

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STEVEN C. LARABEE and)
FRANCES C. LARABEE,)
)
Appellants,)
)
vs.) In Re: WD68188
)
BUDDY EICHLER and)
DOROTHY EICHLER,)
)
Respondents.)

**APPEAL FROM THE CIRCUIT COURT OF
BENTON COUNTY, MISSOURI CIRCUIT DIVISION
THIRTIETH JUDICIAL CIRCUIT
HONORABLE JOHN W. (BILL) SIMS, CIRCUIT JUDGE**

**APPELLANTS STEVEN C. LARABEE AND FRANCES C. LARABEE
BRIEF ON APPEAL**

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INDEX

AFFIDAVIT OF SERVICE.....3

CERTIFICATE OF BRIEF.....4

TABLE OF CASES.....5

JURISDICTIONAL STATEMENT.....6

STATEMENT OF FACTS.....7

POINTS RELIED ON.....8

ARGUMENT.....10

CONCLUSION.....27

REQUEST FOR ORAL ARGUMENT.....28

APPENDIX INDEX.....29

CERTIFICATE OF BRIEF

I hereby certify pursuant to Rule 84.06(b) that the Brief includes the information required by Rule 55.03, that the Brief complies to the limitations contained in Rule 84.06(b), that the Brief contains 5463 number of words, and that the disk containing the Brief is virus free.

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STATE OF MISSOURI)
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COUNTY OF HENRY)

On this 31st day of May, 2007, before me personally appeared J. Eric Mitchell, to me known to be the person described in and who executed the foregoing document, and acknowledged to me that he executed the same as his free act and deed for the purposes contained herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year last above written.

Notary Public

My Commission Expires:

TABLE OF CASES

<u>Anderson v. Dyer</u> , 456 S.W.2d 808 (Mo. App. 1970).....	10, 15
<u>Artilla Cove Resort, Inc. v. Hartley</u> , 72 S.W.3d 291, 300 (Mo. App. S.D. 2002)..	18, 19
<u>Burr v. Nat'l Life & Accident Ins. Co.</u> , 667 S.W.2d 5, 7 (Mo. App. 1984).....	13
<u>Chesus v. Watts</u> , 967 S.W.2d 97 (Mo. App. W.D. 1998).....	20, 21, 22
<u>Consumers Co'op Assoc. v. McMahan</u> , 393 S.W.2d 552, 556[6] (Mo. 1965).....	17, 18
<u>Foster v. Pettijohn</u> , 358 Mo. 84, 88; 213 S.W.2d 487, 490 (Mo 1948).....	16
<u>Gilmore v. Chicago Title Ins. Co.</u> , 926 S.W.2d 695, 698 (Mo. App. E.D. 1996).....	17
<u>Graf v. Michaels</u> , 900 S.W.2d 659, (Mo. App. S.D. 1995).....	13, 15, 16
<u>Iota Management Corp. v. Boulevard Inv. Co.</u> , 731 S.W.2d 399, 413[10, 11] (Mo. App. 1987).....	18
<u>ITT Commerical Finance Corp. v. Mid-America Marine Supply Corp.</u> , 854 S.W.2d 371, 376 (Mo. En banc 1993).....	25
<u>Martin v. City of Washington</u> , 848 S.W.2d 487 (Mo. En banc. 1993).....	24
<u>McLees v. J.C. Nichols Company</u> , 842 S.W.2d 115 (Mo. Ct. App. W.D. 1992).....	25
<u>Podlesak v. Wesley</u> , 849 S.W.2d 728, 731 (Mo. Ct. App. S.D. 1993).....	24
<u>Shechter v. Brewer</u> , 344 S.W.2d 784 (Mo. App. 1961).....	21, 22
<u>Wilson v. Altuk Freight Sys. Inc.</u> , 820 S.W.2d 717, 720 (Mo. App. S.D. 1991).....	10

JURISDICTIONAL STATEMENT

Plaintiffs Steven C. Larabee and Frances C. Larabee appeal from a Judgment that was entered on March 2, 2007, in the Circuit Court of Benton County, Missouri, Circuit Division, Case No. 04CV692924. (L.F. 179). A Notice of Appeal was filed on March 19, 2004 appealing the Judgment which grants Defendants Motion for Summary Judgment as to Count I and to Count II.

None of the issues to be raised on appeal are within the exclusive jurisdiction of the Missouri Supreme Court. Accordingly, this court has jurisdiction of the appeal pursuant to its general appellate jurisdiction, as more particularly set forth in Article V, Section 3 of the Missouri Constitution, as amended.

STATEMENT OF FACTS

That on or about March 1, 1998, Plaintiffs and Defendants entered into a Proposal and Contract for the purchase of a parcel of real property located in Benton County, Missouri, described as Lot 403, Sterett Creek Village, a subdivision in Benton County, Missouri. (L.F. 8) From the inception of Sterett Creek Village Trusteeship, until 2006, Defendant Buddy Eichler has been a trustee of the same, has been a developer in Sterett Creek Village, and was the prior owner along with Defendant Dorothy Eichler of the Lot 402 and 403. (L.F. 9; App. 2-6) Defendants Buddy and Dorothy Eichler were the owners of E Properties, Inc., at the time the contract was entered into between the Plaintiffs and the E Properties, Inc., however the Warranty Deed as to Lots 402 and 403 were executed by the Defendants personally. (L.F. 89, 91; App. 2-6)

Prior, during and after the purchase of Lots 402 and 403 by Plaintiffs, the Defendants made various representations, both orally and in writing, indicating that Lots 402 and 403 were located in Sterett Creek Village, and that the Plaintiffs would be entitled to all the rights and privileges of the village. (L.F. 8-13; App. 7-25) That in 1998, the Plaintiffs, in reliance on the representations made by the Defendants purchased Lot 403 and later in 2000, purchased Lot 402 from the Defendants. (L.F. 8-13; 87-91) That the representations made by the Defendants were false, and as a result the Plaintiffs have suffered a damage due to a decrease in value of Lots 402 and 403. (L.F. 8-13; 105-140 [specifically 127])

POINT RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT I IN THAT THE STATUTE OF LIMITATIONS DOES NOT BAR THE PLAINTIFFS FROM PURSUING A CAUSE OF ACTION AGAINST THE DEFENDANTS AS THE CLAIM IS FOR MISREPRESENTATION AND DOES NOT ACCRUE UNTIL IT IS DISCOVERED BY THE PLAINTIFFS.

POINT RELIED ON

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THAT THERE ARE GENUINE ISSUES AS TO MATERIAL FACTS IN THE RECORD CONSISTING OF DEPOSITION TESTIMONY, DISCOVERY RESPONSES AND AN AFFIDAVIT OF PLAINTIFFS WHICH PROVIDE FACTS THAT THE DEFENDANTS MADE MATERIAL REPRESENTATIONS TO PLAINTIFFS THAT THE SURROUNDING PROPERTY WOULD BE DEVELOPED IN ACCORDANCE WITH STERETT CREEK VILLAGE TRUSTEESHIP RESTRICTIONS, THAT SAID REPRESENTATION WAS FALSE AT THE TIME IT WAS MADE AND THAT AS A RESULT OF SAID FALSE REPRESENTATION AND REASONABLE RELIANCE THEREON BY PLAINTIFFS, THE PLAINTIFFS HAVE BEEN DAMAGED.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT I IN THAT THE STATUTE OF LIMITATIONS DOES NOT BAR THE PLAINTIFFS FROM PURSUING A CAUSE OF ACTION AGAINST THE DEFENDANTS AS THE CLAIM IS FOR MISREPRESENTATION AND DOES NOT ACCRUE UNTIL IT IS DISCOVERED BY THE PLAINTIFFS.

Summary judgment is proper if no material fact is genuinely at issue and the admitting party can show that it is, therefore, entitled to summary judgment as a matter of law. ITT Commerical Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. En banc 1993). Plaintiffs must set forth specific facts that demonstrate the existence of an outstanding genuine issue of material fact. Wilson v. Altuk Freight Sys. Inc., 820 S.W.2d 717, 720 (Mo. App. S.D. 1991). In this case, the Court sustained Defendants' Motion for Summary Judgment as to Count I, on the sole basis that it was barred by the Statute of Limitations. (L.F. 144, 179).

As to Count I, Plaintiffs entered into a contract with Defendants for the purchase of Lot 403 Sterett Creek Village, on March 1, 1998. (L.F. 87). Said contract was originally between Plaintiffs and E Properties, Inc., which was solely owned by the Defendants, but the Warranty Deed conveying title was executed by the Defendants personally on April 10, 1998, as they were the rightful owners of Lot 403. (L.F. 87-89).

Plaintiffs contend that the Defendants made the following false representations

which Plaintiffs reasonable relied upon and were thereby damaged:

a. That Lot 403 (initially Lot 8, 9, 10, 11 on App. 7-8;), was a parcel in Sterett Creek Village, subject to all the rights and privileges of the same. (L.F. 9; App. 7-16)

b. That the property surrounding Lot 403 was located in Sterett Creek Village, subject to all the rights and privileges of the same, and would be subjected to the restrictive covenants of Sterett Creek Village. (L.F. 9)

c. That the Defendant owned the surrounding lots and that they would be used for additional development subject to the same restrictive covenants. (L.F. 9)

d. A copy of the Sterett Creek Village Subdivision was provided to Plaintiffs by Defendants showing the Future Development areas of Sterett Creek Village and at all times Defendants represented to Plaintiffs that the property was located inside the village, subject to the restrictive covenants, rights and privileges of the Sterett Creek Village Trusteeship. (L.F. 9, 159-160, App. 7-25)

e. Defendants further provided an additional plat of the surrounding property, identifying it as being located in Sterett Creek Village - West, and showing the surrounding property as part of the same subdivision, all in an effort to induce Plaintiffs to purchase Lot 403. (L.F. 9, 159-160, App. 7-25)

f. Defendants further stated that they owned various undeveloped lots in Sterett Creek Village West and that they would be subject to the restrictive covenants of Sterett Creek Village Trusteeship. (L.F. 9, 159-160, App. 7-25)

g. Defendants stated that the open area in the undeveloped portion of their

property would be utilized as a park, but that it was subject to the same restrictions. (L.F. 9, 159-160, App. 7-25)

On February 28, 1998, prior to the purchase of Lot 403, the Defendants provided Plaintiffs with a plat indicating the property Plaintiffs were purchasing would be in Sterett Creek Village. (App. 7-10, 12-16) The document was recorded in Plat Book 19, Page 101, in the office of the Benton County Recorder of Deeds, on April 10, 1998. (App.16) The plat document stated as follows: “Lots 402 and 403, Sterett Creek Village a Subdivision in the South Half of the Southwest Quarter of Section 28, in T 41 N, R 22 W of the 5th P.M., Benton County, Missouri. (App. 16) The Dedication of said Plat states as follows:

The undersigned owner of the above described tract of land has caused the same to be surveyed and subdivided in the manor indicated hereon and said subdivision hereafter be known as “Lot 402 and 403 Sterett Creek Village”.

All tracts are subject to conditions and restrictions filed or set forth in an instrument of even date to be filed herewith.

All road as indicated hereon not previously dedicated are hereby dedicated to the use of the property owners for the purpose of ingress and egress and the construction and maintenance of utilities. (App. 16)

Said dedication was executed by Defendant Buddy P. Eichler and Defendant Dorothy F. Eichler on February 25, 1998. (App. 16) That the recorded Survey Plat subdividing Lots 402 and 403 indicate that the property to be purchased by the Plaintiffs from Defendants was located in Sterett Creek Village. These representations made by the Defendant prior to the purchase of Lot 403 and while the Defendant Buddy Eichler was

acting in the capacity of Trustee of Sterett Creek Village. (App. 2-6; 16) At the time of the dedication, the Defendants knew that the property was located just outside the boundaries of Sterett Creek Village and that their statements were false. (L.F.8-13) Plaintiffs reasonably relied upon the Defendants representations as to the location of Lots 402 and 403, as the Defendant Buddy Eichler was a developer and Trustee of Sterett Creek Village.

Plaintiffs cause of action in Count I is not barred by the Statute of Limitations.

RSMo §516.120(5) states:

Within five years:

(5) An action for relief on the ground of fraud, the cause is such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within the ten years, of the facts constituting fraud.

“A cause of action for fraud accrues at the time the defrauded party discovered or in the exercise of due diligence should have discovered the fraud.” Graf v. Michaels, 900 S.W.2d 659, (Mo. App. S.D. 1995); citing Burr v. Nat’l Life & Accident Ins. Co., 667 S.W.2d 5, 7 (Mo. App. 1984). Where the means of discovery exist, the plaintiff will be deemed to have known of the fraud so as to begin the running of the statute. Id. The reliance by the Plaintiffs in this case is upon a recorded document, executed by the Defendants, purporting that the property is located within Sterett Creek Village, and subject to all of its rights and privileges. (App. 16) The Plaintiffs have been billed and paid assessments to Sterett Creek Village, paid well hook up fees, and were allowed to vote and participate in the Sterett Creek Village Trusteeship annual meetings until 2004.

(App. 29-32)

Defendant Buddy Eichler, as Trustee of Sterett Creek Village, allowed the Plaintiffs to participate in annual meetings of Sterett Creek Village, vote at annual meetings, enjoy the use of the pool and pavilion, all in an attempt to hide the fact that the Plaintiffs property was not located in Sterett Creek Village. (L.F. 162, App.29-32) In 2003, the Defendant began using the property noted as “Future Development” in the drawings provided to Plaintiffs prior to purchase by Defendants, in violation of the restrictive covenants which were represented to the Plaintiffs by the Defendants. (L.F. 159-162; App. 9-14). Said violations include by are not limited to placement of a mobile camper and brush pile by Defendants, in front of Plaintiffs’ residence, in violation of the Restrictive Covenants, all for the sole purpose of harassing Plaintiffs and detracting from the use and beauty of Plaintiff’s property, thereby devaluing the same. (L.F. 10).

That prior to Defendants acting in this manner regarding the adjacent property, which Defendants represented said property to be located in Sterett Creek Village, Plaintiffs had enjoyed the benefit of the restrictions and privileges of the beneficiaries of Sterett Creek Village Trusteeship as outlined in the Warranty Deed provided to them by Defendants. (L.F. 89, 91, App. 17-25)

The fraud, predicated by the false written and oral communications from Defendant Eichlers was not discovered by the Plaintiffs until after the Defendants began violating the restrictive covenants in 2002. Plaintiff initiated a lawsuit against Trustee Eichler and the other Trustees of Sterett Creek Village on June 18, 2002, Benton County

Case No. 02CV693545, and was summarily dismissed for lack of standing on May 12, 2004. (App. 35-36)

Plaintiffs inability to enforce the restrictive covenants which he is subjected to is detrimental to the value of his property and was not discovered until the motions to dismiss him for lack of standing in Case No. 02CV693545 were filed on March 25, 2004. (App. 35-36) That the Plaintiffs initiated this action on March 29, 2004, immediately after the filing of a Motion to Dismiss for Lack of Standing in Benton County Circuit Court Case No. 02CV693545. (App. 35-36) Plaintiffs have filed their cause of action within four (4) days of the Motion to Dismiss for Lack of Standing in the previous case, which is within both the five (5) year and fifteen (15) year limitation of time specified under RSMo §516.120(5) and Missouri Law.

The application of the statute is explained in Anderson v. Dyer, 456 S.W.2d 808 (Mo. App. 1970). The statute initially imposes a five year limitation on the commencement of actions brought for relief on the ground of fraud; the concluding portion constitutes a ten-year period during which the commencement of the statute of limitation must accrue or will automatically accrue if not discovered. Graf 900 S.W.2d at 661. If the fraud is not discovered or discoverable during the ten-year period, the cause of action is deemed to have accrued at the termination of such period, and the statute of limitations will begin to run at the of such period and bar filing of claim at the end of fifteen years from when the alleged fraud took place. Id. “[T]he action is to be brought within fifteen years in any event and if the fraud be discovered [or is discoverable] prior

to the lapse of ten years, then within five years after its discovery, [or discoverability].”
Foster v. Pettijohn, 358 Mo. 84, 88; 213 S.W.2d 487, 490 (Mo 1948).

Plaintiffs were represented that Lot 402 and 403 were within Sterett Creek Village and subject to the restrictive covenants in 1998, and Lot 402 was within Sterett Creek Village again on February 1, 2000. (L.F. 8-12, 91; App. 7-25). Defendants further represented that the property adjacent to Lot 402 and 403 was owned by Defendants, was located in Sterett Creek Village, and would be subject to the same restrictive covenants, and would be developed as single family residences pursuant to the drawings provided to Plaintiffs by Defendants. (L.F. 8-13, 159,160; App. 7-34). That the documents provided to Plaintiffs by Defendants, represented that the adjacent land to Plaintiffs Lot 402 and 403 were part of Future Development, located in Sterett Creek Village, would be developed in the same manner and subject to the same restrictions. (L.F. 8-13, 159, 160, App. 7-34).

Under Missouri law, plaintiffs have a duty to make inquiry to discover the facts surrounding the fraud and Plaintiff is deemed to know of the fraud where plaintiff possesses the means of discovery. Gilmore v. Chicago Title Ins. Co., 926 S.W.2d 695, 698 (Mo. App. E.D. 1996). The means of discovering the alleged fraud was not available to the Plaintiffs in the case in that the recorded plat by the Defendants indicates that Lot 402 and 403 are located within Sterett Creek Village, a Subdivision in the South Half of the Southwest Quarter of Section 28, in T 41, R 22 W of the 5th P.M., Benton County, Missouri. (App. 16). The Restrictive Covenants further indicate that the Sterett Creek

Village subdivision is located in the South Half of the Southwest quarter of Section 28, Township 41 North, Range 22 West of the 5th P.M. in Benton County , Missouri. (Exhibit B). The Plat was recorded on April 10, 1998, while the Restrictive Covenants were recorded in 1986, Book 395, Page 267. (App. 16; 17-25) Said Restrictive Covenants further indicate that the Defendant Buddy Eichler is the Trustee of Sterett Creek Village. (App. 17-25). The Warranty Deeds executed by Defendants in favor of Plaintiffs for Lots 402 and 403 reference the Restrictive Covenants recorded in Book 395, Page 267. (L.F. 89, 91).

What is clearly discoverable to the Plaintiffs by the representations and the recorded documents is that Lot 402 and 403 are located within Sterett Creek Village. (L.F. 89, 91; App. 16-25). In Consumers Co'op Assoc. v. McMahan, 393 S.W.2d 552, 556[6] (Mo. 1965), our Supreme Court stated that “where a party makes his own independent investigation, he will be presumed to have been guided by what he learned and the conclusions he reached and will not be permitted to say that he relied on misrepresentations of another and that he was deceived thereby.” Although these investigations deal with visual and structural defects in the property which are hidden in some capacity, the same rule of law should be applied to this case as the representations relate to defects in the enjoyment of the real property which were concealed by the Defendants and not readily accessible, if at all, to the Plaintiffs. The independent investigation of Plaintiffs Larabee would have led them to the conclusion that Lots 402 and 403 were within the Sterett Creek Village.

There are exceptions to the general rule enunciated in Consumers Co'op Assoc., 393 S.W.2d at 556[6] (Mo. 1965). First, when the party making the independent investigation makes only a partial inspection and relies on the misrepresentations as well as the inspection, he may maintain an action for fraud. Iota Management Corp. v. Boulevard Inv. Co., 731 S.W.2d 399, 413[10, 11](Mo. App. 1987).

“Second, the buyer is entitled to rely on the representation when he lacks equal footing for learning the truth where the facts are peculiarly within the knowledge of the party making the representation and are difficult to ascertain.” Artilla Cove Resort, Inc. v. Hartley, 72 S.W.3d 291, 300 (Mo. App. S.D. 2002); citing Iota Management Corp., 731 S.W.2d at 413. The buyer has the right to rely on the representation if the seller makes a distinct and specific representation, even if they stand on equal footing. Id. Defendant Eichlers were developers in Sterett Creek Village, and Defendant Buddy Eichler was the original Trustee from 1986 to the present. (App. 17-25; 26-34). As the original Trustee and developer of Sterett Creek Village, the Defendant was in a superior position to the knowledge of the falsity of the representation and the parties were not on equal footing.

In Artilla Cove Resort, Inc., 72 S.W.3d 291 (Mo. App. S.D. 2002), the purchasers of a building had the right to inspect the building being purchased, and that the property was being sold under contract which contained the following provision:

“BUYER acknowledges that neither SELLER, or any party acting on SELLER’S behalf has made, nor do they hereby make, any representations to the past, present or future condition, income, expense, operation or any other matter, or thing affecting or relating to the Property except as expressly set forth in this Contract.”

Although the purchaser inquired about the structure, they were told that further inspections were not necessary, and the purchasers relied upon the same. Id. The seller did not disclose the foundation problems, and the Court found that the foundation problems were hidden behind a plywood wall which concealed the defects. Id. The evidence in that case, supported the finding that the vendors had knowledge of the structural defects of the building which were beyond the fair reach of the purchasers. Id. at 300. Although the defects as to the structure could have been revealed with extensive inspection of the property, the Court found that the common accepted inspection practices would not have revealed the defects, and the seller could be liable. Id.

In the case at hand, the Plaintiffs inspection of the recorded documents would have revealed that Lots 402 and 403 were located in Sterett Creek Village, subject to the same restrictions, and its physical location was immediately adjacent to Lot 401 of Sterett Creek Village. (L.F. 8-13, 89, 91, 94; App. 16; 17-25). Plaintiffs inquired as to the use of the pavilion, pool, maintenance of roads, snow removal, voting rights, and restrictions all of which were represented to Plaintiffs by Defendants to be part of their rights and privileges in Sterett Creek Village. (L.F. 8-13, 89, 91; App. 16; 17-25).

The Plaintiffs were on less than equal footing as to the truthfulness of the representations made by Defendants, as Plaintiffs were residents of Illinois, while the Defendants were residents of Benton County, were developers in Sterett Creek Village and Trustees in Sterett Creek Village. (L.F. 8-13, 89, 91; App. 16; 17-25). The Plaintiffs reasonably relied upon the documents provided to them by Defendants, recorded

documents and the oral representations made to them by the Defendants regarding Lots 402 and 403 and their location within Sterett Creek Village. Furthermore, their reasonable reliance upon said representations were from an inferior position as that of Defendants regarding the location of Lots 402 and 403 and their access to the privileges of Sterett Creek Village.

In Chesus v. Watts, 967 S.W.2d 97 (Mo. App. W.D. 1998), the plaintiffs were individual purchasers of lots within a residential housing development, and were successful in bringing an action for fraud based upon the developers' alleged failure to carry out stated plans for development. The purchase of the lot was at the early stages of the development and the representations by the developer included:

1. Transfer of common areas to the Association;
2. Construction of a water drainage system, sewer system and roadway
In compliance with state laws;
3. Providing accessibility to ten acres of common areas;
4. Development of the common areas; and
5. Landscaping along the road at Cedar Creek.

To further facilitate sales, the Watts prepared sales brochures which suggested that certain amenities would be provided during the development of the subdivision. Id. at 102. The Court concluded that "...[w]hen a development is a work in progress, a lot buyer should be able to rely on the developer's oral representations regarding amenities and basic services." Id. at 109. "To hold otherwise would require prospective buyers to insist that every detail of the development's plan be in a written binding contract, ...which would be impractical, time-consuming and would likely discourage developers from

providing a variety of amenities.” Id. The promises made by Watts’ were in his complete control, and did not require predicting events over which he had no control. Id. at 112.

The Court further explained that “[a]lthough the facts of Shechter v. Brewer, 344 S.W.2d 784 (Mo. App. 1961), were not analogous to the case in Chesus; i.e.; the seller said the foundation to the house was in good order and that immediately on possession that assertion proved to be incorrect, the language from this court in upholding a fraudulent misrepresentation suit holds true under the facts here some 36 years later.” Chesus, 967 S.W.2d at 112. In Shechter and in Chesus, the defendant sought to imply that the purchaser was negligent in not preventing the fraud, and that the representations were mere statements of opinion. Id. “The tendency of modern decisions is not to extend, but to restrict the rule requiring diligence, and similar rules, such as caveat emptor, and the rule granting immunity for dealers to talk; to condemn falsehood of the fraud feisor rather than the credulity of the victim.” Id. Citing; Schechter 344 S.W.2d at 788.

Defendant Eichlers provided written maps, plat maps, deeds, and oral statements which indicated that Lots 402 and 403 were located in Sterett Creek Village, representing to Plaintiffs that they would be entitled to its rights and privileges. (L.F. 8-13, 89, 91; App. 16; 17-25). Defendant Eichler, as Trustee of Sterett Creek Village, allowed the Plaintiffs access to the privileges of Sterett Creek Village until sometime after 2004. (L.F. 8-13). Plaintiffs’ reliance upon said representations by Defendants, is reasonable and as a

result of the falsity of the relied upon representations, Plaintiffs were damaged. Said falsity of the representations were not discoverable until the Defendants actions made them discoverable sometime between 2002 and 2004.

The cause of action for fraudulent misrepresentation could not have accrued until sometime in 2002, when Defendant violated the restrictive covenants by placing a brush pile and mobile camper in front of Defendants home. Even at that, the Plaintiffs were not aware of their lack of entitlement to the rights and privileges until after that time. The Statute of Limitations under RSMo §516.120(5) would not bar Plaintiffs claim until sometime in 2007.

As the claim was filed on March 29, 2004, the Plaintiffs have filed their claim in a timely fashion, the Trial Court erred by granting Summary Judgment for the Defendants and its decision should be reversed.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THAT THERE ARE GENUINE ISSUES AS TO MATERIAL FACTS IN THE RECORD CONSISTING OF DEPOSITION TESTIMONY, DISCOVERY RESPONSES AND AN AFFIDAVIT OF PLAINTIFFS WHICH PROVIDE FACTS THAT THE DEFENDANTS MADE MATERIAL REPRESENTATIONS TO PLAINTIFFS THAT THE SURROUNDING PROPERTY WOULD BE DEVELOPED IN ACCORDANCE WITH STERETT CREEK VILLAGE TRUSTEESHIP RESTRICTIONS, THAT SAID REPRESENTATION WAS FALSE AT THE TIME IT WAS MADE AND THAT AS A RESULT OF SAID FALSE REPRESENTATION AND REASONABLE RELIANCE THEREON BY PLAINTIFFS, THE PLAINTIFFS HAVE BEEN DAMAGED.

Summary judgment is appropriate when the pleadings, discovery, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 74.04(c). The purpose of summary judgment is to move the parties beyond the allegations and the pleadings and discover if disputed facts exist for trial. Martin v. City of Washington, 848 S.W.2d 487 (Mo. En banc. 1993). Summary Judgment should be exercised with great caution because it borders on the denial of due process. Podlesak v. Wesley, 849 S.W.2d 728, 731 (Mo. Ct. App. S.D. 1993). In the present case, if Plaintiffs, Steve and Frances Larabee can make a case on

any plausible theory, summary judgment is inappropriate. McLees v. J.C. Nichols Company, 842 S.W.2d 115 (Mo. Ct. App. W.D. 1992).

A “genuine issue” of a material fact exists when the record contains competent material that shows plausible, contradictory accounts of essential facts. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. En banc. 1993). The record should be reviewed in the light most favorable to Plaintiffs Larabee. Id. at 376. Facts set forth by deposition and discovery responses shall be taken as true unless contradicted. Id. Plaintiffs Larabee are to be given the benefit of all reasonable inferences. Id. at 382. If a court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute, then summary judgment is not proper. Id. at 378. In this case there are disputed issues of fact as to whether Plaintiffs have been damaged by the misrepresentations made by the Defendants as to Lot 402, Sterett Creek Village, which was purchased from Defendants on February 1, 2000. (L.F. 8-13; 91)

The Plaintiffs claim that the value of their property in Lot 402, Sterett Creek Village is worthless as a result of the false representation made by the Defendants and relied upon by the Plaintiffs in purchasing the same. (L.F. 11). Lot 402 is adjacent to north property line of Lot 403, in Sterett Creek Village. (App. 7-15; 16;). The property located to the South of Lot 403 is not subject to any restrictions as it was represented to the Plaintiffs by the Defendants at the time of purchase. (L.F. 8-13; 159-160; App. 26-34). As a result of the property owned by Defendants to the South being unrestricted (rather than restricted as represented by Defendants to Plaintiffs), Plaintiffs have suffered

a decrease in property value by forty percent (40.0%), or damage of Seventeen Thousand Dollars (\$17,000.00). (L.F. 105-128; specifically 127). Plaintiffs filed an Affidavit with their Suggestions in Support of their Response to Summary Judgment (L.F. 161-162) which indicate other damages as follows:

1. Loss of use of enjoyment do to the visual obstacles of the mobile camper for over four (4) years in violation of the restrictive covenants.
2. Loss of use of enjoyment do to the visual of a brush pile for several months in front of their house in violation of the restrictive covenants.
3. Losing one-half of the roadway to Plaintiffs home which existed at the time of purchase.
4. Failure of Sterett Creek Village Trusteeship (Homeowner's Association) to maintain the road and provide snow removal as represented to us by Defendants.
5. Loss of ability to enforce the restrictions of Sterett Creek Village against the Trustees who have failed to provide us with the services represented to Plaintiffs by the Defendants.

These are damages which provide a genuine issue of material fact for the trier of fact to consider in determining whether or not Plaintiffs were damaged by the misrepresentations of the Defendants. The Trial Court adopted the Defendants' contested facts as true and by not adopting any of the Plaintiffs' uncontested facts. The Trial Court erred as the record contains competent evidence of disputed facts and its decision granting Summary Judgment for Defendants should be reversed.

CONCLUSION

For the reasons stated above, Appellant Cindy Firestone respectfully prays that the decisions of the Circuit Court granting Summary Judgment in favor of Defendants be reversed as to Count I and Count II.

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REQUEST FOR ORAL ARGUMENT

Comes now Appellants, Steven C. Larabee and Frances C. Larabee , and request an oral argument be had on the merits of the Appeal.

APPENDIX INDEX

Judgment A-1

Defendant’s Interrogatory Answers.....A-2

Contract.....A-7

Drawings and Maps.....A-9

Sterett Creek Village Restrictions.....A-17

Plaintiff’s Answers to Interrogatories.....A-26

Case.net Docket Entries.....A-35