SUPREME COURT OF FLORIDA

CASE NO. SC11-1196

GEORGE JACKSON, KERRY JACKSON, and JACKSON REALTY TEAM, INC., a Florida Corporation,

Petitioners,

Lower Tribunal No(s):
1D10-1049
09-1399-CA

vs.

THE SHAKESPEARE FOUNDATION, INC. and THE HERD COMMUNITY DEVELOPMENT CORPORATION, a California Corporation authorized to do business in the State of Florida

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondents, THE SHAKESPEARE FOUNDATION, INC. and THE HERD COMMUNITY DEVELOPMENT CORPORATION, will be referred to herein as Shakespeare and Herd.

Petitioners, GEORGE JACKSON and KERRY JACKSON will be referred to herein as the Jacksons, or individually as Mr. or Mrs. Jackson.

Petitioner, JACKSON REALTY TEAM, INC., will be referred to herein as Jackson Realty.

References to the volume and page of the Record before the District Court will be referred to herein as R, V-_, p _.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE

This case is before this Court based on this Court's Order accepting jurisdiction dated November 8, 2011. The nature of the case is an action for fraudulent misrepresentation as to the existence of wetlands on certain real property (subject property) in Bay County, Florida, purchased by Shakespeare and Herd from Mr. and Mrs. Jackson. The course of this proceeding began with Shakespeare and Herd filing their Complaint on March 24, 2009. (R-V 1, pp. 001-

014). In their Complaint, Shakespeare and Herd alleged that the Jacksons and/or Jackson Realty fraudulently misrepresented, among other things, that the subject property purchased by Shakespeare and Herd from Mr. and Mrs. Jackson was "a great affordable housing project" and that "wetland study verifies no wetlands". In fact, 26% of the subject property was wetlands. As a result of this fraudulent misrepresentation Shakespeare and Herd suffered damages.

In response to Shakespeare and Herd's Complaint the Jacksons and Jackson Realty filed their Motion to Dismiss alleging as grounds therefor that the Purchase and Sale Agreement (Contract) between the parties contained a provision requiring the buyer and seller to attempt to resolve disputes through mediation and failing to do so in mediation, to resolve the dispute through neutral binding arbitration. (R V-1, pp. 015-016). On January 27, 2010, the lower court entered its Order Granting Defendants' Motion to Dismiss. (R V-1, p. 054). Thereafter an appeal to the First District Court of Appeal was timely filed by Shakespeare and Herd on February 23, 2010. (R V-1, 065-066). The District Court handed down its opinion reversing the trial court's Order dismissing Shakespeare and Herd's Complaint on May 9, 2011. *See Shakespeare Foundation v. Jackson*, 61 So.3d 1194 (Fla. 1st DCA 2011). The Jacksons and Jackson Realty then filed their

Notice to Invoke Discretionary Jurisdiction in this Court on June 8, 2011. This Court entered its Order accepting jurisdiction on November 8, 2011.

STATEMENT OF THE FACTS

The following allegations are contained in Shakespeare and Herd's Complaint. (R V-1, pp. 001-014). Prior to January 2006 Shakespeare and Herd had agreed to develop an affordable housing development in Panama City, Florida, known as Jackson Place Affordable Housing Development (Jackson Place). At that time Mr. and Mrs. Jackson owned the subject property located at 915 Everett Avenue, Panama City, Florida, more particularly described as:

> Part of Section 2, Township 4 South, Range 14 West, Bay County, Florida; more particularly described as follows:
>
> Begin 264 feet East of the Northwest Corner of the Southeast Quarter of the Northwest Quarter of the Southwest Quarter of the Northwest Quarter of the Southwest Quarter of Section 2, Township 4 South, Range 14 West; thence East 396 feet; thence South 165 feet; thence West 396 feet; thence North 165 feet to the Point of Beginning.

The Jacksons and/or Jackson Realty caused the subject property to be advertised through the Bay County Multiple Listing Service. A copy of the advertisement was attached to Shakespeare and Herd's Complaint as Exhibit A. (R V-1, p. 007). That advertisement in the Bay County Multiple Listing Service

contained the following statement: "This is a great affordable housing project. Estimate from North Bay Engineering is $17,500 to get you to dev order stage. Topography and boundary survey completed recently by Dragoon Surveying to be included in price. Property is 165' on Everett Avenue and 396' deep, totally cleared and filled except for 10' around fence line. Zoning per city PC is MU2, Mixed use 2, Multi Family duplex, triplex or quadraplex be built on property. Recently tapped into Panama City Water and Sewer, with new commercial grade pump/lift station on site. Local Engineering company has platted 10 duplexes could fit 6 4 plexes. Zone 20 units per acre or 30 units total. Wetlands study verifies No Wetlands. One of Sellers is Licensed Fl. Realtor."

At the time the above advertisement was posted by the Jacksons or Jackson Realty on the Bay County Multiple Listing Service, the Jacksons had in their possession a Property Report Land Use Planning Analysis prepared by Ron Thomasson, A.T.C.P., Land Use Consulting, showing that, in fact, 25% of the land was in wetlands. The Jacksons purchased the property shortly before listing it for sale through the Bay County Multiple Listing Service. Ms. Jackson used the above-referenced report to negotiate the purchase price of the subject property from the prior owner from $175,000.00 down to $145,000.00.

During the negotiation between Shakespeare and Herd and the Jacksons, Ms. Jackson was advised by Shakespeare and Herd that they intended to develop the subject property into low-income houses with 27 units on the entire parcel.

Based on the representation that there were no wetlands on the property and that 30 units could be built on the subject property, Shakespeare and Herd entered into the Contract to purchase the property from the Jacksons for the sum of $253,000.00. A copy of the Contract was attached to Shakespeare and Herd's Complaint as Exhibit B. (R V-1, pp. 008-014). Shakespeare and Herd ultimately paid the Jacksons the purchase price of $253,000.00 for the subject property.

After the purchase of the subject property, Shakespeare and Herd held an onsite meeting in July 2007 with their builder and engineer in preparation for moving forward with construction of the project. At that time the builder noticed that the foliage and the general lay of the land indicated that the subject property might contain some wetlands.

Shakespeare and Herd then contacted North Bay Engineering, who the Multiple Listing Service advertisement stated had been involved in preparing the subject property for development. Shakespeare and Herd were informed by North Bay Engineering that Ms. Jackson had had someone "walk the property" and reported that there were no wetlands. Shakespeare and Herd then contacted Ms.

Jackson who stated that she would provide a copy of the wetland study and a fill permit. As of the date of filing the Complaint no copy of a wetlands report or fill permit report had been provided to Shakespeare and Herd.

Thereafter, Shakespeare and Herd, through North Bay Engineering, contacted Bethany Womack, who performed a wetlands delineation in which she reported the presence of wetlands on the subject property. Shakespeare and Herd then contracted with Wilson Miller, Inc. who performed an in depth wetlands delineation. The Wilson Miller Report showed that 0.39 acres of the 1.5 acres, or 26% of the entire tract, is in wetlands and unbuildable. The wetlands eliminate the ability to develop 9 of the 27 units engineered and designed for the project.

The representation made by the Jacksons and Jackson Realty in the Multiple Listing Service advertisement were knowingly false when made. If Shakespeare and Herd had known that 26% of the land was wetlands they would not have purchased the subject property because the wetlands made the project economically unfeasible.

Shakespeare and Herd learned from the Department of Army, Corps of Engineers, and the Florida Department of Environmental Protection, that the wetlands on the subject property are not state or federal jurisdictional. However, because of the existence of the wetlands on the subject property, the development

of the project has been delayed. The delay has caused Shakespeare and Herd to miss a favorable housing market for affordable housing, and has placed them in one of the worst real estate markets, if not the worst real estate market, in the history of the Florida panhandle area. Shakespeare and Herd have also incurred additional expenses as a result of the undisclosed wetland on the subject property.

SUMMARY OF ARGUMENT

Shakespeare and Herd's fraud claim in the instant case is not significantly related to their Contract with the Jacksons. The claim does not raise issues, the resolution of which requires reference to or construction of some portion of the Contract itself. Therefore, arbitration of their claim is not required. *See Seifert v. U.S. Home Corporation,* 750 So.2d 633, 638 (Fla. 1999).

In *Seifert,* this Court found that because arbitration provisions are contractual in nature, the construction of these provisions and the contract in which they appear remain a matter of contract interpretation. Therefore, the determination of whether an arbitration clause requires arbitration of a particular dispute necessarily "rests on the intent of the parties." *Seifert* at 636. This Court recognized that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate. This Court recognized that ". . . it is fair to presume that not every dispute that arises between contracting parties

should be the subject of arbitration." *Seifert* at 638. This Court further recognized that the mere coincidence that the parties in dispute have a contractual relationship would not ordinarily be enough to mandate arbitration of the dispute.

In explaining its reasoning this Court stated: "If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of contractually-imposed duty is one that arises from the contract. . . . *If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract but sounds in tort. Id.* Therefore, a contractually-imposed arbitration requirement . . . would not apply to such a claim." *Seifert* at 639.

In this case, Shakespeare and Herd can prove their cause of action for fraud against the Jacksons by proof: that the Jacksons made false statements concerning a material fact; that the Jacksons knew the statements were false when made; that the Jacksons intended, in making the statements that the statements would induce another to act on it; and that another (Shakespeare and Herd) acted in reliance on the representation to their injury. The resolution of none of these issues would require reference to or construction of some portion of the Contract itself. The

duty alleged by Shakespeare and Herd to be breached by the Jacksons is one imposed by law in recognition of public policy. It has long been the public policy of this State to prohibit one from profiting from purposeful use of false information. *See M/I Schottenstein Homes, Inc. v. Azam,* 813 So.2d 91, 96 (Fla. 2002) (citing *Gilchrist Timber Company v. ITT Rayonier, Inc.,* 696 So.2d 334, 336, 37 (Fla. 1997)). Therefore the breach is not one arising from contract but sounds in tort, and contractually imposed arbitration requirements would not apply to such claim. *Seifert* at 639.

As recognized by the District Court, this case is distinguishable from *Maguire v. King,* 917 So.2d 263 (Fla. 5th DCA 2005), in that the parties in *Maguire* had reduced the representation made in that contract to a written addendum to their real estate contract. Plaintiff's complaint in *Maguire* was based on breach of contract on two counts and three counts of fraud in the inducement, fraud, and negligent misrepresentation. Shakespeare and Herd's Complaint in this case is based strictly on fraud.

It is also clear from the arbitration clause in this Contract that Shakespeare and Herd did not intend to arbitrate their fraud claim. The arbitration clause in this case is limited to disputes related to the buyer's and seller's default under the terms of the Contract, and disputes as to the entitlement to binder deposits. The

Contract does not provide a remedy, through arbitration or otherwise, for fraud such as that alleged in Shakespeare and Herd's Complaint. In fact, the Contract provides: "The arbitrator may not alter the contract terms or award any remedy not provided for in this contract." (Contract, paragraph 14). Therefore, the Contract violates the fundamental law of this State and the Florida Constitution. *See Perkins v. Pare,* 352 So.2d 64, 65 (Fla. 4th DCA 1977) (there is no principle of law more fundamental than that which declares for every wrong there is a remedy). *See also* Article 1, Section 21, Declaration of Rights, Florida Constitution (1968) ("The courts shall be open to every person for redress of injury, and justice shall be administered without sale, denial or delay.").

Shakespeare and Herd's Complaint clearly alleges that they have been damaged as a result of the Jacksons' fraud, however, the Contract does not provide any remedy for damages resulting from that fraud. Therefore, the arbitration clause in this case is unenforceable based on public policy. For this additional reason the Order dismissing Shakespeare and Herd's Complaint was properly reversed. *See Seifert* at 643 (requiring petitioner to submit her tort claim to binding arbitration would deprive her of her rights to a trial by jury, due process, and access to the courts). For these reasons, the District Court's opinion in *Shakespeare* should not be disturbed.

ARGUMENT

I. SHAKESPEARE'S AND HERD'S FRAUD CLAIM IS NOT SIGNIFICANTLY RELATED TO THEIR CONTRACT WITH JACKSONS, THEREFORE ARBITRATION OF THEIR CLAIM IS NOT REQUIRED.

STANDARD OF REVIEW

Shakespeare and Herd agree with the Jacksons that the standard of review of a lower court's construction of an arbitration provision in a contract and its application of that law to the facts is *de novo*. *Gainesville Health Care Center, Inc. v. Weston*, 857 So.2d 278, 283 (Fla. 1st DCA 2003). When the only evidence that is before the lower court is the same documents that are before the Appellate Court, the standard of review is *de novo*. *Infinity Design Builders, Inc. v. Hutchinson*, 964 So.2d 752, 755 (Fla. 5th DCA 2007). In this case the lower court had the same Contract before it that is before this Court, therefore the standard of review in this case should be *de novo*.

ARGUMENT

As will be shown hereafter, Shakespeare and Herd's fraud claim is not significantly related to their Contract with the Jacksons. Therefore, arbitration of their claim is not required.

It is respectfully suggested that this Court should, as the District Court did, look no further than the four corners of the Complaint in reaching its opinion. *Shakespeare* at 1197. When reviewing the Complaint it is important to note that Shakespeare and Herd's claim is not a claim for fraudulent inducement, although referred to as such by the District Court in its footnote 1 and by the dissent. It is a claim for intentional fraud. Therefore, Shakespeare and Herd's claim is not subject to the law regarding claims for fraudulent inducement set forth in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L. Ed.2d 1270 (1967) and its progeny.

It is also important to note, contrary to the argument of the Jacksons, that the only reference to the Contract in the Complaint, other than a copy being attached, is the purchase price of the property and the allegations related to attorney's fees. Neither are related to the arbitration clause.

The District Court properly found that Shakespeare and Herd and the Jacksons:

> [O]bviously would not be in this adverse situation had they not agreed to the contract; however, the claim at the center of the dispute arose from a general duty owed under common law, not from the contract. "[F]or a tort claim to be considered 'arising out of or relating to' an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself."

Shakespeare at 1198, quoting from this Court's opinion in *Seifert*.

In *Seifert,* this Court held that an agreement to arbitrate in a contract does not necessarily mandate arbitration of a subsequent and independent tort action based upon common law duties. *Seifert* at 635. After recognizing that arbitration provisions are common and their use generally favored by the courts, this Court recognized that ". . . because arbitration provisions are contractual in nature, construction of such provisions and the contracts in which they appear remains a matter of contract interpretation. (Citations omitted). Accordingly, the determination of whether an arbitration clause requires arbitration of a particular dispute necessarily 'rests on the intent of the parties.'" *Seifert* at 636.

This Court went on to quote from the United States Fourth Circuit Court of Appeals' opinion in *American Recovery Corp. v. Computerized Thermal Imaging, Inc.,* 96 F.3d 88, 93 (4th Cir. 1996). "[T]he test for determining arbitrability of a particular claim under a broad arbitration provision is whether a 'significant relationship' exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute. (i.e., tort or breach of contract.)" *Seifert* at 637, 638.

This Court further recognized that: "Disputes arise in many and varied contexts and the mere coincidence that the parties in dispute have a contractual

relationship will ordinarily not be enough to mandate arbitration of the dispute. In other words, the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement." *Seifert* at 638.

Finally the Court cited with approval the following from the opinion of the Arizona Court of Appeals in *Dusold v. Porta-John Corp.,* 167 Ariz. 358, 807 P.2d 526 (Ct. App. 1990):

> . . . [T]he better-reasoned cases start with the premise that, in order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself. (Citation omitted). The relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of a contract between the parties. (Citation omitted).
>
> * * *
>
> . . . If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. (Citations omitted). Analogously, such a claim would be one arising from the contract terms and therefore subject to arbitration where the contract required it. *If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising*

> *from the contract, but sounds in tort. Id.* Therefore, a contractually-imposed arbitration requirement . . . would not apply to such a claim.

Seifert at 639.

To determine whether the dispute in this case can be characterized as arising out of or related to the subject matter of the Contract, and thus subject to arbitration, the Court must look to the allegations contained in Shakespeare and Herd's Complaint. In their Complaint, Shakespeare and Herd alleged the jurisdictional requirements (paragraph 1), the identities of the parties (paragraphs 2 through 7), venue (paragraph 8), and that all conditions precedent have occurred (paragraph 9). Shakespeare and Herd then alleged that they had agreed to develop an affordable housing development in Panama City, Florida, known as Jackson Place Affordable Housing Development (Paragraph 10). They then alleged that the Jacksons owned a certain parcel of land which is described in the Complaint in Paragraph 11.

In Paragraph 12 Shakespeare and Herd allege that the Jacksons advertised the property through the Bay County Multiple Listing Service as "this is a great affordable housing project. Estimates from North Bay Engineering is $17,500 to get you to dev order stage. Topography and boundary survey completed recently by Dragoon Surveying to be included in price. Property is 165 with a f. on Everett

Avenue and 396 f. deep, totally cleared and filled except for 10 f. around fence line. Zoning per city PC is MU2, Mixed use 2, Multi Family duplex, triplex or quadraplex be built on property. Recently tapped into Panama City Water and Sewer, with new commercial grade pump/lift station on site. Local Engineering company has platted 10 duplexes, could fit 6 4 plexes. Zone 20 units per acre or 30 units total. Wetlands study verifies No Wetlands. One of sellers is licensed Fl. realtor."

In Paragraph 13 Shakespeare and Herd allege that at the time the advertisement was posted by the Jacksons on the Bay County Multiple Listing Services, they knew that the advertisement was not true. In fact, Ms. Jackson had used a wetlands report to negotiate the price they paid for the property.

In Paragraph 14 Shakespeare and Herd allege that Jacksons knew that Shakespeare and Herd intended to developed the subject property into low-income housing with 27 united on the parcel.

In Paragraphs 15 and 16 Shakespeare and Herd allege that based on the Jacksons representations, they paid $253,000.00 for the property. Shakespeare and Herd then alleged that after the purchase of the property they held an onsite meeting in July 2007 with their builder and at that time learned they may have some wetlands issues.

In Paragraphs 18 and 19 Shakespeare and Herd allege that the wetlands issues were verified. In Paragraph 20 Shakespeare and Herd allege that the representations made by the Jacksons in the multiple listing advertisement were knowingly false when made, and that Shakespeare and Herd would not have purchase the property had they know of the truth of those representations. Finally, Paragraphs 21 through 23 allege damages.

The only reference in Shakespeare and Herd's Complaint to the Contract is in paragraphs 15 and 16 which refer to the parties entering into the Contract and the purchase price, and in paragraph 23 in which Shakespeare and Herd claimed attorney's fees based on the Contract. There is no issue raised by Shakespeare and Herd's Complaint which "requires reference to or construction of some portion of the contract itself" for its resolution. *See Seifert* at 638, 639.

As the District Court properly recognized, Shakespeare and Herd's "common-law fraud claim does not require reference to or construction of the contract, nor does it invoke any contractual provision; . . .". In fact, again as the District Court properly recognized, Shakespeare and Herd "theoretically could have raised their fraud claim even before the contract was signed if Appellants detrimentally relied on Appellees' advertisement." *Shakespeare* at 1199. For example, if Shakespeare and Herd had incurred engineering or other expenses

prior to entering into the Contract based on the Jacksons' fraud, they would have had a claim against the Jacksons to recover those damages even though they did not ultimately enter into a contractual relationship with the Jacksons.

The Jacksons' statement that "Shakespeare and Herd's claims arise solely from the buyer/seller relationship created by the Contract, and therefore, are significantly related to the Contract" and that "the claims by Shakespeare and Herd cannot be resolved without reference to, and interpretation of, the parties' Contract" (Initial Brief, p. 8) are unsupported and without merit. As set forth above, the only reference to the Contract relate to the fact that it exists, the price paid, and the prayer for attorney's fees. Shakespeare and Herd's common-law fraud claim does not require reference to or construction of the Contract for its resolution, nor does it invoke any contractual provision.

This Court in *Lance v. Wade,* 457 So.2d 1008, 1011 (Fla. 1984) set forth the elements for actual fraud as: "(1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party." Shakespeare and Herd may prove their cause of action for actual fraud by the following proof, without reference to or construction of some portion of the

Contract. They may prove the first element by proof that the Jacksons advertised the subject property through the Bay County Multiple Listing Service as "a great affordable housing project" and that "wetland study verifies no wetlands" and that those statements are false. The absence of wetlands is certainly a material fact to the development of an affordable housing project. They may prove the second element by proof that at the time this advertisement was posted by the Jacksons or Jackson Realty on the Bay County Multiple Listing Services, the Jacksons had in their possession a Property Report Land Use Planning Analysis which showed that 25% of the lands was in wetlands, and that the Jacksons used this report to negotiate the purchase price of the subject property from $175,000.00 down to $145,000.00. Therefore, the Jacksons knew the statements were false when made. Next, Shakespeare and Herd may prove the third element, again by proof, that the Jacksons and/or Jackson Realty listed the property for sale and advertised it through the Bay County Multiple Listing Service. The advertisement itself could have only been posted by the Jacksons or Jackson Realty in furtherance of their intend to induce another (including Shakespeare and Herd) to purchase the subject property in reliance on the statements. Finally, Shakespeare and Herd may prove the fourth element by their own testimony that they relied on the representation made by the Jacksons and Jackson Realty in the advertisement through the Bay

County Multiple Listing Services that the property was a great affordable housing project and that a wetland study verified no wetlands, and that they have suffered damages as a result of their reliance. None of this proof requires reference to or an interpretation of the parties' Contract.

Although the provisions of the Contract related to "land use" raised by the Jacksons and by the dissent may ultimately provide the Jacksons with some affirmative defense as this case proceeds, that provision of the Contract is not a part of Plaintiffs' cause of action for fraud. Therefore, there is no need for reference to these provisions to prove Shakespeare and Herd's cause of action for fraud.

The Jacksons' statement that: "The facts in the matter at hand are most similar to those in *Maguire v. King*, 917 So.2d 263, 266 (Fla. 5th DCA 2005)" is likewise without merit. In *Maguire*, the seller of certain real property represented to the purchaser of the property that the transaction would include two acres of permitted drainage rights. The parties in that case reduced their drainage rights agreement to writing and executed an addendum to the agreement which provided that the seller would release all drainage system capacities relative to the subject property, approximately 2+/- acres. The parties then closed on the transaction.

In its opinion in this case the District Court addressed the Fifth District's decision in *Maguire* by distinguishing it stating:

> Important to our decision here, the parties in *Maguire* executed a written addendum to their real estate contract which included the drainage rights. *Id.* After closing, the plaintiffs discovered the seller previously transferred one acre of the drainage rights in a different transaction. *Id.* The plaintiff sued for breach of contract in two counts, and three counts of fraud in the inducement, fraud, and negligent misrepresentation, all based on the same factual allegations. *Id.* at 265. Reasoning that the tort claims were "nonsensical when divorced from the contractual obligation" to deliver two acres of drainage rights, the court reversed and remanded so that the trial court could impose arbitration. *Id.* at 266-67. Because the parties' dispute was directly related to duties arising from the contract, *Maguire* is distinguishable from this appeal.

Shakespeare at 1200, 1201. In this case, the fraudulent misrepresentation made by the Jacksons were not reduced to writing, and Shakespeare and Herd's cause of action is not based on contract but on tort. For that reason *Maguire* is distinguishable, there is no conflict between *Maguire* and *Shakespeare* and the District Court's opinion in *Shakespeare* should not be disturbed.

II. IT IS CLEAR FROM THE TERMS OF THE CONTRACT THAT IT WAS NOT THE INTENT OF THE PARTIES THAT THE ISSUES RAISED IN THIS CASE BE DETERMINED BY ARBITRATION.

STANDARD OF REVIEW

The standard of review of a lower court's construction of an arbitration provision in a contract and its application of that law to the facts is *de novo*. *Weston* at 283. When the only evidence that is before the lower court is the same documents that are before the Appellate Court, the standard of review is *de novo*. *Hutchinson* at 755. In this case the lower court had the same Contract before it that is before this Court, therefore the standard of review in this case should be *de novo*.

ARGUMENT

Because the "dispute resolution" paragraph of the Contract fails to provide any remedy for the cause of action for fraud alleged in Shakespeare and Herd's Complaint, it clearly was not the intent of the parties that the arbitration clause apply to the dispute involved in this case.

In *Seifert* at 641 this Court stated:

> The absence or any mention of the parties' rights in the event of personal injury or death arising out of any alleged tortious conduct such as that which allegedly occurred in this case creates ambiguity and uncertainty as to the intent of the parties. Under a well-

> established rule of construction, we are constrained to construe the provisions of the U.S. Home contract against its drafter, U.S. Home. The contract between the Seiferts and U.S. Home explicitly refers only to the sale and purchase of a house. It appears to be a standard commercial contract containing provisions relating solely to the duties and obligations of the parties in regard to the construction and sale of the house, The two-paged sales agreement written by U.S. Home includes such matters as the purchase price and payment schedule, deposits, the time and location of closing, closing costs, title, substitutions, site specifications, installation requirements, damage to the property before closing, promotional displays, the parties' rights in the event of a default, and the homeowners' warranty. There is nothing within these provisions to indicate that either party intended to include tort claims for personal injuries arising under the common law within the scope of either the contract in general or the arbitration provision in particular.

The Contract in the instant case, like the contract in *Seifert*, was a standard commercial contract containing provisions related to sellers default and buyers default under the terms of the contract. Paragraph 13 of the Contract provides:

> 13. DEFAULT: (a) Seller Default: If for any reason other than failure of Seller to make Seller's title marketable after diligent effort, Seller fails, refuses or neglects to perform this Contract, Buyer may choose to receive a return of Buyer's deposit without waiving the right to seek damages or to seek specific performance as per Paragraph 14. (b) Buyer Default: If Buyer fails to perform this Contract within the time specified, including timely payment of all deposits, Seller may choose to retain and collect all deposits paid and agreed to be paid as liquidated damages or to seek specific performance as per Paragraph 14; and Broker will, upon demand, receive 50% of all deposits paid and agreed to be paid (to be split equally among cooperating brokers) except when closing does not occur due to Buyer not being able to secure Financing after providing a Commitment, in which Brokers' portion of the deposits will go solely to the listing broker) up to the full amount of the brokerage fee.

The remedies provided in the Contract are:

(1) A remedy for the Buyer in the event the "Seller fails, refuses or neglects to perform this Contract", in which case the Buyer may choose to receive a return of the Buyer's deposit without waiving the right to seek damages or to seek specific performance as per paragraph 14.

(2) A remedy for the Seller if the Buyer defaults, in which case the Seller may choose to retain and collect all deposits paid and agreed to be paid as liquidated damages or to seek specific performance as per paragraph 14.

(3) A remedy in the event of disputes concerning entitlements to deposits, failing resolution through mediation, in which case the Escrow Agent may choose to elect to have the issue resolved by arbitration, a Florida Court, or the Florida Real Estate Commission.

(4) All other disputes, failing resolution in mediation, must be determined through mutual binding arbitration in the county where the Property is located, however, "the Arbitrator may not alter the contract terms or award any remedy not provided for in this Contract."

In *Seifert,* after referring to verbiage such as that in the above-referenced contract, this Court stated: "This language essentially suggests that, as in

Michaels, the parties anticipated potential disputes arising out of the interpretation, performance, or breach of the contract and accordingly provided that disputes as to those matters be arbitrated." *Seifert* at 641.

The verbiage which the lower court determined mandated arbitration is found in paragraph 14 of the Contract and provides as follows:

> All controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled as follows:
>
> (a) Disputes concerning entitlement to deposits made and agreed to be made: Buyer and Seller will have 30 days from the date conflicting demands are made to attempt to resolve the dispute through mediation. If that fails, Escrow Agent will submit the dispute, if so required by Florida law, to Escrow Agent's choice of arbitration, a Florida court, or the Florida Real Estate Commission. Buyer and Seller will be bound by any resulting award, judgment, or order.
>
> (b) All other disputes: Buyer and Seller will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county where the Property is located. <u>The arbitrator may not alter the Contract terms or award any remedy not provided for in this Contract</u>.

(Emphasis added).

The Contract does not provide a remedy, through arbitration or otherwise, for fraud such as that alleged in Shakespeare and Herd's Complaint. In *Perkins v.*

Pare, 352 So.2d 64, 65 (Fla. 4th DCA 1977), the Fourth District Court of Appeal, citing this Court's opinion in *Waller v. First Savings & Trust Co.,* 103 Fla. 1025, 138 So. 780 (1931), stated: "There is no principle of law more fundamental than that which declares for every wrong there is a remedy." *See also* Article 1, Section 21, Declaration of Rights, Florida Constitution (1968): ("The courts shall be open to every person for redress of injury, and justice shall be administered without sale, denial or delay.").

In *Infinity Design Builders, Inc.*, 964 So.2d at 755, the Fifth District Court of Appeal stated:

> Article I, section 21 of the Florida Constitution requires the courts of this state to be "open to every person for redress of any injury." As with any other constitutional right, the right of access to the courts may be relinquished (citations omitted).
>
> Arbitration stands on a different foundation because it is a matter of contract. Accordingly, a party cannot be compelled to arbitrate any dispute that he or she did not agree to submit to arbitration. (Citations omitted). In deciding whether arbitration is required, therefore, one must necessarily begin by asking whether the parties contractually agreed to arbitrate. If they did not, then unless there is a waiver of the right, Article I, section 21 requires submission of the legal dispute to the courts.

In considering a motion to dismiss, all material factual allegations of the complaint must be taken as true. *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Shakespeare and Herd's Complaint clearly alleges a wrong. The

wrong alleged is that the Jacksons and Jackson Realty made the following misrepresentation regarding the subject property: "Wetland study verifies no wetlands." (R V-1, pp. 004, 007). This misrepresentation made by the Jacksons and Jackson Realty was knowingly false when made. (R V-1, p. 005). Shakespeare and Herd's Complaint alleges that as a result of the intentional misrepresentation they suffered damages. The development of the project has been delayed and the delay has caused Shakespeare and Herd to miss a favorable housing market for affordable housing. (R V-1, p. 005, 006). For that wrong there must be a remedy. However, there is no remedy provided in the Contract for this wrong. In fact, the Contract clearly prohibits the arbitrator from awarding any remedy not provided therein. The Contract only provides a remedy in the event the seller fails, refuses or neglects to perform the Contract; the buyer defaults; or in the event of disputes concerning entitlement to deposits. The Contract does not provide any remedy for damages resulting from fraud. Therefore, the District Court properly reversed the lower court's Order dismissing Shakespeare and Herd's Complaint for the additional reason that the Order was contrary to Article I, section 21, Declaration of Rights of the Florida Constitution (1968), and the fundamental principle of law that for every wrong there is a remedy. *See Perkins*, 352 So.2d 64, and *Waller*, 103 Fla. 1025, 138 So. 780.

In *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. 1st DCA 1999), the First District Court of Appeal stated: "The arbitrability of a statutory claim rests on the assumption that the arbitration agreement permits relief equivalent to that which is available in the courts." Although this case does not involve a statutory claim, this reasoning should apply to the fraud claim in this case. For the fraud claim to be arbitrable, the arbitration agreement must permit relief equivalent to that which is available in the courts. The arbitration clause in the Contract does not. The arbitration clause in the Contract provides no relief for the fraud in this case. The arbitration clause in this case deprives Shakespeare and Herd of the ability to obtain meaningful relief for the wrong alleged, therefore it is unenforceable based on public policy. Therefore, the Order dismissing Shakespeare and Herd's Complaint was properly reversed.

Finally, this Court recognized in *Seifert* that public policy supports the right to a jury trial in cases such as this one. This Court stated:

> Moreover, public policy also supports the result we reach in this case. As noted by the trial court, to require petitioner to submit her tort claim to binding arbitration would deprive her of her rights to a trial by jury, due process, and access to the courts.
>
> * * *
>
> Neither the statutes validating arbitration clauses nor the policy favoring such provision should be used as a shield to block a party's

> access to a judicial forum in every case. Further, in the absence of express language in the parties' contract mandating arbitration of such disputes, we conclude that such a result is not required here. To deprive petitioner of these certain rights simply because she and her husband signed a contract which contained an arbitration provision, the language of which provides no indication that tort claims arising under the common law were contemplated or included, would clearly be unjust.

Justice Overton, specially concurring, stated: "If the intent is to provide for arbitration broadly for all claims, contract and tort, such a provision should make that intent clear." If the Jacksons intended to require Shakespeare and Herd to arbitrate their fraud claim, that intent should have been made clear.

CONCLUSION

Because Shakespeare and Herd's fraud claim does not raise issues, the resolution of which requires a reference to or construction of some portion of the Contract itself, and because the duty alleged in Shakespeare and Herd Complaint to have been breached by the Jacksons is one imposed by law in recognition of public policy, the dispute regarding such breach is not one arising from contract but sounds in tort. Therefore the contractually-imposed arbitration requirement would not apply to this claim.

It is clear from the limited remedies provided through arbitration in the Contract that the parties did not intend Shakespeare and Herd's fraud claim to be

the subject of arbitration. This Court recognized in *Seifert* "neither the statutes validating arbitration clauses nor the policy favoring such provision should be used as a shield to block a parties' access to a judicial forum in every case." *Seifert* at 643. It would be unconscionable for the arbitration clause in this case to be used by the Jacksons as a shield to block Shakespeare and Herd's access to a judicial forum based on the egregious facts in this case. Wherefore the District Court's opinion in *Shakespeare* should not be disturbed.

CLAYTON-JOHNSTON, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail only to Jean Marie Downing, 2111 Thomas Drive, Suite 1, Panama City, Florida 32408, and electronically submitted via e-mail to e-file@flcourts.org on this 8th day of February 2012.

__/s/______________________________
Leonard E. Ireland, Jr.

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this Brief has been prepared in accordance with Rule.9.210(a) and is submitted in Times New Roman 14-point font.

__/s/______________________________
Leonard E. Ireland, Jr.