IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

NASAD AZAM, SAFEEIA 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.
_____/

CASE NO.: SC00-1582

4DCA Case No.: 4D99-2898

Florida Bar No. 773476

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

INITIAL BRIEF ON THE MERITS OF PETITIONER M/I SCHOTTENSTEIN HOMES, INC. WITH APPENDIX

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Defendant/Appellee, M/I SCHOTTENSTEIN HOMES, INC., 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 - Trial Judge.

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

12. BARRIE G. RODERMAN, ESQ., Co-Counsel for Appellants/Plaintiffs in the lower court.

CERTIFICATE OF INTERESTED PERSONS Continued

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 Defendants/Appellees, M/I SCHOTTENSTEIN HOMES, INC. in the Lower Court and Appellate Court.

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PREFACE

This Initial Brief on the Merits is submitted on behalf of M/I SCHOTTENSTEIN HOMES, INC., Defendant in the trial court and Petitioner here.

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

In *Azam v. M/I Schottenstein Homes, Inc.*, 761 So.2d 1195 (Fla. 4th DCA 2000), the Fourth District Court of Appeal affirmed the trial court's ruling dismissing with prejudice Count II - Rescission, and Count III - Negligent Misrepresentation; however, it reversed the trial court's ruling as to Count I - Fraud in the Inducement, noting conflict with the Third District Court of Appeal's Decision in *Pressman v. Wolf*, 732 So.2d 356 (Fla. 3rd DCA), *rev. denied,* 744 So.2d 459 (Fla. 1999). For the reasons

discussed below, *Pressman* properly applied the law in Florida on Fraudulent Misrepresentation as set forth in *Besett v. Basnett,* 389 So.2d 995, 997 (Fla. 1980) and reached a correct result. This Court accordingly should quash so much of the Fourth District's Decision in *Azam*, as revived Count I – Fraud in the Inducement, along with the First District's Decision in *Newbern*. It should approve the result in *Pressman* and reinstate the judgment of the trial court, dismissing the Fraud in the Inducement Court with prejudice.

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

(R)	–	Record on Appeal
(07/20/99 T)	–	Transcript of 07/20/99 Hearing on Purchasers' Motion to Dismiss
(A)	–	Appendix to Initial Brief on Merits

CERTIFICATION OF FONT TYPE

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

POINT ON APPEAL

The *Azam* Court erred 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, and failed to follow *Besett* to determine as a matter of law that an alleged misrepresentation was obviously false, in favor of a "case-by-case" determination which turns on the subjective impressions of the Buyer, and a myriad of other factors.

STATEMENT OF CASE AND FACTS

A. PROCEEDINGS IN THE TRIAL COURT

Between December of 1995 and August of 1998, the several Plaintiffs, PURCHASERS herein, each entered into a respective "Agreement For Sale Of House And Lot", with the Developer, M/I SCHOTTENSTEIN HOMES, INC. Each of these Real Estate Contracts were for the sale and purchase of houses and lots located in the Brindlewood Subdivision, at or near Wellington, Palm Beach County, Florida. Each commercial transaction closed, resulting in the transfer of the Real Property from DEVELOPER to each PURCHASER.

The gravamen of PURCHASERS' claims is an alleged misrepresentation by an agent or employee of M/I SCHOTTENSTEIN HOMES, INC. that two (2) parcels of land directly across the roadway which ran in front of the entrance to the "Brindlewood Subdivision," were "a natural preserve" and would remain that way. In fact, and in reality, the Palm Beach County Site Plan dated September 11, 1989, and attached to PURCHASERS' Complaint, indicates that one fifteen (15) acre parcel was designated to be developed as a school, and the other twenty-one (21) acre parcel was zoned for commercial development and use. PURCHASERS' Complaint and specifically paragraph 12 thereof, stated that at all times material the Site Plan was available in the Public Records of Palm Beach County (R. 3-4). Further, the Palm

Beach County Site Plan was at all times material hereto, on file at the office of Palm Beach County and available for inspection or review, according to paragraph 13 of PURCHASERS' Complaint (R. 4). According to Count I of PURCHASERS' Complaint, and paragraph 69 thereof, the Site Plan was on file with Palm Beach County at the time of the alleged "misrepresentations" (R. 22).

The trial court conducted the Hearing on the Motion To Dismiss With Prejudice on July 20, 1999 (7/20/99 T 1-12). On July 20, 1999, the court entered its Order granting DEVELOPER'S Motion To Dismiss With Prejudice. From the Order Of Dismissal With Prejudice and the Order Denying Rehearing, PURCHASERS' appeal in the Fourth District was timely perfected.

B. PROCEEDINGS IN THE FOURTH DISTRICT

The Fourth District Court of Appeal affirmed the dismissal with prejudice of Count II - Rescission, and Count III - Negligent Misrepresentation, but reversed the dismissal with prejudice as to Count I - Fraud in the Inducement. The Fourth District then observed that it's Decision in *Azam* conflicted with the Third District's Decision in *Pressman*. (App. 1).[1] The Fourth District explained:

> The main issue on appeal is whether appellants alleged sufficient facts to support a cause of action for fraud in the

[1] The Fourth District's Decision is reported at *Azam v. M/I Schottenstein Homes, Inc.*, 761 So.2d 1195 (Fla. 4th DCA 2000).

inducement against Schottenstein. We believe they did. Specifically, they alleged that (1) Schottenstein made a misrepresentation of a material fact; (2) Schottenstein knew or should have known of the statement's falsity; (3) Schottenstein intended that the representation would induce appellants to rely and act on it; and (4) they suffered injury in justifiable reliance on the representation. *See Hillcrest Pacific Corp. v. Yamamura,* 727 So.2d 1053, 1055 (Fla. 4th DCA 1999)(stating the elements of a cause of action for fraud in the inducement). Accordingly, we hold that dismissal of their cause of action for fraud was improper.

* * *

[2] Schottenstein, however, argues that dismissal was proper under *Pressman*. *Pressman* held that "[s]tatements concerning public records cannot form the basis for a claim of actionable fraud." 732 So.2d at 361. In reaching this decision, the court cited *Nelson v. Wiggs,* 699 So.2d 258 (Fla. 3d DCA 1997), which referred to the obligation of a buyer's "diligent attention" to matters contained in public records. *Nelson* suggested the test for whether the availability of adverse information in public records precludes a fraud claim is the reasonableness of the buyer's actions vis-a-vis the extent of investigatory effort that one would expend to discover such records.

We disagree with the broad prohibition in *Pressman*. Rather, whether a fraud claim may lie with respect to statements about matters outside the property being sold, the status of which matters can be determined from a public record, is a factual question. Thus, 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. [FN1] 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. To the extent that this decision conflicts with *Pressman*, however, we note conflict.
>
> > FN1. We wholly agree with Judge Gross' concurring opinion in this regard. *See Besett v. Basnett,* 389 So.2d 995, 998 (Fla.1980)(holding that a "recipient may rely on the truth of a 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").

This Court has now exercised its Discretionary Jurisdiction to resolve the conflict between *Azam* and *Pressman*, and also presumably, *Newbern v. Mansbach*, 2001 WL 10239 (Fla. 1st DCA 2001), as well.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred in holding that the dismissal of Plaintiffs' cause of action for fraud in the inducement was improper.

PURCHASERS' cause of action for fraud in the inducement, or intentional misrepresentation must fail, as PURCHASERS cannot state a cause of action based upon the allegation that an agent or employee of M/I SCHOTTENSTEIN HOMES, INC. made misrepresentations about the possible future speculative development (or non-development) of nearby real estate owned or controlled by Palm Beach County. This Court should therefore quash the Fourth District's ruling to the contrary, and

should approve the result directed by *Pressman*, which properly applied the rule in *Besett v. Basnett*, infra.

Second, PURCHASERS are charged with knowledge of the Public Record including those of Palm Beach County as they concede that the Site Plan was contained within the Public Records of various respective government offices, including the Palm Beach County Engineering Department, the Palm Beach County Health Department, the Palm Beach County Attorney, the Palm Beach County Zoning Division, and Palm Beach County Building Division (Initial Brief of Appellants in Fourth District Court of Appeal at Pg. 2). Because the various governmental offices are the precise public offices any prudent person, closing agent, or attorney would consult in performing their due diligence investigation with respect to a transaction leading to the purchase of a residential home, PURCHASERS' cause of action for fraud in the inducement must fail as the alleged misrepresentation was "obviously false" as those terms are defined within Sections 540 and 541 of the Restatement Second of Torts and in *Besett v. Basnett*, infra. Purchasers could not justifiably rely on an alleged misrepresentation when they were charged with knowledge of the Site Plan, which clearly demonstrated otherwise.

Moreover, the utility of the bright line rule – statements concerning the Public Record cannot form the basis for a claim of actionable fraud – outweighs the

uncertainty and disparate results likely to flow from a case-by-case determination of whether reliance is justifiable. So too, the case-by-case determination offends the longstanding general principle that a landowner or purchaser is deemed to have constructive knowledge of the contents of the Public Record. This rule should apply with equal force to adjacent property even if that is the property to which the representation related. Even if this Court adopts the case-by-case determination of justifiable reliance, when the representation embraces a matter within the Public Record, the bright line rule above should apply.

ARGUMENT

PURCHASERS' cause of action for fraud in the inducement, or intentional misrepresentation should fail, as PURCHASERS cannot state a cause of action based upon the allegation that an agent, or employee of M/I SCHOTTENSTEIN HOMES, INC. made false misrepresentations about the possible future speculative development (or non-development) of nearby real estate owned or controlled by Palm Beach County. Statements concerning the Public Record cannot form the basis for a claim of actionable fraud.

THE THIRD DISTRICT'S POSITION ON MISREPRESENTING THE PUBLIC RECORD

The trial court in the case at bar correctly relied upon the result reached by *Pressman v. Wolf*, 732 So.2d 356 (Fla. 3rd DCA), *rev. denied*, 744 So.2d 459 (Fla. 1999) in determining PURCHASERS' Fraud in the Inducement Count failed to state a cause of action, and furthermore, that it could not be amended to allege a viable cause of action. In *Pressman* the purchaser entered into a contract for the sale of residential property "as is" with no warranty provisions as to the home's air conditioning system and pool. Seller warranted that there were no facts known to Seller materially affecting the value of the Real Property which were not readily observable by Buyer or which had not been disclosed to Buyer. [2] The Purchaser in *Pressman* had pre-closing inspections done on the air conditioner and pool which outlined the problems with both. A pre-closing representation that the home could be renovated for $100,000.00 did not appear anywhere in the Contract. A pre-closing representation that an "eye-sore" building on nearby property would be torn down by the City was also not included in the Contract. In ruling that recovery was barred under a theory of fraudulent misrepresentation, the Third District referred to *Johnson v. Davis, supra* and *Besett v. Basnett*, 389 So.2d 995, 997 (Fla. 1980) which adopted

[2] This language embodies the holding in *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985).

as its holding, Sections 540 and 541, Restatement Second of Torts, as being directly applicable to this type of case:

> s 540. Duty to investigate.
>
> > The recipient of a fraudulent representation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.
> >
> > Comment:
> >
> > a. ...On the other hand, if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in s 541.
>
> s 541. Representation Known To Be Or Obviously False.
>
> > The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.

Continuing, the Third District referred to Comment a. under Section 541 which example states:

> Thus, if one induces another to buy a horse by representing it to be sound, the purchaser can not recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect.

The *Pressman* court concluded that the home for sale in that case was the functional equivalent of a one-eyed horse and purchaser's recovery was barred accordingly.

Pressman, 732 So.2d at 360; *see also, Wasser v. Sasoni*, 652 So.2d 411 (Fla. 3rd DCA 1995) (Concluding a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence); *David v. Davenport*, 656 So.2d 952 (Fla. 3rd DCA 1995) (same). The exact same analysis bars PURCHASERS' claims in this case. The Third District specifically held that the purchaser's accusation that sellers told her that a building posing an obstacle to her view would be removed, failed to state a basis for relief. Statements concerning Public Record can not form the basis of a claim for actionable fraud. *Pressman*, 732 So.2d at 361, *citing, Nelson v. Wiggs*, 699 So.2d 258, 261 (Fla. 3rd DCA 1997)(concluding seller had no duty to disclose seasonal flooding as the information that the property is subject to seasonal flooding was available to the buyers through diligent attention).

In addition to *Pressman v. Wolf, supra*, holding that statements concerning the Public Record can not form the basis of a claim for actionable fraud, other cases support that proposition. In *Nelson v. Wiggs*, 699 So.2d 258 (Fla. 3rd DCA 1997), Purchasers brought an action against Vendor for recission of Contract after discovering the property was located in an area with seasonal flooding. In affirming the trial court's judgment for Vendor, the Third District held that the Vendor had no duty to disclose the flood-prone nature of the property to Purchasers. The court observed that Dade County's regulations requiring that homes in such area be built on

elevations to avoid interior flooding, were duly enacted and a matter of Public Record. Their availability in the Public Records showed that the information was within the diligent attention of any Buyer.

The *Nelson* court cited *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985) in concluding that the Seller was under no duty to disclose the Dade County regulations in the Public Records as the same were readily observable and known to the Buyer. The *Nelson* court specifically found that Dade County's flood criteria were included within the rule that owners of Real Property are deemed to have purchased it with knowledge of the applicable land used regulations. *Nelson*, 699 So.2d at 264 n. 4, *citing, Metropolitan Dade County v. Fontainebleau Gas & Wash, Inc.*, 570 So.2d 1006 (Fla. 3rd DCA 1990); *see also, Rosique v. Windley Co., Ltd.*, 542 So.2d 1014 (Fla. 3rd DCA 1989) (Purchaser not entitled to rescind Real Estate Contract on ground of mutual mistake after discovering that Zoning Density Requirements did not permit motel's construction); *Ammons v. Okeechobee County*, 710 So.2d 641 (Fla. 4th DCA 1998) (Applicants for Occupational License were on constructive notice of contents of Zoning Ordinance); *City Of Miami Beach v. New Floridian Hotel, Inc.*, 324 So.2d 715 (Fla. 3rd DCA 1976) (Owner of land is chargeable with knowledge of general laws prescribing manner in which it may be enjoyed or title thereto affected); *Killearn Properties, Inc. v. Department Of Community Affairs*, 623 So.2d 771, 775 (Fla. 1st

DCA 1993) (Purchaser of land had the duty to ascertain legal restrictions on the property which they purchased by reference to the published Ordinances or Public Records); *Namon v. State Department Of Env. Reg.*, 558 So.2d 504 (Fla. 3rd DCA 1990) (Purchasers are deemed to purchase property with constructive knowledge of the applicable land use regulations); *Steinberg v. Bay Terrace Apartment Hotel, Inc.*, 375 So.2d 1089 (Fla. 3rd DCA 1979) (Purchasers who made decision not to inspect Building and Zoning Records prior to closing were not entitled to rescind transaction). Thus, even assuming an alleged "misrepresentation" regarding the two (2) adjacent parcels was made by an agent of DEVELOPER, the same cannot be the basis for a claim of actionable fraud. PURCHASERS, like it or not, are charged with knowledge of the Public Records and cannot now be heard to complain that they were misled, as their claimed reliance was not justifiable.

Clearly, the PURCHASERS in the case at bar were in an equal position with M/I SCHOTTENSTEIN HOMES, INC. to know of the Public Records and the Site Plan. PURCHASERS are charged with that very knowledge. It is indisputable that the Site Plan (A. 5) was available in the Public Records of Palm Beach County at the time each of the PURCHASERS entered into their respective Agreement For Sale Of House And Lot. PURCHASERS concede that the Site Plan was contained within the public records of various respective governmental offices including the Palm Beach

County Engineering Department, Palm Beach County Health Department, Palm Beach County Attorney, Palm Beach County Zoning Division, and Palm Beach County Building Division.

THE FOURTH DISTRICT'S *AZAM* DECISION

The problem with the *Azam* Opinion is that it eschews the "bright line rule" applicable to statements concerning the public record, in favor of a "case-by-case" analysis when the same can have no other legitimate effect than to throw uncertainty into commercial transactions where a misrepresentation is alleged. It virtually absolves the Buyer of any due diligence obligation relative to the commercial transaction. For example, the purchase of a home, for most Americans, is the single largest investment they will make. Due diligence, or diligent investigation and attention is appropriate to such a transaction. Moreover, the various governmental offices which contained the Site Plan are not located in the "bowels of the courthouse," but are the very public offices any prudent person, closing agent or attorney would consult in performing their due diligence investigation with respect to a transaction relating to the purchase of a home.

Azam interjects a factual determination into the equation by focusing on the "justifiable reliance" element for a fraud in the inducement cause of action. Sections 540 and 541 of the Restatement Second of Torts were adopted by the Florida Supreme

Court as its holding in *Besett*, 389 So.2d at 998. While a case-by-case analysis may be appropriate to other factual scenarios, where the Public Record is concerned, the bright line rule is favorable. PURCHASERS' Complaint, to which the Site Plan was appended, makes clear that the alleged misrepresentation was "obviously false" as those terms were illustrated in comment a. to Section 540, and Comment a. to Section 541.

The decision in *Azam* is also problematic because it implicitly suggests a different standard should apply if the Seller is a developer like M/I SCHOTTENSTEIN HOMES, INC. No rationale is offered for this disparate treatment, nor is one readily apparent.

The *Azam* court reiterated the elements for fraud in the inducement. The fourth element requires "justifiable reliance." But according to *Besett supra*, no justifiable reliance can occur if falsity is obvious. This Honorable Court should exercise its discretionary jurisdiction to correct these conflicts created by the *Azam* decision.

THE FIRST DISTRICT'S *NEWBERN* DECISION

The First District Court of Appeal has recently weighed in on this issue in the case of *Newbern v. Mansbach*, 2001 WL 10239 (Fla. 1st DCA 2001). There, Purchasers brought suit against the vendor's real estate broker, and their own insurance agent asserting claims for fraudulent and negligent misrepresentations as to

whether the property's location in a Coastal Barrier Resource Area (CBRA) made it ineligible for Federal Flood Insurance and as to whether insurance coverage had actually been obtained prior to closing. In reversing summary judgment in favor of the Defendants, the First District held that as to the negligent misrepresentations, the rule in *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So.2d 334, 339 (Fla. 1997) required the recipient's conduct to be evaluated under principles of comparative negligence. The *Gilchrist* court determined that the question of a party's justifiable reliance is an issue of comparative negligence that should be resolved by a jury. *Id*. at 339. According to the First District: "*Gilchrist* in no way suggests that a cause of action may be precluded as a matter of law based on the trial court's determination that if Plaintiff reasonably could have discovered the information and/or that such information is part of Public Record." *Newbern,* 2001 WL 10239. On the issue of negligent misrepresentation, the First District concluded by observing that the rulings of the Third District in *Pressman* and *Nelson* were contrary to the holding in *Gilchrist; Id*.

Somewhat more troubling, is the First District's analysis as to the fraudulent misrepresentation cause of action. The First District stated that the *Pressman* holding conflicts with the Supreme Court's holding in *Besett v. Basnett*, 389 So.2d 995, 998 (Fla. 1980) and cited to the portion of *Besett* wherein the Florida Supreme Court

adopted Sections 540 and 541 of the Restatement Second of Torts.[3] The *Newbern* court concluded its analysis of the purposeful misrepresentation tort by stating that the trial court could not make a determination as a matter of law, but that the question of the PURCHASERS' reliance remained a disputed issue of material fact. In so holding, the First District recognized that its decision in *Newbern* conflicts with the *Nelson* and *Pressman* decisions from the Third District Court of Appeal, and aligned itself with the Fourth District's announcement in *Azam*. The First District did not address the parameters within which the reliance is to be evaluated. Nor did it mention that its result implicitly absolves Purchasers of land of constructive knowledge of the contents of the Public Record as to adjacent property which could materially affect the value of the property being purchased. This perhaps unintended result also throws into uncertainty that longstanding principle.

As a practical matter, the application of the bright line rule, at least with respect to information in the Public Record, serves the utilitarian purpose of maintaining the stability of commercial transactions. Moreover, if the information forming the basis of the representation is in the Public Record, a judicial determination can be made as a matter of law as to whether the recipient of the alleged misrepresentation had

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[3] A recipient may rely on the truth of a 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.

knowledge of its falsity. This could be done by comparing the assertion to the Public Record.

Another problem with the "case-by-case" analysis suggested by the Fourth District in *Azam* and implicitly by the First District in *Newbern* is the absence of any uniform parameters in which to evaluate the conduct of any given recipient of the alleged misrepresentation. For example, the circumstances surrounding the receipt of an alleged misrepresentation, whether negligent or intentional, are as varied as can be conceived. To eschew the bright line rule in favor of a "case-by-case" analysis, but without providing any parameters within which to evaluate a recipient's justifiable reliance is an even less desirable result.

POLICY CONSIDERATIONS

Whether PURCHASERS have a cause of action for fraudulent misrepresentation, an intentional tort, turns on whether PURCHASERS had knowledge of the falsity or whether the falsity of the alleged misrepresentation was obvious. Stated the other way – was the recipient's reliance justifiable? The *Azam* decision suggests a case-by-case analysis of the conduct of the PURCHASER, i.e. the nature of the misrepresentation, to whom it was made, the surrounding circumstances, the ease with which the Public Record could have been analyzed, and the proponent of the alleged misrepresentation. While the "case-by-case" analysis has the allure of

trying to balance the deceit of misrepresentation against the foreseeable poor outcome which can arise from a lack of due diligence attendant to a commercial transaction, it is not the preferable solution where the Public Record is concerned. Simply put, the question is what means should be employed to determine whether the reliance on the alleged misrepresentation was justifiable? That determination is dependant on whether the recipient of the statement knew of its falsity or the falsity was obvious. Because the Site Plan is a Public Record of which PURCHASERS were aware by operation of law, they are charged with knowledge of the falsity of the alleged misrepresentation and, as a matter of law, their claimed reliance could not be justified.

The Fourth District's and the First District's proposed method of evaluating the conduct of parties to an arm's length transaction is problematic. At what point does the defense of unjustifiable reliance overcome the intentional tort of misrepresentation of material fact? At what point is the falsity of the statement sufficient to say that reliance on it was not justifiable? Perhaps most perplexing is the resulting intermingling of factors usually attendant to analyzing "reasonable" conduct against the "mens rea" or "scienter" requirements of an intentional tort. For these reasons, the bright line rule is preferable, certainly with respect to representations concerning the Public Record.

Moreover, the *Pressman's* broad prohibition against allowing a cause of action for misrepresentation of the Public Record serves two purposes. First, it comports

with a long line of cases, which recognize that a landowner or purchaser is charged with knowledge of information within the Public Record. *See Ammons; City of Miami Beach; Killearn Properties; Namon; Steinberg supra*.

Secondly, Florida is committed to wide ranging access by its citizens to all manner of Public Record as recognized by the Public Records Act, Chapter 119, Florida Statutes. With that access comes a corresponding obligation on the PURCHASERS to be reasonably informed, and to exercise due diligence. This is particularly true in the age of the World Wide Web, computer information, posting of governmental documents, and other information within relatively easy access of the citizens at large. The bright line rule allows an appropriate and immediate determination as a matter of law as to whether there is any actionable misrepresentation.

CONCLUSION

Based on the facts and authorities discussed above, Petitioner respectfully requests that so much of the Fourth District's Decision as revived Count I - Fraud in the Inducement be quashed, that the Third District's result in *Pressman* be approved, and that the Court align the First District accordingly.

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 foregoing was sent by U.S. Mail this _____ day of _____, 2001 to: **S. TRACY LONG, ESQ.**, Gustafson & Roderman, Attorneys for Respondents, 4901 North Federal Highway, Suite 440, Ft. Lauderdale, FL 33308.

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