happened. *Compare*, *Mortimer v. M.D.C./Wood, Inc.*, 854 P2d 1307 (Colo.App. 1992). Thus, under the case law cited above, and specifically the Supreme Court of Florida's prior rulings, the PURCHASERS do possess a cause of action against the Seller.

Even the State of New York, which has staunchly upheld the doctrine of *Caveat Emptor* in residential real estate sales, has recognized a cause of action on the part of the purchaser against the seller for affirmative representations about issues that are a matter of public record. See, *Avalon Realty, Inc. v. Baumrind*, 610 N.Y.S.2d 269 (A.D. 1 Dept. 1994); *Casey v. Masullo Bros. Builders, Inc.*, 630 N.Y.S.2d 599 (A.D. 3 Dept. 1995).

The ruling of the Fourth District Court of Appeal was rendered in accord with

the prevailing rule of law in the State of Florida as well as a growing number of other jurisdictions.

CONCLUSION

Based upon the facts and authorities discussed above, the Respondents respectfully requests this Court to affirm the ruling of the Fourth District Court of Appeal regarding Count I of the PURCHASERS complaint for Fraud, and reverse the ruling of the Fourth District Court of Appeal regarding Count II and Count III of the complaint for Recission and Negligence, and remand the case to the lower court for further proceedings.

CERTIFICATE OF COMPLIANCE

This Brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2). The size and type used in this Brief is Times New Roman 14, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed on this _____ day of _____, 2001 to: **DIRAN V. SEROPIAN,**

ESQUIRE, ***PETERSON, BERNARD, VANDENBERG, ZEI, GEISLER & MARTIN, P.A., Attorneys for Defendant, M/I SCHOTTENSTEIN HOMES, INC.***, 1550 Southern Boulevard, Suite #300, Post Office Drawer #15700, West Palm Beach, Florida 33416.

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APPENDIX