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M/I Schottenstein Homes, Inc. v. Nasad Azam

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS SCHOTTENSTEIN HOMES VERSUS AZAM. COUNSEL FOR THE PETITIONER. -.

MAY IT PLEASE THE COURT. I AM DIRAN SCROPIAN. WE HAVE THE PLEASURE OF REPRESENTING M/I SCHOTTENSTEIN HOMES, INCORPORATED, IN THIS MATTER, HERE AS A RESULT OF THE FOURTH DISTRICT COURT OF APPEAL APPEAL'S DECISION IN THE M/I SHOT ENSHINE. -- SHOT ENSHINE. -- SCHOTTENSTEIN. THE THIRD DISTRICT AND MORE RECENTLY THE NUBEIN DECISION HAS COME DOWN FROM THE THIRD DISTRICT. TO GIVE A BRIEF RECITATION OF THE FACTS, THIS CASE INVOLVES -- OF THE FACTS, THIS CASE INVOLVES A RESIDENTIAL HOME SALE FROM THE DEVELOPER M/I SCHOTTENSTEIN HOMES, REPRESENTING THE VARIOUS HOMES IN WHAT IS CALLED THE BRENDAWOOD SUBDIVISION, DEVELOPED OFF OF SOUTHERN BOULEVARD IN PALM BEACH COUNTY, TO SOME HOMEOWNERS. THOSE TRANSACTIONS OCCURRED BETWEEN DECEMBER OF '95 AND AUGUST OF '98. THERE WAS, ON RECORD AT THE TIME OF THESE TRANSACTIONS, A SIGHT PLAN IN THE PUBLIC RECORDS AND VARIOUS OTHER OFFICES IN PALM BEACH COUNTY, AS CONCEDED BY THE RESPONDENTS.

WHAT STAGE OF THE BRIINGS THIS LITIGATION -- WHAT STAGE OF THE PROCEEDINGS WAS THIS LITIGATION TERMINATED? PROCEDURALLY HOW ARE WE HERE?

THE SUIT WAS MAILED FOOILED IN MAY 1999 -- THE SUIT WAS FILED IN MAY 1999 AND IT WAS DISMISSED WITH PREJUDICE. THE RESPONDENTS TOOK THE MATTER TO THE FOURTH DCA, WHERE THE FOURTH DISTRICT REVERSED AS PREJUDICIAL AS TO THE FRAUD AND INDUCEMENT CLAIM.

WE ARE TALKING ABOUT THE SUFFICIENCY OF THE ALLEGATIONS IN THE COMPLAINT?

INDEED.

WHAT WERE THE ALLEGATION IN HIS THE COMPLAINT?

THE ALLEGATIONS WERE THAT, IN CONJUNCTION WITH EACH RESIDENTIAL TRANSACTION, THE AGENT OF THE DEVELOPER MADE AN ASSERTION THAT HIS PROPERTY, WHICH WAS ACROSS THE WAY, A CROSS THE HIGHWAY FROM THE DEVELOPMENT, WOULD REMAIN AS, I BELIEVE THE WORDS WERE PREVEFERB -- PRESERVE OR OPAQUE RAJ, WHEN, IN FACT -- OR OPEN ACREAGE, WHEN IN FACT THE SIGHT PLAN REVEALED THAT ONE WAS ZONED QOMER SHALL 21 ACHE -- WAS ZONED COMMERCIAL 21 ACRES AND THE OTHER WAS ZONED 15 --

HOW DO WE GET TO THAT ISSUE? WAS IT ATTACHED TO THE COMPLAINT?

YES, IT WAS ATTACHED TO THE COMPLAINT.

THAT IS HOW THE ISSUE CAME UP, THEN, IF THE DEFENDANT SET UP THE SEEDS OF THEIR OWN DESTRUCTION HERE, BY SAYING THAT THIS THIS WAS A MATTER OF PUBLIC RECORD.

AT LEAST IN THE PART THAT IS TRUE. I DON'T WANT TO RUN AMOK OF THE HARRY PEPPER RULE, TO THE EXTENT THAT WE ESCHEW THAT OR DETERMINE THE ALLEGATIONS --

THE ALLEGATIONS THAT EUROPE COMPANY MADE FALSE REPRESENTATION TO SAY THE PURCHASERS ABOUT THIS STAND ADJACENT TO OR NEARBY THE HOMES, CORRECT?

YES, YOUR HONOR.

THAT WAS A MATERIAL MISREPRESENTATION, IN TERMS OF THE PURCHASER RELYING ON THAT REPRESENTATION, IN ORDER TO BUY THIS PARTICULAR HOME?

I WOULD HAVE TO LOOK AT THE COMPLAINT, IN ORDER TO SEE IF THE WORD "MATERIAL" APPEARS THERE, BUT CERTAINLY THE ESSENCE OF WHAT THE HOMEOWNERS, THE PURCHASERS CLAIM, IS THAT IT WAS MATERIAL TO THEIR TRANSACTION, THAT THEY BELIEVED THAT THIS AREA ACROSS THE WAY WAS GOING TO BE A PRESERVE AREA, AND THAT IN RELIANCE ON THAT STATEMENT THAT, THEY MADE THE DECISION TO PURCHASE THESE RESIDENTIAL HOMES IN THIS SUBDIVISION. FROM THAT POINT OF VIEW, ONE COULD ASSUME THAT IT WAS MATERIAL TO THEIR TRANSACTION, WITH THE STATUS OF THE PROCEDURE AND THE MATTER BEING DISMISSED WITH PREJUDICE, BASED SOLELY ON THE COMPLAINT, I AM CONSTRAINED TO RESPOND DIRECTLY TO THAT, BECAUSE, OF COURSE, WE HAVE NO EVIDENCE.

YOU WANT US TO ADOPT A RULE THAT WOULD SAY THAT, IF SOMETHING IS AVAILABLE IN THE PUBLIC RECORDS, THERE CAN'T BE A CAUSE OF ACTION FOR A FRAUDULENT MISREPRESENTATION, RIGHT?

YES.

ALL RIGHT. AND IN THE GILL GREECE CASE -- THE GILCREST CASE, DECIDED IN 1997, HOW DO YOU GET AROUND THAT WHERE THE REPRESENTATION WAS THAT IT WAS GOING TO BE ABLE TO BE DEVELOPED, AND IN -- TO BE DEVELOPED, AND IN FACT IT WAS ZONED AS PRESERVATION, AND ISN'T THAT A PUBLIC RECORD ISSUE, HOW IT WAS ZONED?

I WOULD THINK SO, YOUR HONOR.

SO EVEN THOUGH THERE IS A, I GUESS A CONFLICT IN THE THIRD DISTRICT CASE AND THIS CASE, IN FACT WE WOULD HAVE TO REcede FROM GILCHRIST AND A LONG LINE OF CASES THAT THIS COURT HAS DECIDED, THAT ALLOWS CAUSES OF ACTION FOR BOTH NEGLIGENT AND AFFIRMATIVE MISREPRESENTATIONS OF FACT.

WELL, AT SOME POINT, MY POSITION IS THAT THE COURT'S DETERMINATION HERE WOULDN'T NECESSARILY INVOLVE RETREATING FROM THE DISTANCE THAT WE HAVE ALL TAKEN FROM CAVEAT EMPTOR, WHETHER IT IS NEGLIGENT MISREPRESENTATION, IN FACT, OR FRAUDULENT INTENT THERE, STILL COMES A POINT WHEN, EVEN IF WE LOOK AT THE GILCHRIST CASE THAT USES THE TERM "JUSTIFIABLE RELIANCE" --

HOW IS THAT AN ISSUE OF FACT? THAT IS WHERE WE GET BACK TO JUSTICE ANSTEAD'S ISSUE THAT YOU ARE NOT SAYING THAT WE ARE SUPPOSED TO LOOK AT THIS COMPLAINT AND SAY THAT A PURCHASER OF A PIECE OF PROPERTY THAT IF THE DEVELOPER SAYS THERE IS NOT GOING TO BE ANY DEVELOPMENT AROUND AND ACROSS THE STREET. NONE. YOU CAN TAKE THAT TO THE BANK, THAT THAT WOULD BE SOMETHING THAT SOMEONE WOULD DECIDE ON A MOTION TO DISMISS THE COMPLAINT THAT, IT WASN'T JUSTIFIABLE RELIANCE.

I AM NOT OF THE OPINION THAT ONE CAN JUSTIFIABLY RELY ON REPRESENTATIONS MADE WITH RESPECT TO ADJACENT PROPERTY IN THE SAME FASHION, WITH REGARD TO REPRESENTATIONS THAT ONE CAN MAKE ABOUT THE REPRESENTATIONS AT ISSUE.

SO THE DISTINCTION WOULD BE IT IS NOT JUST PUBLIC RECORD, BUT IF IT IS PUBLIC RECORD, IF IT WAS ABOUT THE PROPERTY YOU ARE PURCHASING, WE SHOULD ALLOW CAUSE OF ACTION, BUT IF IT IS OTHER TYPES OF MISREPRESENTATIONS THAT INDUCE SOMEBODY TO BUY A PIECE OF PROPERTY THAT WE SHOULD SAY, AS A MATTER OF LAW, THAT THAT SHOULDN'T BE JUSTIFIABLE

RELIANCE. IS THAT BECAUSE -- IS THAT WHAT YOU ARE SAY SOMETHING.

I AM NOT SAYING THAT THE TWO ARE MUTUALLY EXCLUSIVE, BUT AS TO EITHER OF THEM AND WITH REGARD TO THE NEGLIGENT MISREPRESENTATION, THERE IS A POINT AT WHICH THE COURT COULD MAKE A DETERMINATION, AS IT CAN ON OTHER MATTERS, WHETHER SUMMARY JUDGMENT OR SIMPLY ON THE FACE OF THE PLEADINGS, THAT THE KNOWLEDGE OF THE REPRESENTATION AS TO WHETHER IT IS FALSE COULD BE OBVIOUS, AND THE POINT IN TIME WHEN THAT CAN BE MADE DOESN'T HAVE TO BE SOLELY AT THE END OF TAKING OF EVIDENCE OR A JURY TRIAL, SO I THINK IT IS A SEPARATE BUT RELATED ISSUE, AS TO WHAT THE REPRESENTATION IS CONCERNING. IF IT IS ABOUT THE PROPERTY THAT YOU ARE PURCHASING, I THINK THAT FALLS WELL WITHIN THE PURVIEW OF THE RESTATEMENT OF 540 AND 541 OR EVEN JOHNSON VERSUS DAVIS. IF IT IS A BUYER THAT HAS TO DO WITH THE PROPERTY. BUT WHEN YOU ARE TALKING ABOUT REPRESENTATION THAT IS RELATE TO ADJACENT PROPERTY, WHICH IS NOT THE SUBJECT OF THE PURCHASE --

SO IF YOU BUY A LOT THAT IS ON A GOLF COURSE, AND THE DEVELOPER THAT DEVELOPED ALL THIS, NOW, HAS ALREADY RECEIVED PERMISSION TO SUBDIVIDE THE GOLF COURSE AND TURN IT INTO RESIDENTIAL LOTS, TOO, AND YET IT IS REPRESENTED THAT THIS LOT IS ON THE GOLF COURSE AND HAS A BEAUTIFUL GOLF COURSE VIEW, AND THAT THAT IS THE WAY IT IS GOING TO BE, BECAUSE THAT IS ADJACENT PROPERTY, THERE WOULDN'T AND CAUSE OF ACTION IN THAT SITUATION.

NO. I AM NOT SAYING THAT AT ALL. I AM SUGGESTING --

ISN'T THAT ADJACENT PROPERTY?

YES, SIR.

THEN THE REPRESENTATION IS ABOUT THE CONDITION OF THE ADJACENT PROPERTY?

IT IS.

WHY WOULDN'T YOUR RULE KNOCK THAT OUT?

WELL, IF THE OTHER PART OF 541 IS IN PLAY, WHICH SUGGESTS THAT YOU CAN'T RELY ON THE REPRESENTATION, IF YOU HAVE KNOWLEDGE OF ITS FALSITY OR THE FALSITY IS OBVIOUS, IF THE PUBLIC RECORDS DEMONSTRATE THAT THE STATEMENT IS FALSE, THEN ONE SHOULD NOT JUSTIFIABLY BE ABLE TO RELY ON IT, TO CLAIM THAT THEY HAVE A CAUSE OF ACTION.

JUSTICE LEWIS HAS A QUESTION.

CAN WE TELL, FROM THE STATUS OF THESE PLEADINGS, THE NATURE OF THE PUBLIC RECORD, i.e. THE SITE PLAN? IS THIS SOMETHING THAT WAS PART OF THE BUYER'S CHAIN OF TITLE? DOES THAT SHOW, NUMBER ONE, AND DOES IT MAKE A DIFFERENCE? FOR EXAMPLE, IF WE HAVE PUBLIC RECORDS THAT ARE DOWNTOWN, AND DO WE EXPECT THE REAL ESTATE LAWYERS TO CHECK EVERY PIECE OF PAPER THAT EVERY GOVERNMENT HAS, BECAUSE WE DO HAVE SOME CONCERN ABOUT STABILITY OF LAND TRANSFERS, CERTAINLY, BUT CAN WE TELL HERE, WITH REGARD TO, FIRST HOW THIS IS OF PUBLIC RECORD, THE SITE PLAN, IS IT PLED, CAN WE TELL FROM THE EXHIBITS, AND NUMBER TWO, DOES IT MAKE A DIFFERENCE?

NUMBER ONE, THE PLEADINGS SIMPLY STATE THAT IT WAS AVAILABLE FOR EITHER PARTY TO INSPECT, HAD THEY GONE TO LOOK FOR IT. THERE IS NO EVIDENCE IN THE RECORD, AND THE COMPLAINT DOESN'T SPECIFY, OTHER THAN I BELIEVE IT USES THE TERM PALM BEACH COUNTY ATTORNEYS OFFICE, WHERE THIS DOCUMENT WAS.

SHOULD THAT MAKE A DIFFERENCE? I GUESS THAT IS THE NEXT QUESTION. IF WE HAVE JUST DOCUMENTS SOMEWHERE ELSE AND IT IS NOT, FOR EXAMPLE, IN A CHAIN OF TITLE THAT A LAWYER WOULD EXAMINE TO PERMIT THE PURCHASE TO GO FORE, -- TO GO FORWARD, DOES THAT MAKE A DIFFERENCE OR DOES IT NOT?

I THINK JUDGE GROSS WAS ONTO THAT WHEN HE SUGGESTED WHERE DO PEOPLE HAVE TO LOOK? WHETHER THE BOWELS OF THE COURTHOUSE OR RIGHT ON THE TOP OF THE STACK OF DOCUMENTS, AND FROM WHAT WE HAVE IN THE RECORD AT THIS POINT, I CAN'T TELL YOU WHERE THAT SLIPPERY SLOPE EXISTS BUT TO THE OTHER SIDE OF THE COIN IS, IF WE HAVE THE -- OR THE FAR END OF THAT COIN IS, IF WE ARE IN THE AGE OF INFORMATION AND KNOWLEDGE AND NOTICE, AND THE ABILITY TO HAVE ACCESS TO ALL OF THIS INFORMATION AT THIS POINT, AS TO COMMENTARY IN SPEZNICK VERSUS BASNICK MENTIONS THE REFUSAL TO PLACE ANY DUE DILIGENCE ON THE PURCHASER SORT OF CODDLES HIS NEGLIGENCE, AND I AM NOT -- I DON'T STAND BEFORE YOU TO SUGGEST THAT THE DECEIT, ASSUMING THERE WAS SOME, IS SOMETHING THAT SHOULD BE TOLERATED, IN THE FACE OF NEGLIGENCE, IF THERE WAS SOME ON THE PART OF THE PURCHASER.

DOES IT MAKE ANY DIFFERENCE, IN THESE TYPES OF SITUATIONS, AS TO WHETHER OR NOT A NEIGHBORING PROPERTY IS OWNED BY THE PERSON MAKING THOSE MISREPRESENTATIONS? WOULD THAT MAKE A DIFFERENCE IN YOUR ARGUMENT? THAT THIS COMPANY, ALSO, OWNED THE PROPERTY THAT WAS ACROSS THE STREET.

I THINK IT WOULD, BECAUSE IT WOULD MAKE THEIR MISREPRESENTATION, ASSUMING ONE WAS MADE, ALL THE MORE EGREGIOUS IF, IN FACT, THEY KNEW THEY WERE --

BUT UNDER YOUR ARGUMENT, IT SEEMS TO ME YOU ARE MAKING A PRETTY MUCH STRICT ARGUMENT, ASSUMING THE SAME SITUATION THAT THERE WAS A SITE PLAN TO BUILD SOMETHING ON IT IN THE PUBLIC RECORDS. DON'T YOU STILL HAVE THE SAME SITUATION, AS A BUYER, SHOULD HAVE FOUND THIS IN THE PUBLIC RECORDS?

YES.

SO I AM TRYING TO GET TO WHETHER WE SHOULD, REALLY, HAVE A STRICT RULE THAT SAYS, IF IT IS IN THE PUBLIC RECORDS, THEN THE BUYER SHOULD HAVE TO SEARCH THOSE RECORDS.

PERHAPS YOUR POINT IS WELL -- YOUR POINT IS WELL TAKEN THAT, IF IT IS NOT PROPERTY THAT IS OWNED BY THE DEVELOPER OR THE PERSON WHO IS MAKING THE SALE, THEN THERE CAN BE A DIFFERENT APPLICATION. I MEAN THIS PROPERTY APPEARS TO HAVE BEEN OWNED BY PALM BEACH COUNTY, ALTHOUGH AGAIN THERE IS NO EVIDENCE TO SUPPORT THAT NOTION. IF IT WAS GOING TO BUILD A SCHOOL THERE, I ASSUME THAT BUT I DON'T HAVE ANY PROOF OF THAT, SHOULD A DIFFERENT STANDARD APPLY, IF THE PROPERTY IS OWNED BY GOVERNMENTAL ENTITY? THAT SEEMS, TO ME, TO BE AN APPROPRIATE LINE OF DEMARCATION, OR IT COULD BE TO THE EXTENT THAT WE HAVE THE WHOLE LINE OF CASES THAT TALK ABOUT --

HAVEN'T YOU JUST ABOUT CONCEDED YOURSELF OUT OF YOUR POSITION, IN YOUR RESPONSE TO JUSTICE LEWIS AND JUSTICE QUINCE'S QUESTION? IT SEEMS TO ME YOU ARE SAYING, IN EFFECT, THAT IT IS ON A CASE-BY-CASE BASIS. IN SOME INSTANCES. BUT YOU WOULD NOT HAVE A PER SE RULE. AND I THOUGHT YOU WERE ARGUING FOR A PER SE RULE.

I THINK I AM, YOUR HONOR, WITH RESPECT TO THE PUBLIC RECORD. I BELIEVE THAT THAT IS THE APPROPRIATE PLACE TO DRAW THE LINE, IF ONE MUST BE DRAWN SWR. THERE ARE SOME CASES WHICH ARE SUSCEPTIBLE OF DETERMINATION BY THE COURT, AS A MATTER OF LAW, THAT THE STATEMENT WAS FALSE.

BUT YOU HAVE AGREED THAT THAT IS A BAD PUBLIC POLICY AND EVERYTHING ELSE, IF THEY

HAVE A PER SE RULE, WHICH MEANS TO ME THAT IS WHAT YOUR RESPONSES WERE.

WELL, WITH THE EXCEPTION OF THE REPRESENTATION OF WHAT IS IN THE PUBLIC RECORD, AND IF I HAVE MISSPOKEN, IN IN TERMS OF MY RESOLVE ABOUT THAT --

WHAT WOULD BE YOUR PER SE RULE THEN? WHAT WOULD BE THE RULE THAT YOU WOULD ARTICULATE?

WELL, THAT WHICH WAS ESPOUSED IN EITHER NELSON VERSUS WITT OR IN THE --

ARTICULATE IT IN YOUR WORDS. WHAT WOULD BE THE RULE?

IF THE REPRESENTATION WHICH WAS MADE AND IS PRESUMED TO BEFALLS WAS A MATTER THAT IS WITHIN THE PUBLIC RECORD, A RECORD THAT THE PARTY IS CHARGED AND ITS FALSITY ON THE FACE OF THAT PUBLIC RECORD, THEN THERE WOULD BE NO --

IF IT MAKES NO DIFFERENCE, THERE ARE PUBLIC RECORDS AND PUBLIC RECORDS. SOME ARE PUBLIC RECORDS THAT THE PUBLIC IS INCLINED TO SEE AND LOOK INTO, AND SOME ARE INCLINED THAT A REASONABLE PERSON, EVEN A LAND OWNER, SOMEBODY BUYING PROPERTY, WOULD LOOK AT IT, BUT YOUR RULE WOULD INCLUDE BOTH. ISN'T THAT WHAT I UNDERSTAND?

YES, AND I AM SENSITIVE TO THE DIFFICULTY THAT THAT TYPE OF BRIGHT-LINE RULE APPLIES.

AND IT WOULD INCLUDE PROPERTY THAT IS OWNED BY, THAT IS BEING SOLD AND, ALSO, OTHER PROPERTY THAT MAY BE ADJACENT TO IT.

YES.

AND THAT WOULD, THEN, CAUSE US TO RECEDE FROM GILCHRIST. I MEAN, YOU HAVE TO, IF YOU ARE BEING CANNEDITY, THEN YOU HAVE TO MAKE SURE WE KNOW WHAT WE ARE DOING. THAT WAS AN OBVIOUS THING. THE ZONING OF THE PROPERTY IN QUESTION. THAT IS THE SUBJECT OF GILCHRIST.

RIGHT.

YOU ARE INTO YOUR REREBUTTAL TIME.

THANK YOU.

MR. LONG.

MAY IT PLEASE THE COURT. MY NAME IS TRACY LONG, AND I WORK FOR THE FIRM OF BARRY G RODER MAN AND ASSOCIATES. IT IS MY PLEASURE TO REPRESENT THE HOMEOWNERS IN THIS CONTROVERSY. ON BEHALF OF THE BRINDLEWOOD HOMEOWNERS IN THIS CONTROVERSY, WE ARE OPPOSED TO A BRIGHT-LINE TEST IN THIS MATTER. THEY BELIEVE THAT IT IS A BAD IDEA, AND I CAN SAY THAT FOR THREE DIFFERENT REASONS. IF THE COURT WERE TO ADOPT A BRIGHT-LINE TEST, WHICH IT EXEMPTS ANYTHING THAT IS ON THE PUBLIC RECORD FROM ANY CAUSE OF ACTION, WHAT YOU DO IN ESSENCE IS CREATE A LOOPHOLE FOR ANY DEVELOPER TO MAKE ANY MISREPRESENTATION, I BELIEVE, MR. ANSTEAD HAD A GOOD EXAMPLE REGARDING THE GOLF COURSE. THEY CAN SAY ANYTHING TO A PURCHASER, TO INDUCE THEM TO BUY THE PROPERTY, AND WHEN THAT DOESN'T COME TO FRUITION, THEY ARE SAFE GUARDED FROM ANY TYPE OF LAWSUIT. THAT IS TO ENSURE YOU ARE PROMOTING THE INATTENTIVENESS OF THE PURCHASER, VERSUS THE WILLFUL LYING OR MISREPRESENTATION OF THE BUYER.

DOESN'T THE PURCHASER, HOWEVER, HAVE ANY DUTY, SAY IF I AM BUYING PROPERTY AND I AM

CONCERNED ABOUT THE PROPERTY ACROSS THE STREET OR THE PROPERTY NEXT DOOR, SHOULD THERE BE ANY DUTY ON MY PART, TO ASSERT THE PUBLIC -- TO SEARCH THE PUBLIC RECORDS CONCERNING THAT PROPERTY?

I THINK THE ANSWER HAS TO BE YES, AND TO SUGGEST ANYTHING ELSE WOULD BE RIDICULOUS, AND I THINK THE WAY YOU PHRASE THE QUESTION, IT IS APPROPRIATE. IF THE BUYER HAS ANY REASON TO BELIEVE OR ANY SUSPICION, SHOULD THEY GO AND CHECK THE RECORDS? ABSOLUTELY YES. THEY SHOULD. AND I THINK THAT PLAYS INTO THE CASE-BY-CASE BASIS, WHICH WAS IN THE FOURTH DCA OPINION. AND I THINK, IF THERE IS SOMETHING ON THAT PROPERTY, FOR INSTANCE, IF, IN THIS CASE, THAT PRISTINE PROPERTY HAD A CRANE OVER THERE OR A LAW OR A BULLDOZER -- OR A PLOUGH OR A BULLDOZER, THAT SHOULD HAVE ALERTED THAT THERE IS SOMETHING NOT RIGHT IT WITH THIS -- NOT RIGHT WITH THIS REPRESENTATION. I SHOULD GO AND HAVE AN ATTORNEY CHECK, AND I THINK YOU HAVE A LOT OF CASES THAT WOULD HAVE ENSUED FROM THIS VARIOUS CONTROVERSY, IF THE CONTRACT IS AN AS-IS CONTRACT. THAT BASICALLY PUTS THE PURCHASER AND THE BUYER IN EQUAL BARGAINING POSITIONS. THEY SHOULD HAVE A DUTY TO GO AND CHECK THE RECORDS, CHECK WHATEVER MIGHT BE THERE THAT WOULD AFFECT THE VALUE OF THE PROPERTY OR THE QUIET ENJOYMENT OF THE PROPERTY.

BUT WOULDN'T YOU AGREE, COUNSEL, THAT THERE MUST BE SOME THINGS OF RECORD, DEPENDING UPON HOW YOU DEFINE "OF RECORD" THAT WOULD, AT SOME TIME IN THIS LITIGATION PROCESS, IF YOU DO IT CASE BY CASE, THAT WOULD, AS A MATTER OF LAW, ENTITLE A SELLTORY A -- A SELLER TO A MATTER OF JUDGMENT, THAT THAT WAS IN THE CHAIN OF TITLE OF LOT SIZE, MAYBE THE POSITION OF A HOME ON A LOT, SOMETHING LIKE THAT. WHERE DO WE DRAW THE LINE? BECAUSE THERE ARE CONCERNS, OF COURSE, FOR THE STABILITY OF REAL ESTATE TRANSACTIONS, SO THERE MUST BE SOME BOUNDS AND NOT JUST A FREE-FOR-ALL. YOU BUY THE PROPERTY AND LITIGATE IT FOR THE NEXT 20 YEARS, NO MATTER WHAT THE STATUS IS, WHAT ARE YOUR PARAMETERS WITH REGARD TO THIS?

THAT IS A DIFFICULT QUESTION TO ANSWER, BECAUSE --

THAT IS THE ONLY QUESTION WE HAVE TO ANSWER.

I UNDERSTAND THAT, YOUR HONOR HONOR. THE PROBLEM WITH DRAWING A LINE IS, ONCE YOU DRAW A LINE, SOMEONE ALWAYS INVARIABLY GETS TRAPPED ON THE WRONG SIDE OF IT, AND IT IS USUALLY AN INNOCENT PARTY. YES. THERE HAS TO BE SITUATIONS WHERE THERE IS SOMETHING IN THE CHAIN OF TITLE, SOMETHING THAT YOU WOULD HAVE HAD TO DO IN YOUR DUE DILIGENCE, AS A PURCHASER, TO FIND, THAT MAY AFFECT YOUR RIGHT TO RELY ON SOMETHING THAT THE SELLER IS DOING.

THE EXTREMES ON BOTH SIDES ARE PROBABLY NOT GOOD FOR FLORIDA CITIZENS.

THAT IS TRUE.

THE STABILITY AND ABSENT WHERE DO WE DRAW THIS LINE, FOR BOTH STABILITY OF REAL ESTATE TRANSACTIONS AND TO PROTECT THE PEOPLE THAT BUY?

I AM NOT SAYING THAT NECESSARILY A LINE HAS TO OR NEEDS TO BE DRAWN. I THINK IN THE LINE OF CASES THAT WE HAVE, STARTING WITH NELSON VERSUS WAKES AND GOING TO THE PRECEDENT OF THE NEW BURN CASE, OUT -- AND THE NUBURN CASE OUTLINES THE STRUCTURE CLEARLY AS TO WHAT THIS COURT HAS HANDED DOWN, CLEARLY, IN JOHNSON VERSUS DAVIS.

BECAUSE ARE SUGGESTING IN THE RULES OF LAW IS THAT EVERYTHING IS KNOWN TO A JURY AND THE JURY DECIDES.

THAT IS NOT WHAT I AM SUGGESTING. I AGREE WITH MR. SCROPIAN, THAT THE BUYER SHOULD KNOW WHETHER THEY HAD JUSTIFIABLE RELIANCE ON THE REPRESENTATION OF THE TRANSACTION.

DON'T YOU AGREE HERE THAT THE KEY IS IN THE ASSESSMENT OF WHAT THE LEGAL PARAMETERS OF JUSTIFIABLE RELIANCE ARE IN THESE TRANSACTIONS? BECAUSE YOU ARE PLEADING A CAUSE OF ACTION IN FRAUD.

RIGHT.

AND IN THE INDUCEMENT.

CORRECT.

CORRECT.

WHICH ONE OF THE ELEMENTS HAS TO BE JUSTIFIABLE RELIANCE.

THAT'S CORRECT. AND PERHAPS THE ISSUE OF JUSTIFIABLE RELIANCE IS DIFFICULT TO REACH, IN A -- ON A MOTION TO DISMISS, BUT AT SOME POINT, THERE CAN BE A RECORD DEVELOPED THAT WOULD LAY OUT SOMETHING THAT A COURT COULD RULE, AS A MATTER OF LAW, THAT WAS NOT -- THERE COULD BE NO PROOF.

I CONCUR WITH YOUR HONOR'S STATEMENT. IT IS PARTICULARLY DIFFICULT IN THIS CASE, BECAUSE WE DID GET PAST A MOTION TO DISMISS, SO THERE WAS NO EVIDENCE THAT THAT WAS TAKEN. GRANTED THERE MAY COME A POINT IN TIME WHERE EVIDENCE IS COLLECTED, WHERE THE COURT CAN DECIDE ON A MOTION FOR SUMMARY JUDGMENT THAT THERE WAS NO JUSTIFIABLE RELIANCE. IN FACT, WHEN YOU LOOK AT EACH OF THE OTHER CASES, OTHER THAN AZAM, THE NELSON VERSUS WILT CASES WAS AFTER A JUDGMENT. AND THE NUBURN CASE WAS A SUMMARY JUDGMENT, AND IN EACH OF THOSE CASES IT WAS ALLOWED TO PROCEED PAST THE PLEADINGS CASE AND ACTUALLY COLLECTED FACTS, AND I BELIEVE THE COURT HAS ACTUALLY SPOKEN UPON AT LEAST SOME SORT OF FRAMEWORK OR STANDARD FOR JUSTIFIABLE RELIANCE IN THIS PARTICULAR SITUATION, AND THAT KASICH WREED TO THE COURT -- AND THAT KASICH READ TO THE COURT, UNDER -- AND THAT CASE, I CAN READ TO THE COURT. THE COURT STATED, IN COMMENT "A" THE RULE APPLIES ONLY WHEN THE RECIPIENT OF THE MISREPRESENTATION IS CAPABLE OF APPRECIATING ITS FALSITY AT THE TIME, BY THE USE OF HIS SENSES. THUS ANY EXPERIENCED HORSE HAS NOT BE -- HORSE MAN AT FIRST GLANCE WOULD HAVE THE EXPERIENCE OF LOOKING AT HORSES. THE ARGUMENT BY MR. SCROPIAN, IN THE OPENING ARGUMENT HERE, YOU ARE DEEMED TO HAVE KNOWLEDGE OF IT, AND THUS WHUR LOOKING AT A PIECE OF PRISTINE PROPERTY THAT, DEDOESN'T FOLLOW CHRONOLOGICALLY F YOU FOLLOW ITS ARGUMENT, THE PURCHASER SHOULD BE REQUIRED TO GO AND LOOK AT THE PUBLIC RECORD. THAT IS AT SOME OTHER TIME OTHER THAN LOOK ING AT THE PIECE OF PROPERTY ACROSS THE ROADWAY, AT THE PARTICULAR TIME THAT HE IS GETTING THE MISREPRESENTATION FROM THE SELLER.

DIDN'T YOU AGREE, JUST A MINUTE AGO, THAT THE PURCHASER HAS A DUTY OF DUE DILIGENCE IN THE TRANSACTION?

I DO AGREE WITH THAT.

HOW DOES THAT WORK, IN THE SCHEME OF THE PUBLIC RECORD?

FIRST OF ALL, I WOULD HAVE TO REFER BACK TO THE NELSON VERSUS WAKES AND THE PRESSME CASE. I THINK THAT THOSE AS-IS CASES ARE A SIGNIFICANT DIFFERENCE HERE. YOU ARE ON AN EQUAL FOOTING WITH THE SELLER. YOU HAVE A DUTY TO GO AND LOOK AT EVERYTHING TO TRY

AND FIGURE OUT WHETHER THE REPRESENTATIONS ARE NONDISCLOSE YOURS ARE MATERIAL TO YOUR -- NONDISCLOSURES ARE MATERIAL TO YOUR POSITION. WHEN YOU HAVE A WARRANTY SALE THAT, IS A COMPLETELY DIFFERENT ANIMAL. UNDER THAT CIRCUMSTANCE, THE PURCHASER SHOULD NOT BE REQUIRED TO GO IN AND FIND THINGS, UNLESS THEY HAVE SOME SORT OF SUSPICION SOME SORT OF REASON NOT TO TRUST THE REPRESENTATION OF THE SELLER.

LET'S SAY THE LAND IS UNDER KOMPD LAND, AND HE -- IS UNDER COMPED LAND, AND THE SELLER, IN ORDER TO SELL THIS PROPERTY, IS TELLING THE BUYER THAT WE ARE GOING TO PUT YOU WAY OUT HERE, AND WE ARE GOING TO PUT YOUR SEPTIC TANK HERE AND ALL OF THIS TYPE OF THING, AND IN THE COMPED LAND, YOU ARE NOT GOING TO BE ABLE TO PUT SEPTIC TANKS ON THIS PROPERTY. HOW DOES THAT WORK OUT, UNDER YOUR THEORY? HAS THAT BEEN FRAUD THERE?

I BELIEVE THERE WAS ACTUALLY A CASE ON THAT POINT, AND I AM TRYING TO REMEMBER WHICH CASE IT WAS. IT HAD TO DEAL WITH THE SERIES OF SEPTEMBERTIC TANKS AS DESCRIBED BY MR. SCROPIAN AND MYSELF. IT IS A DIFFICULT QUESTION. GRANTED THIS COURT HAS TO STRUGGLE WITH IT, THERE IS A POINT IN TIME WHERE A PURCHASER HAS TO GO OUT AND FIND INFORMATION FOR THEMSELVES. AGAIN --

BUT WOULD THAT BE FRAUD, AS FAR AS UNDER YOUR THEORY, WOULD THAT BE FRAUD?

I BELIEVE IT WOULD BE.

BECAUSE MOST FLORIDIANS KNOW, NOW, TO LOOK FOR A COMP PLAN, IF YOU ARE PLANNING ON BUILDING, SO ISN'T THERE SOME DUTY ON THE PART OF THE BUYER, TO SEE IF YOU ARE RUNNING INTO SOMETHING LIKE THIS?

WELL, WITH ALL DUE RESPECT, JUSTICE SHAW, THAT IS A DIFFICULT QUESTION, BECAUSE YOU HAVE TO CRAWL INTO THE HEAD OF THE PURCHASER AND FIGURE OUT WHAT THE PURCHASER MAY OR MAY NOT KNOW AND WHAT IS COMMON KNOWLEDGE AND WHAT IS NOT COMMON KNOWLEDGE. PERSONALLY I AM A RENTER. I HAVE NEVER PURCHASED ANYTHING IN MY LIFE. I WOULDN'T KNOW ANYTHING ABOUT A SEPTIC TANK VERSUS A SEWER. SO YOU ARE DEALING WITH MY KNOWLEDGE. WHEREAS IF YOU HAVE A SOPHISTICATED PURCHASER, THEY MAY KNOW THAT, IF THEY HAVE PURCHASED OTHER PROPERTY, SO WOULD THE DUTY BE DIFFERENT FOR ME AS OPPOSED TO A DIFFERENT PURCHASER? I THINK IT WOULD HAVE TO BE.

IN THE ITT CASE, WE WERE DEALING WITH WHAT WAS ALLEGED TO BE A NEGLIGENT MISREPRESENTATION AND IN THE SENSE OF THAT DECISION, IT WAS THAT THE ORDINARY PRINCIPLES OF COMPARATIVE NEGLIGENCE SHOULD COME INTO PLAY, AND IN THE CASE TO BE DEALT WITH LIKE ANY OTHER NEGLIGENCE TORT CASE. IS THAT -- ARE THE RULES OF COMPARATIVE NEGLIGENCE, DO THEY APPLY IN A FRAUD CASE?

THAT WOULD BE AN UNIQUE THEORY. I DON'T BELIEVE THEY DO APPLY IN A FRAUD CASE. I THINK YOU HAVE AN EITHER/OR QUESTION.

YOU HAVE GOT AN EITHER/OR QUESTION.

IT IS FRAUD OR IT IS NOT.

RIGHT. THEN DON'T WE -- AREN'T WE PUT IN AN EITHER/OR SITUATION, THAT EITHER A PUBLIC RECORD IS NOT FRAUD OR IT IS. IT SEEMS TO ME THAT WE ARE -- THAT THEREIN LIES THE PUZZLE HERE, THAT IF WEBBED, IF THE RULES OF COMPARATIVE NEGLIGENCE APPLY, THEN YOU HAVE GOT A SITUATION IN WHICH WE WOULD HAVE FACT FINDER EVALUATE WHAT WAS IN THE HEAD OF THE BUYER, AND WHAT THE BUYER, A REASONABLE BUYER WOULD DO IN THOSE SITUATIONS, AND -- BUT IF THEY DON'T APPLY, THEN THE COURT DOES HAVE TO MAKE A DECISION, AS MATTER

OF LAW.

APPLIED THE COMPARATIVE NEGLIGENCE STANDARD TO THIS PARTICULAR SET OF CIRCUMSTANCES, COULD THEY -- I THINK MAYBE THEY COULD AND MAYBE THEY SHOULD, FOLLOWING THE GILCHRIST LINE OF LOGIC HERE. IF THE GOAL IS TO WEIGH THE FAULT OF THE PURCHASER VERSUS THE FAULT OF THE BUYER, THAT WOULD BE THE ULTIMATE WAY TO MAKE THE DECISION, RATHER THAN DRAWING A BRIGHT-LINE THAT SOMEONE HAS TO LOSE. I WOULD GO BACK TO THE BASSETT VERSUS BASNICK CASE. THE MEAN THRUST OF THAT CASE AND THE REASON BEHIND THIS COURT'S DECISION WAS TO NOT THROW PURCHASERS UNDER THE PROVERBIAL BUS, WHEN YOU HAVE A SELLER WHO IS PURPOSELY MISREPRESENTING SOMETHING. SO I THINK YOU HAVE TO PROTECT THOSE RIGHTS OF THE PURCHASER, AND ALL OF THE LINE OF CASES THAT HAVE FOLLOWED, INCLUDING JOHNSON VERSUS DAVIS, HAVE THE PURPOSE OF RESTRICTING THE CAVEAT EMPTOR IN THESE LAND TRANSACTIONS. NOW THERE IS A BRIGHT-LINE RULE OF CASES AND BRINGS US BACK 20 YEARS, TO WHERE WE WERE BEFORE. CAVEAT EMPTOR WOULD ESSENTIALLY BE RESURRECTED.

LET'S UNASSUME THIS. LET'S ASSUME THIS WAS A NEGLIGENT MISREPRESENTATION CASE. UNDER GILCHRIST, THERE WOULD BE WHAT YOUR CLIENT SHOULD OR SHOULDN'T HAVE DONE WOULDN'T NECESSARILY BE A BAR TO RECOVERY BUT IT MIGHT REDUCE THE RECOVERY. YOU ARE SEEKING A DECISION, SO I DON'T KNOW HOW THAT WOULD WORK. IF WE HAVE THE ISSUE OF FRAUD, THEN THE ISSUE OF DUE DILIGENCE GOES TO THE ELEMENT OF JUSTIFIABLE RELIANCE?

THAT IS ESSENTIALLY CORRECT, YOUR HONOR.

SO THAT IT DOES BECOME, IN THE, WHETHER IT IS BY THE FACT FINDER OR AS A MATTER OF LAW, FOR THE AFFIRMATIVE MISREPRESENTATION, AN ALL OR NOTHING, BUT IF IT IS NEGLIGENT --

SUBSUMED IN THE JUSTIFIABLE RELIANCE STANDARD.

DOES THAT MAKE IS SENSE TO YOU, THAT -- DOES THAT MAKE SENSE TO YOU, THAT THERE SHOULD BE AN ALL OR NOTHING FOR AFFIRMATIVE MISREPRESENTATION, AND A CHANCE OF RECOVERY, IF THERE IS A NEGLIGENT MISREPRESENTATION?

YOU HAVE TO WEIGH THE NEGLIGENCE BETWEEN THE TWO, THE BUYER AND THE PURCHASER, BECAUSE THE PURCHASER DOES NOT LOSE UNDER THAT CIRCUMSTANCE.

DO YOU KNOW ANY CAMPED LAW WITH REGARD TO THE COMPARATIVE NEGLIGENCE TO A FRAUD CASE?

I AM NOT AWARE OF ANY SUCH CASE LAW AS I STAND HERE, YOUR HONOR. THE OTHER --

HOW DOES THE TORT DEAL WITH IT? AS AN ALL OR NOTHING?

IT IS FUNNY YOU WOULD ASK ABOUT THAT, YOUR HONOR, BECAUSE I THINK THIS COURT HAS, AT LEAST IMPLIEDLY, DECIDED THIS ISSUE IN JOHNSON VERSUS BASNICK. I THINK THE DUTY TO INVESTIGATE, UNDER "B", IT STATES THAT, EVEN THE FACT THAT IT IS FRAUDULENTLY REPRESENTED, IT IS REQUIRED TO BE RECORDED AND IT IS, IN FACT, RECORDED. THE RECORDING ACT IS NOT INTENDED AS PROTECTION FOR FRAUDULENT LIARS. THE PURPOSE IS TO AFFORD PROTECTION TO PERSONS WHO BUY A RECORDED TITLE, AS AGAINST THOSE WHO HAVE A PAPER TITLE AND HAVE FAILED TO RECORD IT. THE PURPOSE OF THE STATUTES IS FULLY ACCOMPLISHED, WITHOUT GIVING THEM A COLLATERAL AFFECT THAT PROTECTS THOSE WHO MAKE FRAUDULENT MISREPRESENTATIONS FOR RELIABILITY. THIS COURT HAS SPOKEN AND NATURALLY IT DIDN'T DEAL WITH THE FACTS OF THIS CASE, WHERE YOU HAVE A SITE -- THE FACTS OF THIS CASE, WHERE YOU HAVE A SITE PLAN ON RECORD WITH THE OFFICE OF COMPLIANCE, BUT THIS IS SOMETHING THAT IS ACTUALLY FILED AND RECORDED, AND THE

BASNICK CASE WOULD BE PERFECTLY LOGICAL AND FOLLOW THROUGH WITH THIS CASE. AGAIN, I THINK, AND I WOULD COMMENT THAT, ALTHOUGH THIS COURT HAS ACCEPTED JURISDICTION ON THE ISSUE OF CONFLICT, I DON'T BELIEVE THERE IS A CONFLICT HERE. I THINK THE LINE OF CASES THAT HAVE BEEN DECIDED, NELSON VERSUS WIGGS, PRESS MAN AND AZAM AND NUBURN DETAIL HOW THIS STANDARD OR PROCEDURE SHOULD WORK, AND I HATE TO REITERATE THE SAME POINT BUT IF THERE IS AN AS-IS PURCHASE, WHETHER IT IS A NONDISCLOSURE OR AN AFFIRMATIVE MISREPRESENTATION, PERHAPS THERE SHOULD BE A BAR, BECAUSE THE PURCHASER IS ON EQUAL FOOTING WITH THE BUYER, AT LEAST ON SOMEWHAT OF AN EQUAL FOOTING, WHERE YOU GO AND INVESTIGATE, WHEREAS IF YOU HAVE A WARRANTED NEW SALE, THERE IS A GREATER DUTY ON BEHALF OF THE SELLTORY INFORM THE PURCHASER OF ANYTHING THAT MAY AFFECT HIS INTEREST, THE PRICE OR THE VALUE OF THE PROPERTY OR HIS QUIET ENJOYMENT OF THE PROPERTY.

THE PRESS MAN MAKES -- YOU ARE SAYING YOU AGREE WITH THE RESULT OF PRESSMAN, BUT IT MAKES THE STATEMENT CONCERNING PUBLIC RECORDS CANNOT FORM THE BASIS OF A CLAIM FOR ACTIONABLE FRAUD. THAT IS THE STATEMENT IN PRESSMAN. YOU DON'T AGREE WITH THAT STATEMENT.

THAT'S CORRECT. I DON'T AGREE WITH THAT STATEMENT.

SO THERE IS CONFLICT WITH THE STATEMENT.

THE POINT THAT I WANT TO MAKE TO THE COURT IS --

IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR, BUT I THINK THE PRESSMAN CASE IS SERIOUSLY FLAWED. THAT STATEMENT IS DICTA. THE PRESSMAN CASE WAS DECIDED ON OTHER GROUNDS AND ONLY REACHED THAT STATEMENT THROUGH A SIDE ISSUE, AND IT WAS BASED UPON NELSON VERSUS WIGS. I THINK JUSTICE SERANDO ALSO COMMENTED IN NELSON VERSUS WIGGS I THINK YOU HAVE ADDICT A BUILT UPON ADDICT A -- THAT YOU HAVE DICTA BUILT UPON DICTA TO REACH THAT BRIGHT-LINE, AND I THINK THE FOURTH DCA ACTUALLY STATED THAT THE PRESSMAN DECISION WAS BADLY WORDED BUT IT WAS NEVER INTENDED TO CREATE THAT BRIGHT-LINE TEST. IN CONCLUSION, I WOULD LIKE TO STATE, ON BEHALF OF THE BRINDLEWOOD HOMEOWNERS THAT WE WOULD URGE THIS COURT TO AFFIRM THE FOURTH DCA HOWEVER, IF THEY ARE INCLINED TO CHANGE THE FOURTH DCA'S RULING, BRINDLEWOOD HOMES, THE MOTION TO DISMISS AND NEGLIGENCE, WHICH I GET BACK TO THE GILCHRIST CASE AND NEGLIGENT MISREPRESENTATION. THANK YOU.

REBUTTAL.

MAY IT PLEASE THE COURT. I DID HEAR SOMETHING THAT, TO ME JUST IS SOMETHING I WANTED TO DISCUSS A LITTLE BIT, AND THAT IS THE ISSUE OF THE WARRANTY VERSUS AN AS-IS TRANSACTION, AND IT SEEMS TO ME THAT, IF THE WARRANTY THAT RELATED TO THESE TRANSACTIONS, RELATES TO THE PROPERTY AND THE HOMES THAT THE PEOPLE BOUGHT, THEN THERE IS NO APPROPRIATE DISTINCTION GOOD BETWEEN AS IS ANNA WARRANTY -- BETWEEN AS-IS, AND A WARRANTY TRANSACTION, BECAUSE THE RELATED PAPER RELATED TO AN ADJACENT PROPERTY THAT WASN'T SUBJECT TO THE CONTRACT. AND SO, FROM MY POINT OF VIEW, THERE NEED BE NO DISTINCTION BETWEEN THE CASES THAT TALK ABOUT AN AS-IS TRANSACTION VERSUS A WARRANTY TRANSACTION. IF THE PURCHASER HAS AN OBLIGATION OF DUE DILIGENCE APPROPRIATE TO THE TRANSACTION THAT HE HAS UNDERTAKEN, THEN THAT DUE DILIGENCE SHOULD BE AT LEAST IN PART, TO BE AWARE OF THE PUBLIC RECORD, AND THAT IS AN APPROPRIATE OBLIGATION TO PLACE ON THE PURCHASER, IN LIGHT OF THE TRANSACTION THAT HE IS UNDERTAKEN.

WILL YOU DEFINE FOR US, DASHES, WHAT THE PUBLIC RECORD IS THAT YOU MUST BE AWARE OF?

NO. AND I AM NOT BEING FLIPPANT AT ALL, JUSTICE.

I UNDERSTAND.

I CANNOT DO THAT, AND IN THE ABSENCE OF ANY RECORD EVIDENCE, I CANNOT SPECIFY WHAT THE PUBLIC RECORD IS OR WHICH PART OF THE PUBLIC RECORD EACH HUMAN BEING SHOULD BE AWARE OF, WHEN THEY ARE ENGAGED IN AN ARM'S LENGTH TRANSACTION, AND SHOULD THE PUBLIC RECORD BE ANY DIFFERENT FOR A PERSON WHO IS BUYING HER 20th HOME VERSUS THEIR FIRST HOME? I THINK THAT THE PUBLIC RECORD SHOULD BE THAT WHICH IS CONTAINED WITHIN, WITHIN EITHER THE RECORDING ACTOR THE OTHER DOCUMENTS THAT ARE AVAILABLE TO THE PERSONS INVOLVED IN THE TRANSACTION. ONE THING WE HAVEN'T DISCUSSED, WHICH MAY NOT BE PARTICULARLY GERMANE, IS THE ISSUE OF THE NATURE OF THE MISREPRESENTATION, AND WE HAVE NO EVIDENCE ON THAT, SO IT IS HARD TO DISCUSS THAT, BUT I AM CERTAINLY AWARE OF, AS IS THIS COURT, THE ISSUE OF PUFFING OR THE REPRESENTATIONS THAT ARE MADE AND WHETHER, AND THE CIRCUMSTANCES UNDER WHICH THEY ARE MADE AND RECEIVED, AND IF THE REPRESENTATION IS THAT THAT PIECE OF LAND OVER THAT WAY WILL ALWAYS STAY THAT WAY, IS THAT A REASONABLE REPRESENTATION TO RELY ON, WHEN THE PUBLIC RECORD HAS A DOCUMENT THAT PLAINTIFFS HAVE, THEIR ATTORNEYS HAVE, THAT THEY HAVE ATTACHED, THAT SHOWS, WITH EVEN A CURSORY GLANCE, AS THE COMMENT SAYS, THEY WOULD HAVE KNOWN THAT THE REPRESENTATION WAS NOT CORRECT.

BUT ISN'T THAT AN ARGUMENT FOR THE CASE BY CASE DETERMINATION, WHETHER OR NOT IT WAS PUFFING, OR WHETHER IT WAS SOME STATEMENT THAT WAS INTENDED TO BE RELIED ON IN THIS PURCHASE?

JUSTICE, IT CAN BE. I CONCEDED THAT POINT IN MY BRIEF, THAT THERE ARE SOME CASES WHICH ARE APPROPRIATE TO A CASE BY CASE DETERMINATION OF WHETHER THE RELIANCE IS JUSTIFIABLE, BUT TO PUT TEETH INTO SECTION 541 OR THE OTHER PORTION OF THE RULE THAT THIS COURT ADOPTED, AT SOME POINT THERE IS THE ABILITY TO DETERMINE WHETHER THE KNOWLEDGE OF THE FALSITY WAS POSSESSED TO THE PERSON OR CAN BE ASCRIBED TO THEM, AND IT IS MY POSITION THAT THAT POINT IS THE PUBLIC RECORD, RECOGNIZING THAT WHAT IS IN THE PUBLIC RECORD IS SOMETHING THAT IS SOMEWHAT AMORPHOUS.

YOU MENTIONED THAT YOU MADE A STATEMENT THAT EVEN A CURSORY GLANCE WOULD HAVE PUT THE BUYER ON NOTICE. IS THAT CRITICAL TO YOUR POSITION, THAT, JUMP OUT TO RED FLAG ITSELF, OR CAN IT BE HIDDEN SOMEPLACE IN THE DOCUMENT?

THEREIN LIES THE PROBLEMS --

SITE PLANS AND SO FORTH AND MANY THINGS, YOU HAVE TO READ FOR FIVE PAGES BEFORE YOU GET TO THEM.

I UNDERSTAND YOUR CONCERN, JUSTICE, AND I DON'T HAVE A DIRECT ANSWER THAT WOULD RESOLVE THAT PROBLEM. AS TO WHEN IT, A CURSORY GLANCE, WHEN IT IS OBVIOUS, OTHER THAN TO SUGGEST THAT THERE IS A REASONABLE POINT IN TIME WHEN YOU CAN A SCRIBE THAT THE FALSITY IS OBVIOUS, AND THAT IS WITH RESPECT TO THE PUBLIC RECORD, PARTICULARLY THE FACTS OF THIS CASE THAT HAD A SITE PLAN THAT SHOWS THAT THE MISREPRESENTATION WAS, IN FACT, NOT ACCURATE. MR. CHIEF JUSTICE: THANK YOU, COUNSEL. YOUR TIME IS UP. THANK YOU FOR COUNSEL'S ASSISTANCE IN THIS CASE AND THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.