SC94074

In the
SUPREME COURT OF MISSOURI

SHAWN STEVENS
Plaintiff-Appellant
vs.
MARKIRK CONSTRUCTION, INC., et al.,
Defendants-Respondents

Appeal from the Circuit Court
of Jackson County, Missouri
Case No. 0916-CV36579
The Hon. Marco Roldan

SUBSTITUTE REPLY BRIEF OF PLAINTIFF-APPELLANT SHAWN STEVENS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Both an "existing condition" misrepresentation and a "future event" misrepresentation were made by defendants-respondents to plaintiff-appellant, requiring use of MAI 23.05's third alternate for Paragraph Fourth and second alternate for Paragraph Fourth, respectively.

Generally speaking, there are two types of misrepresentations: (1) a misrepresentation of an existing fact and (2) a misrepresentation of an intention to perform in the future coupled with a present state of mind not to so perform. *See, e.g., Wolk v. Churchill,* 696 F.2d 621 (8th Cir. 1982), *Klecker v. Sutton,* 523 S.W.2d 558 (Mo. App. W.D. 1975).

Different showings of scienter are required for each type of misrepresentation. Under MAI 23.05, misrepresentation of an existing fact requires a showing that defendant knew that the misrepresentation was false, or that defendant made the representation without knowing whether it was true or false. On the other hand, MAI 23.05 requires a showing that the defendant knew that the representation was false at the time it was made in order to submit a misrepresentation of future performance. *See* MAI 23.05, "Notes on Use" (2007 Revision), No. 1, *citing Klecker v. Sutton*, 523 S.W.2d 558 (Mo. App. 1975), and *Wolk v. Churchill*, 696 F.2d 621 (8th Cir. 1982). Also relevant on the element of intent is *Brennaman v. Andes & Roberts Brothers Construction Co.,* 506 S.W.2d 462 (Mo. App. W.D. 1973), cited in *Klecker.*

The defendant in *Brennaman v. Andes & Roberts Brothers Construction Co.,* 506 S.W.2d 462 (Mo. App. W.D. 1973), was a developer/contractor which had misrepresented its intention to build a house for plaintiffs that complied with "FHA plans

and specifications." *Brennaman, supra,* 506 S.W.2d 462, 464. *Brennaman* held that an actionable misrepresentation could be based on a promise to perform in the future accompanied by a current intention not to perform. *Brennaman, supra, 506* S.W.2d 462, 465. Thus, *Brennaman* refers to a "future performance" misrepresentation.

Klecker v. Sutton, 523 S.W.2d 558 (Mo. App. 1975), considered an instruction stating that a corporate defendant "could and would" purchase and sell an equipment package. *Klecker, supra,* 523 S.W.2d 558, 561. The *Klecker* Court determined that this instruction submitted on both the corporate defendant's present ability to perform as well as its present intention to perform. *Klecker, supra,* 523 S.W.2d 558, 562. Thus, *Klecker* presented an "existing condition" misrepresentation as well as a "future performance" misrepresentation. *Id.*

Wolk v. Churchill, 696 F.2d 621 (8th Cir. 1982), involved both "existing condition" misrepresentations and "future performance" misrepresentations, in a case in which sellers of a business brought suit for payment and the purchasers counterclaimed for fraudulent misrepresentations. The Eighth Circuit identified the "existing condition" misrepresentations as including that plaintiffs owned all of the business's outstanding capital stock, that all business liabilities and obligations had been disclosed, that plaintiffs had no knowledge of litigation or other materially adverse developments, that an injunction preventing the sale of certain products would be lifted and thus allow their sale to satisfy the business's past-due amounts payable to the union pension fund. The "future performance" misrepresentations were that plaintiffs would transfer a patent to defendants and that plaintiffs would credit defendants' payment obligation by any

amount not collected on the sale of products affected by the injunction. *Wolk, supra*, 696 F.2d 621, 623-24, 626.

In discussing the instruction submitted in the case, the Eighth Circuit noted that Missouri law provides that the proper statement of intent on an "existing condition" misrepresentation is defendant's knowledge of the falseness of the representation or ignorance as to its truth or falsity. *Wolk, supra*, 696 F. 621, 626. Conversely, "promises of future performance" misrepresentations must be supported by the showing of an existing intent not to perform at the time the promise was made. *Id.*

In the case at bar, defendants-respondents made both types of misrepresentation and, thus, under MAI 23.05, different types of intent were required to be submitted. Plaintiff-appellant was induced to purchase a lot in a residential subdivision based on an "existing condition" misrepresentation (that the lot would not flood), and a "promise of future performance" misrepresentation (that the defendant-respondent would do whatever was necessary to remedy any such flooding). Specifically, the misrepresentations were (1) "There are no problems with water issues on Lot 335" [an "existing facts" fraudulent misrepresentation, i.e., that the current condition of the lot was that it had no water problems] and (2) "and if there are, I will regrade, we will regrade, we will build retaining walls, whatever it takes, to resolve the problem" [a "future promises" fraudulent misrepresentation, falsely stating defendants-respondents' present intention to perform remedial work in the future if necessary]. (Tr. 42, 2-5). (*See also* Tr. 51, 5-10; Tr. 52,17-22).

Defendants-respondents, however, argue that this case involves only a

misrepresentation as to a "future event," because only a flood occurring in the future would show whether the lot was flood-proof and whether defendants-respondents would provide any promised remedy. Thus, they argue, the intent element required to be included in the verdict-directing instruction was the second alternate for Paragraph Fourth, that defendants-respondents "knew that it was false at the time the representation was made." The Circuit Court agreed with this argument and submitted the case using the second alternate for Paragraph Fourth for both types of misrepresentation. At the instruction conference, plaintiff-appellant objected on the record to this submission, requesting either use of the third alternate for Paragraph Fourth (that defendants-respondents "made the representation without knowing whether it was true or false") or, in the alternative, use of two separate verdict directors for each of the two different types of misrepresentation, including the different scienter elements, as suggested by Comment N to MAI 23.05 (2007 revision) at 396-97.

Defendants-respondents' argument has been specifically refuted by *Brennaman v. Andes & Roberts Brothers Construction Co.*, 506 S.W.2d 462 (Mo. App. W.D. 1973); the reasoning and holding in *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409 (Mo. App. W.D. 1996), cited in Annotation No. 10, titled "Future event," to MAI 23.05 (2007 revision) at 399; and the Washington Supreme Court's *Nyquist v. Foster*, 44 Wash. 2d 465, 268 P.2d 442 (1954).

The *Brennaman* Court succinctly distinguished between the two types of misrepresentation as follows:

> While the necessity for demonstrating the falsity of the representation by future events is common to both types of action, the distinctions in theory and proof are significant. Misrepresentation of intent to perform requires the measure of the promissor's purpose at the time the agreement is made as against his own subsequent performance. Both the promise and the performance are in such cases at all times within the control of the promissor. Fraudulent misrepresentation of product capability compares the promissor's statements with the consequences, performance or results later derived from the acquisition, use or application of an article then in existence.

Brennaman, supra, 506 S.W.2d 462, 465-66.

And as the *Judy* Court stated:

> The future event type of case discussed in the Notes refers "to the theory of fraud in misrepresenting an existing purpose or state of mind...." *Klecker v. Sutton*, 523 S.W.2d 558, 562 (Mo. App. [W.D.] 1975). . . .
>
> From the foregoing, it is clear that ALH's representations in the case at bar were not as to future events. Rather, they were statements of fact that the joints were designed to be weather-tight, the homes were to be long-lasting and durable, and that the logs were penta treated to minimize the threat of rot. These were not representations of an intention to perform or of

> a state of mind. They were present representations intended to induce plaintiffs to purchase their log homes. Point denied.

Judy, supra, 923 S.W.2d 409, 420, 421.

And, finally, in *Nyquist v. Foster,* 268 P.2d 442 (Wash. 1954), the Washington Supreme Court considered a case in which plaintiff had sought to purchase a trailer with aluminum sidewalls but instead was induced to purchase a trailer with masonite sidewalls based on defendant's misrepresentation that the masonite sidewalls would not warp. The Court specifically considered whether the defendant's misrepresentation "may be considered as one relating to either (a) a future event, or (b) an existing fact." *Nyquist, supra,* 268 P.2d 442, 470. The Court concluded that the misrepresentation was a statement of existing fact given that:

> a quality is asserted which inheres in the article so that, at the time the representation is made, the quality may be said to exist independently of future acts or performance of the one making the representation, independently of other particular occurrences in the future, and independently of particular future uses or future requirements of the buyer.

Nyquist, supra, 268 P.2d 442, 471.

In summary, although the falsity of any type of misrepresentation will not be revealed until some point in the future, that does not mean that all misrepresentations therefore involve a "future event." As stated in *Brennaman:* "While the necessity for demonstrating the falsity of the representation by future

events is common to both types of action, the distinctions in theory and proof are significant." *Brennaman, supra,* 506 S.W.2d 462, 465-66.

II. Submission of the questioned instruction constituted reversible error.

Missouri Rule of Civil Procedure 70.02(a) requires the Circuit Court to give jury instructions as required by law and supported by the evidence. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 397 (Mo. App. W.D. 2011).

The case at bar involves an instruction "required by law" given that plaintiff-appellant requested use of MAI 23.05 with the alternates to Paragraph Fourth as sanctioned by *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409 (Mo. App. W.D. 1996) ("existing condition" misrepresentation), and *Klecker v. Sutton,* 523 S.W.3d 558 (Mo. App. W.D. 1975) ("future performance" misrepresentation).

This Court's review of the Circuit Court's action is *de novo* given that the questioned instruction was one required by law and supported by the evidence. *See, e.g., Klotz v. St. Anthony's Medical Center,* 311 S.W.3d 752, 767 (Mo. banc 2010); *Marion v. Marcus*, 199 S.W.3d 887, 892-94 (Mo. App. W.D. 2006). Further, as stated by the Court of Appeals in its Opinion filed in this matter:

> Moreover, the court's error in refusing to submit such instruction cannot be viewed as harmless because Stevens was entitled to have the jury properly consider his chosen theory of misrepresentation of an existing fact. *Adams v. Badgett*, 114 S.W.3d 432, 436 (Mo. App. 2003). In particular, the jury should have been allowed to consider Stevens's claim that Jones made the statement that the lot would not flood without knowing whether the

statement was true or false. Accordingly, the circuit court's error in refusing to give Stevens's proposed jury instructions constituted reversible error.

Stevens v. Markirk Construction, Inc., No. WD75532 (Mo. App. W.D. Jan. 21, 2014), slip op. at *11-12.

CONCLUSION

For the foregoing reasons, submission of the questioned instruction was prejudicially erroneous to plaintiff, and therefore this case should be remanded for a new trial with instructions to the Circuit Court to submit two verdict directors based on MAI 23.05, using the appropriate alternates to Paragraph Fourth.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06 of the Missouri Rules of Civil Procedure, counsel for Plaintiff-Appellant Shawn Stevens certifies that this brief includes the information required by Rule 55.03, that this brief complies with the limitations contained in Rule 84.06, and that the file containing this brief has been scanned for viruses and is virus-free. In reliance on the word count of the word-processing system used to prepare this brief, counsel for Plaintiff-Appellant certifies that this brief contains 2,103 words, exclusive of the Table of Contents and Table of Authorities.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing *Substitute Reply Brief of Plaintiff-Appellant Shawn Stevens* was filed with the Missouri Supreme Court, through its electronic filing system, on this 18th day of August, 2014, and that, through such electronic filing, was also thereby served on the following registered users of the electronic filing system:

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