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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

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

Respondents

_____/

Case No.: SC00-1582

Fourth DCA Case No.: 4D99-2898

Florida Bar No.: 0843008

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

RESPONSE OF RESPONDENTS ON JURISDICTION
NASAD AZAM, SAFEEIA AZAM, ETC., ET.AL.,
(WITH APPENDIX)

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CERTIFICATION OF FONT TYPE

It is hereby certified that the size in type used in this Response to Petition on Jurisdiction is Times New Roman 14, a font that is not proportionately spaced.

STATEMENT OF CASE AND FACTS

The Respondents, NASAD AZAM, SAFEEIA AZAM, etc., et. al., would, for the most part, agree with, and adopt the Petitioner's Statement of Case and Facts. The Petitioner's Statement of Case and Facts is essentially correct. However, it is incomplete. The Respondents would add the following important and distinguishing facts to their Statement of Case and Facts.

Between the dates of December of 1995 and August of 1998, each of the families who are the Respondents to this Petition entered into an "Agreement for Sale of House and Lot" with the Petitioner. Each and every one of those Agreements were attached to the initial Complaint as exhibits in the Lower Court. A representative copy of those Agreements is included herein in the Appendix to this Response to the Petition on Jurisdiction.

The "Agreement for Sale of House and Lot" is included in the Appendix to this Response to the Petition on Jurisdiction to underscore the ultimate distinguishing fact to the Petition for Jurisdiction: none of the residential real estate transactions with the Respondents were "As Is" sales.

The Respondents filed a complaint against the developer and seller of those homes in the Lower Court. The initial Complaint state causes of action for (1) Fraud in the Inducement, (2) Recission, and (3) Negligence. The Lower Court dismissed

all three causes of action with prejudice upon the authority of Pressman v. Wolf, 732 So.2d 356 (Fla. 3rd DCA), review denied, (744 So.2d 459 (Fla. 1999).

The Respondents appealed the ruling of the Lower Court to the Fourth District Court of Appeal.

The Fourth District Court of Appeal reversed and remanded the ruling of the Lower Court regarding the cause of action for Fraud in the Inducement. The Fourth District Court of Appeal affirmed the ruling of the Lower Court regarding the causes of action for Recission and Negligence.

The Fourth District Court of Appeal did not certify a conflict with either the decisions of the Third District Court of Appeal in the cases of Nelson v. Wiggs, 699 So.2d 258 (Fla. 3rd DCA 1997) or Pressman v. Wolf, 732 So.2d 356 (Fla. 3rd DCA), review denied, (744 So.2d 459 (Fla. 1999).

The Petitioners now seek to invoke discretionary jurisdiction of this Court to recognize just such a conflict with the cases of Nelson v. Wiggs, 699 So.2d 258 (Fla. 3rd DCA 1997) and Pressman v. Wolf, 732 So.2d 356 (Fla. 3rd DCA), review denied, (744 So.2d 459 (Fla. 1999), or, in the alternative, with this Court's prior ruling in Besset v. Basnett, 389 So.2d 995 (Fla. 1980).

SUMMARY OF ARGUMENT

The case at bar is factually distinguishable from the cases in which the

Petitioner argues there is grounds for discretionary jurisdiction on the basis of conflict. The ruling of the Fourth District Court of Appeal stated that it is a pure factual determination whether the purchaser of real estate can rely upon the representations of the seller regarding facts which are in the public record. The facts of this case warranted such a reliance on the representation of the seller where the facts of the Third District Court of Appeals did not. Factually distinguishable cases, and the application of the principles of law to varying factual circumstances cannot form the basis to invoke the discretionary jurisdiction of this Court. The Supreme Court of the State of Florida has not issued a ruling which conflicts with the case at bar, and in fact, the case cited by the Petitioner was relied upon by the Fourth District Court of Appeal in rendering their decision. As such, the Petition for Jurisdiction should be dismissed.

ARGUMENT

The general rule is that in order for the Supreme Court of the State of Florida to have discretionary subject matter jurisdiction over any decision of a district court of appeal it must "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Times Publishing Company v. Russell, 615 So.2d 158 (Fla. 1993). If the decision of the district court of appeal does not present the necessary express and direct conflict, the

supreme court lacks the jurisdiction to decide the case. Id. at 158.

The "express and direct" conflict must appear within the four corners of the majority decision of the case to be reviewed by this Court. Dept. of Heath v. Nat. Adoption Counseling, 498 So.2d 888 (Fla. 1986). In other words, inherent or implied conflicts cannot serve as a basis for invoking this Court's discretionary jurisdiction. Id. at 889.

An "express conflict" is usually demonstrated when the district court of appeal either certifies a conflict to the supreme court or identifies a direct conflict with another district court of appeal within the body of their ruling. Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981). If neither of those conditions exists, and they do not in the case at bar, then the legal principles applied by the district court must supply a sufficient basis for invoking the discretionary jurisdiction of the supreme court. Id. at 1342.

Conflict Jurisdiction can be invoked by such a legal principle, even if it is as minimal as dicta. See, Garcia v. Cedars of Lebanon Hospital Corp., 444 So.2d 538 (Fla. 3rd DCA 1984).

However, if the ruling of the district court of appeal that is sought to be reviewed lacks precedential value, and is merely adjudicating the rights of the litigants, then there does not exist a conflict to invoke the discretionary jurisdiction

of this Court. Mystan Marine, Inc. v. Harrington, 339 So.2d 200 (Fla. 1976). Indeed, if the decisions of the district court of appeal is factually distinguishable from the opinions of the other district courts of appeal, there is no conflict. Wilson v. Southern Bell Telephone and Telegraph Co., 327 So.2d 220 (Fla. 1976); Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). Naturally, cases addressing completely different propositions at law are not in conflict. Curry v. State, 682 So.2d 1091 (Fla. 1996).

In the case at bar, the Fourth District Court of Appeal, in rendering their ruling in Azam v. M/I Schottenstein, 2000 WL 827238 (Fla. 4th DCA June 28, 2000) neither certified a conflict to this honorable court, nor identified a direct conflict with the Third District Court of Appeal with either Pressman v. Wolf, 732 So.2d 356 (Fla. 3rd DCA), review denied, (744 So.2d 459 (Fla. 1999) or Nelson v. Wiggs, 699 So.2d 258 (Fla. 3rd DCA 1997). They did not alter, overrule or explain those cases.

The Fourth District Court of Appeal did rule that it is a question of fact whether the purchaser of real estate can rely upon the representation of the seller about something that is in the public record to state a cause of action for Fraud in the Inducement. The Fourth District Court of Appeal ruled that the facts of the case at bar *were* sufficient for the purchaser of real estate can rely upon the representation of the seller about something that is in the public record , and state a cause of action for

Fraud in the Inducement. Specifically, the Court ruled that a buyer's duty to use due diligence and discover adverse facts in the public records is an issue of fact which should weigh such factors of the reasonableness of the buyer's reliance upon the seller's representations about the public records, whether the seller is a developer, and the nature of the public record. The Fourth District Court actually relied upon, and quoted this Court's ruling in Besset v. Basnett, 389 So.2d 995, 998 (Fla. 1980), which stated, "a recipient may rely on the truth of a representation, even though its falsity could have been acertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.

Thus, it cannot be overstated that although each of the Third District Court of Appeals cases and the case at bar all involved information in the public records impacting a real estate transaction, the similarity stops there. The case at bar is factually distinguishable from those cases, and the Fourth District Court of Appeal applied the principles of law disputed by the Petitioner to a completely different set of facts. Under the cases cited above, these circumstances cannot invoke the discretionary jurisdiction of this Court. The transactions in the Third District Court of Appeal cases involved "as is" sales of residential real estate by sellers who were *not* developers. The transaction in the case at bar is a fully warrantied sale by a developer. The two varying circumstances represent a different level of due diligence

on the part of the buyer to discover adverse information in the public record.

To that extent the opinion of this Court in Besset v. Basnett, 389 So.2d 995 (Fla. 1980) is exactly on point. It does not conflict with the decision of the Fourth District Court of Appeal who actually applied the facts of this case to the legal principles contained therein. Interestingly enough, it was the Respondents herein and not the Petitioner, who cited and used this Court's ruling in Besset in support of their argument in the Fourth District Court of Appeal. The claim of a conflict with the Fourth District Court of Appeal is the first time the Petitioner has sought to use Besset in any respect.

This Court's ruling in Besset turns upon the factual determination of whether a representation is obviously false. In the Pressman case, the factual issue is whether the buyer's view would be blocked by another building. When the buyer bought the real estate the view was *already* blocked by a building, and the seller, the former owner, represented that the city planned to tear down the building. In Pressman the representation was of an obvious falsity to where the buyer could not rely upon the representation. In Nelson, the representation was whether the real estate was in a flood plain. The court found that it was obviously in a flood plain from the facts on the record. The same result ensued. The court in Besset could not determine whether the representation was of such falsity to preclude reliance upon the representation,

thus the ruling of this Court.

The Petitioner suggests that the representation in this case was obviously false. In the case at bar the subject parcel of property was already a natural preserve at the time the Respondents purchased their homes. The representation by the seller/developer was that it would always be a natural preserve. The Fourth District Court of Appeal has already determined that the representation was not obvious, and thus the application of Besset. The Petitioner is asking this Court to do a de novo review to determine that the representation was obvious. It is improper to disturb the ruling of the Fourth District Court of Appeal in this type of forum.

There is no conflict between the Fourth District Court of Appeal and the Third District Court pf Appeal or the Florida Supreme Court to invoke this Court's discretionary jurisdiction. The Respondents strongly urge this Court to follow the case law cited above and rule there is no basis for discretionary jurisdiction. The Respondents strongly urge this Court to dismiss the Petition on Jurisdiction.

CONCLUSION

For the reasons cited above, the Respondents urge this Court to dismiss the Petition on Jurisdiction.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true an correct copy of this Response to Petition on Jurisdiction has been forwarded by U.S. Mail to: Diran V. Seropian, Esq. Peterson, Bernard, Vandenberg, Zei, Geisler & Martin, Attorneys for Petitioner, 1550 Southern Boulevard, #300, West palm Beach, Florida 33406 this 12th day of September 2000.

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By: _____
S. Tracy Long, Esq.
Fla. Bar No. 0843008

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

In Cooperation With (Broker) Shirley Bolton / Keyes
3300 University Dr., Coral Springs, FL 33065
3 % Commission To Be Paid At Closing

M/I HOMES
A DIVISION OF M/I SCHOTTENSTEIN HOMES, I

AGREEMENT FOR SALE OF HOUSE AND LOT

THIS AGREEMENT, made and entered into this 29th day of March, 19 97, by and between Najmd + Shefali Hzam

whose address for the purposes of communications shall be known as 5345 N.W. 54th St, Coconut Creek, FL
phone (954) 428-0419, hereinafter referred to as Purchaser, and M/I Schottenstein Homes Inc d b a M I HOMES whose address for purposes of communicatio
4 Harvard Circle, Suite 950, West Palm Beach, Florida 33409, hereinafter referred to as Seller.

WITNESSETH

1. **Purchase-Sale-Deposit:** Seller agrees to sell and Purchaser agrees to buy for the consideration and upon the terms hereinafter set forth, Lot No. Forty Nine (49) loc Brindlewood Subdivision, Palm Beach County, Florida as recorded. Sel to construct on said lot a single family residence, known as the Vizcaya C Model, in accordance with Plans and Selection Sheet chosen by Purchaser and approved by Seller, which Plans and Selec shall remain on file at the office of Seller and, by reference, are hereby made a part of this Agreement. Said Selection Sheet shall list optional items chosen by Purchaser and set forth on the data sheet attached hereto. I agrees to complete the Selection Sheet within fourteen (14) days of the date of execution of this Agreement by Purchaser. In the event of conflict with the Plans, the Selection Sheet shall control. Purchaser provides deposit in the sum of $ 2000.00 accompanying Purchaser's execution of this Agreement.

2. **Purchase Price:** The purchase price of the above lot, together with the house to be constructed thereon, (together called the "property") is One Hundred Forty Sev Thousand Nine Hundred Forty Five ($ 147,945.00), which sum shall be paid as follows:

(a) Initial deposit accompanying this Agreement (to be applied to the Purchase Price in the event that this Agreement is approved by the Authorized Representative) $ 2000.00
(b) Additional deposit to be due and payable in U.S. dollars at the earlier of loan approval or issuance of building permit on or before 5/31/97 $ 5400.00
(c) Balance of purchase price to be due and payable in U.S. dollars in cash at closing $ 140,545.00

TOTAL $ 147,945.00

Purchaser has waived his/her right to have all deposit funds deposited in an interest-bearing escrow account.

3. **Mortgage Financing Commitment:** Within seven (7) days of this Agreement, Purchaser shall make application for a conditional conventional mortgage commitment in the amount of 93,000.00 with a lender satisfactory to Seller for the purchase of said House & lot. If Purchaser is not able to obtain such commitment within Forty Five (45) days after the date of application, Seller the right to terminate this Agreement and return the initial deposit to Purchaser. If Purchaser after having made a good faith effort to obtain a mortgage commitment be declined in his attempt to secure a preliminary mortgage then Seller, upon notification, shall return the initial deposit to the Purchaser and all Parties shall be relieved of further liability each to the other. If Purchaser fails to make application for a commitment or fails to use good f to obtain such commitment, Seller may retain the initial deposit as liquidated damages as provided in Paragraph 11 hereof, and thereupon all Parties hereto shall be relieved of further liability each to the other. If a mortgage co is obtained, this Agreement shall be in full force and effect and the initial deposit shall be retained by Seller in accordance with the terms herein contained.

4. **Construction Representations:** Construction of the house shall substantially conform to the Plans and Selection Sheet on file at the Seller's office, allowing minor deviations which may be occasioned by expediency, pr and as are common to the construction industry in general, and subject to availability of labor and materials. Notwithstanding the above, Seller expressly reserves the right (a) to make such modifications, additions or in or to the Plans and or Selection Sheet as may be required by lending institutions making mortgage loans on properties within Brindlewood Subdivision, by public authorities, by legislation, determination, or such as Seller may deem advisable and in the interests of Brindlewood Subdivision, at large, provided none of the same shall require a substantial physical modification of su and (b) to make substitutions of materials or products in the construction of the house, provided such materials or products are substantially equal or superior to those shown in the Plans and/or Selection Sheet. If t is not constructed substantially the same as represented at either the Buyer or Seller's option this contract is null and void and all parties released of all liability.

5. **Completion:** Seller can neither imply nor guarantee a firm completion and availability date for the house, such advance projections being, and by their nature, having to be, estimates. Seller can make every r and diligent effort to meet or to exceed the estimated construction schedule, with delivery now estimated to be Aug-Sept. 97/120 days, after Seller receives the following (1) written ev Purchaser's mortgage loan commitment (2) a completed selection sheet approved by Seller (3) the additional sum of money due from Purchaser at the time Purchaser obtained their mortgage loan commitment, but S not be obligated to make, provide or compensate for any accommodations to Purchaser as a result of construction delays or any other delays in the completion of said house or closing of this sale. Further, such de not serve to cancel, amend or diminish any of the Purchaser's obligations herein undertaken.

Notwithstanding anything to the contrary, it is agreed that if electricity and/or public utilities are not available to service the aforementioned lot, through no fault of Sellers, Seller's obligation to complete said construc be extended until 120 days after said public utilities are available to service aforesaid lot.

Notwithstanding anything to the contrary contained herein, Seller agrees to complete construction of the house on or before one (1) year from date of contract, subject however to delays provided in Section 6 hereof.

6. **Delays:** The parties hereto agree that in the event the progress of the subject house is delayed at any time by strikes, war or the declaration of a national emergency, or in the event of a disaster or loss to the co site by act of God or other cause, then and in such event, the Seller may, at its option, within ninety (90) days of any or all of such causes, refund to Purchaser his deposit and this Agreement shall be deemed t and the Parties shall be relieved of any and all responsibility hereunder.

7. **Interference:** Purchaser agrees that he shall not interfere with, restrict, interrupt, harass or obstruct construction or its progress, physically, by nuisance or in any other manner. So doing shall, at the option of t constitute, on the part of the Purchaser, a breach of this Agreement and a failure to perform and Seller shall under such circumstances be entitled to the remedies set forth herein.

8. **Closing:** Closing of this sale, including payment in full of the balance of funds due in U.S. dollars as shown on Seller's closing statement and the execution of necessary documents and acknowledgements by the Purchaser, shal place at Seller's place of business within five (5) days after (a) final inspection of the house by the appropriate building inspector, or, (b) if required, a certificate of occupancy has been issued. If the closing is dela request or through the fault of the Purchaser or his lender, the balance of purchase price, as set forth in Paragraph 2(c) hereof, shall bear interest at the rate of eighteen percent (18%) per annum from the date specifi for closing until paid, and all prorations shall be made to such date specified herein for closing, such date being the tenth day after final inspection or, if required, issuance of a certificate of occupancy.

Notwithstanding any previous estimated date of occupancy of the house, it is understood and agreed that Purchaser shall not be entitled to any degree of possession or occupancy of the property sold hereunder prior and delivery of the deed.

Purchaser shall pay all pre-paid items, cost of recording the deed and stamp tax required to be attached to any mortgage or loan to the Purchaser. See Financing Addendum made a part of contract hereof.

9. **Closing Documents:** As evidence of title, Seller shall provide an owners title insurance policy (ALTA Form B). If required by Lender, the Seller shall provide a mortgage title insurance policy.

Seller shall convey title subject to: Zoning, restrictions, prohibitions and other requirements imposed by governmental authority; matters appearing on the plat or otherwise common to the subdivision, public utility e of record, and taxes for the year of closing and subsequent years.

If the title to all or part of the real estate to be conveyed is uninsurable, or if any part of the real estate is subject to liens, encumbrances, easements, conditions or restrictions other than those excepted in this A or in the event of any encroachment, Seller shall have a reasonable amount of time, not to exceed thirty (30) days after written notice thereof, within which to remedy or remove any such defect, lien, encumbrance, e condition, restriction or encroachment, or obtain title insurance against the same, provided, however, that if Seller fails to cure such defect in title to the satisfaction of the Purchaser within the said 30 days period, e shall have the right to rescind this agreement. In the event of such recission, Seller shall refund to the Purchaser all deposits received and the parties shall be released from all further laibility hereunder.

10. **Construction Guarantee:** In addition to the above documents, at closing, or as soon thereafter as possible Seller will turn over and assign to Purchaser all appropriate warranties and guarantees furnished to subcontractors and materialmen. The Seller shall be responsible for items which are not covered by guarantees and warranties of subcontractors and materialmen if written notice of defects in materials or workmanshi to the Seller prior to two (2) years from the date of closing, but only to the extent set forth in the limited warranty a part of the Seller's Home Owner's Manual. Seller also provides a twenty (20) year limited structural w described in the Seller's Home Owner's Manual.

11. **Default by Purchaser:** In the event Purchaser fails to pay the balance of the deposit when due, it is agreed between the Parties hereto that the initial deposit shall be retained by Seller as liquidated and agreed for Purchaser's default and/or failure to perform and thereupon all Parties hereto shall be relieved of further liability each to the other, it being acknowledged and agreed that the exact amount of damages which would be by Seller is not and will not be susceptible of specific ascertainment.

In the event of default by Purchaser after the balance of the deposit has been paid to Seller, Seller shall, in addition to all other rights and remedies in law and in equity available to Seller, at the sole option of entitled to elect one of the following rights and remedies:

(a) To retain the entire deposit as liquidated damages for the reasons set forth above and agreed to by all the Parties hereto, in which event all such Parties shall be relieved of further liability each to the other: or
(b) To apply the entire deposit on account and proceed with an action at law for damages for breach of contract or recovery of the balance of the purchase price.

If Seller should elect this option, and prevail in such litigation against Purchaser, Seller shall be entitled to recover reasonable attorney's fees and costs.

12. **Notices:** Any notice or communication which may be given or is required to be given pursuant to the terms of this Agreement shall be in writing by certified mail, return receipt requested, sent to the Party at th set forth herein.

13. **Right of Assignment:** Seller retains the right to assign all or part of its interests in this Agreement to any person, firm or corporation, and, upon such assignment Seller shall be relieved of all responsibilities an incurred hereunder. Purchaser shall not assign this Agreement or his rights hereunder, without prior written consent of Seller.

14. **Captions:** The captions and title of the various sections and paragraphs of this Agreement are for convenience and reference only and in no way define, limit or describe the scope or intent of this Agreement way affect this Agreement.

15. **Previous Understandings:** All understandings and agreements heretofore had between the Parties hereto are merged into this Agreement which fully and completely expresses the Parties' agreement and th entered into after full investigation, neither Party relying upon any statement or representation not embodied in this Agreement by the other. This Agreement may not be changed or terminated orally. Further, this Agree survive the closing.

16. **Binding Effect:** This Agreement is not effective until executed by an Authorized Representative of Seller.

17. **Miscellaneous:** Words of any gender herein shall include any other gender where appropriate.

18. **Other:**

RADON NOTIFICATION: Radon is a naturally occuring, colorless and odorless gas that is caused by the natural decay of radioactive radium and uranium. In the decay process, these two elements

obtain such commitment Seller may retain the initial deposit as liquidated damages ...

obtained, this Agreement shall be in full force and effect and the initial deposit shall be retained by Seller in accordance with the terms herein contained.

4 **Construction Representations**: Construction of the house shall substantially conform to the Plans and Selection Sheet on file at the Seller's office, allowing minor deviations which may be occasioned by expediency, practical... and as are common to the construction industry in general and subject to availability of labor and materials. Notwithstanding the above, Seller expressly reserves the right (a) to make such modifications, additions or deletions or to the Plans and or Selection Sheet as may be required by lending institutions making mortgage loans on properties within Brookwood Subdivision by public authorities by legislation by judicial determination, or such as Seller may deem advisable and in the interests of Brookwood Subdivision, at large, provided none of the same shall require a substantial physical modification of such house and (b) to make substitutions of materials or products in the construction of the house, provided such materials or products are substantially equal or superior to those shown in the Plans and or Selection Sheet. If the house is not constructed substantially the same as represented at either the Buyer or Seller's option this contract is null and void and all parties released of all liability.

5 **Completion**: Seller can neither imply nor guarantee a firm completion and availability date for the house, such advance projections being, and by their nature, having to be, estimates. Seller can make every reasonable and diligent effort to meet or to exceed the estimated construction schedule, with delivery now estimated to be Aug.-Sept. 97/120 days, after Seller receives the following (1) written evidence of Purchaser's mortgage loan commitment (2) a completed selection sheet approved by Seller (3) the additional sum of money due from Purchaser at the time Purchaser obtained their mortgage loan commitment but Seller shall not be obligated to make, provide or compensate for any accommodations to Purchaser as a result of construction delays or any other delays in the completion of said house or closing of this sale. Further, such delays shall not serve to cancel, amend or diminish any of the Purchaser's obligations herein undertaken.

Notwithstanding anything to the contrary, it is agreed that if electricity and/or public utilities are not available to service the aforementioned lot, through no fault of Sellers, Seller's obligation to complete said construction shall be extended until 120 days after said public utilities are available to service aforesaid lot.

Notwithstanding anything to the contrary contained herein Seller agrees to complete construction of the house on or before one (1) year from date of contract, subject however to delays provided in Section 6 hereof.

6 **Delays**: The parties hereto agree that in the event the progress of the subject house is delayed at any time by strikes, war or the declaration of a national emergency, or in the event of a disaster or loss to the construction site by act of God or other cause, then and in such event, the Seller may, at its option, within ninety (90) days of any or all of such causes, refund to Purchaser his deposit and this Agreement shall be deemed terminated and the Parties shall be relieved of any and all responsibility hereunder.

7 **Interference**: Purchaser agrees that he shall not interfere with, restrict, interrupt, harass or obstruct construction or its progress, physically, by nuisance or in any other manner. So doing shall, at the option of the Seller, constitute, on the part of the Purchaser, a breach of this Agreement and a failure to perform and Seller shall under such circumstances be entitled to the remedies set forth herein.

8 **Closing**: Closing of this sale, including payment in full of the balance of funds due in U.S. dollars as shown on Seller's closing statement and the execution of necessary documents and acknowledgements by the Purchaser shall take place at Seller's place of business within five (5) days after (a) final inspection of the house by the appropriate building inspector, or, (b) if required, a certificate of occupancy has been issued. If the closing is delayed at request or through the fault of the Purchaser or his lender, the balance of purchase price, as set forth in Paragraph 2(c) hereof, shall bear interest at the rate of eighteen percent (18%) per annum from the date specified herein for closing until paid, and all prorations shall be made to such date specified herein for closing, such date being the tenth day after final inspection or, if required, issuance of a certificate of occupancy.

Notwithstanding any previous estimated date of occupancy of the house, it is understood and agreed that Purchaser shall not be entitled to any degree of possession or occupancy of the property sold hereunder prior to closing and delivery of the deed.

Purchaser shall pay all pre-paid items, cost of recording the deed and stamp tax required to be attached to any mortgage or loan to the Purchaser. See Financing Addendum made a part of contract hereof.

9 **Closing Documents**: As evidence of title, Seller shall provide an owners title insurance policy (ALTA Form B). If required by Lender, the Seller shall provide a mortgage title insurance policy.

Seller shall convey title subject to Zoning, restrictions, prohibitions and other requirements imposed by governmental authority; matters appearing on the plat or otherwise common to the subdivision; public utility easements of record, and taxes for the year of closing and subsequent years.

If the title to all or part of the real estate to be conveyed is uninsurable, or if any part of the real estate is subject to liens, encumbrances, easements, conditions or restrictions other than those excepted in this Agreement, or in the event of any encroachement, Seller shall have a reasonable amount of time, not to exceed thirty (30) days after written notice thereof, within which to remedy or remove any such defect, lien, encumbrance, easement, condition, restriction or encroachment, or obtain title insurance against the same, provided, however, that if Seller fails to cure such defect in title to the satisfaction of the Purchaser within the said 30 days period, either party shall have the right to rescind this agreement. In the event of such recission, Seller shall refund to the Purchaser all deposits received and the parties shall be released from all further liability hereunder.

10 **Construction Guarantee**: In addition to the above documents, at closing, or as soon thereafter as possible Seller will turn over and assign to Purchaser all appropriate warranties and guarantees furnished to Seller by subcontractors and materialmen. The Seller shall be responsible for items which are not covered by guarantees and warranties of subcontractors and materialmen if written notice of defects in materials or workmanship is given to the Seller prior to two (2) years from the date of closing, but only to the extent set forth in the limited warranty a part of the Seller's Home Owner's Manual. Seller also provides a twenty (20) year limited structural warranty described in the Seller's Home Owner's Manual.

11 **Default by Purchaser**: In the event Purchaser fails to pay the balance of the deposit when due, it is agreed between the Parties hereto that the initial deposit shall be retained by Seller as liquidated and agreed damages for Purchaser's default and/or failure to perform and thereupon all Parties hereto shall be relieved of further liability each to the other, it being acknowledged and agreed that the exact amount of damages which would be sustained by Seller is not and will not be susceptible of specific ascertainment.

In the event of default by Purchaser after the balance of the deposit has been paid to Seller, Seller shall, in addition to all other rights and remedies in law and in equity available to Seller, at the sole option of Seller, be entitled to elect one of the following rights and remedies:

(a) To retain the entire deposit as liquidated damages for the reasons set forth above and agreed to by all the Parties hereto, in which event all such Parties shall be relieved of further liability each to the other, or

(b) To apply the entire deposit on account and proceed with an action at law for damages for breach of contract or recovery of the balance of the purchase price.

If Seller should elect this option, and prevail in such litigation against Purchaser, Seller shall be entitled to recover reasonable attorney's fees and costs.

12 **Notices**: Any notice or communication which may be given or is required to be given pursuant to the terms of this Agreement shall be in writing by certified mail, return receipt requested, sent to the Party at the address set forth herein.

13 **Right of Assignment**: Seller retains the right to assign all or part of its interests in this Agreement to any person, firm or corporation, and, upon such assignment Seller shall be relieved of all responsibilities and liabilities incurred hereunder. Purchaser shall not assign this Agreement or his rights hereunder, without prior written consent of Seller.

14 **Captions**: The captions and title of the various sections and paragraphs of this Agreement are for convenience and reference only and in no way define, limit or describe the scope or intent of this Agreement nor in any way affect this Agreement.

15 **Previous Understandings**: All understandings and agreements heretofore had between the Parties hereto are merged into this Agreement which fully and completely expresses the Parties' agreement and the same is entered into after full investigation, neither Party relying upon any statement or representation not embodied in this Agreement by the other. This Agreement may not be changed or terminated orally. Further, this Agreement shall survive the closing.

16 **Binding Effect**: This Agreement is not effective until executed by an Authorized Representative of Seller.

17 **Miscellaneous**: Words of any gender herein shall include any other gender where appropriate.

18 Other:

RADON NOTIFICATION: Radon is a naturally occuring, colorless and odorless gas that is caused by the natural decay of radioactive radium and uranium. In the decay process, these two elements produce radon gas. The gas may migrate through the soil and diffuse from the ground and be released into the atmosphere. Since radium is contained in the earth's crust and dissolves readily in water, radon can be found virtually everywhere. Studies suggest that prolonged indoor exposure to high levels of radon gas may result in adverse health consequences.

Because of the multitude of factors involved, it is difficult to predict whether a residence may be subject to high radon levels, unless tests to determine the actual radon concentrations are conducted in a completed structure. The United States Environmental Protection Agency ("EPA") and the Department of Energy are conducting extensive investigations regarding this matter. The EPA has issued "A Citizen's Guide to Radon", a copy of which Seller makes available to Purchaser. This guide explains among other things what the owner of a home should do upon receiving the results of a radon test.

The EPA has also issued testing advice that radon testing firms and homeowners should follow when testing homes. The homeowner may wish to make arrangements to test the home for radon. Costs of radon test kits vary from $10.00 to $50.00 or more. The EPA publishes a list of EPA-approved suppliers of such test kits. If you decide to measure the level of radon gas in your home, and if your test detects an elevated level, you may wish to take steps to conduct longer-term testing or to reduce the level detected.

The Purchaser acknowledges that the Seller does not claim or possess any special expertise in the measurement or reduction of radon, nor does the Seller provide any advice to Purchaser as to acceptable levels or possible health hazards of the gas. The EPA has issued a technical guidance manual for new home construction. Since no known construction technique is foolproof, the Seller assumes no responsibility for the reduction of radon gas levels in the home. If Seller makes available to Purchaser any optional construction packages, Seller cannot be certain of and does not warrant the effectiveness of any optional package.

The Seller makes no representation or warranty as to the presence or lack of radon or other hazardous environmental condition, or as to the effect of radon or any such condition on the new home or residents. SELLER DISCLAIMS AND ASSUMES NO LIABILITY AND PURCHASER WAIVES ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF HABITABILITY OR FITNESS OF PURPOSE THAT COULD BE CONSTRUED TO COVER THE PRESENCE OF RADON OR OTHER ENVIRONMENTAL POLLUTANTS. THE ONLY WARRANTIES SELLER PROVIDES TO THE PURCHASER ARE THOSE CONTAINED IN THE HOME OWNER'S MANUAL DESCRIBING THE SELLER'S LIMITED WARRANTY.

"Radon Gas: Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county public health unit." (Section 404.056(8) Florida Statutes effective July 1, 1988)

PURCHASER (If more than one person each should sign)

Signature [signature]

Co-Signature Sapiens Jam

Address 5245 N.W. 54th St.

Coconut Creek, FL 33073

Phone Number (954) 428-8419

SELLER

M/I Schottenstein Homes, Inc.

d.b.a. M/I HOMES

By: [signature] (Sales Representative) Date 3/...

Not binding upon Seller until signed by Authorized Representative

By: ______ (Authorized Representative) Date ______

WHITE—Lender GREEN—Purchaser Approved Copy CANARY—Office PINK—Purchaser Non-approved Copy GOLD—Sales

ADDENDUM TO PURCHASE CONTRACT

1. **Guaranteed Delivery Date.** M/I Homes will specify and guarantee the month in which the home will be completed and scheduled for closing, provided the following conditions are met.
   a. Homesites within the subdivision are completed at time of contract. (If the subdivision is not completed at the time of contract, the delivery date will be specified and guaranteed in writing at the time development is completed.)
   b. Buyer must complete loan application within seven (7) days of contract.
   c. Buyer must complete color and finish selections within fourteen (14) days of contract and make all deposits required by contract.
   d. M/I Homes must receive a financing opinion letter (pre-approval) within fourteen (14) days of signing the contract.
   e. Buyer does not initiate any changes in selections, construction or scheduled date of presettlement. If the buyer does initiate changes, the time of delay caused by the changes will be added to the delivery date.

   If these conditions are met and M/I Homes does not deliver the home within the month specified, the price of the home will be reduced $800. *Exceptions to the Guaranteed Delivery Date are restricted to those set forth in the contract.*

2. **Early Closing Bonus.** If the home is completed during the month prior to the specified month of closing, the buyer may close early and receive the following credits.

   0-5 days early - no credit
   6-15 days early - $200 reduction in selling price
   16 or more days early - $400 reduction in selling price

3. **Guaranteed Completion of Pre-Settlement Items.** Prior to closing M/I Homes will schedule a Pre-settlement Inspection to determine what items require further attention. M/I Homes guarantees that all items noted will be completed before the closing of the home except for exterior weather - related items. (Applies only to homes scheduled to close after January 1, 1995.)

4. **Brinks Home Security System.** Every M/I home includes a Brinks Home Security System. Optional monthly monitoring service fee (minimum of $21.95 per month) is available. *(See Brinks Home Security System fact sheet for specifications.)*

5. **Worry Free Mortgage Plan.** If within 18 months of closing the homeowner becomes unemployed due solely to economic conditions, M/I Homes will pay the principal and interest on the homeowner's first mortgage, up to $1,500 per payment, for up to six months. *See the "Worry Free Mortgage Plan" brochure for details.* (Addendum required.)

6. **Twenty-Year Transferable Structural Warranty.** M/I Homes extends the Limited Warranty contained in the Homeowner's Manual for structural defects to twenty (20) years. *See the M/I Schottenstein Homes, Inc. Extended Twenty-Year Limited Warranty Certificate for details.* (Addendum required.)

7. **Personal Construction Supervisor.** Every M/I Home buyer will have a Personal Construction Supervisor who monitors the construction progress of the home to guarantee its overall quality and timely delivery.

8. **Pre-Construction and Pre-Settlement Conferences.** Prior to the start of construction, the Personal Construction Supervisor will meet with the home buyer to discuss the specific house plan, how it will be built and positioned on the site, to finalize last minute adjustments or options and to answer questions. Prior to closing the Personal Construction Supervisor also will conduct the pre-settlement inspection and home orientation.

9.. **Personal Hard Hat.** At the pre-construction conference, the home buyer(s) will be provided with hard hats and encouraged to visit their homesite to see for themselves the quality being built into their home.

10. **Quality Control Cards.** During the construction of the home, a Quality Control Card is posted in the front window for your inspection. As each construction step is properly completed, the Personal Construction Supervisor and area production manager sign the Quality Control Card.

11. **Certificate of Quality Plaque.** A Certificate of Quality Inspection plaque is permanently mounted in the home at the time of closing. The plaque is signed by the Personal Construction Supervisor and Irving Schottenstein, President of M/I Homes.

12. **One-Stop Shopping for Financing at M/I Financial Corporation.** Home buyers are encouraged to use the services of M/I Financial Corporation, a mortgage banking subsidiary of M/I Schottenstein Homes, Inc. M/I Financial provides a wide range of conventional and government fixed and adjustable rate mortgages at competitive rates with a variety of terms, and offers personalized service and follow through to facilitate closing.

13. **Three-Way Interest Rate Protection Plan.** M/I Homes guarantees that the home buyer's mortgage interest rate will not go up at any time through closing. If a lower rate is available for the same financing program ten (10) days prior to closing, the home buyer automatically receives the lower rate. Available only on conventional financing programs through M/I Financial Corporation. (Addendum required.)

M/I HOMES

ADDENDUM A

PURCHASER DATA SHEET
Page 1 of 2

SUBDIVISION: Brandlewood
LOT #: 49

HOUSE TYPE: Vizcaya
ELEV.: C
BR's: 3/2

CONTRACT DELIVERY DATE: Aug-Sept. 97 / 120 days

GARAGE LOCATION: GR
STREET FACING: Oak Chase Ct.

PURCHASER(S) NAMES (AS THEY ARE TO APPEAR ON DEED)

LAST	FIRST	MI
Azam	Nasad	
Azam	Safeea	M

PURCHASER(S) PRESENT ADDRESS ☑ OWN ☐ RENT

STREET: 5245 N.W. 54th St.

CITY: Coconut Creek

STATE/ZIP: FL 33073

HOME PHONE: (954) 428-8419

PURCHASER

BUS. PHONE

BUS. NAME

BUS. ADDRESS

CO-PURCHASER

BUS. PHONE

BUS. NAME

BUS. ADDRESS

1ST DEPOSIT ________ OTHER DEPOSIT ________

SALES REP.: M. Quevedo

BROKER/AGENT: Shirley Bolton

TYPE OF FINANCING

LENDER: M.I.

TYPE

% DOWNPAYMENT

YEARS

RATE

DESCRIPTION

ORIG. FUND FEE

PRE-PAYMENT-PENALTY

BASE CONTRACT PRICE $132,990.

OPTIONS

LOT PREMIUM	1,000.
M/bth - Cul. marble vanity	275.
2nd bth - Cul. marble vanity	150.
3 add. t.v. outlets	90.
3 add. phone outlets	90.
Moen Kit. faucet 7350	250.
80/20 per. sink	325.
Pest Ban	350.
13 x 13 tile - L/R + D/R	2300.
Upgrade carpet incl. bdrm's. + hallway	375.
Bonus Rm.	9700.
PAGE 1 OPTION TOTAL	
PAGE 2 OPTION TOTAL	
TOTAL OPTIONS AT CONTRACT	
TOTAL CONTRACT PRICE	$147,94

OPTIONS AND/OR CREDIT AFTER CONTRACT

TOTAL OPTIONS/CREDITS AFTER CONTRACT $

TOTAL SETTLEMENT PRICE $

STREET 5245 N.W. 54th St.

CITY Coconut Creek

STATE/ZIP FL 33073

HOME PHONE (954) 428-8419

PURCHASER

BUS. PHONE

BUS. NAME

BUS. ADDRESS

CO-PURCHASER

BUS. PHONE

BUS. NAME

BUS. ADDRESS

1ST DEPOSIT OTHER DEPOSIT

SALES REP. M. Quevedo

BROKER/AGENT Shirley Bolton

Upgrade carpet pkg.	
bdrm's. + hallway	375.00
Bonus Rm.	9700.00
PAGE 1 OPTION TOTAL	
PAGE 2 OPTION TOTAL	
TOTAL OPTIONS AT CONTRACT	
TOTAL CONTRACT PRICE	$ 147,975
OPTIONS AND/OR CREDIT AFTER CONTRACT	
TOTAL OPTIONS/CREDITS AFTER CONTRACT	$
TOTAL SETTLEMENT PRICE	$

TYPE OF FINANCING

LENDER MIJ

TYPE

% DOWNPAYMENT

YEARS

RATE

DESCRIPTION

ORIG. FUND FEE

PRE-PAYMENT-PENALTY

MIP OR PMI FEE

PRELIMINARY WORK SHEET

APPROX. (INITIAL) MONTHLY PAYMENTS

PRINCIPAL & INT

REAL ESTATE TAX

HAZARD INSURANCE

M.I.P. or PMI

APP. TOTAL PAYMENT

GMP INCREASE PER YR. %

ADJ. MORTGAGE AMT.

APPROX. PREPAID ITEMS

DAYS INTEREST FROM CLOSING

TAX ESCROW

HAZARD INSURANCE

M.I.P. ESCROW

APP. TOTAL PREPAID

APPROX. AMOUNT DUE AT CLOSING

PURCHASE PRICE

LESS LOAN AMT.

DOWN PAYMENT

PLUS CLOSING COSTS

PLUS 1st YR. M.I.P.

PLUS PRE-PAID ITEMS

TOTAL CASH OUTLAY

LESS DEPOSIT AT CONTRACT SIGNING

LESS DEOPSIT AT LOAN APPROVAL OR START

TOTAL CASH OUTLAY AT CLOSING

This fact sheet contains approximations only. • The actual figures will be given at time of loan application. • This is not a credit application or RESPA disclosure sheet.

APPLICATION FEE (Non refundable) DATE 3/29/97 PURCHASER

COMMITMENT FEE TO LENDER (Refundable at closing) 2 PURCHASER Safwan Agam

Authorized Representative

Supreme Court of Florida

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

THOMAS D. HALL
CLERK
DEBBIE CAUSSEAUX
CHIEF DEPUTY CLERK

PHONE (850) 488-0125

ACKNOWLEDGMENT OF NEW CASE

August 7, 2000

RE: M/I SCHOTTENSTEIN HOMES, INC., ETC. vs. NASAD AZAM, ET AL.

CASE NUMBER: SC00-1582
Lower Tribunal Case Number : 4D99-2898
Lower Tribunal Filing Date: 7/27/00

The Florida Supreme Court has received the following documents reflecting a filing date of 7/31/2000.

Notice to Invoke Discretionary Jurisdiction

Filing Fee: Paid in Full Receipt Number: R2000-993060

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts enclosed with this acknowledgment.

kt
cc:
DIRAN V. SEROPIAN
S. TRACY LONG
HON. MARILYN BEUTTENMULLER, CLERK

validation proceedings. Noble does not challenge the Authority's authority to issue the bonds or assert that the Authority has failed to comply with the requirements of law. Nor does Noble argue that the bond money is going to be used for something other than providing health care services. Noble instead challenges the public purpose of the bonds based on economic considerations.

Section 154.207(1), Florida Statutes (1995), states that "the exercise by [a health facility] authority of the powers conferred by this part shall be deemed and held to be the performance of an essential public function." Noble concedes that there is a presumption of validity accorded to the legislature's determination that health care facilities serve a public purpose and that he has the burden to show that the circuit court was clearly erroneous in its determination that the bonds at issue serve a public purpose. We find that Noble's arguments regarding the economic effects of the bond money fail to overcome the presumption of validity accorded to the actions of the Authority. In sum, we find that the Authority acted within its authority and complied with all requirements of the law. We uphold the circuit court's determination that Noble's challenge raised collateral issues which fell outside its jurisdiction and affirm the final judgment validating the bonds.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.

John F. CURRY, Petitioner,

v.

STATE of Florida, Respondent.

No. 85910.

Supreme Court of Florida.

Nov. 7, 1996.

On review of decision of District Court of Appeals, 656 So.2d 521, for conflict of decisions, the Supreme Court held that review was improvidently granted, as cases addressed different propositions of law which were not in conflict.

Petition dismissed.

1. Courts ⇐216

Review for conflict of decisions was improvidently granted, where cases addressed different propositions of law which were not in conflict.

2. Criminal Law ⇐995(8)

Portion of probation order that required defendant to pay for drug evaluation and treatment programs was properly stricken as a special condition not announced orally in defendant's presence at sentencing.

3. Criminal Law ⇐982.5(2)

Condition of probation requiring defendant to submit to drug evaluation and screening was not improper on ground it was not reasonably related to second-degree murder and battery offenses, as it is standard condition of probation that can be imposed on any probationer, irrespective of whether it reasonably relates to type of offense. West's F.S.A. § 948.03(1)(j).

John F. Curry, Avon Park, pro se.

Jeffrey E. Appel of Holland & Knight, Lakeland, for Petitioner.

Robert A. Butterworth, Attorney General; Robert J. Krauss, Senior Assistant Attorney General, Bureau Chief, Criminal Law Division, and Stephen D. Ake, Assistant Attorney General, Tampa, for Respondent.

PER CURIAM.

[1] We accepted jurisdiction to review *Curry v. State*, 656 So.2d 521 (Fla. 2d DCA 1995), which certified conflict with *Navarre v. State*, 608 So.2d 525 (Fla. 1st DCA 1992). However, on closer examination, we find that review was improvidently granted.

[2] The cases address different propositions of law which are not in conflict. The district court in *Curry* correctly struck that portion of the defendant's probation order that required him to *pay for* drug evaluation and treatment programs "because this is a special condition not announced orally" in the defendant's presence at sentencing. 656 So.2d at 522.

[3] In contrast, the defendant in *Navarre* objected to a condition of probation requiring him to submit to drug evaluation and screening as not reasonably related to his second-degree murder and battery offenses. 608 So.2d at 526. The First District affirmed the condition of probation, holding that it "is a standard condition of probation that can be imposed on any probationer, irrespective of whether it reasonably relates to the type of offense." *Id.* at 528. The First District was correct because such a requirement was a standard condition of probation provided for in section 948.03(1)(j), Florida Statutes (1988 Supp.). The First District did not address a "special" condition requiring the defendant to pay for his drug evaluation and treatment as did the Second District in *Curry*.

Because no conflict exists between *Curry* and *Navarre*, we accordingly dismiss the petition.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

STATE of Florida, Petitioner,

v.

Steven K. HOLIDAY, Respondent.

No. 87318.

Supreme Court of Florida.

Nov. 14, 1996.

Defendant was convicted in the Circuit Court, Dade County, Carol R. Gersten, J., upon charges of armed burglary, third-degree grand theft, and grand theft of firearm. Defendant appealed. The District Court of Appeal, 665 So.2d 1089, reversed. State sought review. The Supreme Court, Wells, J., held that state was not required to show that peremptory challenge was being used impermissibly before trial court asked proponent of strike for permissible reason.

Quashed.

Anstead, J., filed special concurring opinion, in which Kogan, C.J., joined.

1. Jury ⇐33(5.15)

To require trial court to hold inquiry as to whether peremptory strike of venireperson is not race-neutral, party objecting to opponent's use of peremptory challenge must make timely objection on that basis, show that venireperson is member of distinct racial group, and request that trial court ask striking party to explain reason for strike.

2. Criminal Law ⇐1158(3)

Trial court's decision as to whether to determine propriety of party's reasons for peremptory strike of venireperson turns primarily on determination of credibility and will not be overturned on appeal unless clearly erroneous.

Robert A. Butterworth, Attorney General, and Richard L. Polin, Assistant Attorney General, Miami, for Petitioner.

Bennett H. Brummer, Public Defender, and Robert Kalter, Assistant Public Defender, Miami, for Respondent.

WELLS, Judge.

[1] We have for review *Holiday v. State*, 665 So.2d 1089 (Fla. 3d DCA 1995), which expressly and directly conflicts with *Valentine v. State*, 616 So.2d 971 (Fla.1993), over the threshold burden a party challenging the opponent's use of a peremptory challenge

plaint described Snow's actions as malicious, willful and reckless as opposed to intentional was not dispositive. Unfortunately, the majority of this Court feels as though they, and not the jury, are in a better position to determine whether the defendant's actions were intentional or merely negligent.

I am afraid that this Court, by failing to answer the question presented and failing to recognize the existence of a prima facie case sounding in intentional tort, has given employers a license to maim and kill their employees. The majority seems to lose sight of the fact that all the plaintiffs were seeking to do is allow the jury to determine whether the defendant's actions were negligent or intentional.

For the reasons expressed I would answer the question presented in the negative, quash the decision of the district court and remand the cause to the circuit court.

SHAW and BARKETT, JJ., concur.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Petitioner,

v.

NATIONAL ADOPTION COUNSELING SERVICE, INC., et al., Respondents.

No. 68191.

Supreme Court of Florida.

Nov. 26, 1986.

Proceeding was instituted on complaint by the Department of Health and Rehabilitative Services to enjoin alleged unlicensed child-placing agencies from engaging in further placement or referral activity. The Circuit Court, Broward County, Lawrence L. Korda, J., granted Department a temporary injunction, and agencies appealed. The District Court of Appeal, 480 So.2d 250, reversed, and Department filed petition for review. The Supreme Court, Ehrlich, J., held that reversal of order temporarily enjoining alleged unlicensed child-placing agencies from engaging in further placement or referral activity was not based on merits, but was based on finding that the Department of Health and Rehabilitative Services was without standing to maintain a suit for injunction and, hence, was not based on a finding which was in conflict with other decisions so as to vest the Supreme Court with jurisdiction on a petition for review.

Petition dismissed.

Boyd, J., dissented and filed opinion in which Overton, J., concurred.

Adkins, J., dissented.

1. Courts ⇐216

Reversal of order temporarily enjoining alleged unlicensed child-placing agencies from engaging in further placement or referral activity was not based on merits, but was based on finding that the Department of Health and Rehabilitative Services was without standing to maintain a suit for injunction and, hence, was not based on a finding which was in conflict with other decisions so as to vest the Supreme Court with jurisdiction on a petition for review. West's F.S.A. §§ 63.012 et seq., 381.025 et seq.; West's F.S.A. Const. Art. 5, § 3(b)(3).

2. Courts ⇐216

Jurisdiction of the Supreme Court on a petition for review depends upon whether the conflict between decisions below is express and direct and not upon whether the conflict is inherent or implied. West's F.S.A. §§ 63.012 et seq., 381.025 et seq.; West's F.S.A. Const. Art. 5, § 3(b)(3).

Morton Laitner, Dade County Health Dept., Miami, for petitioner.

Arthur J. England, Jr. and Charles M. Auslander of Fine, Jacobson, Schwartz, Nash, Block & England, P.A., Miami, for respondents.

EHRLICH, Justice.

We accepted jurisdiction to review *National Adoption Counseling Service, Inc. v. State, Department of Health and Rehabilitative Services,* 480 So.2d 250 (Fla. 4th DCA 1985), because of asserted conflict with *Adoption Hot Line, Inc. v. State, Department of Health and Rehabilitative Services ex rel. Rothman,* 385 So.2d 682 (Fla. 3d DCA 1980), and *Adoption Hot Line, Inc. v. State, Department of Health and Rehabilitative Services,* 402 So.2d 1307 (Fla. 3d DCA 1981). Art. V, § 3(b)(3), Fla. Const. However, upon closer examination it has become apparent that review was improvidently granted, as there is no direct and express conflict of decisions as required by article V, section 3(b)(3) of the Florida Constitution.

[1] Although the instant decision and both *Adoption Hot Line* decisions involved attempts by the Department of Health and Rehabilitative Services to enjoin alleged "unlicensed child-placing agencies" from engaging in further placement or referral activity in violation of Chapter 63, Florida Statutes, the *Adoption Hot Line* cases were decided on the merits.* Whereas, the reversal below was based on the district court's holding that "HRS had no standing [under Chapters 63 and 381, Florida Statutes] to maintain this suit for injunction." 480 So.2d at 253. While HRS concedes that standing was not an issue before the Third District Court in the *Adoption Hot Line* cases, it argues that the "inferential" or "implied" conflict inherent in the decisions supports this Court's jurisdiction.

[2] All the cases relied on by HRS for this "implied" conflict argument were decided prior to the 1980 amendment to article V, section 3(b)(3) of the Florida Constitution. As we recently noted in *Reaves v. State,* 485 So.2d 829, 830, (Fla.1986), "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." In other words, inherent or so called "implied" conflict may no longer serve as a basis for this Court's jurisdiction.

Accordingly, the petition for review is dismissed.

It is so ordered.

McDONALD, C.J., and SHAW and BARKETT, JJ., concur.

ADKINS, J., dissents.

BOYD, J., dissents with an opinion, in which OVERTON, J., concurs.

BOYD, Justice, dissenting.

I dissent because I find that this Court has jurisdiction to review the decision of the district court of appeal. Moreover I believe that the district court's decision is erroneous. I would exercise jurisdiction and quash the decision of the district court of appeal.

There is express and direct conflict between the decision of the district court of appeal in the instant case and the decision of another district court, *Adoption Hot Line, Inc. v. State Dept. of Health and Rehabilitative Services ex rel. Rothman,* 385 So.2d 682 (Fla. 3d DCA 1980). The conflict appears "within the four corners of the majority decision." *Reaves v. State,* 485 So.2d 829, 830 (Fla.1986). The fact that in the instant case the district court characterized its decision as pertaining to "standing" is immaterial. The fact is that in *Adoption Hot Line* the district court

* In *Adoption Hot Line I* a temporary injunction was upheld because the "record compiled ... in the cause support[ed] the trial court's action in granting the temporary injunction." 385 So.2d at 684. In *Adoption Hot Line II* the trial court's order granting a permanent injunction was reversed "on the grounds that [the] injunction [was] more extensive than [was] necessary to protect against any unlawful activity under Chapter 63." 402 So.2d at 1308. The issue of standing to enjoin activities in violation of Chapter 63 was never addressed by the Third District Court.

held that the Department of Health and Rehabilitative Services had statutory authority to seek injunctive relief in aid of enforcement of laws regulating adoption. In the present case another district has held that the Department does not have such statutory authority. The conflict could not be any more express and direct. The inaccurate use of the word "standing" does not alter the fact that the district court passed on a question of statutory authority. Thus the factual distinction relied upon by the Court is without substance. On the real issue of statutory interpretation there is express and direct conflict.*

Section 63.212(1), Florida Statutes (Supp. 1984), provides in pertinent part as follows:

(1) It is unlawful for any person:

(a) Except the Department of Health and Rehabilitative Services or an agency, to place or attempt to place without the state a child for adoption unless the child is placed with a relative within the third degree or with a stepparent.

(b) Except the Department of Health and Rehabilitative Services or an agency, to place or attempt to place a child for adoption with a family whose primary residence and place of employment is in another state unless the child is placed with a relative within the third degree or with a stepparent.

(c) Except the Department of Health and Rehabilitative Services, an agency, or an intermediary, to place or attempt to place within the state a child for adoption unless the child is placed with a relative within the third degree or with a stepparent. This prohibition, however, does not apply to a person who is placing or attempting to place a child for the purpose of adoption with the Department of Health and Rehabilitative Services or an agency or through an intermediary.

....

(f) To assist in the commission of any act prohibited in paragraph (a), paragraph (b), paragraph (c), paragraph (d), or paragraph (e).

(g) Except the Department of Health and Rehabilitative Services or an agency, to charge or accept any fee or compensation of any nature from anyone for making a referral in connection with an adoption.

(h) Except the Department of Health and Rehabilitative Services, an agency, or an intermediary, to advertise or offer to the public, in any way, by any medium whatever the placement of a child for adoption.

Section 409.175(2)(d), Florida Statutes (Supp.1984), provides in pertinent part as follows:

"Child-placing agency" means any person, corporation, or agency, public or private, other than the parent or legal guardian of the child or an intermediary acting pursuant to chapter 63, that ... places or arranges for the placement of a child in ... [an] adoptive home.

Section 409.175(3)(b), provides:

A person or agency, other than a parent or legal guardian of the child or an intermediary as defined in s. 63.032, shall not place or arrange for the placement of a child in a family foster home, residential child-caring agency, or adoptive home unless such person or agency has first procured a license from the department to do so.

Section 409.175(9) and (10) provide as follows:

(9)(a) The department *may institute injunctive proceedings in a court of competent jurisdiction* to:

* To the extent that the district court's opinion can be read to hold that the Department's complaint was insufficient because it did not fully set forth the statutory authority for the seeking of an injunction, the decision conflicts with cases stating the well recognized principle that a complaint need not set forth statutory provisions if the facts alleged are sufficient to bring the case within the requirements of the statutory law. *E.g., City of Lakeland v. Select Tenures, Inc.*, 129 Fla. 338, 176 So. 274 (1937); *Dade County v. City of Miami*, 77 Fla. 786, 82 So. 354 (1919); *Barnett Bank of Jacksonville v. Jacksonville National Bank*, 457 So.2d 535 (Fla. 1st DCA 1984); *Vance v. Indian Hammock Hunt & Riding Club*, 403 So.2d 1367 (Fla. 4th DCA 1981).

1. Enforce the provisions of this section or any license requirement, rule, or order issued or entered into pursuant thereto; or

2. Terminate the operation of an agency in which any of the following conditions exist:

a. The licensee has failed to take preventive or corrective measures in accordance with any order of the department to maintain conformity with licensing requirements.

b. If there is a violation of any of the provisions of this section, or of any licensing requirement promulgated pursuant to this section, which violation threatens harm to any child or which constitutes an emergency requiring immediate action.

(b) If the department finds, within 30 days after written notification by registered mail of the requirement for licensure, that a person or agency continues to care for or to place children without a license, *the department* shall notify the appropriate state attorney of the violation of law and, if necessary, *shall institute a civil suit to enjoin* the person or agency from continuing the placement or care of children.

(c) Such injunctive relief may be temporary or permanent.

(10)(a) *The department is authorized to seek compliance* with the licensing requirements of this section to the fullest extent possible *by reliance on* administrative sanctions and *civil actions.*

(b) If the department determines that a person or agency is caring for a child or is placing a child without a valid license issued by the department or has made a willful or intentional misstatement on any license application or other document required to be filed in connection with an application for a license, the department, as an alternative to or in conjunction with an administrative action against such person or agency, shall make a reasonable attempt to discuss each violation with, and recommend corrective action to, the person or the administrator of the agency, prior to written notification thereof. The department, instead of fixing a period within which the person or agency must enter into compliance with the licensing requirements, may request a plan of corrective action from the person or agency that demonstrates a good faith effort to remedy each violation by a specific date, subject to the approval of the department.

(c) Any action taken to correct a violation shall be documented in writing by the person or administrator of the agency and verified through follow-up visits by licensing personnel of the department.

(d) If the person or agency has failed to remedy each violation by the specific date agreed upon with the department, the department shall within 30 days notify the person or agency by certified mail of its intention to refer the violation or violations to the office of the state attorney.

(e) If the person or agency fails to come into compliance with the licensing requirements within 30 days of written notification, it is the intent of the Legislature that the department within 30 days refer the violation or violations to the office of the state attorney.

(Emphasis supplied). It is clear from the foregoing statutes that the legislature intended to confer upon the Department the authority to bring civil actions for enforcement while referring cases to the state attorney to prosecute criminal violations.

These various statutory provisions are remedial in nature and should be given a liberal construction so as to facilitate achievement of the legislative purpose. The Department's complaint alleged facts showing that state laws regarding adoption referrals were being violated. The complaint specifically alleged that the defendant was charging fees for referring pregnant women to agents or representatives of prospective adoptive parents and was therefore acting as an unlicensed child-placing agency. Thus the complaint alleged sufficient facts to establish the Depart-

ment's authority to seek injunctive relief. After an evidentiary hearing the trial court granted a temporary injunction.

The fact that section 409.175 was not specifically brought to the district court's attention did not relieve that court of the obligation to follow the law. *Bedenbaugh v. Adams*, 88 So.2d 765 (Fla.1956). Moreover, because the Department brought the complaint pursuant to statutory authority, it was not required to allege that there was no adequate legal remedy or that there would be irreparable harm without court relief. *See Rich v. Ryals*, 212 So.2d 641 (Fla.1968).

For the foregoing reasons I would exercise jurisdiction, quash the decision of the district court, and direct that the trial court's orders be affirmed.

OVERTON, J., concurs.

Daniel SPARKMAN, Petitioner,

v.

Charles D. McCLURE, Jr., etc., Respondent.

No. 68020.

Supreme Court of Florida.

Nov. 26, 1986.

Criminal defendant filed petition for writ of prohibition, alleging violation of his speedy trial rights. The Circuit Court, Leon County, J. Lewis Hall, Jr., J., denied petition, and defendant appealed. The District Court of Appeal, First District, 478 So.2d 1145, affirmed, but certified question. The Supreme Court, McDonald, C.J., held that: (1) recording onto cassette tape of judge's oral denial of motion to dismiss on speedy trial grounds did not satisfy Criminal Procedure Rule, so as to commence running of time under Rule providing that trial shall be scheduled and commenced within 90 days of written or recorded order denying discharge on speedy trial grounds; (2) oral denial of discharge, coupled with clerk's preparation of form relating to disposition of defendant's case, met recording requirement of Criminal Rule, so as to commence running of speedy trial time at time of oral pronouncement; but (3) defendant, who sought to prevent prosecution that had already taken place, and who had adequate remedy by way of conviction appeal currently pending, was not entitled to relief via writ of prohibition.

District court decision approved in result.

Adkins, J., concurred in result only.

1. Criminal Law ⇐577.10(9)

Defendant charged by information who requested continuance thereby waived his speedy trial rights.

2. Criminal Law ⇐577.9

County court's denial of defendant's motion for dismissal of prosecution on speedy trial grounds reinstated speedy trial rights of defendant, who had previously requested continuance and thereby waived his speedy trial rights.

3. Statutes ⇐197

Word "or" is generally construed in disjunctive when used in statute or rule, and normally indicates that alternatives were intended.

4. Criminal Law ⇐577.9

Recording onto cassette tape of judge's oral denial in open court of defendant's motion to dismiss on speedy trial grounds did not commence running of time for trial under Criminal Procedure Rule providing that trial shall be scheduled and commenced within 90 days of written or recorded order of denying motion for discharge on speedy trial grounds. West's F.S.A. RCrP Rule 3.191(d)(3).

DEPARTMENT OF REVENUE, Petitioner,

v.

Suzanne JOHNSTON, as Flagler County Property Appraiser, and Flagler County, Respondents.

No. 63013.

Supreme Court of Florida.

Dec. 15, 1983.

Department of Revenue appealed from an order entered by the Circuit Court, Flagler County, Kim C. Hammond, J., confirming as final taxes levied in county against an interim assessment for the 1980 tax year. The District Court of Appeal, 422 So.2d 935, affirmed. On application for review on ground that decision of District Court of Appeal was in conflict with opinions of two other District Courts of Appeal, the Supreme Court, Ehrlich, J., held that because case was distinguishable on its facts from those cited in conflict, Supreme Court would discharge jurisdiction.

Jurisdiction discharged.

Boyd, J., dissented with opinion.

1. Taxation ⇐362

Statewide impact is significant in determining what would be "in the best interest of the public" within meaning of statute providing that the court may find that implementation and administration of a reconciliation between interim and final tax rolls or that preparation of a final roll is not "in the best interest of the public," and enter an order confirming taxes levied against interim assessments to be final for the year in question. West's F.S.A. § 193.1145(8)(d).

2. Courts ⇐216

Where cause was before Supreme Court because of apparent conflict between opinion of district court below and opinions of two other district courts, but cause was distinguishable on its facts from those cited in conflict, Supreme Court would discharge jurisdiction.

Jim Smith, Atty. Gen. and J. Terrell Williams, Asst. Atty. Gen., Tallahassee, for petitioner.

Ronald E. Clark, Palatka, for respondents.

Talbot D'Alemberte of Steel, Hector & Davis, Miami, for City of Bunnell, Barry Ferguson, Mayor; Flagler County Chamber of Commerce; Flagler County Council on Aging, David Siegel, Chairman; Flagler County School Bd., Larry S. Goodemote, Chairman; ITT–Community Development Corp.; Palm Coast AARP Chapter and Palm Coast Kiwanis Chapter, G.B. Colesworthy, Jr.; Palm Coast Civil Ass'n, Warren Wolfert, Vice-President; Palm Coast Community Center, Carol King, President; Shangri-La Home Owners Ass'n, Elizabeth C. Neimeyer, President; and Woodlands at Palm Coast Ass'n # 1, Jerome Wunder, President, amicus curiae.

EHRLICH, Justice.

This cause is before the Court because of apparent conflict between the opinion of the district court below, *State, Department of Revenue v. Johnston*, 422 So.2d 935 (Fla. 5th DCA 1982), and opinions of two other district courts, *State, Department of Revenue v. Markham*, 426 So.2d 555 (Fla. 4th DCA 1982), and *State, Department of Revenue v. Adkinson*, 409 So.2d 53 (Fla. 1st DCA 1982). We accepted jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution. Because we find this cause distinguishable on its facts from those cited in conflict, we discharge jurisdiction.

All three cases arose in the wake of the Florida legislature's passage of the Truth in Millage (TRIM) Bill requiring county property appraisers to appraise property at just valuation, that is, one hundred per cent of fair market value. In the case of Fla-

gler County, the property reappraisal was hampered by a small staff, lack of computer assistance and a limited budget. Flagler is a small county containing a relatively high number of individual parcels. The property appraiser's staff was unable to complete the reappraisal and the new tax roll in time to prepare the 1980 tax bills. The property appraiser went before the circuit court, pursuant to section 193.1145, Florida Statutes (Supp.1980), seeking adoption of an interim tax roll on which taxes for 1980 could be collected. The circuit court entered an order certifying the interim roll. It is undisputed that this tax roll did not represent just valuation.

After several extensions of time in which to file, the final tax roll was submitted to the Department of Revenue on May 29, 1981 and accepted. On June 17, 1981, the property appraiser filed a motion in the circuit court to have the interim roll declared the final roll, pursuant to section 193.1145(8)(d), Florida Statutes (Supp.1980), which provides:

> However, the court, upon a determination that the amount to be supplementally billed and refunded is insufficient to warrant a separate billing or that the length of time until the next regular issuance of ad valorem tax bills is similarly insufficient, may authorize the tax collector to withhold issuance of supplemental bills and refunds until issuance of the next year's tax bills. At that time the amount due or the refund amount shall be added to or subtracted from the amount of current taxes due on each parcel, provided that the current tax and the prior year's tax or refund shall be shown separately on the bill. Alternatively, at the option of the tax collector, separate bills and statements of refund may be issued. *In addition, the Court may find that the implementation and administration of a reconciliation between the interim and final rolls or that the preparation of a final roll is not in the best interest of the public. Upon so finding, the court may enter an order confirming taxes levied against interim assessments to be final for the year in question;* property appraisal adjustment board petitions may then be filed with respect to interim assessments, and delinquent provisional taxes shall then be subject to the provisions of chapter 197.

(Emphasis supplied.)

The circuit court conducted a full evidentiary hearing, at which the Department of Revenue alone opposed the motion; no Flagler County taxpayer opposed confirmation of the interim roll. Testimony was presented, primarily by county officers, showing that reconciliation would require disruption of the county's adopted budget, with a resulting cut-back in services and capital projects; that the county would lose $1.4 million in state revenues which would not be immediately replaceable from increased county revenues; that because of limited staff and resources the process of reconciliation would halt preparation of the 1981 tax roll, which was projected as being in full compliance with the TRIM Bill requirements. In short, the undisputed testimony presented the picture of a county caught on a treadmill of "catching up" on just valuation without being able to achieve the goal mandated by the legislature absent fiscal chaos.

The trial judge in weighing these facts, "considered the impact of revenues on a State wide basis" and "weighed impact upon the economy and the orderly flow of Government functions in Flagler County." In light of the legislature's own statement of policy regarding adoption of interim rolls as final—"It is the intent of the legislature that no undue restraint shall be placed on the ability of local government to finance its activities in a timely and orderly fashion." § 193.1145(1), Fla.Stat. (Supp. 1980)—the court found that "the 'best interest of the public' whether limited to the County of Flagler or the general public of the State of Florida, would be best served by confirming the taxes levied against the interim assessments to be final in 1980."

[1] The facts recited above are not analytically the same as those in *Adkinson.*

There, the property appraiser had made no attempt to correct a tax roll disapproved by the Department of Revenue, as ordered by the court. The trial court, in certifying the taxes collected on the deficient interim roll as final, had weighed costs and benefits only at the local level. The First District correctly held that state-wide impact was significant to the determination of what would be "in the best interest of the public."

In *Markham*, the Fourth District Court of Appeal recognized many of the same factors raised by Flagler County, but found they did not, in Broward County, pose a threat of governmental fiscal and administrative chaos, a finding of fact necessary to the granting of the Flagler County's motion for certification. We note that the Fourth District, in dicta, stated that the interpretation given the statute by the Fifth District rendered the statute unconstitutional by permitting certification of a tax levied against less than just valuation. However, on rehearing, that court acknowledged "the trial court's inherent power to head off such [governmental] crisis." 426 So.2d at 566.

[2] Because we find no conflict, we discharge jurisdiction.

It is so ordered.

ALDERMAN, C.J., and ADKINS, OVERTON, McDONALD and SHAW, JJ., concur.

BOYD, J., dissents with an opinion.

BOYD, Justice, dissenting.

I dissent to the ruling of the Court. I would quash the decision of the district court of appeal and disapprove its rationale. Article VII, section 4 of the Florida Constitution requires that assessments of *all* property for *ad valorem* taxation purposes be at "just valuation." The requirement of "just valuation" was also in predecessor provisions of our state constitutions before 1968. Art. IX, § 1, Fla. Const. (1885); art. XII, § 1, Fla. Const. (1868). The language was held by this Court to require assessment of property at full market value as early as 1945. *See Root v. Wood*, 155 Fla. 613, 21 So.2d 133 (1945). There are no expressed exceptions in article VII, section 4, and the only judicially recognized implied exception to the full-market-value requirement has arisen only in cases where relief was needed to avert governmental catastrophe. *Slay v. Department of Revenue*, 317 So.2d 744 (Fla. 1975); *State ex rel. Butscher v. Dickinson*, 196 So.2d 105 (Fla.1966); *State ex rel. Glynn v. McNayr*, 133 So.2d 312 (Fla.1961). None of those cases, however, was like this case, because in none of those cases was there an available final tax roll assessing property at its full value. In the present case the property appraiser submitted a final tax roll for approval by the Department of Revenue and it was approved on May 29, 1981. Then, on June 17, 1981, the appraiser filed the complaint seeking to have the interim roll declared as the final roll. Thus a final roll assessing property at full market value existed when the court decided to declare the interim roll as final. That existing, approved, and valid final roll should have been ordered adopted and used.

My review of the record convinces me that there was insufficient evidence to support the trial court's factual conclusions and its decision to relieve the property appraiser of the duty to use the valid final roll. This case is not substantially different from *State Department of Revenue v. Markham*, 426 So.2d 555 (Fla. 4th DCA 1982) and *State Department of Revenue v. Adkinson*, 409 So.2d 53 (Fla. 1st DCA 1982). Thus the failure to use the valid final full-market value assessment roll is being excused on the ground of inconvenience. I therefore dissent.

to repay it for nearly two years. For this action, the referee recommended that respondent be found guilty of violating Disciplinary Rules 5–101(A), 5–104(A), and 9–102(B)(4), and Integration Rule, art. XI, rule 11.02(4).

As to count two, the referee found that respondent failed to keep adequate records of his trust accounting procedures in 1978 and 1979 as required by Integration Rule Bylaws, art. XI. The referee recommended that for this action respondent be found guilty of violating disciplinary rules 9–102(A) and 9–102(B)(3); Integration Rule, art. XI, rule 11.02(4)(c); and technical but not blatant violation of Disciplinary Rule 1–102(A)(4).

Finding no past disciplinary record, the referee recommended that respondent be publicly reprimanded. No petition for review has been filed with this Court. We therefore approve the findings and recommendations as presented. Publication of this order will serve as public reprimand. Respondent will pay the cost of these proceedings in the amount of $1,902.32.

It is so ordered.

OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

BOYD, Acting C. J., concurs as to finding of misconduct but dissents to the discipline imposed and would favor a private reprimand.

FORD MOTOR COMPANY, Petitioner,

v.

James A. KIKIS, Respondent.

No. 59634.

Supreme Court of Florida.

July 30, 1981.

Plaintiff appealed from judgment of the Circuit Court, Orange County, B. C. Muszynski, J., entered after motion for judgment notwithstanding the verdict was granted. The District Court of Appeal, 386 So.2d 306, reversed and remanded. Application was made for review of decision of the District Court of Appeal. The Supreme Court, England, J., held that: (1) discussion of legal principles which District Court of Appeal applied in reversing trial court's decision supplied sufficient basis for petition for conflict review, and (2) District Court of Appeal's apparent failure to apply correct standard in reviewing trial court's granting of motion for new trial required that decision be quashed and proceeding be remanded.

Ordered accordingly.

1. Courts ⇐216

It is not necessary that a district court explicitly identify conflicting district court or Supreme Court decisions in its opinion in order to create an "express" conflict under constitutional provision stating that Supreme Court may review any decision of District Court of Appeal that expressly and directly conflicts with decision of another District Court of Appeal or Supreme Court on question of law. West's F.S.A.Const. Art. 5, § 3(b)(3).

2. Courts ⇐216

Discussion of legal principles which District Court of Appeal applied supplies sufficient basis for petition for conflict review. West's F.S.A.Const. Art. 5, § 3(b)(3).

3. Appeal and Error ⇐977(3)

Appropriate standard for district courts on review of trial court's motion granting new trial is whether trial court abused its broad discretion.

4. New Trial ⇐6

If reasonable men could differ as to propriety of action taken by trial court in granting motion for new trial, then there is no abuse of discretion.

5. Appeal and Error ⇐1089(1)

District Court of Appeal's apparent failure to apply correct standard in reviewing trial court's granting of motion for new trial required that the decision of the District Court of Appeal be quashed and case remanded.

Monroe E. McDonald of Sanders, McEwan, Mims & McDonald, Orlando, and Edward T. O'Donnell of Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, for petitioner.

Walter R. Moon and Edward Casoria, Jr., of Rush, Marshall, Bergstrom & Robison, Orlando, for respondent.

ENGLAND, Justice.

This case presents one issue which we have never addressed and another issue which we have never stopped addressing. The first requires clarification of the "expressly" requirement in this Court's constitutional jurisdiction to resolve conflicting appellate decisions. Art. V, § 3(b)(3), Fla. Const. The second revisits the role of the districts courts of appeal when reviewing a trial judge's order granting a motion for a new trial.

On Ford's motion, the trial court vacated a jury verdict for Kikis, directed a verdict for Ford, and entered judgment on the verdict. The court alternatively granted Ford's motion for a new trial[1] on the grounds that the verdict was contrary to the manifest weight of the evidence and that the court had erred in refusing to give an instruction requested by Ford. On appeal, the district court reversed the trial court's judgment, directing that the jury verdict be reinstated and judgment enter for Kikis. *Kikis v. Ford Motor Co.*, 386 So.2d 306 (Fla. 5th DCA 1980). Ford asks us to review that decision on the basis of an express and direct conflict with prior appellate decisions.

[1, 2] The first issue—the meaning of the expressly requirement—arises from the fact that the district court below did not identify a direct conflict of its decision with any other Florida appellate decisions. The court's opinion discusses, however, the basis upon which it reversed the trial court's entry of a directed verdict for Ford. This discussion, of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under section 3(b)(3).[2]

[3, 4] The second issue in this proceeding is a product of the district court's ambiguous reasoning. The court reversed the trial court on the grounds that "there was evidence in the record to support the jury verdict and no reversible trial error occurred warranting either a judgment for the defendant or *a new trial.*"[3] Its subsequent analysis addresses whether there was evidence in the record to support the jury verdict. This inquiry is relevant to review of the trial court's grant of a directed verdict, but not to the alternative grant of a new trial. We have stated and restated the appropriate standard for district courts on review of a trial court's motion granting a new trial. The test is whether the trial court abused its "broad discretion." If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion. *See Baptist Memorial Hospital, Inc. v. Bell*, 384 So.2d 145 (Fla.1980); *Cloud v. Fallis*, 110 So.2d 669 (Fla.1959); *Rivera v. White*, 386 So.2d 1233 (Fla. 3d DCA 1980).

1. The order provided that "should the foregoing Final Judgment be reversed by the Appellate Court, the Defendant's Motion for New Trial ... is ... granted ...."

2. *See* England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147, 188–89 (1980).

3. *Kikis v. Ford Motor Co.*, 386 So.2d at 306–07 (footnote omitted and emphasis added).

[5] The district court's apparent failure to apply this standard requires that we quash the decision and remand this cause solely for a reexamination of the trial court's alternative grant of a new trial.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur.

STATE of Florida, Petitioner,

v.

RIVERS, Charles, etc., Respondent.

No. 59828.

Supreme Court of Florida.

July 30, 1981.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions.

Jim Smith, Atty. Gen., and Anthony C. Musto, Asst. Atty. Gen., Miami, for petitioner.

Charles Rivers, in pro. per.

PER CURIAM.

Conflict of decisions having been dispelled, the petition is denied. 392 So.2d 913 (Fla.App.). *Villery v. The Florida Parole and Probation Commission*, 396 So.2d 1107 (Fla.1980).

ADKINS, Acting C. J., and BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

STATE of Florida, Petitioner,

v.

Dennis Andrew HEGSTROM, Respondent.

No. 59893.

Supreme Court of Florida.

July 30, 1981.

Defendant was convicted before the Circuit Court, Dade County, Alan R. Schwartz, J., of robbery and first-degree murder, and he appealed. The District Court of Appeal, Third District, Daniel S. Pearson, J., 388 So.2d 1308 vacated robbery conviction and sentence on double jeopardy grounds. On state's application for review, the Supreme Court, England, J., held that: (1) Court would not, in attempt to avoid double jeopardy issue, reweigh the evidence for purpose of determining whether robbery conviction could be sustained on theory that the murder was a premeditated murder rather than a felony-murder, and (2) though sentencing defendant for underlying lesser included felony of robbery was statutorily prohibited, he could be convicted of such offense as well as the felony-murder.

Affirmed in part, reversed in part, and remanded.

Order on mandate, 403 So.2d 587.

1. Criminal Law ⇐1134(6)

In reviewing District Court of Appeal's decision vacating defendant's conviction and sentence for underlying felony-robbery in felony-murder case on double jeopardy grounds, Supreme Court would not, in an attempt to avoid the double jeopardy issue, reweigh the evidence for purpose of determining whether robbery conviction could be sustained on theory that the murder was a premeditated murder rather than felony-murder. U.S.C.A.Const. Amend. 5.

nel Club, 117 So.2d 531 (Fla.2d DCA 1959), cert. denied, 122 So.2d 408 (Fla.1960); *Millar v. Tropical Gables Corp.,* 99 So.2d 589 (Fla. 3d DCA 1958); 9 Fla.Jur.2d Carriers §§ 111, 126 (1979); (b) the damage award is not beyond the province of the trier of fact, *Bould v. Touchette,* 349 So.2d 1181 (Fla. 1977); and (c) no harmful error has been demonstrated in the admission or striking of various items of evidence. *Binger v. King Pest Control,* 401 So.2d 1310 (Fla. 1981); *Prince v. Aucilla Naval Stores Co.,* 103 Fla. 605, 137 So. 886 (1931); *Landin v. Oerting,* 61 Fla. 652, 55 So. 843 (1911); *Leeb v. Read,* 190 So.2d 830 (Fla. 3d DCA 1966); Sec. 59.041, Fla.Stat. (1981).

Affirmed.

Jose Luis GARCIA, a minor, By and Through his parents and next best friends, Jose Antonio GARCIA and Marisela Garcia, and Jose Antonio Garcia and Marisela Garcia, individually, Appellants,

v.

CEDARS OF LEBANON HOSPITAL CORP. a Florida corporation; Florida Patients Compensation Fund; Jose H. Leon, M.D.; Physicians Protective Trust Fund; Rory A. Marin, M.D., and Michael A. Nahmad, and Luis Felipe Mencia, M.D. and S. Villega, M.D., Appellees.

Nos. 83-1127, 83-1324.

District Court of Appeal of Florida, Third District.

Jan. 24, 1984.

Plaintiffs in a medical malpractice action appealed from a judgment of the Circuit Court, Dade County, Joseph M. Nadler, J. The District Court of Appeal, Ferguson, J., held that provision of Medical Malpractice Reform Act which limits a judgment against qualified health providers to $100,000 is valid and enforceable.

Affirmed.

1. Hospitals ⇐7

Provision of Medical Malpractice Reform Act which limits a judgment against qualified health providers to $100,000 is valid and enforceable. West's F.S.A. § 768.54(2)(b).

2. Courts ⇐216

Interdistrict conflict for Supreme Court jurisdictional purposes may be based on dicta.

Brumer, Cohen, Logan & Kandell and Allan G. Cohen and Karen A. Curran, Miami, for appellants.

Adams, Hunter, Angones & Adams and R. Wade Adams and John McClure, Miami, for appellees.

Before BARKDULL, NESBITT and FERGUSON, JJ.

FERGUSON, Judge.

[1, 2] This case presents another challenge to the constitutionality of former Section 768.54(2)(b), Florida Statutes (1981).[1] We adhere to our decision in *Mercy Hospital, Inc. v. Menendez,* 371 So.2d 1077 (Fla. 3d DCA 1979), *cert. denied,* 383 So.2d 1198 (Fla.1980), which concluded, although in dicta, that the provision which limits a judgment against qualified health providers to $100,000 was valid and enforceable. In *Florida Medical Center, Inc. v. Von Stetina,* 436 So.2d 1022 (Fla. 4th DCA 1983), the fourth district's well-reasoned

1. We note that this section, which limited the liability of health care providers, was amended by Chapter 82-391, Section 2, Laws of Florida (codified at Section 768.54(2)(b), Florida Statutes (1982)). The amendment, which became effective June 22, 1982, does not apply to the case at bar.

opinion declared Section 768.54(2)(b) an unconstitutional invasion of the courts' province, noting that its decision conflicted with our decision in *Mercy Hospital*.[2] The Florida Supreme Court has accepted certiorari in *Von Stetina*,[3] the disposition of which will control this case as well.

Affirmed.

Donna Sue KIDDER, Appellant,

v.

The STATE of Florida, Appellee.

No. 83–1183.

District Court of Appeal of Florida, Third District.

Jan. 24, 1984.

Appeal from Circuit Court, Dade County; Adele Segall Faske, Judge.

Bennett H. Brummer, Public Defender, and John H. Lipinski, Sp. Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., and Bruce Barkett, Asst. Atty. Gen., for appellee.

Before HENDRY, BARKDULL and JORGENSON, JJ.

PER CURIAM.

Affirmed. *See In the Interest of D.A.H.*, 390 So.2d 379 (Fla. 5th DCA 1980); *Division of Family Services v. State of Florida*, 319 So.2d 72 (Fla. 1st DCA 1975).

2. The court in *Mercy Hospital* focused on the 1977 statute. The limitation of liability provision was subsequently amended several times. Although the *Von Stetina* court dealt with the 1981 version of the statute, the prior amendments had no effect on the provisions pertinent to either court's holding.

Rodney WOOTEN, Appellant,

v.

The STATE of Florida, Appellee.

No. 83–1211.

District Court of Appeal of Florida, Third District.

Jan. 24, 1984.

Appeal from Circuit Court, Dade County; Henry L. Oppenborn, Judge.

Bennett H. Brummer, Public Defender and Claudia Greenberg, Sp. Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., and William P. Thomas, Asst. Atty. Gen., for appellee.

Before BARKDULL, NESBITT and FERGUSON, JJ.

PER CURIAM.

Affirmed. *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *White v. State*, 377 So.2d 1149 (Fla. 1979) *cert. denied*, 449 U.S. 845, 101 S.Ct. 129, 66 L.Ed.2d 54 (1980); *Neil v. State*, 433 So.2d 51 (Fla. 3d DCA 1983) (question pending); *Tacoronte v. State*, 419 So.2d 789 (Fla. 3d DCA 1982); *Mack v. State*, 346 So.2d 1229 (Fla. 3d DCA 1977); *Hicks v. State*, 138 So.2d 101 (Fla. 2d DCA 1962).

3. Interdistrict conflict for jurisdictional purposes may be based on dicta. *See Sweet v. Josephson*, 173 So.2d 444, 446 (Fla.1965).

the trial court directing the reinstatement of the judgment.

It is so ordered.

OVERTON, C. J., and ENGLAND, SUNDBERG and HATCHETT, JJ., concur.

MYSTAN MARINE, INC. and Aetna Insurance Company, Petitioners,

v.

C. Shawn HARRINGTON, and Continental Casualty Insurance Company, Respondents.

No. 47065.

Supreme Court of Florida.

Nov. 4, 1976.

After plaintiff's motion for voluntary dismissal of negligence suit he had brought against defendant was granted, defendant was denied recovery of attorney's fees and certain other costs, and defendant took petition for common-law writ of certiorari. The District Court of Appeal, Fourth District, denied petition without opinion, and defendant petitioned for writ of certiorari alleging "conflict" in jurisdiction. The Supreme Court, England, J., held that denial of certiorari by district court without statement of reasons did not create discord in decisional law of state as its decision lacked precedential value, and, thus, constitutional scope of Supreme Court's jurisdiction prohibited review.

Writ discharged.

Roberts, J., agreed to judgment discharging writ.

Hatchett, J., concurred in result only.

1. Courts ⇐216

Jurisdiction of the Supreme Court extends to only narrow class of cases enumerated in article of the Florida Constitution. West's F.S.A.Const. art. 5, § 3(b), (b)(3).

2. Courts ⇐216

Under article of the Florida Constitution setting forth narrow class of cases over which the Supreme Court of Florida has jurisdiction, use of words "direct conflict" in section providing that court may review by certiorari a decision by district court of appeal in "direct conflict" with decision of any district court of appeal on same question of law concerns decisions as precedents as opposed to adjudications of the rights of particular litigants. West's F.S.A.Const. art. 5, § 3(b), (b)(3).

See publication Words and Phrases for other judicial constructions and definitions.

3. Courts ⇐216

Denial of certiorari by a district court without a statement of reasons does not create discord in decisional law of state as its decisions lack precedential value and, thus, constitutional scope of Supreme Court's jurisdiction prohibits review. West's F.S.A.Const. art. 5, § 3(b), (b)(3).

4. Courts ⇐107

Denial of certiorari need not be considered as a decision that trial court did not exceed its jurisdiction or depart from essential requirements of law whenever appeal was not available as a remedy. West's F.S.A.Const. art. 5, § 4(b)(3).

5. Courts ⇐216

Even if trial court's ruling conflicted with another case, district court's subsequent denial of certiorari would not also necessarily conflict for purposes of creating discord in decisional law of state and, thus, would not necessarily give "conflict" jurisdiction to the Supreme Court. West's F.S.A.Const. art. 5, §§ 3(b), (b)(3), 4(b)(3).

Marjorie D. Gadarian, of Jones, Paine & Foster, West Palm Beach, for petitioners.

F. Kendall Slinkman, of Farish & Farish, West Palm Beach, for respondents.

ENGLAND, Justice.

We tentatively granted certiorari in this case, and dispensed with oral argument, in order to explore an apparent conflict of decisions. Upon further consideration we conclude that our jurisdiction does not extend to this case and that the writ must be discharged.

C. Shawn Harrington moved for a voluntary dismissal of a negligence suit he had brought against Mystan Marine, Inc. The motion was granted without prejudice to his reinstating the suit, pursuant to Fla.R. Civ.Proc. 1.420(a)(1). Mystan Marine then moved to tax its costs against Harrington, including attorneys' fees. A hearing was held, as a result of which the trial judge granted part of the motion but denied recovery of attorneys' fees and certain other costs. Mystan Marine then took a petition for a common law writ of certiorari to the Fourth District Court of Appeal. The district court denied the petition without opinion, after which Mystan Marine petitioned this Court for a writ of certiorari alleging "conflict" jurisdiction under Article V, § 3(b)(3) of the Florida Constitution. The petition here asserts direct conflict between the district court's order and *Royal-Globe Ins. Co. v. Indian River Gas Co.*, 281 So.2d 380 (Fla. 1st DCA 1973), *cert. dismissed on stip.*, Case No. 44320, filed January 7, 1974 (Fla.).

In *Royal-Globe* a majority of the First District Court of Appeal held without explanation that attorneys' fees were taxable as costs following a voluntary dismissal such as occurred in the case before us. In his written order, the trial judge specifically refused to follow *Royal-Globe* as being contrary to settled law. It is clear, then, that Mystan Marine was denied a financial benefit by the circuit court which a defendant in the identical legal position in *Royal-Globe* was able to obtain. That does not alone show, however, that the decisions of the two district courts are in direct conflict for purposes of our jurisdiction.

[1, 2] The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. Time and again we have noted the limitations on our review [1] and we have refused to become a court of select errors. As was explained in *Ansin v. Thurston*,[2] Article V uses the words "direct conflict" to manifest a "concern with decisions as precedents as opposed to adjudications of the rights of particular litigants."

[3] In this perspective, it is seen that the decision of the district court we are now asked to review does not constitute precedent in any form. Its entire opinion consists of the words "certiorari denied", and there is no means by which we, or anyone else, can determine exactly what action the district court took. It may have been persuaded by the trial judge and decided on the merits of the case that Mystan Marine should not recover attorneys' fees as costs. It may, alternatively, have decided that there was one of two procedural bars to its jurisdiction since (1) the common law writ of certiorari with which it was presented lies only to determine whether the lower court exceeded its powers or failed to proceed in accordance with the essential requirements of law,[3] and (2) with only limited exceptions the writ is available only to review "final" judgments and decrees where no other remedy exists.[4] As a third alternative, the court may simply have exercised its discretion to refuse to issue the writ.[5]

1. See, for example, *Lawyers Title Ins. Corp. v. Little River Bank & Trust Co.*, 243 So.2d 417 (Fla.1970); *Kyle v. Kyle*, 139 So.2d 885 (Fla. 1962); *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla.1960); *Lake v. Lake*, 103 So.2d 639 (Fla.1958), *overruled on other grounds, Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla.1965).

2. 101 So.2d 808, 811 (Fla.1958).

3. *Saffran v. Adler*, 152 Fla. 405, 12 So.2d 124 (1943); *Brundage v. O'Berry*, 101 Fla. 320, 134 So. 520 (1931).

4. *Feiner v. Sun Ray Drug Co.*, 86 So.2d 891 (Fla.1956); *Tart v. State*, 96 Fla. 77, 117 So. 698 (1928).

5. Article V, § 4(b)(3) of the Florida Constitution provides: "A district court of appeal *may* issue

[4, 5] Admittedly this Court has accepted jurisdiction in at least one case where a district court denied a writ of common law certiorari without disclosing any reason for doing so. *Whittemore v. Dade County*, 292 So.2d 363 (Fla.1974). In that case, however, the Court did not explain on what basis it discerned jurisdiction. A clear majority of the Court, however, apparently did not adopt the views, espoused in a concurring opinion by Chief Justice Carlton, that (1) a denial of certiorari must be considered as a decision that the trial court did not exceed its jurisdiction or depart from the essential requirements of the law whenever appeal was not available as a remedy, and (2) that if the trial court's ruling conflicted with any case then the district court's denial of certiorari would also conflict. We too reject these assumptions.

Obviously the denial of certiorari by a district court without a statement of reasons does not create discord in the decisional law of this state. Since its decision lacks precedential value, the constitutional scope of our jurisdiction prohibits our review. Accordingly, the writ is discharged.

OVERTON, C. J., and ADKINS, BOYD and SUNDBERG, JJ., concur.

ROBERTS, J., agrees to judgment discharging writ.

HATCHETT, J., concurs in result only.

writs of . . . certiorari . . . ." (emphasis added). It is also possible, of course, that the district court viewed the Constitution as prescribing the *only* forms of its review, thereby precluding the prior remedy of "common law" certiorari.

Allie William CAMPBELL et al., Petitioners,

v.

James W. MAZE, Respondent.

No. 47118.

Supreme Court of Florida.

Nov. 4, 1976.

After plaintiff took a voluntary dismissal of a personal injury action before trial began, defendant moved for taxation of costs, including reasonable attorney's fees. The trial court denied the motion as to attorney's fees and the District Court of Appeal, Fourth District, 307 So.2d 234, denied certiorari. On the defendant's petition for writ of certiorari, the Supreme Court, Overton, C. J., held that costs taxable to a plaintiff taking a voluntary dismissal did not include reasonable attorney's fees incurred in preparation for trial.

Affirmed and petition for certiorari discharged.

Hatchett, J., dissented.

1. Costs ⇐172

Cost taxable to plaintiff taking voluntary dismissal did not include reasonable attorney's fees incurred in preparation for trial.

2. Costs ⇐172

Except where attorney's fees may be allowed in equity from specific fund or property which may be lawfully charged with their payment, attorney's fees may not be recovered except when specifically authorized by statute or by agreement of parties.

Marjorie D. Gadarian, Jones, Paine & Foster, West Palm Beach, for petitioners.

Horace E. Beacham, Jr., and Franklin G. Callas, Beacham & Callas, Palm Beach, for respondent.

It seems to us that we would have to discard the well-established rule were we to decide that by fixing an effective date exactly midway between the first days of the 1957 and 1958 tax years the legislature meant that the increase should become applicable on the former. If uniformity of the taxing process is to be maintained to the convenience of taxpayers as well as tax gatherers and the rule is to be perpetuated there can be only one logical conclusion and that is that the act should be operative prospectively.

Why the legislature did not choose language clearly stating that the act would put the added burden on the property during the year 1957 we will not undertake to surmise. We say only that the legislature did not and that not having done so, the tax could not attach before the later year.

So much for the general rule.

[3] The special rule buttresses relator's position. In Overstreet v. Ty-Tan, Inc., Fla., 48 So.2d 158, 160, we referred to the *cardinal* rule that statutes imposing taxes must be clear and specific and will be "liberally construed in favor of the taxpayer." The same thought was expressed in Florida Nat. Bank of Jacksonville v. Simpson, Fla., 59 So.2d 751, 758, 33 A.L.R. 2d 581, when we said that such statutes must be construed "strictly as against the state and in favor of the taxpayer."

[4] The Attorney General argues plausibly that the act involved was part of a plan to secure a certain amount of revenue for specified purposes and he includes in his brief a statement of the sources from which income was to be obtained by the act under question and its companions. As we have pointed out, the purpose to make the act retroactive must be more than plausible—it must be clear. We cannot bend the rules of construction to embrace other acts of the legislature linked in a common plan. If that was the program, the act should have stated in unmistakable language that it was to apply in the tax year 1957. Thus would the plan have been saved and, probably, this litigation would not have been instituted.

The peremptory writ is ordered to be issued notwithstanding the return.

TERRELL, C. J., and HOBSON, THORNAL and O'CONNELL, JJ., concur.

S. ANSIN, Petitioner,

v.

Ralph L. THURSTON, Respondent.

S. ANSIN, Petitioner,

v.

Ralph L. THURSTON, as Administrator of the Estate of Ralph L. Thurston, Jr., deceased minor, Respondent.

Supreme Court of Florida.

March 26, 1958.

Rehearing Denied April 12, 1958.

Action for death by drowning. The Circuit Court, Dade County, Harold R. Vann, J., rendered judgments for the plaintiff and defendant appealed. The District Court of Appeal, Pearson, J., 98 So.2d 87 affirmed the judgments and the defendant sought review by certiorari. The Supreme Court, Drew, J., held, inter alia, that fact that defendant found it necessary to review with particularity evidence in various cases and to refer to authorities elsewhere to bolster his position indicated that argument was primarily upon the merits of decision attacked as opposed to any contention that it brought into existence a conflict of authority, and hence writ would be denied for failure to show a direct conflict between decision involved and a previous ruling on the same point of law.

Writ denied.

1. Negligence ⇐39

The maintenance of an artificial body of water where there exists some unusual element of danger not present in ponds or natural bodies of water generally may constitute actionable negligence supporting recovery for injury or death by drowning of a minor child under attractive nuisance doctrine.

2. Courts ⇐216

That petitioner seeking review by certiorari of decision of District Court of Appeal which had affirmed judgments in tort actions for negligence found it necessary to review with particularity evidence in various cases and to refer to authorities elsewhere to bolster his position indicated that argument was primarily upon the merits of decision attacked as opposed to any contention that it brought into existence a conflict of authority, and hence writ would be denied for failure to show a direct conflict between decision involved and a previous ruling on the same point of law. F.S.A.Const. art. 5, § 4(2) as amended in 1956; Florida Appellate Rules, rule 2.1, subd. a(5) (b).

3. Courts ⇐216

Under constitutional provision authorizing review by Supreme Court by certiorari, the powers of the Supreme Court to review decisions of District Courts of Appeal are limited and strictly prescribed since it was never intended that District Courts of Appeal should be intermediate courts. F.S.A.Const. art. 5, § 4(2) as amended in 1956; Florida Appellate Rules, rule 2.1, subd. a(5) (b).

4. Courts ⇐216

The revision and modernization of the Florida judicial system at appellate level was prompted by the great volume of cases reaching the Supreme Court and consequent delay in administration of justice, and new constitutional provision embodies idea of a Supreme Court which functions as a supervisory body in judicial system for the state, exercising appellate power in certain specified areas essential to settlement of issues of public importance and preservation of uniformity of principle and practice, with review by district courts of appeal in most instances being final and absolute. F.S.A.Const. art. 5, § 4(2) as amended in 1956; Florida Appellate Rules, rule 2.1, subd. a(5) (b).

5. Courts ⇐216

The constitutional provision limiting review by Supreme Court of decisions of District Courts of Appeal to decisions in "direct conflict" evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants. F.S.A.Const. art. 5, § 4(2) as amended in 1956.

See publication Words and Phrases, for other judicial constructions and definitions of "Direct Conflict".

Blackwell, Walker & Gray, Miami, for petitioner.

Nichols, Gaither, Green, Frates & Beckham and Sam Daniels, Miami, for respondent.

DREW, Justice.

The petitioner, defendant in the trial court, seeks review by certiorari of a decision of the District Court of Appeal, Third District, by which certain judgments against him in tort actions for negligence were affirmed.

The only point presented in the appeal below was the alleged error of the trial court in denying defendant's motion for directed verdict on the issue of liability. The actions against him, both arising out of the same circumstances, were by the respondent individually and as administrator of the estate of his minor son, who died by drowning in a "rockpit" on land owned by defendant. In each case the cause of action was dependent upon proof of facts sufficient to come within the doctrine of tort

liability usually referred to as attractive nuisance.

[1] It was the opinion of the district court that the facts alleged and proved, details of which appear fully in the published report of the case in that court, were sufficient to present a jury question under the rule enunciated in the case of Allen v. William P. McDonald Corporation, Fla., 42 So.2d 706, to the effect that the maintenance of an artificial body of water where there exists some unusual element of danger not present in ponds or natural bodies of water generally may constitute actionable negligence supporting recovery for injury or death by drowning of a minor child upon the theory noted above.

The petition herein is necessarily prosecuted under that portion of amended Article V, Section 4(b), [4(2), F.S.1957] of the Florida Constitution, F.S.A., authorizing review by certiorari in this Court of "any decision of a district court of appeal * * that is in *direct conflict* with a decision of another district court of appeal or of the supreme court on the same point of law * * *," and the corresponding provision of Rule 2.1, subd. a(5) (b) of the Florida Appellate Rules.

[2] Petitioner contends that the decision below is not in accord with the rule of the case relied upon by the district court, and that it conflicts with two subsequent decisions where this Court affirmed judgments for defendant in such actions, but did not purport to overrule the earlier case. Newby v. West Palm Beach Water Co., Fla., 47 So.2d 527; Lomas v. West Palm Beach Water Co., Fla., 57 So.2d 881. In the brief much attention is devoted to the character of the banks surrounding the body of water involved, and argument is addressed primarily to the point that the present case is distinguishable upon the facts from Allen v. McDonald Corp., supra. The very fact that petitioner finds it necessary in a proceeding of this nature to review with such particularity the evidence in the various cases, and to refer to authorities elsewhere to bolster his position, would indicate that the argument is primarily upon the merits of the decision attacked as opposed to any contention that it brings into existence a conflict of authority in this jurisdiction. These considerations, among others, impel our conclusion that the writ should be denied for failure to show direct conflict between the decision in question and a previous ruling "on the same point of law." Rule 2.1, subd. a(5) (6) supra.

[3, 4] We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. Diamond Berk Insurance Agency, Inc., v. Goldstein, Fla., 100 So.2d 420; Sinnamon v. Fowlkes, Fla., 101 So.2d 375. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

[5] The suggestion is inevitable that the detailed consideration given the issues here presented and the exposition of reasons by written opinion, contrary to the cus-

tomary appellate practice in denying certiorari, involves the expenditure of quite enough judicial labor to have enabled the Court to dispose of this controversy on its merits, and so far as the particular litigation is concerned our efforts might more logically be so directed. But it is of obvious importance that there should be developed consistent rules for limiting issuance of the writ of certiorari to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" between decisions. See Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 43 S.Ct. 422, 423, 67 L.Ed. 712. While the court in the latter case dealt with rules couched in varying language, the conclusion is inescapable that our own constitutional provision has the same general objectives. A limitation of review to decisions in "direct conflict" clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.

Similar provisions in the court systems of other states have been so construed: "A conflict of decisions * * * must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions." 21 C.J.S. Courts § 462.

The general import of these pronouncements should be of benefit in charting a course of practice under amended Article V, and considered in relation to the instant case they serve to sustain and explain our conclusion herein.

Writ denied.

TERRELL, C. J., THORNAL and O'CONNELL, JJ., and WIGGINTON, District Judge, concur.

Alleen SMITH, Petitioner,

v.

John H. CONNELLY, as Executor of the Estate of Sam Raymond, Deceased, Respondent.

Supreme Court of Florida.

March 26, 1958.

Writ of Certiorari to District Court of Appeal, Third District.

Anderson & Nadeau, Miami, for petitioner.

Fogle & Fordham, Miami, for respondent.

PER CURIAM.

Certiorari denied. Fla.App., 97 So.2d 865. See Ansin v. Thurston, Fla., 101 So. 2d 808.

TERRELL, C. J., DREW, THORNAL and O'CONNELL, JJ., and WIGGINTON, District Judge, concur.

John Harvey CARSON and Clara K. Carson, his wife, Appellants,

v.

Gaylort TANNER and Clara M. Tanner, his wife, Appellees.

Supreme Court of Florida.

March 19, 1958.

Rehearing Denied April 28, 1958.

Grantees' action against grantors to establish right of ingress and egress over portion of grantors' land in order to reach property conveyed by deed. The Circuit Court for Duval County, Charles A. Luckie,

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.

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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.

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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

TIMES PUBLISHING COMPANY, Miami Herald Publishing Company, and the State of Florida, Petitioners,

v.

John Lewis RUSSELL, III, Respondent.

No. 79496.

Supreme Court of Florida.

March 11, 1993.

On application for review of decision of the District Court of Appeal, 592 So.2d 808, on ground that decision directly conflicted with prior Supreme Court decisions, the Supreme Court, McDonald, J., held that district court's placement of burden on party seeking to unseal criminal records and its good cause standard did not conflict with burden and tests articulated in prior Supreme Court decisions so as to confer jurisdiction on Supreme Court to decide case.

Petition dismissed.

Courts ⇐216

District court's placement of burden on party seeking to unseal criminal court records and its good cause standard did not conflict with burden and tests articulated in prior Supreme Court decisions involving closing of criminal pretrial proceedings and closing of civil divorce proceeding so as to confer jurisdiction on Supreme Court to decide case. West's F.S.A. Const. Art. 5, § 3(b)(3).

Lawson L. Lamar, State Atty. and William C. Vose, Chief Asst. State Atty., Orlando and George K. Rahdert and Alison M. Steele of Rahdert & Anderson, St. Petersburg, for petitioners.

Richard S. Blunt, Tampa, for respondent.

McDONALD, Justice.

We accepted review of *Russell v. Times Publishing Co.*, 592 So.2d 808 (Fla. 5th DCA1992) (*Russell II*), based on the Times' argument that the district court's opinion conflicted with *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla.1982), *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla.1988), and *Russell v. Miami Herald Publishing Co.*, 570 So.2d 979 (Fla. 2d DCA 1990) (*Russell I*). Pursuant to article V, section 3(b)(3) of the Florida Constitution, this Court has subject-matter jurisdiction over any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Because *Russell II* does not present the necessary express and direct conflict, this Court lacks jurisdiction to decide the case.

In *Lewis*, we established a three-prong test for determining whether criminal pretrial proceedings should be closed to the general public. The *Lewis* test requires that the party seeking closure prove the following:

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and,
3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Lewis, 426 So.2d at 6. The *Lewis* test was designed to "address the problems of prejudicial pretrial publicity and the competing constitutional rights to a fair trial by an impartial jury for criminal defendants." *Barron*, 531 So.2d at 118. In *Barron*, where the issue involved closure of a civil divorce proceeding, we placed the burden of justifying closure on the party seeking closure. *Id.*

In both *Lewis* and *Barron*, Florida's strong public policy in favor of open government warranted the placement of the burden on the party seeking closure. In the instant case, the district court held that properly sealed court records cannot be unsealed unless the party seeking to unseal the records shows "good cause." *Russell II*, 592 So.2d at 809. Seeking to close rec-

cords that are presumably open is a substantially different task than seeking to open records that have already been closed by a court. Therefore, we find that the district court's placement of the burden and its "good cause" standard in the instant case does not conflict with the burden and tests articulated in *Lewis* and *Barron*. Furthermore, the district court's opinion in the instant case does not conflict with the Second District Court of Appeals' decision in *Russell I*.* In *Russell I*, as in the instant case, the court placed the burden of proof on the party seeking to reopen sealed records.

Because we do not find any conflict to support this Court's jurisdiction, the petition for review is dismissed.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

* Nor is *Russell II* in conflict with cases decided subsequent to that decision.

Donald G. RESHA, Petitioner,

v.

Katie D. TUCKER, Respondent.

No. 80228.

Supreme Court of Florida.

March 11, 1993.

Application for Review of the Decision of the District Court of Appeal—Constitutional Construction, First District—Case Nos. 92-914 & 92-945.

Richard E. Johnson of Spriggs & Johnson, and William A. Friedlander, Tallahassee, for petitioner.

Brian S. Duffy of McConnaughhay, Roland, Maida, Cherr & McCranie, P.A., Tallahassee, for respondent.

Prior Report: 600 So.2d 16.

McDONALD, Justice.

Finding no express and direct conflict to support this Court's jurisdiction, the petition for review is dismissed. *See Times Publishing Co. v. Russell*, 615 So.2d 158 (Fla.1993).

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

James WILSON et al., Petitioners,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH CO., Respondents.

No. 46940.

Supreme Court of Florida.

Feb. 11, 1976.

An interlocutory order of the Circuit Court, Dade County, Thomas Testa, J., granted "class action status" in suit by telephone subscribers, and an interlocutory appeal was taken. The District Court of Appeal reversed, Fla.App., 305 So.2d 302, and writ of certiorari was granted. The Supreme Court, England, J., held that where decision of District Court of Appeal did not conflict with any other appellate decision, the Supreme Court lacked jurisdiction to proceed.

Writ of certiorari discharged.

Courts ⇐216

Where there was no direct conflict between decision of District Court of Appeal and any other appellate decision since same principles were applied to reach different results on different facts, the Supreme Court lacked jurisdiction to proceed with petition for writ of certiorari which had been tentatively granted, so that writ of certiorari would be discharged. West's F.S.A.Const. art. 5, § 3(b)(3).

Jeffrey S. Goldman, of Wallace & Breslow, Miami, for petitioners.

W. H. Adams, III, of Mahoney, Hadlow, Chambers & Adams, Jacksonville, James Knight of Walton, Lantaff, Schroeder, Carson & Wahl, Miami, and John A. Boykin, Jr., Altanta, Ga., for respondents.

ENGLAND, Justice.

This case was brought to us on petition for writ of certiorari to review a decision of the Third District Court of Appeal holding that petitioners could not bring a class action on behalf of all telephone subscribers who do not receive financial recompense for interrupted telephone service, extending at least 24 hours, which is not a result of their own fault.[1] We tentatively granted certiorari to explore a possible direct conflict between that decision and either *Port Royal, Inc. v. Conboy,* 154 So.2d 734 (Fla.App.2d 1963), or *City of Miami v. Keton,* 115 So.2d 547 (Fla.1959).[2] Additional briefs and oral argument have sharpened the threshold jurisdictional issues, and it now appears that the constitutionally required direct conflict does not exist.[3]

In *Port Royal, Inc. v. Conboy,* the Second District Court of Appeal allowed a class action suit on behalf of City of Naples taxpayers after analyzing the requirements for such an action and finding no deficiencies. The court there developed its analysis from the premise, well established in Florida's class action jurisprudence, that "a class [action] suit depends upon the circumstances surrounding the case . . . and whether a party adequately represents the persons on whose behalf he sues depends on the facts of the particular case." 154 So.2d at 736–37. The district court in this case proceeded from the same premise.

1. The district court's decision is reported at 305 So.2d 302.

2. Petitioners also alleged conflict with *Watnick v. Florida Comm. Banks, Inc.,* 275 So.2d 278 (Fla.App.3d 1973), on the asserted ground that the court there limited the class action rule to governmental as opposed to private acts. Petitioners argue that respondent here is a governmental agency, and that the issues in this case are within the *Watnick*-announced rule. The allegation of jurisdictional conflict with *Watnick* is frivolous. The district court did not announce the rule of law which petitioners ascribe to the *Watnick* decision. Moreover, if it had the decision now under review would not, for that reason, be in conflict with *Watnick.*

3. Fla.Const. art. V, § 3(b)(3).

After analyzing the same factors for class representation as the court in *Port Royal*, the court simply found the factual situation developed by the pleadings at variance with the necessary class action elements. The court's decision in no way conflicts with *Port Royal* on any point of law, as petitioners' counsel acknowledged in oral argument, and it patently varies as to the operative facts.[4]

Petitioners allege conflict with the *City of Miami* case on the ground that here, as there, the class is so numerous that individual actions are impossible. The district court's decision did not contradict that principle. That court found other factors to exist which in its judgment required a different result.

Without a direct conflict between the decision below and any other appellate decision, we lack jurisdiction to proceed.

The writ of certiorari is discharged.

ADKINS, C. J., and ROBERTS, BOYD and OVERTON, JJ., concur.

Mark SCHAFER, Petitioner,

v.

ST. ANTHONY'S HOSPITAL et al., Respondents.

No. 46430.

Supreme Court of Florida.

Feb. 11, 1976.

The Industrial Relations Commission reversed and remanded cause to the Judge of Industrial Claims for reconsideration of the claimant's lost wage-earning capacity, and claimant petitioned for writ of certiorari. The Supreme Court, Overton, J., held that even if record contained substantial competent evidence to support the findings of the Judge of Industrial Claims, the Commission was not prohibited from requiring the Judge to take further evidence and make more expansive findings to assure a just result and that order of the Industrial Relations Commission was not a final disposition of the cause, so that petitions for writ of certiorari and attorney fees would be denied.

Ordered accordingly.

Adkins, C. J., dissented.

1. Workmen's Compensation ⇐1821

Fact that record might have contained substantial competent evidence to support findings of Judge of Industrial Claims with respect to claimant's lost wage-earning capacity did not prohibit Industrial Relations Commission from requiring the Judge to take further evidence and make more expansive findings to assure a just result. West's F.S.A. § 440.25(4)(d).

2. Workmen's Compensation ⇐1821

The Industrial Relations Commission possesses inherent authority to direct its finders of fact to meet the issues presented in each claim with answers as fully developed in fact as its quasi-judicial supervisory function and judicial economy require. West's F.S.A. § 440.25(4)(d).

3. Workmen's Compensation ⇐1835, 1981

Where order of Industrial Relations Commission reversing and remanding cause to Judge of Industrial Claims for reconsideration of claimant's lost wage-earning capacity was not a final disposition of the cause, claimant's petitions for writ of certiorari and attorney fees would be denied.

4. Petitioners complain that the district court below could not have made the factual determinations expressed in its opinion since the full record developed in the circuit court was not before the appellate court. This contention overlooks the court's holding that the pleadings themselves are inadequate to show the common interest of the class.