ORIGINAL

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

BRIEF OF PETITIONER ON JURISDICTION
M/I SCHOTTENSTEIN HOMES, INC.
(WITH APPENDIX)

Diran V. Seropian, Esquire
PETERSON, BERNARD, VANDENBERG, ZEI, GEISLER & MARTIN
Attorneys for Petitioner
1550 Southern Boulevard, #300
West Palm Beach, FL 33406
(561) 686-5005 - Telephone
(561) 471-5603 - Facsimile

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Page

Statutes and Authorities

POINT ON APPEAL

The decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with the decision of the Third District Court of Appeal in Nelson v. Wiggs, 699 So.2d 258 (Fla. 3rd DCA 1997) and Pressman v. Wolf, 732 So.2d 356, 361 (Fla. 3d DCA), review denied, 744 So.2d 459 (Fla. 1999), which held that statements concerning the public record cannot form the basis for a claim of actionable fraud; and with the Supreme Court's decision in Besset v. Basnett, 389 So. 2d 995 (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 misrepresentation to be false or its falsity is obvious to him.

STATEMENT OF CASE AND FACTS

Between December of 1995 and August of 1998, the several Plaintiffs, PURCHASERS herein, each entered into an "Agreement For Sale Of House And Lot", with the Petitioner 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 M/I SCHOTTENSTEIN HOMES, INC. 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 to be used as "preserve acreage" or "open space acreage." In fact, and in reality, the Palm Beach County Site Plan dated September 11, 1989, (A5) 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 Initial Brief below concede that at all times material the Site Plan was available in the Public Records of Palm Beach County. According to Count I of PURCHASERS' Complaint, the Site Plan was in the public

records within various Palm Beach County offices at the time of the alleged "misrepresentations."

On July 20, 1999 the trial court entered its Order granting M/I SCHOTTENSTEIN HOMES, INC.'s Motion to Dismiss with Prejudice. PURCHASERS timely appealed to the Fourth District Court of Appeal which reversed the dismissal with prejudice of the Count alleging fraud in the inducement.

SUMMARY OF ARGUMENT

With respect to fraud in the inducement, it is impossible to state a cause of action based upon allegations that M/I SCHOTTENSTEIN HOMES, INC. made false misrepresentations about possible future speculative development or non-development of nearby real estate owned or controlled by Palm Beach County. Public property records were accessible to the PURCHASERS. Pressman v. Wolf, 732 So.2d 356, 361 (Fla. 3rd DCA), rev. denied, 744 So.2d 459 (Fla. 1999) held that statements concerning the public record cannot form the basis of a claim for actionable fraud.

In the present case, assuming arguendo that the alleged misrepresentations were made, they were of such character that even a cursory glance at the Site Plan would have disclosed the falsity of the representation. That being so, its falsity was obvious and under Besset v. Basnett, 389 So.2d 995, 997 (Fla. 1980) the PURCHASERS were

not therefore justified in relying on its truth. The misrepresentation was not actionable because PURCHASERS are charged with knowledge of the Public Records.

Therefore, the decision of the Fourth District conflicts with these cases. PURCHASERS concede the Site Plan was contained within the public records of various 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.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of the District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Art. V Section 3(b)(3) Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

> The decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with the decision of the Third District Court of Appeal in Nelson v. Wiggs, 699 So.2d 258 (Fla. 3rd DCA 1997) and Pressman v. Wolf, 732 So.2d 356, 361 (Fla. 3d DCA), review denied, 744 So.2d 459 (Fla. 1999), which held that statements concerning the public record cannot form the basis for a claim of actionable fraud; and with the Supreme Court's decision in Besset v. Basnett, 389 So. 2d 995 (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 misrepresentation to be false or its falsity is obvious to him.

PURCHASERS' cause of action for fraud in the inducement, or intentional misrepresentation must fail, as it is impossible for PURCHASERS to 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 can not form the basis for a claim of actionable fraud. The trial court correctly relied upon the case of Pressman v. Wolf, 732 So.2d 356 (Fla. 3rd DCA), rev. denied, 744 So.2d 459 (Fla. 1999) in determining PURCHASERS' Complaint failed to state a cause of action, and furthermore, that it could not be amended to allege a 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. The Pressman Contract also had a Merger Clause labeled "Other Agreements" which provided that no prior or present agreement or representation was binding upon Buyer or Seller unless included in the Contract. 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 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 Besset v. Basnett, 389 So.2d 995, 997 (Fla. 1980) which adopted at 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. 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.

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. Thus, the Buyers claim for recission was correctly denied. 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. Thus, even assuming an alleged "misrepresentation" regarding the two (2) parcels was made by an agent of M/I SCHOTTENSTEIN HOMES, INC., the same cannot be the basis for a claim of actionable fraud. The trial court correctly dismissed the Complaint with prejudice. PURCHASERS, like it or not, are charged with knowledge of the Public Records and cannot now be heard to complain that they were misled.

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 (A5) 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 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 for no legitimate purpose. It virtually absolves the Buyer of any due diligence obligation relative to the commercial transaction. That result is unwarranted and adds unnecessary instability to this area of the law. 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. The decision of the Fourth District flies in the face of common sense. 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 needlessly interjects a factual determination into the equation. Sections 540 and 541 of the Restatement Second of Torts were adopted by the Florida Supreme Court as its holding in Besset, 389 So.2d at 998. Moreover, it is clear from PURCHASERS' Complaint, to which the Site Plan was appended, that the alleged misrepresentation was "obviously false" as that terms was 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 M/I SCHOTTENSTEIN HOMES, INC.. No rationale is offered for this disparate treatment, nor is one readily apparent.

It should be further noted that in its rush to give Plaintiffs a cause of action, the Azam court reiterated the elements for fraud in the inducement. The fourth element requires "justifiable reliance." But according to Besset 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.

CONCLUSION

The decision in the present case, as indicated within the body of the Opinion of the Fourth District Court of Appeal, conflicts with the cases of Pressman v. Wolf, 732 So.2d 356 (Fla. 3rd DCA), rev. denied, 744 So.2d 459 (Fla. 1999), Nelson v. Wiggs, 699 So.2d 258, 261 (Fla. 3rd DCA 1997), as well as this Court's holding in Besset v. Basnett, 389 So.2d 995 (Fla. 1980). Accordingly, this Honorable Court should accept jurisdiction, should clarify the law, and should hold that Pressman and Besset are the

law of Florida, and reinstate the judgment of the trial court, dismissing the Complaint with prejudice.

Respectfully submitted,
PETERSON, BERNARD, VANDENBERG,
ZEI, GEISLER & MARTIN
Attorneys for Petitioner
1550 Southern Boulevard, Suite 300
West Palm Beach, Florida 33416
(561) 686-5005 - Telephone
(561) 471-5603 - Facsimile

By _____
Diran V. Seropian, Esq.
Florida Bar No. 773476

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 4th day of AUGUST, 2000 to: **S. TRACY LONG, ESQ.**, Gustafson & Roderman, 4901 North Federal Highway, Suite 440, Ft. Lauderdale, FL 33308.

PETERSON, BERNARD, VANDENBERG,
ZEI, GEISLER & MARTIN
Attorneys for Petitioner
1550 Southern Boulevard, Suite 300
West Palm Beach, Florida 33416
(561) 686-5005 - Telephone

By _____
Diran V. Seropian, Esq.
Florida Bar No. 773476

Appendix

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 2000

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,

Appellants,

v.

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

Appellee.

CASE NO. 4D99-2898

Opinion filed June 28, 2000

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; James T. Carlisle, Judge; L.T. Case No. 99-5209 AE.

S. Tracy Long of Gustafson & Roderman, Fort Lauderdale, for appellants.

Diran V. Seropian of Peterson, Bernard, Vandenberg, Zei, Geisler & Martin, West Palm Beach, for appellee.

POLEN, J.

Appellants, individual homeowners in the Brindlewood Subdivision ("Brindlewood") in Palm Beach County, appeal after the trial court dismissed their complaint against their developer, M/I Schottenstein Homes, Inc. ("Schottenstein"), with prejudice. They argue that they alleged sufficient facts to support a cause of action against Schottenstein. We agree and, thus, reverse.

Appellants sued Schottenstein under fraud in the inducement, recission, and negligence stemming from the sales of homes from December, 1995 to August, 1998. They alleged that, around 1989, Palm Beach County prepared a site plan to build a school on a parcel of land ("parcel") to be located approximately 500 feet from Brindlewood. This plan was at all times available to all parties for inspection or review. They also alleged Schottenstein knew of this plan, but falsely represented to them, for the purpose of inducing them to purchase a home in Brindlewood, that the parcel was a "natural preserve," and would be left permanently in that state. They further alleged that they purchased their homes in reliance upon Schottenstein's representation.

Schottenstein filed a motion to dismiss the complaint with prejudice. The court granted the motion on the basis of Pressman v. Wolf, 732 So. 2d 356, 361 (Fla. 3d DCA), review denied, 744 So. 2d 459 (Fla. 1999). This timely appeal followed.

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

In reaching this determination, we hold that Johnson v. Davis, 480 So. 2d 625 (Fla. 1985), does not apply to this case. Johnson held "that where the seller of a home knows of facts

materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." Johnson, 480 So. 2d at 629. Johnson, however, involved the non-disclosure of a physical defect in the property sold. In contrast, this case involves the alleged fraudulent misrepresentation of facts concerning an off-property site that do not affect the physical condition of the properties sold. We, therefore, decline to extend Johnson to the nature of the claim alleged here.

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.[1] 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.

We affirm the dismissal of the remaining counts.

AFFIRMED in part, REVERSED in part.

STONE, J., concurs.
GROSS, J., concurs specially with opinion.

GROSS, J., concurring specially.

I write only to note that I disagree with that broad language in Pressman v. Wolf, 732 So. 2d 356, 361 (Fla. 3d DCA), rev. denied, 744 So. 2d 459 (Fla. 1999), that "[s]tatements concerning public record cannot form the basis for a claim of actionable fraud." (Citation omitted). Whether a fraudulent statement about a public record is actionable is a question of fact. The law should not expect every potential homeowner in every case to root around the bowels of the courthouse for those surveys, plats, and records which would verify or contradict a seller's representations about the property.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

[1]We wholly agree with Judge Gross' concurring opinion in this regard. See Besset 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").

Supreme Court of Florida.

Merle E. BESETT, Irene D. Besett, and C. Joe Czerwinski, Petitioners,
v.
Robert K. BASNETT and Barbara L. Basnett, Respondents.

No. 57201.

Oct. 23, 1980.

Fishing lodge purchasers brought action against vendors to recover damages for fraud and misrepresentation and seeking reformation of contract of sale and abatement of purchase price. The Circuit Court, Charlotte County, Richard M. Stanley, J., dismissed complaint, and purchasers appealed. The District Court of Appeal, 371 So.2d 705, reversed and remanded with instructions, and vendors file petition for certiorari. The Supreme Court, Alderman, J., held that purchasers' fraudulent misrepresentation complaint stated cause of action against vendors, even though purchasers failed to allege that they had investigated truth of vendors' alleged misrepresentations, where it did not appear from complaint that purchasers knew that alleged misrepresentations were false, nor could Supreme Court conclude from that complaint as matter of law that misrepresentations were obviously false.

Decision of district court approved.

Adkins, J., dissented.

West Headnotes

[1] Fraud ⚖22(1)
184k22(1)

Recipient may rely on truth of representation, even though its falsity could have been ascertained had he made investigation, unless he knows representation to be false or its falsity is obvious to him.

[2] Fraud ⚖46
184k46

Fishing lodge purchasers' fraudulent misrepresentation complaint stated cause of action against vendors, even though purchasers failed to allege that they had investigated truth of vendors' alleged misrepresentations, where, it did not appear from complaint that purchasers knew that alleged misrepresentations were false, nor could Supreme Court conclude from that complaint as matter of law that misrepresentations were obviously false.

*996 C. Guy Batsel and Leo Wotitzky of Wotitzky, Wotitzky, Johnson, Mandell & Batsel, Punta Gorda, and Charles J. Cheves, of Cheves & Rapkin, Venice, for petitioners.

Michael R. Karp of Wood, Whitesell & Karp, Sarasota, for respondents.

ALDERMAN, Justice.

The petitioners, Mr. and Mrs. Besett and Mr. Czerwinski, the appellees in the district court and the defendants in the trial court, seek review of the district court's decision in Basnett v. Besett, 371 So.2d 705 (Fla.2d DCA 1979). In this case, the district court found that a fraudulent misrepresentation complaint stated a cause of action even though the plaintiffs failed to allege that they had investigated the truth of the defendants' misrepresentations. We accept jurisdiction on the basis of conflict with Potakar v. Hurtak, 82 So.2d 502 (Fla.1955), approve the decision of the district court, and hold that the plaintiffs' fraudulent misrepresentation complaint does state a cause of action.

The respondents, Mr. and Mrs. Basnett, the appellants in the district court and the plaintiffs in the trial court, were Connecticut residents interested in resettling in Florida. They obtained information about Redfish Lodge from its owners, the Besetts, and the Besetts' real estate broker, Czerwinski. As prospective buyers, they made several trips to Florida to inspect the lodge. They allege that the sellers misrepresented the size of the land offered for sale to be approximately 5.5 acres, when, in fact, the sellers knew it to be only 1.44 acres. They allege that the sellers knowingly misrepresented the amount of the lodge's business for 1976 to be $88,000 and that the roof on a building was brand new, when, in fact, the business income was substantially lower and the roof was not new and leaked. They also allege the defendants misrepresented to them the availability of additional

land for expansion. Relying on these misrepresentations, which they allege were made to induce them to buy, they bought the lodge and the land.

Upon the motion of the defendants, the trial court, relying on Potakar v. Hurtak, dismissed the complaint for failing to state a cause of action. The district court reversed on the authority of its decision in Upledger v. Vilanor, Inc., 369 So.2d 427 (Fla.2d DCA 1979), cert. denied, 378 So.2d 350 (Fla.1979). These cases represent the two divergent lines of authority on this issue which have developed in Florida.

Potakar v. Hurtak was also a fraudulent misrepresentation action. Potakar alleged that he had asked Hurtak if the previous lessees of a restaurant had made a profit, and Hurtak replied they had, even though he knew the previous lessees had lost money for several years. Potakar alleged the misrepresentations were made to defraud, deceive, and influence him to lease the business. In affirming the trial court's dismissal of the complaint for failure to state a cause of action, the court observed that there were "no allegations as to the past profits, no showing as to the right of the plaintiff to rely on past statement, no fact stated as to the diligence on the plaintiff's part in investigating, or failing to investigate such facts, or how he was prevented from investigating the past profits of the said business." 82 So.2d at 503. The Court looked to 23 Am.Jur., Fraud and Deceit s 155, at 960-61 (1940), for a statement of the general rule that "a person to whom false representations have been made is not entitled to relief because of them if he might readily have ascertained the truth by ordinary care and attention, and his failure to do so was the result of his own negligence." 82 So.2d at 503. The Court concluded that Potakar's complaint did not state a cause of action.

***997** The district court, in Upledger, reached a different result. In that case, Upledger, who was purchasing an apartment building from Vilanor, relied upon misrepresentations made by Vilanor concerning the amounts for which the apartments rented and the duration of the leases. Upledger admitted that he did not undertake an independent investigation, and he claimed that he would not have completed the purchase if he had known the true facts. In reversing the trial court's dismissal of Upledger's complaint, the district court, recognizing that there are conflicting lines of authority, concluded:

> (W)hen a specific false statement is knowingly made and reasonably relied upon, we choose to align ourselves with the growing body of authorities which holds that the representee is not precluded from recovery simply because he failed to make an independent investigation of the veracity of the statement....

369 So.2d at 430.

The district court, we believe, made the correct choice. A person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor. The principle of law which we adopt is expressed in Sections 540 and 541 of Restatement (Second) of Torts (1976) as follows:

> s 540. Duty to Investigate.
> The recipient of a fraudulent misrepresentation 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. The rule stated in this Section applies not only when an investigation would involve an expenditure of effort and money out of proportion to the magnitude of the transaction, but also when it could be made without any considerable trouble or expense. Thus it is no defense to one who has made a fraudulent statement about his financial position that his offer to submit his books to examination is rejected. 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.
> b. The rule stated in this Section is applicable even though the fact that is fraudulently represented is required to be recorded and is in fact recorded. The recording acts are not intended as a protection for fraudulent liars. Their purpose is to afford a protection to persons who buy a recorded title against those who, having obtained a paper title, have failed to record it. The purpose of the statutes is fully accomplished without giving them a collateral effect that protects those who make fraudulent misrepresentations from liability.
> 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.
Comment:
a. Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot 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. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

***998** A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two-fraud and negligence-negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter. As the Michigan Supreme Court said many years ago:

> There may be good, prudential reasons why, when I am selling you a piece of land, or a mortgage, you should not rely upon my statement of the facts of the title, but if I have made that statement for the fraudulent purpose of inducing you to purchase, and you have in good faith made the purchase in reliance upon its truth, instead of making the examination for yourself, it does not lie with me to say to you, "It is true that I lied to you, and for the purpose of defrauding you, but you were guilty of negligence, of want of ordinary care, in believing that I told the truth; and because you trusted to my word, when you ought to have suspected me of falsehood, I am entitled to the fruits of my falsehood and cunning, and you are without a remedy."

Bristol v. Braidwood, 28 Mich. 191, 196 (1873).

[1] We hold 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. We recede from Potakar v. Hurtak insofar as it is inconsistent with our present holding, and we disapprove all other decisions inconsistent with our holding in this case.

[2] As was the case in Upledger, the petitioners in this case, as owners of the property being sold, had superior knowledge of its size, condition, and business income. As prospective purchasers, the respondents were justified in relying upon the representations that were made to them although they might have ascertained the falsity of the representations had they made an investigation. From the complaint, it does not appear that the respondents knew that the alleged misrepresentations were false, nor can we conclude from that complaint as a matter of law that the misrepresentations were obviously false.

Accordingly, we approve the decision of the district court.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND and McDONALD, JJ., concur.

ADKINS, J., dissents.

END OF DOCUMENT

District Court of Appeal of Florida,
Third District.

Tom NELSON and Maria Nelson, Appellants,
v.
Helen K. WIGGS, Appellee.

No. 96-3328.

Aug. 13, 1997.
Rehearing Denied Oct. 8, 1997.

Purchasers brought action against vendor for recission of contract after discovering that property was located in area with seasonal flooding. The Circuit Court, Dade County, Gisela Cardonne, J., entered judgment for vendor. Purchasers appealed. The District Court of Appeal, Fletcher, J., held that vendor had no duty to disclose flood-prone nature of property to purchasers.

Affirmed.

Sorondo, J., dissented with opinion.

West Headnotes

[1] Fraud ⚿22(1)
184k22(1)

Purchaser who brings action against vendor based on negligent misrepresentation or failure to disclose must take reasonable steps to ascertain material facts relating to property and to discover facts if they are reasonably ascertainable.

[2] Evidence ⚿65
157k65

Owners of real property are deemed to have purchased property with knowledge of applicable land use regulations.

[3] Vendor and Purchaser ⚿36(2)
400k36(2)

Vendor had no duty to disclose flood-prone nature of property to purchasers, as information that property was subject to seasonal flooding was available through diligent attention; property was located in area covered by county regulations enacted to protect homes from seasonal flooding, regulations were available in public records, and one purchaser, who was contractor, visited county building department and reviewed with county employees the original permits and plans for house prior to closing.
***259** Robert S. Glazier, Miami, for appellants.

Ludovici & Ludovici and Michelle C. Fraga, Miami, for appellee.

Before FLETCHER, SHEVIN and SORONDO, JJ.

FLETCHER, Judge.

Tom Nelson and Maria Nelson appeal a final judgment following a bench trial, which judgment denied their complaint for rescission of their purchase of a house from appellee Helen K. Wiggs. We affirm.

Subsequent to the destruction of their home by Hurricane Andrew in 1992, the Nelsons, who had lived in South Dade County for ten years, began a search for a "fixer-upper" house that they could afford. They found Mrs. Wiggs' house by noticing a "For Sale By Owner" sign out front. Mrs. Wiggs, who had resided on the property since 1970, was selling, according to her testimony, because she needed to relocate close to public transportation, having recently been widowed and being unable to drive a car.

The house, accessed only by an unpaved road, is situated on an acre and a quarter of land in the eight and one-half square mile agricultural/residential area known as the East Everglades. This area lies west of the flood control levee, which levee affords most of the flood protection for that part of Dade County east of it. During the rainy season the East Everglades area is often flooded, the water varying in depth from ankle to knee deep. The testimony reveals that small vehicles cannot enter the area during heavier flooding, thus many residents have trucks and other large vehicles. The Nelsons testified that they cannot grow the plants that they wish and that, during the flooding, snakes and even alligators (two at least), have gathered at their property (presumably on an elevated portion) to escape the waters. The house itself, however, like

some of the other houses, farm buildings, and structures in the East Everglades area, was constructed at raised elevation, thus assuring that the seasonal flood waters do not enter the house. [FN1] As a consequence, the house has not been flooded and has been continuously occupied, by the Nelsons since their purchase from Mrs. Wiggs and, before that, by Mrs. Wiggs since 1970.

> FN1. The Dade County flood criteria elevations require the roads in the area to be above the ten-year statistical flood level and the house "pads" (elevated sites) to be above the hundred-year statistical flood level, according to the Nelsons' expert witness, a hydrologist. Presumably any houses that are not elevated were constructed before the enactment of the flood criteria regulations.

The Nelsons testified that before they purchased Mrs. Wiggs' property, they did not have actual knowledge of the seasonal flooding that takes place in the East Everglades. They found the property, negotiated the sale, moved into the house, and closed on the sale ***260** during the dry season. [FN2] They testified that it was not until later that they learned of the flooding, after which they filed their suit for rescission, alleging that Mrs. Wiggs knew of the flooding, but failed to disclose it to them, and that they would not have purchased the property had they been aware of the flooding. [R. 13-15]. Relying principally upon Johnson v. Davis, 480 So.2d 625 (Fla.1985), [FN3] they contended that prior to the purchase Mrs. Wiggs had the duty to advise them of the seasonal flooding.

> FN2. With Mrs. Wiggs' permission, the Nelsons resided in the house for a month prior to the closing.

> FN3. Approving this court's decision in Johnson v. Davis, 449 So.2d 344 (Fla. 3d DCA 1984).

In its final judgment, the trial court made the specific findings, thus resolving the somewhat conflicting testimony, that the Nelsons did not ask Mrs. Wiggs about flooding and that Mrs. Wiggs did not make any affirmative statements to the Nelsons regarding flooding. The trial court further found that the Nelsons requested no inspections of the property and did not talk to the neighbors about the flooding. The trial court also observed that the Nelsons had lived in the South Miami area for ten years before their purchase of property in the East Everglades. Based on these facts, the trial court concluded that Johnson v. Davis is inapplicable and denied rescission. We affirm the trial court's conclusion that Mrs. Wiggs had no duty to disclose the seasonal flooding as the information that the property is subject to seasonal flooding was available to the Nelsons through diligent attention.

In Johnson v. Davis, 480 So.2d at 629, the Supreme Court of Florida took a long look at caveat emptor, concluded that changes thereto needed to be made, and approved the salutary rule that:

> "[W]here the seller of a house knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." [emphasis supplied]

Thus, in order for a seller to have a duty to disclose, the material facts must not only be unknown to the buyer, but also not "readily observable." The supreme court did not define these words. Our concern is whether the supreme court intended that a buyer must be able to discern the relevant facts by simple visual observation of the property, at any and all times, or whether it had a broader meaning in mind. We have concluded that the court's intended meaning is broader. In arriving at this conclusion we have considered that the supreme court, in Johnson, 480 So.2d at 628, cited and quoted with approval Lingsch v. Savage, 213 Cal.App.2d 729, 29 Cal.Rptr. 201 (1963):

> "It is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer." [emphasis supplied]

The supreme court, Johnson, 480 So.2d at 629, concluded that this philosophy (and similar philosophies from additional jurisdictions) should be the law in Florida.

We have also considered Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So.2d 334 (Fla.1997), in which the Florida Supreme Court recently reaffirmed the principles of Johnson. While Gilchrist involved a negligent misrepresentation by

the seller, and not inaction by the seller as here, the supreme court, immediately following its reaffirmance of Johnson, stated,

"This does not mean, however, that the recipient of an erroneous representation can hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error."

696 So.2d at 339.

Thus a buyer would be required to investigate any information furnished by the seller that a reasonable person in the buyer's position ***261** would investigate. In Gilchrist the information required to be investigated was the zoning on the property, specifically as it related to the property's developability in accordance with the buyer's plans.

[1] There are distinctions, of course, between cases which involve negligent misrepresentation (Gilchrist) and no representation at all (the instant case). The point is, however, that while reaffirming the principles of Johnson, the supreme court has informed us that, in both types of cases, a buyer must take reasonable steps to ascertain the material facts relating to the property and to discover them--if, of course, they are reasonably ascertainable. As we understand from Gilchrist and Johnson, we need to analyze here whether the flood-prone nature of the property was known only to Mrs. Wiggs and whether, with diligent attention, the Nelsons could have learned of the property's nature (which is clearly material to their interests as buyers).

[2][3] There is nothing concealed about South Florida's rainy season(s), nothing concealed about the fact that low-lying areas of the county flood during the rainy seasons, and nothing concealed about Dade County's regulations requiring that homes in such areas be built on elevations to avoid interior flooding. That Dade County enacted regulations to protect East Everglades homes from seasonal flooding clearly demonstrates that the flood- prone nature of the area is known to others as well as to Mrs. Wiggs. The regulations' enactment and availability in the public records also show that the information is within the diligent attention of any buyer. [FN4]

FN4. Owners of real property are deemed to have purchased it with knowledge of the applicable land use regulations. Metropolitan Dade County v. Fontainebleau Gas & Wash., Inc., 570 So.2d 1006 (Fla. 3d DCA 1990). We discern no reason why the County's flood criteria would not be included within this rule.

Specifically as to the Nelsons, we observe that Mr. Nelson is a contractor (air conditioning, heating and refrigeration) who, according to his testimony, "moved to Florida knowing they had the most stringent building code in the United States." [T.41]. Part of his interest in buying the subject property was to rebuild the house himself, in furtherance of which he visited the county building department and reviewed with county employees the original permits and plans for the house. [T.50-51]. Mr. Nelson also testified [T.53]:

"Q. During the time that you lived there prior to closing, did you have the opportunity to check with Dade County?

A. I did--actually I pulled the permit." [emphasis supplied]

Immediately available from the building department, open to the Nelsons' diligent attention, were the flood criteria to which the county required the house to be built in order to protect it from the seasonal flooding. We conclude that the trial court correctly denied the Nelsons' rescission complaint as the flood-prone nature of the area was within the diligent attention of the Nelsons, thus Mrs. Wiggs had no duty to disclose it.

Affirmed.

SHEVIN, J., concurs.

SORONDO, J., dissents.

SORONDO, Judge (dissenting).

Because I believe that the majority reads the Supreme Court's decision in Johnson v. Davis, 480 So.2d 625 (Fla.1985), too narrowly, I respectfully dissent.

I begin by clarifying certain facts set forth in the majority opinion. It is true that the Nelsons lived in southern Dade County, specifically, in an area known as Cutler Ridge. This area is several miles north of the East Everglades area where the subject property is located. Prior to living in Cutler Ridge they lived in the City of South Miami, a municipality which is several miles north of Cutler

Ridge and even further away from the property at issue. There is nothing in the record to suggest that these two areas suffer from the same flood problems as the East Everglades area or that the residents of these two areas are aware of these flooding problems. Regardless of whether residents of Cutler Ridge and/or South Miami are aware of the flooding problems of the East Everglades, it is absolutely clear that the ***262** Nelsons were not. The trial judge concluded not only that they did not know but that had they known, they would not have purchased the property. [FN5]

> FN5. In an apparent effort to curtail cumulative testimony, the trial judge interrupted the testimony of Ms. Nelson and said to her: "It is clear to me that you, right now, have a situation that if you had known about it you would not have bought the house." Immediately after the court made this assurance the examination of Ms. Nelson ended and the witness was excused.

The majority affirms the trial court's decision on the grounds that "Mrs. Wiggs had no duty to disclose the seasonal flooding as the information that the property is subject to seasonal flooding was available to the Nelsons through diligent attention." Maj. Op. at ----. I believe that the Supreme Court's decision in Johnson compels a different result.

In Johnson, the Court stated that:

> Where the seller of a house knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.

Id. at 629. Based on the trial court's factual finding, there is no doubt that the Nelsons had no actual knowledge of the seasonal flooding that takes place in the East Everglades. Under the Johnson analysis the question then becomes whether the flooding problem was "readily observable" to the Nelsons.

The Nelsons testified that they first saw the property in January of 1993. They further testified that no flooding problems were apparent at that time. There is nothing in the record to suggest that the location of the flood control levee referred to by the majority was plainly identifiable or that the Nelsons ever saw it. The only mention in the record of the levee was by defense counsel and witness Bradley Waller, a hydrologist called by the Nelsons. As concerns the "readily observable" analysis, Mr. Waller testified as follows:

> THE COURT: Assume that a person goes to this area, this particular location, this residence that you now have visited and identified while it is flooded.
> THE WITNESS: Okay.
> THE COURT: Not necessarily at the highest level in the hundred years, but just flooded in one of these three to four months, three to six months, is that something that a person would be able to readily observe?
> THE WITNESS: You should be able to observe that. I mean, if it's flooded, it's flooded. Generally flooding occurs on a typical year, and I say typical because we've had some atypical dry and wet years. It generally occurs May, June at the beginning of the wet season; and September, October at the end of the wet season. Beginning and end of the wet season are usually your peaks.
> THE COURT: Who keeps the records of this flooding stuff?
> THE WITNESS: The South Florida Water Management District and the U.S. Geological Survey.
> THE COURT: If a person, a prospective homeowner wanted to go and research this issue, are these public records?
> THE WITNESS: These are public records. Maybe not published, but they're public records. They're paid for by taxpayers.
> THE COURT: And can you tell me how readily available they are? Is this something that only someone with your expertise would know that they're kept?
> THE WITNESS: Well, most people know that. You know, any insurance company would know about flood criteria. So to do the flood criteria, you'd have to have some type of data available. So it's not common knowledge for every body, but if you find the right people, the agencies that deal with it, it's pretty common, commonly known.

(Emphasis added). The testimony of this hydrologist clearly establishes that only people who see the flooding itself and "the right people" would be aware of the flooding problem.

In considering whether the problem was "readily observable" to the Nelsons it is also important to note that this sale was owner financed, no real estate

professional was involved, ***263** the Nelsons did not hire a lawyer, and, because the house on the property was a shell, they were unable to secure regular homeowners insurance. Consequently, every possible avenue through which the truth could normally have been discovered was unavailable to them. The record further establishes that although the Nelsons had been living in South Florida for approximately 13 years, they had never owned a home here. Before moving to Florida they lived in Texas where they purchased a parcel of land and built a cabin on it. These are obviously very simple people. This record does not establish that this significant problem with the property was "readily observable" during the beginning of the year, the "dry season," when the Nelsons made the purchase. Accordingly, Johnson required Mrs. Wiggs to reveal the significant flooding problem to potential buyers viewing the property during the "dry season." A review of Johnson can lead to no other conclusion.

The majority suggests that South Florida's rainy season, low-lying areas and house elevation requirements in such areas are common knowledge to everyone. This is not so. In 1982, Metropolitan Dade County passed an ordinance which requires sellers of real property within the "East Everglades area of critical environmental concern" to include a warning in the documents of sale. This warning must advise the potential purchaser that the "land is subject to periodic, natural flooding, which poses a serious risk to persons and property in the area and makes the property unsuitable for residential, commercial, and industrial development." DADE COUNTY CODE § 33B-54(a). The purchaser must sign the document and indicate that he or she understands the warning. If a seller fails to give the warning, the sale of property is voidable by the purchaser during the next seven years. DADE COUNTY CODE § 33B-56. Certain areas, including the area at issue here, for unknown reasons, were excluded from the ordinance. Nevertheless, the existence of the ordinance demonstrates the County's recognition that the flooding problem in this area is not commonly known, but rather is something which needs to be told to buyers.

The majority's reliance on Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So.2d 334 (Fla.1997), is misplaced. The facts of Gilchrist are distinguishable from those of this case. In Gilchrist the Gilchrist Timber Co. purchased a 22,641 acre tract of timberland from ITT Rayonier. ITT provided Gilchrist a one year-old appraisal of the property that listed the property as being zoned agricultural, which allowed residential usage. In reality, the vast majority of the property was zoned "preservation," which permits no residential use. The zoning prevented Gilchrist from cutting down the timber on the property and then selling the land for residential use. The issue presented to the Supreme Court involved ITT Rayonier's negligent misrepresentation and its liability for such a misrepresentation where Gilchrist relied upon the erroneous information despite the fact that an investigation by Gilchrist would have revealed the falsity of the information.

As acknowledged by the majority opinion, this is not the issue before this court here. The majority relies on Gilchrist for the dicta which it quotes at page 260 of its opinion. Unfortunately, the quote stops two sentences too short. The Supreme Court goes on to say: Clearly, a recipient of information will not have to investigate every piece of information furnished; a recipient will only be responsible for investigating information that a reasonable person in the position of the recipient would be expected to investigate.

Id. at 339. In Gilchrist, the timber company was purchasing virgin land for purposes of exploiting its timber and then selling the land for residential development. Because the land was being purchased for investment purposes nothing could have been more important than the zoning restrictions on the property. In the present case the Nelsons were home shopping in an area that was clearly residential. The entire neighborhood was dry, and, for all intents and purposes, looked like an average residential area.

The majority notes that the trial court found that the Nelsons did not request "inspections" of the property and "did not talk to the neighbors about the flooding." I am ***264** at a loss to understand what type of "inspections," beyond the customary termite and roof "inspections," [FN6] the Nelsons could have reasonably been expected to conduct that would have resulted in the discovery of the flooding problem. As concerns the trial court's conclusion that the Nelsons did not speak to any neighbors about the flooding problem, I can only repeat that no

such problem was readily observable and that it is unreasonable to expect that they would have conducted such an inquiry. Moreover, I am not prepared to conclude that a purchaser of residential property is obligated to canvass potential neighbors to determine whether there are any "unseen" problems with the neighborhood. There is nothing in this record that suggests that the Nelsons had any reason to investigate anything.

> FN6. I am compelled to observe that because the house on the property was only a "shell" being purchased in an "as is" condition, the Nelsons had no reason to conduct even these, customary inspections.

A review of the facts and holding of Johnson is helpful. There, the plaintiff inquired of the seller why there was some peeling plaster around a window frame in the family room and stains on the ceilings in the family room and kitchen. The seller responded that the window had a minor problem that had long since been resolved. After purchasing the house, the buyer returned home during a heavy rain to find water "gushing" in through the window in question. The buyers sought rescission of the contract of sale and a return of their money. In analyzing the issues before it, the Florida Supreme Court stated:

> [W]here failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and, in fact, both essentially have the same effect.

Id. at 628. The Court went on to discuss the then-existing legal concept in Florida that there was no duty to disclose when parties are dealing at arm's length.

> These unappetizing cases are not in tune with the times and do not conform with current notions of justice, equity and fair dealing. One should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance.... Modern concepts of justice and fair dealing have given our courts the opportunity and latitude to change legal precepts in order to conform to society's needs. Thus, the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor. 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. at 628 (emphasis added). Given this language, it is inconceivable that Johnson does not apply to this case. Although the flooding in the area is a natural occurrence, rather than a "defect" in the property, unlike other natural phenomena such as hurricanes, tornadoes and earthquakes, it is chronic and fully predictable.

As mentioned by the majority, the Nelsons called three neighbors to the witness stand who described the accumulated water during the rainy season as being ankle to knee deep. Many of the people in the neighborhood are forced to drive trucks and other "high" vehicles because smaller vehicles cannot enter the area when it is flooded. During the flooding, the Nelsons' animals must congregate around the house, which is the only dry location on the property. The animals must also relieve themselves in the immediate area surrounding the house because they will not go in the water to do this. Finally, the Nelsons testified that other animals, not their own, gather next to the house in an apparent effort to escape the water. As described by one of the neighbors, the property is unlivable.

The majority opinion paints Mrs. Wiggs' conduct in this case in a far too positive light. When the Nelsons first spoke to Mrs. Wiggs ***265** they told her they wanted the property because they wanted to plant trees and raise animals. [FN7] She responded that there were no limitations and that they could do anything they wished on the property. She never mentioned the flooding which would clearly affect the Nelsons' stated plans for the property. The Nelsons further asked her if there were any problems with the property and she responded that the only problem was with the neighbors.

> FN7. Ms. Nelson testified that they own 42 animals.

The Supreme Court's decision in Johnson, and the many out-of-state cases cited therein, stand for the proposition that the law encompasses a moral dimension in these types of transactions. This

dimension requires full disclosure of facts materially affecting the value of the property in question, which are not readily observable by the average person seeking to buy the property and which are not known by them. This concept is encapsulated in the following language from a respected treatise:

> [T]here has been a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW TORTS § 106 (5th ed. 1984). During the presentation of their case in chief the Nelsons called witness Elizabeth Wilson, a neighbor and realtor associate. Ms. Wilson was asked whether the flooding condition described above materially affects the value of the property. She testified that it did. On cross-examination Ms. Wilson testified that it was impossible to establish an exact value for the Nelson property because there were no "comparables" from which to make a judgment. On re-direct examination she explained that this is so because there are no sales in the area. She added that if she could get half of what her own house is worth she would sell it. Her examination concluded as follows:

> Q. Do you know whether people normally tell their prospective buyer about the flooding problems in that area?
> A. I do. I live in the area and I cannot sell there.
> Q. Okay. You weren't able to sell, so more likely you sell if you're selling in the dry time of the year and you don't tell your prospective buyer about the flooding?
> A. I wouldn't do that.

Ms. Wilson's testimony illustrates the magnitude of the problem Mrs. Wiggs was facing when she decided to sell her property. Unlike Ms. Wilson, Mrs. Wiggs decided that the price of honesty was too great and that the buyer should beware. In light of the Supreme Court's comments concerning the ever shrinking doctrine of caveat emptor, I am convinced that "elementary fair conduct" demanded full disclosure in this case. Consequently, I conclude that Mrs. Wiggs had an affirmative duty to advise the Nelsons of the enormous flooding problem in the area.

The majority's decision affirming the trial court's ruling grants no relief to the Nelsons. It is obvious that the Nelsons cannot continue to live on this property as it is, by all accounts, unlivable. Having failed to obtain relief from the courts, no doubt their solution will be to wait for the dry season and post the same "For Sale by Owner" sign Mrs. Wiggs posted. They will then have to wait for a another naive buyer to come along. When that buyer comes along they will do unto him or her as was done unto them, and the vicious cycle of fraud by silence will continue.

I would reverse and grant rescission of the contract.

END OF DOCUMENT

District Court of Appeal of Florida,
Third District.

Mario PRESSMAN and Fanita Pressman,
Appellants,
v.
Ingrid WOLF, etc., Appellee.

Nos. 97-1791, 97-3656

Jan. 27, 1999.
Rehearing Denied May 12, 1999.

Purchaser brought action against vendor claiming breach of contract and fraudulent misrepresentation, seeking declaratory relief and claiming slander of title. The Circuit Court, Dade County, William A. Norris, Jr., Senior Circuit Judge, ruled in favor of purchaser, and vendor appealed. The District Court of Appeal, Nesbitt, J., held that: (1) purchaser, who had opportunity to discover defects in home, was not entitled to recovery based on theory that vendor had misrepresented condition of home; (2) under economic loss rule, purchaser was not entitled to recovery based on fraudulent inducement theory; and (3) purchaser was not entitled to recovery on claim for slander of title absent indication that vendor acted in willful or wanton manner; but (4) vendor's foreclosure action was properly terminated.

Reversed and remanded.

West Headnotes

[1] Contracts ⚿143.5
95k143.5

[1] Contracts ⚿156
95k156

Individual terms of contract are not to be considered in isolation, but as whole and in relation to one another, with specific language controlling general.

[2] Fraud ⚿23
184k23

Purchaser, who had opportunity to discover defects in home, was not entitled to recovery based on theory that vendor had misrepresented condition of home sold under contract with prominent "as is" clause; purchaser closed while possessing inspections that patently warned of latent defects to pool, and of air conditioning system that had not been tested. Restatement (Second) of Torts § 541.

[3] Fraud ⚿32
184k32

Under economic loss rule, purchaser was not entitled to recovery based on theory that vendor fraudulently induced purchaser to buy home by asserting that home could be repaired for particular sum, and that view from home would be improved by municipality's pending removal of building posing as obstacle, where alleged fraudulent misrepresentations were inseparably embodied in the parties' subsequent agreement.

[4] Fraud ⚿23
184k23

Statements concerning public record cannot form basis for claim of actionable fraud.

[5] Libel and Slander ⚿131
237k131

Purchaser was not entitled to recovery from vendor based on claim for slander of title absent indication that vendor acted in willful or wanton manner.

[6] Mortgages ⚿475
266k475

Vendor's foreclosure action was properly terminated, where, in compliance with court order, purchaser had been paying into escrow amount owed on mortgage while purchaser's action against vendor was pending.

*357 St. Louis, Guerra & Auslander and Charles Auslander, for appellants.

Jeffrey A. Norkin, Miami; Mark C. Katzef, Aventura, for appellee.

Before SCHWARTZ, C.J., and NESBITT and SHEVIN, JJ.

NESBITT, J.

Buyer, Ingrid Wolf, and sellers, Fanita and Mario Pressman, entered into a contract for the sale of a house on Allison Island, Miami Beach. It was clear to all that the house was in need of renovation. The transaction closed "as is" for $500,000, with no warranty provisions concerning the home's significant components, including air conditioning system and pool.

Thereafter, when repair costs mounted to more than the amount the buyer had anticipated, she filed suit against the sellers. In addition to problems she discovered in the house, the buyer claimed she had relied on the sellers' promise that all repairs could be made for $100,000. According to the buyer, however, the final cost of repair was $225,000. The buyer also maintained that the sellers had stated that the view from the island home would be improved when an obstacle was torn down by municipal authorities who planned to extend a park; however, this had never occurred.

The buyer proceeded to trial claiming breach of contract and fraudulent misrepresentation and seeking declaratory relief and claiming slander of title. After two mistrials and a jury verdict in the third trial, the trial judge entered judgment in favor of the buyer for compensatory damages of $125,799 and punitive damages of $40,000. The trial judge denied sellers' motions for new trial, J.N.O.V., and directed verdict, and awarded the buyer prejudgment interest and attorneys fees.

The sellers maintain that the home was in obvious disrepair and that the buyer was in a position to discover whatever problems the home possessed, but instead, she had chosen to take her chances. Based on such a decision, they maintain, the law does not provide a remedy. We agree.

THE DEAL

Through negotiations, the parties modified and executed the standard "Contract for Sale and Purchase." Under the terms of the agreement, the buyer was to pay $250,000 by closing, interest payments for the interim months, and $250,000 a year later. Typed onto the line describing personalty was the following representation by the seller:

> ***358** central a/c--heat, refrigerator, washer/dryer, hot water heater, stove top, existing fixture. ALL IN "AS IS" CONDITION.

Paragraph N of the contract was modified by an agreed crossing-out of any warranty that "the septic tank, pool, all major appliances, heating, cooling, electrical, plumbing systems and machinery are in WORKING CONDITION." The contract provided for inspection rights and a limitation of liability, concluding the purchaser waived all defects not declared and reported less than 10 days prior to closing.

Paragraph W, labeled "WARRANTIES." provided that:

> Seller warrants that there are no facts known to Seller materially affecting the value of the Real Property which are not readily observable by Buyer or which have not been disclosed to Buyer.

This was the clause of the contract on which the purchaser based her breach and tort claims.

Paragraph A., labeled "EVIDENCE OF TITLE," allowed the seller 120 days to clear title, using diligent efforts, failing which buyer could accept the title as it then stood or demand a refund of deposits and release of the parties from further performance under the contract.

Paragraph V. labeled "OTHER AGREEMENTS," provided, in pertinent part, that:

> No prior or present agreements or representations shall be binding upon Buyer or Seller unless included in this contract.

The buyer's real estate closing attorney, Kathy Gregg, or her secretary typed the "as is" clause into the contract. Either Gregg or her secretary crossed- out the line that would otherwise have provided warranties as to the pool, air conditioning and other major systems in the home. Gregg recalled advising the buyer against extinguishing these warranties, which would otherwise have required the seller to promise that these integral elements of the home were in working condition. According to Gregg, however, the buyer made a "business decision," believing sellers' assertions that the home's appliances were in working order. Defects in title were resolved by an escrow at closing on October 25, 1990, with one remaining title defect cleared in March of 1991.

THE INSPECTIONS

Prior to closing, the buyer had ordered and reviewed inspection reports on the home, several of which warned that the true condition of certain elements could not be determined without more detailed inspection. The buyer nonetheless chose not to perform any additional tests, and closed on the home.

Before signing the contract, the buyer and a friend visited the house. The buyer was concerned with the home's structural integrity and worried that there were cracks in the pool and possibly termites in the structure. She had seen that the level of the water (dirty water) in the pool was under the pool pipeline.

Building Inspection Services, Inc. (BIS) and Snapp Construction performed the pre-closing inspections at the buyer's request. These inspections uncovered possible serious problems with numerous aspects of the home. In fact, as stated above, the buyer's attorney warned the buyer prior to closing that she should renegotiate the deal because the inspections had turned up unanswered questions, including possible problems with pool, pilings and structural integrity. The buyer nonetheless decided to proceed.

The first BIS report was prepared on August 1, 1990, two months before closing and three months after signing the purchase contract. It reported evidence that termites were eating away at part of the roof, and that there was a possibility of structural damage. Prior to closing, the buyer chose not to perform further inspection although such an inspection was available to her, according to the BIS representative. ***359** The home was tented for fumigation and a credit was provided at closing. The buyer also had the house treated for subterranean termites.

The same pre-closing inspection reported that the operation of the air conditioning system could not be adequately determined. One condenser unit had to be replaced and another was in need of repair. The inspection report twice concluded: "Notation: Further functionability of this system cannot be determined until all repairs are completed."

As to the pool, the BIS inspection reported that air bubbles were observed, as were cracks, indicating leakage. The report recommended that the pool system be serviced and that, due to the cracks, it be "checked for leakage over an extended period of time." The report also stated that "there is evidence of pool deck settlement."

Unhappy with the results of the BIS inspection and concerned about the pool construction, the buyer obtained another inspection of the pool and surrounding area. This inspection, from Snapp Construction, acknowledged that epoxy that had been applied to stop leakage as a temporary fix but that more work needed to be done. Snapp's findings of damage to the pool were consistent with those reported by BIS. Despite the warnings from these experts, the buyer requested no further pressure check of the pool's pipes. Thus, prior to closing the buyer knew that there could be significant problems with the pool and air conditioning system.

THE HONEYMOON ENDS

Despite the knowledge the buyer had gained from the pre-closing inspections, and her attorney's recommendation to renegotiate the deal, the buyer chose to close on the purchase contract. Her position at trial to explain how the sellers could be in breach and could have defrauded her was that the sellers had continued to state that the air conditioning ran cool, there were no termites and the pool was in perfect condition.

The buyer also claimed that the sellers had defrauded her into closing by promising that a person the sellers knew, Emilio Cruz, could renovate the house for $100,000. This was important to the buyer because her budget for the purchase was $500,000 for the home and $100,000 for renovations. The buyer never received a quote directly from Cruz before closing. Nevertheless, the buyer claimed that she would not have closed the deal absent the representation that the home could be renovated for $100,000. The contract, however, contained no reference to this alleged pre-closing representation. The buyer's testimony was that she had decided not to inform her attorney about this pre-closing representation, because she did not have a detailed quotation from Cruz.

Immediately after the buyer purchased the home, Cruz, began renovations on one room. The buyer was unhappy with Cruz's work and declined to

continue using his services. Thereafter, she hired several contractors to do the job. She then filed her multi-count complaint against the sellers alleging breach of contract, fraud, fraudulent misrepresentation, and slander of title, claiming the sellers had filed three lis pendens on the buyer's title. The buyer claimed that the sellers knew of facts materially affecting the value of the property, which were neither readily observable to her, nor disclosed to her. The sellers counter-claimed, seeking foreclosure of the $250,000 purchase money mortgage, rescission of the Contract for Purchase and Sale, and establishment of a lost document (the original note and mortgage).

At trial, buyer's counsel, in closing argument, requested $125,000 in compensatory damages for the difference between the alleged representation that Cruz could renovate the house for $100,000 and the $225,000 the buyer actually spent. [FN1] A second ***360** alleged ground for the claim of fraudulent inducement was the buyer's claim that the sellers had told the buyer that the view from the home would be altered when an "eye-sore" building was torn down by the city. Apparently that building was modified and was still standing at the time of trial. This alleged pre-closing representation was not in the contract. In closing argument buyer's counsel proclaimed that this inducement regarding the view had damaged the value of the property by $100,000, for which the buyer should be compensated and awarded punitive damages.

FN1. According to the sellers, buyer's cost figure included landscaping costs, fixtures, mirrors and other items buyer knew were in disrepair when she first walked through the house.

THE LAW AND ITS APPLICATION

[1] Individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another, with specific language controlling the general. See South Florida Beverage Corp. v. Figueredo, 409 So.2d 490, 495 (Fla. 3d DCA 1981). See also Hollerbach v. United States, 233 U.S. 165, 49 Ct.Cl. 686, 34 S.Ct. 553, 58 L.Ed. 898 (1914); Bystra v. Federal Land Bank of Columbia, 82 Fla. 472, 90 So. 478 (1921). Here the obvious intention of the sellers was to sell the home in "as is" condition with no warranty as to the home's critical elements. The buyer, fully aware of these terms, agreed to the deal as proposed.

The buyer relies chiefly on Johnson v. Davis, 480 So.2d 625 (Fla.1985) which provides: "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." Id. at 629. In this case the buyer contends that the sellers knew of the defects in the home including the swimming pool and central air conditioning, and that those defects materially affected the value of the property. However the buyer overlooks a critical part of Johnson's much cited holding, wherein the case requiring recovery is limited to those conditions "which are not readily observable and are not known to the buyer " Id.

[2] This distinction is outlined in Besett v. Basnett, 389 So.2d 995, 997 (Fla.1980), as cited in Johnson. Besett refers to Section 541 Restatement Second of Torts and is especially applicable to the instant situation:

> s. 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.
>
> Comment:
>
> a. Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot 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. (Emphasis added.)

The facts disclosed in the instant case leave no doubt that the home in this case was the functional equivalent of a one eyed horse, and recovery is barred under Johnson, Besett, and the Restatement.

See Wasser v. Sasoni, 652 So.2d 411 (Fla. 3d DCA 1995)(concluding a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence). See also Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So.2d 1089 (Fla. 3d DCA 1979); Welbourn ***361** v. Cohen, 104 So.2d 380 (Fla. 2d DCA 1958).

"A buyer must take reasonable steps to ascertain the material facts relating to the property and to discover them--if, of course, they are reasonably ascertainable." Nelson v. Wiggs, 699 So.2d 258, 261 (Fla. 3d 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), review denied, 705 So.2d 570 (Fla.1998). See also Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So.2d 334, 339 (Fla.1997). Just as we concluded that buyer Nelson had the opportunity to discover the facts at issue for himself, we likewise conclude the instant buyer had the opportunity to discover all that she complained about in her actions against these sellers. See Rosique v. Windley Cove, Ltd., 542 So.2d 1014 (Fla. 3d DCA 1989).

Here, the parties closed on a contract that featured a prominent "as is" clause. The buyer closed while possessing inspections that patently warned of latent defects to the pool and of an air conditioning system that had not been tested, and in fact received some credits for these matters at closing. She freely elected to close on the purchase contract and is now bound by its terms.

[3] As for the buyer's claims of fraudulent inducement, our opinion in Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So.2d 74, 76 n. 3 (Fla. 3d DCA 1997) is fully dispositive of why her claims in this regard must fail. Key Largo relies on HTP, Ltd. v. Lineas Aereas Costarricenses, 685 So.2d 1238, 1239-40 (Fla.1996), wherein the Supreme Court adopted the analysis and explanation in Huron Tool and Eng'g Co. v. Precision Consulting Services, Inc., 209 Mich.App. 365, 532 N.W.2d 541 (Mich.Ct.App.1995):

> In Huron Tool, the Michigan Court of Appeals upheld dismissal of the plaintiff's fraud claim finding the claim barred by the economic loss rule. The plaintiff had contracted to purchase a computer software system and sued for breach of contract and fraudulent misrepresentation asserting alleged defects in the software system. The court held that where the alleged misrepresentations concerned the quality and characteristics of the goods sold, they were not extraneous to the contract and the economic loss doctrine would still apply. Huron Tool, 532 N.W.2d at 541. The court noted that "where the only misrepresentation by the dishonest party concerns the quality or character of the goods sold, the other party is still free to negotiate warranty and other terms to account for possible defects in the goods." Huron Tool, 532 N.W.2d at 545.

The facts of the instant case fall directly within that group of scenarios where the alleged fraudulent misrepresentations were inseparably embodied in the parties' subsequent agreement. See Englezios v. Batmasian, 593 So.2d 1077, 1078 (Fla. 4th DCA 1992)(holding a party may not recover in fraud for an alleged oral misrepresentation which is adequately dealt with in a later written contract); Federal Deposit Ins. Corp. v. High Tech Medical Sys., Inc., 574 So.2d 1121 (Fla. 4th DCA 1991)(reliance on oral representations in light of disclaimer in written contract was not justifiable and thus there can be no actionable fraud).

[4] The buyer could not escape the deal made merely by pointing to the sellers' claims that the home could be renovated for a particular sum. Her accusation that the sellers told her that a building posing an obstacle to her view was to be removed also fails to state a basis for relief. It is common knowledge municipal plans change. Property records were accessible to the buyer. Statements concerning public record cannot form the basis for a claim of actionable fraud. See Nelson v. Wiggs, 699 So.2d at 261.

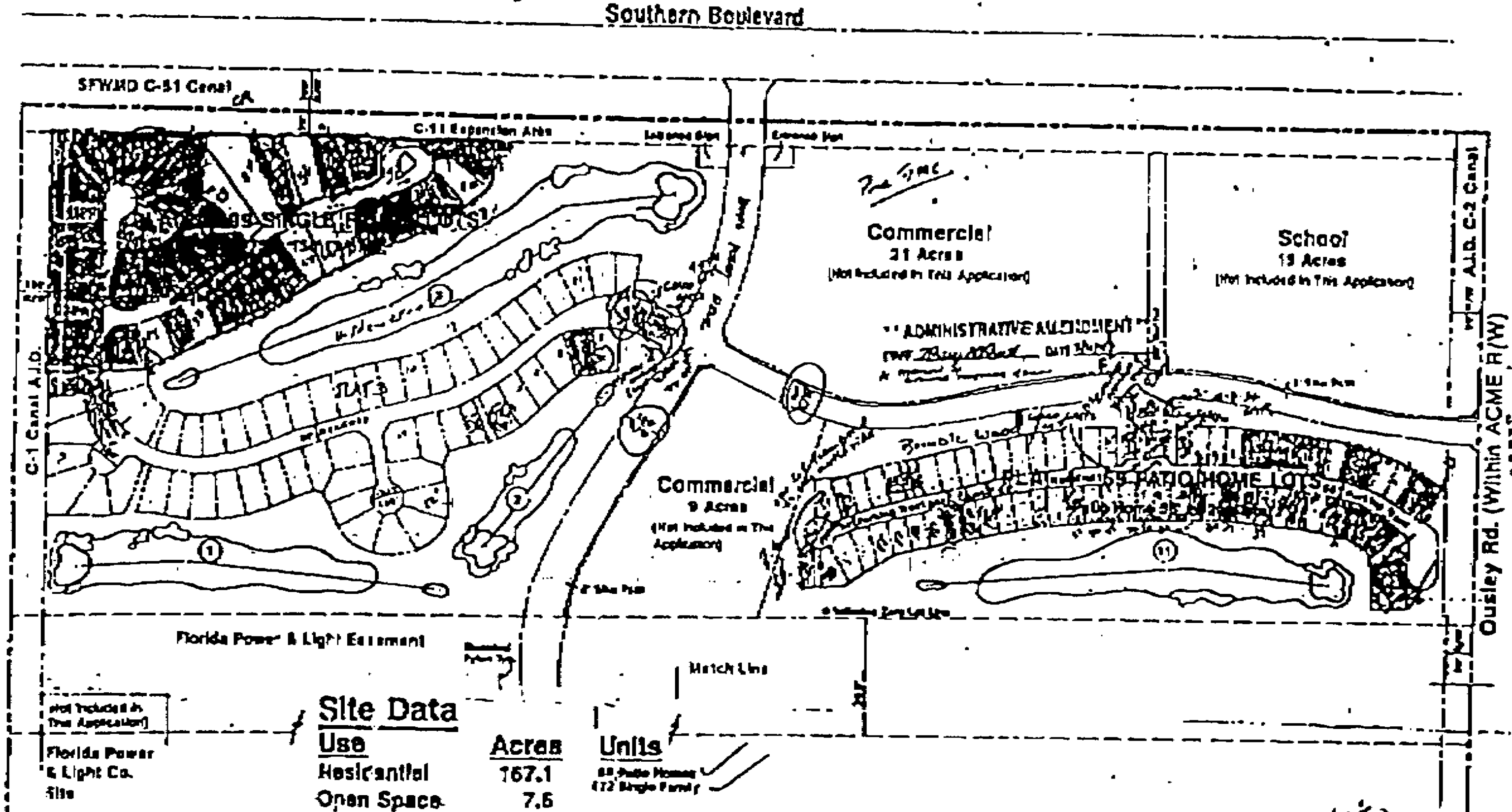
[5][6] Also, the buyer's claim for slander of title fails. The buyer did not prove ***362** that the sellers acted in a willful or wanton manner; the lis pendens were based on a duly recorded instrument, so their filing was privileged. See Palmer v. Shelby Plaza Motel, Inc., 443 So.2d 285 (Fla. 2d DCA 1983). We do agree with the buyer, however, that the trial court did not err in terminating the sellers' foreclosure action. It is undisputed that in compliance with an order of the trial court, the buyer had been paying into escrow the amount owed on the mortgage.

CONCLUSION

The buyer's claims in this case fail as a matter of law. As to buyer's breach of contract claim, the contract clearly provided what was being sold was a home in "as is" condition. As to the general duty of a homeowner to disclose known defects, the home's defects were readily observable and/or within the buyer's ability to know or easily discover. As to claims of fraudulent inducement, the sellers' comments went to the very essence of the contract and as such, under Key Largo these claims were subsumed within the breach of contract claim and barred by the economic loss rule.

Accordingly, the case is reversed and the cause remanded for judgment to be entered in defendants' favor.

END OF DOCUMENT



Site Data

Use	Acres	Units
Residential	167.1	69 Patio Homes 472 Single Family
Open Space	7.6	
Passive Park	5.5	
Lakes & Canals	60.7	
Golf Course (Includes Golf Maint. & Clubhouse)	161.6	
Roads	57.1	
Parking Tracts	1.7	
Total	461.3	541
● Preserve	1.3	
(Not Included) Commercial	30.0	
(Not Included) School	15.0	
(Not Included) F.P.&L. Easement	43.2	

* Golf Maintenance, Parking & Clubhouse To Be Site Planned Separately
● Preserve Acreage Included In Open Space Acreage

Passive Park Site To Be Dedicated To The Homeowners Association.

Note:
Single Family Lot Dimensions Shown Are Typical, Not Minimum. In No Case Will Lots Be Less Than 75' x 100'.

Patio Area Lot Dimensions Shown Are Typical Not Minimum. In No Case Will Lots Be Less Than 45' x 100'.

Trees Required (1/1500 Sq.Ft.)
Residential Lots, Roads, Open Space, Golf Course, & Lakes

461.3 Ac. - 13,396 Total Trees

Distribution of Trees

Lots	5535
Roadways	1708
Golf Course	5703
Passive Park	200
Open Space	250
Total	13,396

Setbacks	S.F.	P.H.
Side Interior	7.5 Ft.	10 Ft. (0' Z.L.L.)
Side Corner	15 Ft.	20 Ft.
Rear	15 Ft.	10 Ft.
Front	25 Ft.	25 Ft. (10' Side Entry Garage)

See section 500.12 4.C / 500.12 4a

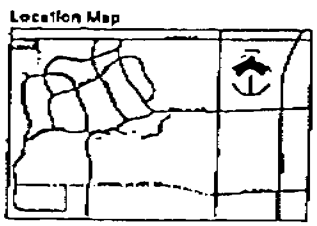
78-44-43-31-02

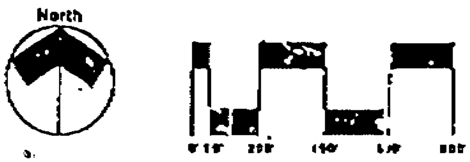
Petition #78-287

RG / PUD

"ADMINISTRATIVE AMENDMENT"

"ADMINISTRATIVE AMENDMENT"





PETITION NO. 78-287
DATE SUBMITTED 9-11-89
EXHIBIT NO. 120
SUPERSEDES EXH. NO. 117