Can *Johnson v. Davis* Rights Be Waived?

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Thirty years ago, in *Johnson v. Davis*,[1] the Florida Supreme Court created an obligation on sellers of residential real estate to disclose latent defects in their property to buyers. As the volume of residential real estate sales and real estate prices now equal or exceed pre-Great Recession levels in many Florida areas, it is likely that incidences of alleged seller failure to disclose latent defects will also increase. A nagging question is whether sellers may use contractual clauses that seek to lessen or avoid their *Johnson v. Davis* duties. Real estate transactional attorneys, like other transactional attorneys, seek to use exculpatory language whenever possible, limited by certain Florida Statutes.[2] Because the *Johnson v. Davis* cause of action is not statutory, the court cases dealing with exculpatory language have focused on the language of the parties' contract and the nature of the *Johnson v. Davis* cause of action. In *Sanislo v. Give Kids The World Inc.*,[3] the Florida Supreme Court recently reviewed the effect of exculpatory language on claims for personal injury. This article will review the nature of the *Johnson v. Davis* cause of action, the case law dealing with attempts by sellers to avoid their *Johnson v. Davis* duties through contract language, and whether the *Sanislo* decision has any relevance to this strategy.

The *Johnson v. Davis* Cause of Action

A review of the *Johnson v. Davis* decision and its Florida Supreme Court progeny reveals that the cause of action was a unique action based in tort. In *Johnson v. Davis*, the plaintiff-buyers alleged breach of the sales contract, fraud, and misrepresentation against the sellers upon the buyers' pre-closing discovery of roof leaks. The buyers sued for return of their deposit and rescission. The trial court found misrepresentation by sellers but refused to order rescission. The Supreme Court, citing its prior decision in *Besett v. Basnett*,[4] agreed that there had been a misrepresentation that amounted to fraud and ordered the return of the deposit money, but refused to grant rescission. The Court stated:

> [T]he Davises reliance on the truth of the Johnsons' representation was justified and is supported by this Court's decision in *Besett v. Basnett*, where we held "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."[5]

The Florida Supreme Court, however, went on to discuss the distinction between misfeasance and nonfeasance. The Court noted that the common law had traditionally provided a remedy in tort only for affirmative conduct and that nonfeasance was not actionable. The court recognized the inequities of a legal system that, on one hand, provided relief to a purchaser induced by misfeasance into completing a transaction, while on the other hand, left a purchaser induced by nonfeasance without a remedy. Determining that misfeasance and nonfeasance should not be treated differently under the circumstances, the Court created a new cause of action when it stated as follows:

> [W]e hold 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.[6]

In the 1997 case of *Gilchrist Timber Co. v. ITT Rayonier, Inc.*,[7] the Florida Supreme Court reviewed the following question certified by the United States Court of Appeals for the Eleventh Circuit:

> Whether a party to a transaction who transmits false information which that party did not know was false, may be held liable for negligent misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information.

The Florida Supreme Court answered the question affirmatively stating the buyer would "not have to investigate every piece of information furnished;" rather, the buyer would need only to investigate "information that a reasonable person in the position of the [buyer] would be expected to investigate."[8] The Court further stated:

> We reaffirm our previous conclusion in *Johnson v. Davis*... that "one should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance".... 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.*[9] [emphasis added]

In the 2002 case of *MI Schottenstein Homes, Inc. v. Azam*,[10] the Court stated, "In *Johnson v. Davis*, this Court extended the

Besett reasoning from affirmative misrepresentations to the arena of nondisclosure of material facts." The *Besett* reasoning allows the buyer to rely on a fraudulent representation without a duty to make an inspection, unless the falsity is "obvious." Extending that reasoning to *Johnson* means that a buyer likewise has no duty to make an inspection where the allegation is nondisclosure. The buyer merely has to observe what is "readily observable."

The district courts of appeal subsequently have answered two critical questions left open by the above Florida Supreme Court cases. First, the standard for the seller is whether the seller has actual knowledge of the fraud, and not whether the seller should have known of the fraud.[11] Second, there is no state of mind element for the seller.[12] Therefore, the buyer must only prove the following elements: 1) the seller had actual knowledge of the property defect; 2) the defect must materially affect the value of the property; 3) the defect must not be readily observable and was unknown to the buyer; and 4) the buyer must establish that the seller failed to disclose the defect to the buyer.[13] Notwithstanding the foregoing, the Florida Standard Jury Instructions do not contain an instruction for the *Johnson v. Davis* action.

Florida Case Law Construing "As Is" Clauses

Several cases have dealt with language found in the standard Florida Association of Realtors/Florida Bar ("FR/BAR") contract, as amended by the parties to the transaction. Specifically, in these cases, the buyers relied to some extent on paragraph W, reflecting the *Johnson v. Davis* obligation: "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."

In the 2003 case of *Syvrud v. Today Real Estate, Inc.,*[14] the parties executed an addendum to the then-existing FR/BAR contract which provided "Buyer(s) hereby acknowledge that the property being sold is not new and that the seller(s) and broker(s) make no verbal representations, warranties, or guarantees as to the condition of the property and its [sic] appurtenances and/or fitness for specific purpose." In finding no waiver of the sellers' disclosure duties, the 2nd DCA held that nowhere in the contract was there a provision specifically stating that the buyers waive the sellers' duty to disclose hidden defects materially affecting the value of the property as required by *Johnson v. Davis*. The court found that the provision in the addendum should be interpreted as an "as is" clause, i.e., that the sellers were selling the property in "as is" condition and that the buyer was accepting the property in its existing condition.

In the 1999 case of *Pressman v. Wolf,*[15] typed onto the line describing personalty was the following representation by the seller: "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 further provided for inspection rights and a limitation of liability, including that the buyer waived all defects not declared and reported less than 10 days prior to closing. The 3rd DCA reversed the trial court's entry of post-trial judgment for the buyer and rejection of a directed verdict for the seller stating: "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."

In the 2000 case of *Carrero v. Porterfield,*[16] the Carreros sued the appellees alleging fraud in the inducement as a result of undisclosed, alleged latent defects with termite problems, septic tank deficiencies, and plugged pool deck drains. The trial court dismissed the complaint, which alleged a *Johnson v. Davis* cause of action, relying on *Pressman*. The 2nd DCA affirmed per curium. In a dissenting opinion, Judge Altenbernd opined that 1) *Pressman* was distinguishable because, in *Pressman*, the case had been tried and the defects determined to be patent; and 2) Florida law did not allow a buyer's waiver of contractual warranties to operate to bar a claim under *Johnson v. Davis*.

The vitality of *Pressman* and *Carrero* is questionable because the portion of the *Pressman* decision stating that statements by the seller regarding matters of public record could not be the basis for a *Johnson v. Davis* claim was specifically disapproved by the Florida Supreme Court in *MI Schottenstein Homes v. Azam* in 2002.

There had been previous cases similar to *Syvrud*[17] and subsequent to *Syvrud*[18] holding that "as is" clauses do not waive *Johnson v. Davis* rights without any detailed analysis of contract language.

Thus, as of the present, no district courts of appeal decision has dealt with whether a buyer may waive *Johnson v. Davis* rights in the purchase documents through exculpatory language that specifically provides that "Buyer waives the Sellers' duty to disclose hidden defects materially affecting the value of the property" or words to that effect.

The *Sanislo* Decision

In the 2015 case of *Sanislo v. Give Kids the World Inc.,*[19] Stacy and Eric Sanislo filed a negligence action against Give Kids the World after Stacy Sanislo suffered personal injuries during her family's vacation. Give Kids the World, Inc., is a not-for-profit corporation that provides storybook vacations to seriously ill children and their families. The Sanislos applied for their vacation with Give Kids the World by filling out and signing a "wish request form" containing an exculpatory clause. After their application was granted, the Sanislos signed another

liability release form containing a similar exculpatory provision upon arriving at their resort in Central Florida. The exculpatory language in those forms stated in pertinent part as follows:

> I/we hereby release Give Kids the World, Inc. and all of its agents, officers, directors, servants, and employees from any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish, on behalf of ourselves, the above named wish child and all other participants. The scope of this release shall include, but not be limited to, damages or losses or injuries encountered in connection with transportation, food, lodging, medical concerns (physical and emotional), entertainment, photographs and physical injury of any kind....
>
> I/we further agree to hold harmless and release Give Kids the World, Inc. from and against any and all claims and causes of action of every kind from any and all physical or emotional injuries and/or damages which may happen to me/us....

During their vacation, Stacy Sanislo suffered injuries to her back and hip when a pneumatic lift on a horse-drawn carriage collapsed while she and her family posed for a photograph. The Sanislos claimed in their suit against Give Kids the World that the injuries were caused by Give Kids the World's negligence. Give Kids the World asserted the defense of release based upon the exculpatory clauses in her wish request and liability release forms, and eventually moved for summary judgment. The trial court denied that motion and, following a jury trial, entered a judgment against Give Kids the World and in favor of the Sanislos in excess of $70,000.00.

On appeal, Give Kids the World argued that the trial court erred in denying its motion for summary judgment because the exculpatory clauses were unambiguous, consistent with public policy, and therefore enforceable. In opposition, the Sanislos claimed the clauses were ambiguous and therefore unenforceable because they did not specifically release Give Kids the World from its own negligence. The 5th DCA agreed with Give Kids the World.

Ruling 4-3, the Florida Supreme Court affirmed and held that exculpatory clauses are not per se unenforceable to bar a negligence action merely because they do not specifically mention the releasee's negligence. The Florida Supreme Court explained that the exculpatory clauses "clearly convey that Give Kids the World would be released from any liability, including negligence, for damages, losses, or injuries due to transportation, food, lodging, entertainment, and photographs." In reaching its conclusion, the majority stated:

> [T]he courts' basic objective in interpreting a contract is to give effect to the parties' intent. Further, as the U.S. Supreme Court has observed, contract interpretation is largely an individualized process 'with the conclusion in a particular case turning on the particular language used against the background of other indicia of the parties' intention....As a result, we are reluctant to hold that all exculpatory clauses that are devoid of the terms 'negligence' or 'negligent acts' are ineffective to bar a negligence action despite otherwise clear and unambiguous language indicating an intent to be relieved from liability in such circumstances. Application of such a bright-line and rigid rule would tend to not effectuate the intent of the parties and render such contracts otherwise meaningless.

Therefore, *Sanislo* does not address whether parties to a contract may waive claims for affirmative misrepresentation or nondisclosure and therefore does not directly change the landscape for attempts to waive *Johnson v. Davis* duties.

Post-Sanislo Exculpatory Clauses In Real Estate Contracts

Those seeking to use *Sanislo* as support for a waiver will argue that *Sanislo* confirms that there should be no blanket prohibition against *Johnson v. Davis* waivers. Rather, it depends on the particular exculpatory language and the circumstances. However, there are several reasons why *Johnson v. Davis* waivers should be viewed differently than waivers of liability for engaging in a sports or recreational or similar activity. First, the *Johnson v. Davis* cause of action was created as a matter of policy to abrogate *caveat emptor*. Second, a seller who intentionally lies on a disclosure form should be prohibited from relying on the buyer's waiver, because a party may not waive intentional torts they have suffered or will suffer.[20] Third, even though the *Johnson v. Davis* disclosures do not have to be in writing, the seller's conduct occurs during a real estate transaction where there are likely many representations, both oral and written, and many omissions. Courts need to determine, among other things, whether the seller's alleged non-disclosure relates to a material fact. This is a fact-intensive analysis that the courts may have difficulty in deciphering the parties' intent.

Because the *Johnson v. Davis* cause of action extends to unintentional and merely negligent behavior, the question becomes whether such unintentional conduct by the seller can be waived. Nothing in *Sanislo* says the buyer cannot waive *Johnson v. Davis* rights. Certainly, seller's counsel, with an absent-minded client who just plain forgot about a massive water heater leak ten years prior, may argue that there is no operative public policy. However, as noted above, *Johnson v. Davis* is unique in not requiring any particular state of mind on the part of the non-disclosing seller. Permitting effective use of exculpatory language for unintentional/negligent conduct while prohibiting the same exculpatory language from absolving a seller who intentionally lied would add a state of mind element where there is currently none. Also, even though a seller's conduct may be unintentional, the failure to disclose makes the seller's written disclosures misleading, which the law considers fraud.[21]

One reason exculpatory clauses may not have been used in residential transactions is because they would have to be placed in an Addendum to the standard FR/BAR contracts and would by their very nature be very conspicuous. Buyers would then have a good reason to hire counsel to review the entire contract and to have home inspectors do more than merely "eyeball" the premises. On the other hand, exculpatory clauses could be inserted by developers and builders quite easily because they create their own contracts and buyers expect such contracts to be unalterable.

With regard to whether a developer can rely on exculpatory language in a declaration of covenants to bar *Johnson v. Davis* claims, in addition to the other arguments against such application noted above, reliance on exculpatory language in a declaration of covenants would also face arguments that the declaration of covenants was recorded months (or years) before the home was built (or the surrounding land contaminated with a toxic substance) and that the buyers did not sign a document containing the exculpatory language, even though it was in their chain of title. As Justice Pariente stated in *MI Schottenstein Homes v. Azam*, "(T)he fact that a purchaser may be charged with constructive knowledge of information within a chain of title is a different inquiry from whether the purchaser knows of the falsity of the representation or whether the falsity is obvious to the purchaser...." Also, the *Sanislo* situation where the exculpatory language seeks to waive future liability for future participation in an event is distinguishable from a waiver of future wrongdoing by a developer that has not even broken ground on the subdivision yet. The developer would have to prove that, in such circumstances, the buyer made an informed decision to waive the buyer's *Johnson v. Davis* rights. Further, exculpatory language in a declaration of covenants is also different from exculpatory language in an "integrated" transactional document that is signed by the buyer.[22] The key difference is that there is actual knowledge in the transaction while only constructive knowledge from the recording of the declaration.

In conclusion, buyers of previously owned homes will probably not face issues of exculpatory language with regard to their *Johnson v. Davis* rights. Rather, the future cases will more likely deal with attempts by developers and builders to use such language. Courts should continue to reject a seller's use of exculpatory language to waive *Johnson v. Davis* rights or at least wait to review such clauses in the context of post-trial motions where there is a full record developed of the parties' intent.

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Endnotes

1 480 So. 2d 625 (Fla. 1985).

2 Florida statutes prohibit the use of exculpatory clauses in certain transactions such as residential lease agreements that disclaim or limit a landlord's liability to a tenant for breach of the implied warranty of habitability (Fla. Stat. § 83.47 (1977), condominium documents that disclaim liability for breach of the statutory implied warranties of fitness and merchantability to a purchaser of a new condominium (Fla. Stat. § 718.303(2)(2000), agreements that waive the right to assert a construction lien law claim in advance of improving real property (Fla. Stat. § 713.20(2) (2001) and Fla. Stat. § 725.06(1) (2001), and indemnification provisions in construction contracts that encompass claims or damages resulting from gross negligence, willful, wanton, or intentional misconduct, or for statutory violations (Fla. Stat. § 725.06(1) (2001).

3 157 So. 3d 256 (Fla. 2015).

4 359 So. 2d 995 (Fla. 1980).

5 480 So. 2d at 628.

6 *Id.* at 629.

7 696 So. 2d 334 (Fla. 1997).

8 *Id.* at 339.

9 Id.

10 813 So. 2d 91, 95 (Fla. 2002).

11 In *Jensen v. Bailey*, 76 So. 3d 980 (Fla. 2d DCA 2012), the appellate court concluded that a homeowner must have "actual knowledge" of the defective condition in order to be held liable for its nondisclosure. In this specific decision, the court rejected the plaintiff's claim that the homeowner "should have known" about the defect and was therefore liable to the buyer for damages. *See also Slitor v. Elias*, 544 So. 2d 255, 258-59 (Fla. 2d DCA 1989) ("Buyer of a house must prove the seller's knowledge of a defect which materially affected the value of the house."); *Billian v Mobil Corp.*, 710 So. 2d 948, 988 (Fla. 4th DCA 1998) ("*Johnson* creates a duty to disclose where a seller *knows* of certain facts under circumstances giving rise to the duty." (emphasis added)); *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 674 (Fla. 1st DCA 1993) (quoting *Slitor*, 544 So. 2d at 258, for the proposition that "*Johnson* does not convert a seller of a house into a guarantor of the condition of the house").

12 *MI Schottenstein Homes, Inc.*, 813 So. 2d at 95.

13 *Jensen*, 76 So. 3d at 983.

14 858 So. 2d 1125 (Fla. 2d DCA 2003).

15 732 So. 2d 356, 358 (Fla. 3d DCA 1999).

16 752 So. 2d 699 (Fla. 2d DCA 2000).

17 *See Levy v. Creative Constr. Servs. Of Broward, Inc.* 566 So. 2d 347 (Fla 3d DCA 1990); ("[W]e discern no "as is" contractual exception to the duty imposed on the seller herein by the *Johnson* decision."); *Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361, 1364 (Fla. 3d DCA 1987) ("[W]e find that the "as is" provision in this real estate contract does not act as a bar to Rayner's claim of fraudulent nondisclosure.")

18 *Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847, 848 (Fla. 4th DCA 2005) (finding that the description of the property as "not new" and the disclaimer of any representations, warranties, or guarantees concerning it are characteristic of an "as is" transaction).

19 *Sanislo*, 157 So. 3d at 256 (Fla. 2015).

20 An exculpatory clause cannot relieve a defendant from liability for an intentional tort. *Windstar v. WS Realty, Inc.*, 886 So. 2d 986, 987 (Fla. 2d DCA 2004) ("Fraud is an intentional tort and thus not subject to the cathartic effect of exculpatory clauses"); *Fuentes v. Owen*, 310 So. 2d 458 (Fla. 3d DCA 1975) (same). A claim for intentional or knowing failure to disclose material facts is an intentional tort. *Gutter v. Wunker*, 631 So. 2d 1117, 1118 (Fla. 4th DCA 1994); *Vokes v. Arthur Murray*, 212 So. 2d 906 (Fla. 2d DCA 1986); *Cruise v. Graham*, 622 So. 2d 37, 40 (Fla. 4th DCA 1993).

21 See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972) for a discussion of fraud by non-disclosure in the securities fraud context.

22 *See, e.g., Peebles v. Sheridan Healthcare, Inc.*, 853 So. 2d 559 (Fla. 4th DCA 2003) (in case dealing with allegations of oral misrepresentations predating the parties' closing of their transaction, court reverses jury verdict where the closing documents disclosed the material information alleged to be misrepresented and there was an integration clause in the documents); *Berg v. Capo*, 994 So. 2d 322 (Fla. 3d DCA 2007) (in case dealing with oral misrepresentations predating the parties' closing of the transaction, where the stock purchase agreement contained "both an integration clause and a clause mutually releasing the parties", the appeals court affirms trial court's grant of summary judgment and rejects the claim of affirmative fraudulent misrepresentation and conspiracy claim because of alleged conflict by transaction attorney). In *Hadsock v. Lennar Homes, LLC*, No. 12-CA-7588, the trial court dismissed a complaint alleging, among other claims, a *Johnson v. Davis* cause of action against a builder where there was an exculpatory clause in a recorded declaration of covenants and a disclosure of a landfill therein, and the landfill was the gravamen of the wrongdoing. The Second District Court of Appeals affirmed per curium. *Hadsock v. Lennar Homes, LLC*, 151 So. 3d 1245 (Fla. 2d DCA 2014).