IN THE SUPREME COURT OF MISSOURI

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| SHAWN STEVENS,<br><br>Appellant,<br><br>vs.<br><br>MARKIRK CONSTRUCTION, INC.,<br>KIRK JONES, AND<br>DAMAR DEVELOPMENT, INC.,<br><br>Respondents. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal No.: SC94074 |

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

THE HONORABLE MARCO ROLDAN, CIRCUIT JUDGE

# SUBSTITUTE BRIEF OF RESPONDENTS MARKIRK CONSTRUCTION, INC. AND KIRK JONES

**BROWN & JAMES, P.C.**
David R. Buchanan #29228
Derek H. MacKay #59078
Patrick A. Bousquet #57729
1900 City Center Square
100 Main Street
Kansas City, MO 64105
Telephone: (816) 472-0800
Facsimile: (816) 471-1183
Email: pbousquet@bjpc.com
*Attorneys for Respondents Markirk Construction, Inc. and Kirk Jones*

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**ABBREVIATIONS**

A.B. – Appellant's Brief

L.F. – Legal File

Tr. – Transcript

## INTRODUCTION

This appeal involves a claim of fraudulent misrepresentation brought by Appellant Shawn Stevens ("Plaintiff") against Respondent Kirk Jones involving a residential real estate transaction.[1] Plaintiff, Shawn Stevens, testified at trial that Mr. Jones told him the lot he ultimately purchased—Lot 335—would not flood, and if it did, Mr. Jones would remedy the situation. Mr. Jones denied he ever said that. Nonetheless, even if he did make such a statement, it was necessarily a representation concerning a future event, which, under Missouri law, has a more stringent scienter requirement for tort liability.

To prove fraud based on a representation about a future event, a plaintiff must prove the defendant knew the representation was fault at the time he made it. Thus, the trial court properly instructed the jury that in order to find in Plaintiff's favor, it must conclude that the "defendant knew it was false at the

[1] The fraudulent misrepresentation claim was submitted to the jury by separate verdict directing instructions for Kirk Jones and Damar Development, Inc. ("Damar"), and the jury separately found in favor of both defendants. Plaintiff solely appeals the verdict directing instruction for fraudulent misrepresentation against Mr. Jones. There was a second claim submitted to the jury for nuisance against Damar (the jury found in favor of Damar) that Plaintiff also did not appeal.

time the representation was made." Missouri Approved Instruction 23.05 (2007). The jury, in turn, correctly found in favor of Mr. Jones.

Plaintiff now claims the trial court erred in requiring the jury to find that Mr. Jones knew the representation was false. In so doing, Plaintiff attempts to recast the representation made by Mr. Jones as a statement of the existing condition of the lot by claiming that Mr. Jones guaranteed that the lot was "flood-proof." (Appellant's Br. 28).[2] Even taking Plaintiff's account of his discussions with Mr. Jones about the lot as true, that is not what Mr. Jones said. Not only is Plaintiff's characterization of Mr. Jones' alleged statement unsupported by the

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[2] Throughout Plaintiff's brief, he states that Mr. Jones represented the lot as "flood-proof" or "that the lot was designed and constructed in such a manner that it would not flood." For ease of citation, this revision as to Jones' statement is contained in Appellant's Brief on pages 24, 28, 34, 38, 39, 41, 44, and 45, but will be generally referred to as Plaintiff's contention that the lot was represented as "flood-proof."

Additionally, it should be noted that, throughout his brief, Plaintiff refers to the misrepresentation instruction as "Instruction No. 6." However, the misrepresentation instruction was submitted to the jury as Instruction No. 7. It appears that the mix-up occurred during the jury instruction conference, when Judge Roldan skipped Instruction No. 4. Please see Appendix A for the set of instructions submitted to the jury.

evidence presented at trial, Plaintiff's own proposed jury instruction framed the statement as a representation of future events, asking the jury to find for plaintiff if, inter alia, "defendants represented to plaintiffs that Lot 335 ***would not flood*** or that defendants would remedy any flooding problem experienced by Lot 335". (L.F. 0167) (emphasis added).

Indeed, Plaintiff's testimony at trial was that Mr. Jones' representation was "an assurance that there ***would be*** no problems." (Tr. 147, ¶ 16–17). This representation, on its face, related solely to potential future events. Therefore, the trial court properly instructed the jury using the scienter standard for misrepresentations as to future events.

Finally, Plaintiff does not come close to showing that he suffered any prejudice as a result of this jury instruction, a showing that is required for him to prevail. *Bach v. Winfield-Foley Fire Prot. Dist.,* 257 S.W.3d 605, 608 (Mo. banc 2008). Indeed, he makes no attempt to show prejudice at all, other than to baldly state that the jury's verdict prejudiced him. That is not enough, and his claim of error may be—and should be—rejected on this basis alone.

As Plaintiff has failed to show that the trial court committed any error at all, much less prejudicial error, this Court should affirm the judgment entered on the jury's verdict in favor of Mr. Jones.

## STATEMENT OF FACTS

In 1999, Plaintiff began looking for a cul-de-sac lot in or around Blue Springs, Missouri, upon which to build a house. (Tr. 29–30). After inspecting several plots in the Stone Creek subdivision, he found the lot at issue in this appeal, Lot 335. (Tr. 35–36). When the lot became available, in February of 2000, Plaintiff again went to inspect the property, prior to meeting with Mr. Jones about the lot. (Tr. 37, ¶5–23). According to his trial testimony, it was at this point Plaintiff became concerned that "water would come through the lot." (Tr. 37, ¶5–23). Despite these concerns, in March of 2000, he put a hold on the lot. (Tr. 38, ¶14–15). On direct examination at trial, Plaintiff testified that, prior to placing the hold, Mr. Jones told him "[t]here are no water issues on Lot 335, and if there are, I will regrade, we will regrade, we will build retaining walls, whatever it takes to resolve the problem." (Tr. 42, ¶2–5).

Plaintiff further claimed that in May of 2000, after speaking with his builder, Ed Rockwell, he again spoke with Mr. Jones regarding his concern about the water and Mr. Jones said "[t]here are no water issues on this lot. If there [are], we'll regrade, build retaining walls, whatever we have to do, to solve it." (Tr. 52, ¶20–22). Plaintiff testified in his deposition, an excerpt of which was read at trial, that Mr. Jones told him "there should be no problem with water pertaining to my lot that flows across it, damaging, flooding, to Lot 335, to the lot in question." (Tr. 145, 147, ¶ 17–19, 15–18). On cross-examination, Plaintiff clarified

that the statement from Mr. Jones was "an assurance that there would be no problems." (Tr. 147, ¶ 16–17).

Plaintiff allegedly had issues with water in his yard for the duration of his ownership, including "erosion, silt deposits . . . no matter whenever the rain stops . . . the moisture is moving down there . . . . it's always soggy. No swing sets, no pools, no patios . . . . I get no use of it." (Tr. 11, ¶21–25). Plaintiff began attempting to sell the house in 2009 and, as of the time of trial, had not been able to sell the property. (Tr. 121, 123).

Plaintiff filed a multiple-count Petition against Defendants, Markirk Construction, Inc., Kirk Jones, and Damar Development, Inc., on November 24, 2009 alleging, among other things, fraudulent misrepresentation arising out of a contract to buy land. A jury trial was held in May of 2012. At trial, Plaintiff's attorney proposed a verdict director on the fraudulent misrepresentation claim that read in relevant part:

> Your verdict must be for plaintiffs if you believe:
>
> First, defendants represented to plaintiffs that Lot 335 would not flood or that defendants would remedy any flooding problem experienced by Lot 335, and
>
> ***
>
> Fourth, defendants made the representation without knowing whether it was true or false . . . .
>
> (L.F. 0167)

Defendants proposed this verdict director:

> In Verdict No. ___, on plaintiffs' claim for fraudulent misrepresentation, your verdict must be for defendants unless you believe each of the following:
>
> First, Kirk Jones stated prior to the time plaintiffs purchased Lot 335 that there would be no problems caused by flooding or excessive storm water drainage, and
>
> ***
>
> Fifth, at the time the representation was made, Kirk Jones knew the representation was false.
>
> (L.F. 0093)

At the instruction conference, Plaintiff's attorney argued that the "defendant represented that the lot in its current condition would not flood." (Tr. 225, ¶ 17–18). In so doing, she argued that Missouri Approved Instruction (MAI) 23.05, Missouri's approved fraudulent misrepresentation instruction, required the jury to be instructed that "Defendants represented to Plaintiff that Lot 335 would not flood and that if it did, Defendants would remedy any flooding problem experienced by Lot 335." (Tr. 225, ¶ 22–25). Plaintiff's attorney contended the statement that "the lot would not flood was a representation as to present conditions that induced Plaintiffs to purchase Lot 335." (Tr. 226, ¶7–10). Thus, Plaintiff wanted the jury instructed using the less stringent "knew or should have known" version of MAI 23.05. *Id.* Defendants disagreed, stating that

'[t]he representation in this case is that it would not flood in the future . . . and that if it did, Defendants would remedy any flooding problem experienced on Lot 335." (Tr. 226, ¶18–22). Therefore, Defendants' position was that the Court should give the version of MAI 23.05 requiring actual knowledge. *Id.*

After denying Plaintiff's proposed instruction, Plaintiff's counsel suggested that she "would be perfectly fine with the notion of breaking the two out" to reflect (1) a statement as to current condition (that the lot would not flood) and (2) a future event (that defendants would remedy any flooding), and that the less stringent and more stringent scienter requirements be used, respectively. (Tr. 228, ¶1–9). The court reiterated that Plaintiff's proposed instruction was denied. (Tr. 228, ¶15–16). The case was then submitted to the jury with the instruction that "defendant Kirk Jones represented to plaintiff Shawn Stevens that Lot 335 would not flood and that if it did, defendants would remedy any flooding problem experienced by Lot 335" and that "defendant Kirk Jones knew that it was false at the time the representation was made." (App'x A). The jury found in favor of Mr. Jones and Damar, and the trial court entered judgment on May 22, 2012. (L.F. 0187). Plaintiff appealed. After a decision of the Missouri Court of Appeals, Western District, reversing the jury's verdict, this Court granted transfer.

Plaintiff's arguments on appeal surround the proper application of MAI 23.05 for fraudulent misrepresentation. MAI 23.05 and its notes on use set forth three levels of scienter:[3]

1. The Defendant knew the statement was false;
2. The Defendant knew the statement was false at the time the representation was made; or
3. The Defendant made the representation without knowing whether it was true or false.

Missouri Approved Instructions 23.05 (2007).

The Committee Notes on Use 1 direct the Court to use the second alternative—that the Defendant knew the statement was false at the time it was made—for a misrepresentation of a future event. Notes on Use 1, Missouri Approved Instructions 23.05 (2007). The notes specifically state that the third alternative—that the Defendant made the statement without knowing whether it was true or false—is inappropriate for a misrepresentation of a future event. *Id.*

[3] MAI 23.05 contains seven elements. The parties disagree as to the fourth element, the level of scienter needed to find Defendants liable for fraudulent misrepresentation. For simplicity of argument, this fourth element will be referred to as the "scienter element" or "intent element."

## POINTS RELIED ON

**I. The second scienter alternative for MAI 23.05 was properly submitted to the jury.**

Missouri Approved Instruction 23.05 (2007)

*Brennaman v. Andes & Roberts Bros. Const. Co.*, 506 S.W.2d 462 (Mo. App. 1973)

*Lowther v. Hays*, 225 S.W.2d 708 (Mo. 1950)

**II. Plaintiff cannot meet the high burden of demonstrating the instruction was prejudicial and that the trial court abused its discretion.**

*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. banc 2010)

*Livingston v. Baxter Health Care Corp.*, 313 S.W.3d 717, 728 (Mo. App. 2010)

## ARGUMENT

### Preliminary Statement Regarding the Standard of Review

Plaintiff claims this Court's review in this matter is *de novo*. (A.B. 27). It is true that Missouri courts, including this Court, have stated that the issue of whether a jury is properly instructed is a question of law reviewed *de novo*. *Hervey v. Mo. Dept. of Corrections*, 379 S.W.3d 156, 159 (Mo. banc 2012). It is also true that, pursuant to Rule 70.02(a), "[w]henever Missouri Approved Instructions contains an instruction applicable to the facts of a case, such instruction shall be given to the exclusion of any other instructions on the same subject." *Templemire v. W & M Welding, Inc.*, 2014 WL 1464574 (Mo. banc Apr. 15, 2014). But, that is not really the issue here. The trial court gave the approved fraudulent misrepresentation instruction set forth in MAI 23.05, and used one of the scienter alternatives expressly stated in that approved instruction. There is no question that the jury instruction given accurately stated the law.

Plaintiff argues on appeal, however, that the trial court erred in giving the verdict director using the second scienter alternative ("defendant knew that it was false at the time the representation was made") rather than the third scienter alternative, as proposed by Plaintiff ("defendant made the representation without knowing whether it was true or false"). (A.B. 23). Alternatively, Plaintiff argues that the trial court should have given both scienter alternatives in separate instructions. *Id.* The issue, then, is not simply whether the jury was correctly instructed on the law. Rather, the question is which of the alternative scienter

requirements set forth in MAI 23.05 was supported by the evidence—the one regarding representations as to present condition or the one regarding representations of a future event.

The trial judge, having heard all of the evidence regarding the alleged statement, was uniquely positioned to determine whether the statement related to future events or to a present condition, and his determination should be entitled to deference on appeal. The judge found that the alleged statement upon which Plaintiff based his case related to future events and not the present condition of Lot 335. (Tr. 227-28). He therefore gave Mr. Jones' proposed instruction, and refused to give Plaintiff's proposed instruction with the less stringent scienter requirement for statements as to a present condition. *Id.* He also denied Plaintiff's request for two separate instructions. *Id.* at 228.

Plaintiff's claim that this Court's review is *de novo* is overly simplistic and legally incorrect as to his appeal of these rulings. [4] As this Court has stated, "[a] trial court's refusal to give an instruction is reviewed for abuse of discretion."

[4] Plaintiff challenges both the giving of Mr. Jones' proposed instruction and the refusal to give Plaintiff's proposed variants of the instruction in the same point. This is improper. Points containing multifarious allegations of error do not comply with Rule 84.04(d). *Atkins v. McPhetridge*, 213 S.W.3d 116, 120 (Mo. App. 2006). This Court should dismiss Plaintiff's appeal on this basis alone. *Duncan-Anderson v. Duncan*, 321 S.W.3d 498, 499-500 (Mo. App. 2010).

*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 97 (Mo. banc 2010); *see also Butler State Bank v. D & G Const. Co., Inc.,* 659 S.W.2d 239, 245 (Mo. App. 1983) (where, in determining whether the trial court should have submitted a modified MAI form instruction, the Court of Appeals stated that the "submission of or refusal to submit the tendered instruction was within the discretion of the trial court"). Further, as to Plaintiff's challenge to the instruction that *was* given, this Court views the evidence "in the light most favorable to the submission of the instruction," and "give[s] the prevailing party the benefit of "all the reasonable inferences from those facts, and disregarding all unfavorable inferences." *Klotz v. St. Anthony's Medical Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010); *Hudson v. Whiteside*, 34 S.W.3d 420, 427 (Mo. App. 2000).

Finally, even were this Court to determine that the trial court improperly concluded that the scienter requirement for statements of future events applied, instructional error warrants reversal only if the error results in prejudice that "materially affects the merits of the action." *Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605, 608 (Mo. banc 2008). To justify reversal, the instruction must have "misled, misdirected, or confused the jury." *Fleshner*, 304 S.W.3d at 90-91.

## I. The second scienter alternative for MAI 23.05 was properly submitted to the jury.

At trial, the parties disagreed about whether the representation Plaintiff claims Mr. Jones made about flooding on Lot 335 was a representation as to a future event or a statement about an existing condition. As discussed above, MAI 23.05 applies a different scienter requirement for future versus present representations. The trial court agreed with Mr. Jones that the alleged statement contained future promises (i.e., that the lot would not flood, and if it did, he would remedy it) and, therefore, the more stringent intent element was appropriate. (Tr. 227-228). Plaintiff's attempt to cast the statement as one regarding an existing condition (that the property was "flood-proof") is unpersuasive. Even taking Plaintiff's self-serving trial testimony as true, that is not what Mr. Jones said.

### A. The statement made by Mr. Jones was a representation of a future event and, therefore, the trial court submitted the correct scienter requirement to the jury.

As Plaintiff correctly points out, there are two types of fraud recognized in Missouri: fraudulent representation as to an existing fact and fraudulent representation as to an intention to perform in the future. *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409, 421 (Mo. App. 1996) (citing *Dillard v. Earnhart*, 457 S.W.2d 666, 670 (Mo. banc 1970)). The Notes on Use for MAI 23.05 state that "misrepresentation of a future event," is a fraud requiring a specific intent

instruction that the defendant knew the representation was false at the time it was made. Notes on Use 1, Missouri Approved Instruction 23.05 (2007); *see also Klecker v. Sutton*, 523 S.W.2d 558, 562 (Mo. App. 1975) ("Vital to recovery on the theory of an actionable misrepresentation of an existing purpose of state of mind is a current intention by the promisor at the time the agreement is made not to perform."); *Brennaman v. Andes & Roberts Bros. Const. Co.*, 506 S.W.2d 462, 466 (Mo. App. 1973) ("Misrepresentation of intent to perform requires the measure of the promisor's purpose at the time the agreement is made . . . ."). A review of cases addressing the distinction between the two types of fraud makes clear that the alleged representation at issue in this case related to future events and, thus, required knowledge of its falsity at the time it was made.

In *Judy*, the defendant was a manufacturer of log home kits and represented to the plaintiff that the log homes were "long-lasting and durable; weather-tight; the logs were penta treated to avoid fungus damage." 923 S.W.2d at 420. The court differentiated between representations about existing conditions and promises to perform in the future, noting that the statements in question were about the existing condition of the logs at the time of sale. *Id.* at 421. Specifically, the court held that the representations were about the design of the joints as "weather-tight" and that the logs were penta treated "to minimize the threat of rot." *Id.* The court found these to be statements about the current condition of the logs, "intended to induce plaintiffs to purchase their log homes." *Id.*

Similarly, in *Wolk v. Churchill*, another case relied upon by Plaintiff and cited in the Notes on Use for MAI 23.05, the Eighth Circuit Court of Appeals separated several representations made by Defendants into future promises and representations about current conditions. 696 F.2d 621, 626 (8th Cir. 1982). Specifically, the Defendants agreed (1) that they owned and were able to transfer to the Plaintiffs certain realty and personalty; (2) to transfer the patent on the scissor lift; (3) that they owned and were able to transfer all of the stock of the company; and (4) to pay down a balance on a note up to $28,532.40. *Id.* at 623. In finding the more relaxed intent instruction given by the district court inappropriate, the court of appeals stated that the two promises to transfer the patent and to reduce the balance on the note were promises as to future conditions and required the heightened intent instruction of knowledge of the statements' falsity. *Id.* at 626. It conversely found that the statements as to ownership and ability to transfer specific assets were representations as to present conditions. *Id.*

*Klecker*, another case cited in the Notes on Use to MAI 23.05, explicitly held that, "where the representation is the promise of an act to be performed in the future," the stricter intent element is to be used. 523 S.W.2d at 562. In *Klecker*, the court found that the representations made by Defendants, that they "could and would purchase an equipment package and install it for the plaintiff . . . and could and would sell the equipment package to plaintiff on an installment basis at a competitive rate of interest" to be representations of future events. *Id.*

at 561–62. In fact, the court's analysis seemed to treat this as a given, not addressing the different factual scenarios, but rather, focusing on the import of applying the more stringent intent element—that the defendant intended at the time the promise was made not to perform—in cases of future promises. *Id*. at 562.

*Brennaman* is the most instructive on the issue of representations regarding the future versus the present. In *Brennaman*, the defendants, in a real estate contract, agreed that a home to be built for Plaintiffs "would be built 'to FHA plans and specifications.'" 506 S.W.2d at 464. The court specifically found this to be a future representation, holding: "[i]n the subject case, appellants do not complain that the model home exhibited was misrepresented as to quality of materials, construction, durability, or capacity, but *rather that the home later constructed was not, as represented*, of like materials and construction as the model." *Id*. at 466 (emphasis added).

As the above cases demonstrate, Mr. Jones' statement was a promise of future performance and, thus, the trial court properly submitted the instruction required for a representation of a future event. For the first time on appeal, Plaintiff attempts to describe Mr. Jones' statement as a guarantee that the lot was "flood-proof" in its present condition. Yet, the jury instruction proposed ***by Plaintiff*** was that "defendants represented to plaintiffs that Lot 335 ***would not flood*** and that if it did, defendants would remedy any flooding problem experienced by Lot 335." (L.F. 0143, 0167) (emphasis added). The language

ultimately submitted to the jury, likewise, was that "defendant Kirk Jones represented to plaintiff Shawn Stevens that Lot 335 ***would not flood*** and that if it did, defendants would remedy any flooding problem experienced by Lot 335." (Appendix A) (emphasis added). As Mr. Jones' trial counsel correctly noted in the instruction conference, "[t]he representation in this case is that it would not flood *in the future* . . . . [and] that if it did, Defendants would remedy any flooding problem experienced on Lot 335." (Tr. 226) (emphasis added). This is a representation of a future event, which requires the use of the more stringent intent element. There was no evidence, as in *Judy*, that Mr. Jones made guarantees as to the current condition of Lot 335. There was no testimony that he claimed it was flood-proof or graded to prevent flooding. In fact, Plaintiff admitted that he was aware of the grade of the land and the potential for water to flow across the lot prior to purchasing the lot. (Tr. 127-128). Therefore, the correct instruction was submitted to the jury and the judgment should be upheld.

**B. Kirk Jones' statement was properly submitted to the jury as one representation.**

The verdict directing instructions submitted by ***both*** parties contained a single representation by Mr. Jones—that the lot would not flood and, if it did, he would remedy the problem. At the instruction conference, after Plaintiff's proposed instruction was denied, Plaintiff's counsel stated that she would be "perfectly fine" with splitting the two statements up and saying that the statement "the lot would not flood" was a statement concerning the present condition of the

land, and should be submitted to the jury using the lower scienter standard, whereas the statement "defendants would remedy any flooding" was a statement of future intention and the stricter scienter requirement applied. *Id.* It is questionable whether this constituted a proposed jury instruction sufficient to preserve the issue for appeal. Nonetheless, the trial court did not err in failing to submit two separate instructions for several reasons. (Tr. 228).

Most importantly, Mr. Jones' alleged statement that the lot "would not flood," standing alone, is insufficient to support a claim of fraudulent misrepresentation. It is well-settled that "[m]ere statements of opinion, expectations and predictions for the future are insufficient to authorize a recovery." *Lowther v. Hays*, 225 S.W.2d 708, 714 (Mo. 1950); *Dancin Development, L.L.C. v. NRT Missouri, Inc.*, 291 S.W.3d 739, 744 (Mo. App. 2009). If Mr. Jones stated that the lot would not flood, which he expressly disputed at trial (Tr. 216-17), that would be, at best, a prediction or a statement of his expectations for the future. It is the allegation that Mr. Jones also promised that he would remedy any flooding issues in the event they occurred that is actionable. That part of the alleged representation, however, is unquestionably a promise as to a future intent to perform, which requires proof that Mr. Jones knew it was false at the time it was made. *See Grossoehme v. Cordell,* 904 S.W.2d 392, 396 (Mo. App. 1995) (noting that "[g]enerally, statements of intent as to future events are not actionable as fraud, but a promise accompanied by the

present intent not to perform is a misrepresentation of present state of mind and will support an action for fraud").

Further, even according to Plaintiff's testimony at trial, ***both*** statements were representations about future events. Thus, there was no need for separate verdict directors for the "present" and "future" parts of the alleged representation. Plaintiff admitted as much at trial, stating that he took Mr. Jones' statement as "an assurance that there would be no problems." (Tr. 147). The trial court rightly agreed. (Tr. 228). Accordingly, even if Plaintiff properly preserved his claim on appeal that the trial court should have submitted two separate verdict directors, which is doubtful, the court properly submitted only one verdict director using the scienter requirement for representations as to a future event.

### C. Any error in the court submitting the instruction for representations as to future events was self-invited by Plaintiff.

As discussed above, Plaintiff's own proposed verdict director characterizes Mr. Jones' statement as one regarding future events. Plaintiff's verdict director set forth the alleged misrepresentation as "defendants represented to plaintiffs that Lot 335 ***would not flood*** or that defendants would remedy any flooding problem experienced by Lot 335." (LF 0167). This representation, as phrased by Plaintiff, is simply not one about the past or present—it is not that the lot "has not flooded" or even that it is "flood-proof," as Plaintiff suggests. It is that it "would

not flood." The representation, as set forth by Plaintiff, is a representation as to the future condition of the property.

The trial court relied on Plaintiff's characterization of the representation. Indeed, in denying Plaintiff's request that the lesser scienter standard be used, the trial judge stated:

> Let the record reflect the Court obviously—I'm relying on the first paragraph, of the way that it is being submitted in the first paragraph. And the first paragraph does allege not one but ***two future events the way that the plaintiff has phrased that***, so the request to change forth [sic] will be denied but I will mark your instruction as denied for the record.

(Tr. 227). Even in suggesting that the two parts of the statement could be submitted separately, Plaintiff's counsel did not suggest any change to the tense of the statement that would make it refer to the present; rather, she referred to it consistently as "the representation that Lot 335 would not flood." (Tr. 228).

Having characterized Mr. Jones' representation in terms of future happenings, or the lack thereof, Plaintiff may not now accuse the trial court of error. It has long been held in Missouri that a party may not complain of self-invited error. *Schell v. F.E. Ransom Coal & Grain Co.*, 79 S.W.2d 543, 549 (Mo. App. 1935); *Baker v. Kansas City, F.T.S. & M. R. Co.*, 26 S.W. 20, 39 (Mo. banc 1894). As this Court has stated, "[a] party cannot lead the court into error and

then employ that error as a source of complaint." *Calarosa v. Stowell*, 32 S.W.3d 138, 146 (Mo. App. 2000).

While Mr. Jones strongly contests that the trial court's refusal to submit Plaintiff's proposed verdict director was erroneous, any such error in treating the alleged misrepresentation as relating solely to future events, rather than the present condition of the property, was invited by Plaintiff's own characterization of Mr. Jones' statement. Plaintiff may not use instructional error he created to reverse the jury's verdict. As such, this Court should affirm.

## II. Plaintiff cannot meet the high burden of demonstrating the instruction was prejudicial and that the trial court abused its discretion.

The trial court found that the alleged statement upon which Plaintiff based his fraud claim was related to future events and, therefore, the required scienter element was that Mr. Jones knew the representation was false at the time he made it. (Tr. 227, ¶ 16–22). This was just one of the seven elements of fraud that Plaintiff had to prove, which also included that the representation was made with the intent that Plaintiff rely on it, that the representation was material to the purchase of the property, that Plaintiff reasonably relied on the representation, and that he sustained damage. *CADCO, Inc. v. Fleetwood Enterprises, Inc.*, 220 S.W.3d 426, 436 (Mo. App. 2007); MAI 23.05. Based on all the evidence presented at trial, the jury found for Mr. Jones. (L.F. 0187).

To warrant reversal, Plaintiff was required to show not only that the jury was wrongly instructed, but also that "(1) the instruction as submitted misled, misdirected, or confused the jury; and (2) prejudice resulted from the instruction." *Fleshner*, 304 S.W.3d at 91. Indeed, he had to show that the error was so great that it "materially affected the merits and outcome of the case." *Livingston v. Baxter Health Care Corp.*, 313 S.W.3d 717, 728 (Mo. App. 2010). Here, Plaintiff has made no showing that the jury instruction was prejudicial. In fact, in Plaintiff's forty-six page opening brief, the ***only*** reference to prejudice is one sentence on the last page that states: ". . . this error was prejudicial to

Plaintiff-Appellant in that it resulted in a defense verdict." (Appellant's Br. 46). A defense verdict is not a showing of prejudice.

For Plaintiff to prove prejudice based on the trial court using the higher scienter standard of MAI 23.05, he was required to show how the result would have been any different if the jury had been instructed that it could find in favor of Plaintiff if Mr. Jones made the statement "without knowing whether it was true or false." Yet, he points to absolutely no evidence that Mr. Jones made any statement about flooding on Mr. Steven's lot without knowing whether it was true or false. He does not explain how the jury was misled or confused by the instruction that was given, nor does he even attempt to show how the verdict would have been different if the jury had been instructed with the lesser scienter standard.

Because Plaintiff has wholly failed to prove his burden of showing that any instructional error was prejudicial, this Court should affirm the judgment entered on the jury's verdict.

## CONCLUSION

The alleged representation by Kirk Jones that formed the basis of Plaintiff's fraudulent misrepresentation claim at trial was that Lot 335 would not flood and, if it did, he would remedy any flooding. This representation, which Mr. Jones denies making in first place, plainly relates to future events. As such, under MAI 23.05, the trial court was required to instruct the jury that it could find for Plaintiff only if Mr. Jones knew the statement was false. The court did just that and the jury found for Defendants.

Plaintiff's dissatisfaction with the verdict cannot change Mr. Jones' statement to one warranting the condition of the land as "flood-proof." There is nothing in the record indicating that Mr. Jones made any such statement. Thus, the court correctly found that the facts supported the scienter instruction for misrepresentation of future events. Further, any error in treating the alleged misrepresentation as one relating to future events was self-invited by Plaintiff characterizing Mr. Jones' statement as being that the lot "would not flood"—a statement regarding the future.

Finally, Plaintiff has not demonstrated—indeed, did not even attempt to demonstrate—any prejudice resulting from this instruction. Therefore, the trial court's entry of judgment on the jury's verdict should be affirmed.

Respectfully submitted,

Patrick A. Bousquet
**BROWN & JAMES, P.C.**
David R. Buchanan #29228
Derek H. MacKay #59078
Patrick A. Bousquet #57729
1900 City Center Square
100 Main Street
Kansas City, MO 64105
Telephone: (816) 472-0800
Facsimile: (816) 471-1183
Email: pbousquet@bjpc.com
*Attorneys for Respondents Markirk Construction, Inc. and Kirk Jones*

## CERTIFICATE OF SERVICE

I hereby certify that, on the 1st day of August, 2014, the foregoing, as well as the Appendix hereto, was filed via the Court's electronic filing system, which served a true and correct copy upon the following: Margaret Lineberry, Lineberry Law Firm, P.C., 520 W. 103rd Street, No. 214, Kansas City, MO 64114, *Attorney for Appellant Shawn Stevens*.

/s/ Patrick A. Bousquet
Patrick A. Bousquet, # 57729

## CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Substitute Respondent's Brief includes the information required by Rule 55.03.

2. The Substitute Respondent's Brief complies with the limitations contained in Rule 84.06;

3. The file containing the Substitute Respondent's Brief has been scanned for viruses and is virus-free; and

4. The Substitute Respondent's Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, and contains 5,475 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Brief was prepared.

/s/ Patrick A. Bousquet
Patrick A. Bousquet, #57729