WD75532

In the
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SHAWN STEVENS
Plaintiff-Appellant
vs.
MARKIRK CONSTRUCTION, INC., ET AL.,
Defendants-Respondents

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

BRIEF OF PLAINTIFF-APPELLANT SHAWN STEVENS

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NO. 6, THE VERDICT DIRECTOR REQUESTED BY DEFENDANTS, WHICH WAS BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE SECOND ALTERNATE TO PARAGRAPH FOURTH ("[DEFENDANT KNEW THAT IT WAS FALSE AT THE TIME THE REPRESENTATION WAS MADE]"), AND IN (2) (A) REFUSING TO GIVE THE VERDICT DIRECTOR REQUESTED BY PLAINTIFF, WHICH WAS BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE THIRD ALTERNATE TO PARAGRAPH FOURTH ("[DEFENDANT MADE THE REPRESENTATION WITHOUT KNOWING WHETHER IT WAS TRUE OR FALSE]"), OR (B) REFUSING TO GIVE TWO VERDICT DIRECTORS AS REQUESTED BY PLAINTIFF BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE THIRD ALTERNATE TO PARAGRAPH FOURTH FOR MISREPRESENTATION OF THE EXISTING CONDITION OF LOT 335 AND USING THE SECOND ALTERNATE TO PARAGRAPH FOURTH FOR MISREPRESENTATION OF DEFENDANTS' PRESENT INTENT AS TO FUTURE PERFORMANCE, AND (3) AND IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON THIS ERROR, BECAUSE RULE 70.02(A) DIRECTS THAT JURY INSTRUCTIONS "SHALL BE GIVEN OR REFUSED BY THE	

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JURISDICTIONAL STATEMENT

This is an appeal from an action in the Circuit Court of Jackson County involving multiple claims by Plaintiff-Appellant Shawn Stevens against Defendant-Respondents Markirk Construction, Inc. and Damar Development, Inc.

After a jury trial, the Circuit Court entered judgment in favor of Defendants-Respondents Markirk Construction, Inc. and Damar Development, Inc. and against Plaintiff-Appellant Shawn Stevens on his claims.

Appellant-Respondent Developer Services Corporation filed a timely notice of appeal. This Court has jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution in that this appeal does not address any issue that falls with the exclusive jurisdiction of the Missouri Supreme Court.

STATEMENT OF FACTS[1]

General overview.

This case involves the severe and recurrent flooding of a subdivision lot purchased by Plaintiff-Appellant Shawn Stevens and on which he built his home, located at 3102 Shrout Creek Court, Blue Springs, Missouri, 64015, with the legal description of Lot No. 335, Stone Creek Subdivision, 18th Plat. (T.8) The land on which the subdivision was developed was owned by the Shrout family of Blue Springs, operating under the corporate name of Defendant-Respondent Damar, Inc., and the development work (including all of the grading of the subdivision land) was performed by Defendant-Respondent Markirk Construction, Inc. under the supervision and direction of Defendant-Respondent Kirk Jones, President.

Mr. Stevens purchased the lot, located at the bottom of a hill, while the subdivision was still under development and at a time when the contours of the land could have been modified to prevent the lot from flooding. Mr. Stevens was induced to purchase the lot by Defendant-Respondent Kirk Jones' representations, made twice, that the lot would not flood or that, if flooding did occur, Defendants-Respondents Kirk Jones

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[1] References to the Legal File are designated by page number as follows: "L.__."

References to the Transcript are designated by page number as follows: "T.__."

References to Trial Exhibits are designated by exhibit number as follows: "Plaintiff's Ex.__," "Defendant Markirk/Jones Ex.__," or Defendant Damar Ex.__."

References to the Appendix are designated by page number as follows: "A-__."

and Markirk Construction would re-grade the land in the subdivision, install retaining walls, or do whatever else might be necessary to prevent the lot from flooding. As it turned out, the lot began flooding even before the construction of Mr. Stevens' house was completed, and has continued flooding to this day. Defendants-Respondents Kirk Jones, Markirk Construction, and Damar all have refused to take any action to prevent or alleviate the flooding.

1999 – Development of the StoneCreek Subdivision.

As additional background, during 1999 Markirk Construction, Inc. was in the process of developing raw land owned by Damar, Inc. into a subdivision called the StoneCreek Subdivision, 18th Plat, in Blue Springs, Missouri. Because the Shrout family lacked development expertise, their family corporation called Damar, Inc. had contracted with Defendant-Respondent Markirk Construction to develop the subdivision and to help market and sell the subdivision lots. (T.201-202)

Defendant-Respondent Markirk Construction performed all of the activities of a typical developer, including preparing the plat for review by the City, obtaining the City's approval of the development plans, overseeing the installation of the infrastructure, and obtaining the City's final approval of the plat and authorization to sell lots. (T.201-202)

At the time of development of the 18th Plat, Defendant-Respondent Markirk Construction's primary contact with Defendant-Respondent Damar, Inc. was Martin Shrout, but his son Doug Shrout was always involved as well. (T.200-201)

The subdivision took over a year to develop, and Kirk Jones was at the site every

possible working day, both performing development work as well as marketing the lots. (T.218-19) Kirk Jones had at least weekly contact with Damar, Inc., to provide updates, to ask Damar to have the title company prepare the paperwork for a lot sale, etc. (T.204-205)

Defendant-Respondent Markirk Construction, Inc. received $2,000 per lot sold, plus 50% of the net profits at the conclusion of the development work. (T.211) Therefore, of the $34,000 paid by Mr. Stevens for Lot 335, Markirk Construction received $2,000 and Damar received $32,000, with the two parties splitting 50/50 any additional profits realized with respect to Lot 335 (and the remainder of the subdivision upon its completion). (T.212)

1999 – Mr. Stevens begins looking for a lot on which to build a house.

Also during 1999, Mr. Stevens and his then-wife had been talking about building a new house. They had a couple of criteria for the subdivision lots in which they were interested; specifically, they wanted a lot that was located on a cul-de-sac (because less traffic would provide greater safety for their four-year-old daughter and two-year-old son), and one that would accommodate the construction of a house with a walkout basement. (T.26-28)

Mr. Stevens happened upon the development, which had a sign identifying it as the site of the new StoneCreek Subdivision, stating "Markirk Construction, Lots Available." Mr. Stevens began exploring the development on his own to see whether it had any lots that met the criteria he and his wife had established. (T.29-30) He saw several walkout lots (which he defined as lots that sloped downward from the street

toward the back of the lot), but only one (Lot 335) that was located on a cul-de-sac. (T.30-31)

Mr. Stevens called the telephone number on the sign to ask about the lot he had found. Although Mr. Stevens was told by David Lee, the office manager for Markirk Construction (T.199-200), that Lot 335 was not available for purchase, Mr. Lee made arrangements for Mr. Stevens to tour the subdivision with Kirk Jones, President of Markirk Construction, to look at other lots. Kirk Jones showed Mr. Stevens a number of walkout lots but none was located on a cul-de-sac, and so Mr. Stevens stopped looking at the StoneCreek Subdivision. (T.35)

February 2000 - Lot 335 becomes available.

Around February 2000, Mr. Stevens received a call from David Lee, saying that Lot 335 had become available for purchase. (T.34) After receiving the call, Mr. Steven looked at the lot again on his own and then visited it in the company of Mr. Jones. Mr. Jones represented that Lot 335 was suitable for construction of a house with a walkout basement. (T.35-36)

Ed Rockwell of Rockwell Construction was Mr. Stevens' homebuilder. (T.42-43) Sometime in 1999, Mr. Stevens had asked Mr. Rockwell to act as the contractor for the house. (T.45) The house design was a reverse story and a half with a walkout basement, which was a modified version of one of Mr. Rockwell's existing plans. (T.44-46)

On March 21, 2000, Mr. Stevens received a facsimile transmission from Markirk Construction, stating that Lot 335, with its 25-foot setback, could easily accommodate the house with its planned dimensions (64 feet wide and 70 feet deep), and that the house

could be even wider if it were set back farther into the pie-shaped lot.(T.53, 51)

March 21, 2000 – Defendant-Respondent Kirk Jones makes his first representation to Mr. Stevens.

Also on March 21, 2000, Mr. Stevens and Mr. Rockwell met at Lot 335 to discuss the construction of the house. They discussed the possibility of water coming across the lot because of the configuration of the land. (T.57)Specifically, the areas to the east and north of the backyard were of higher elevations, and the rear of the lot's backyard sloped down into what appeared to be part of a natural drainageway. (T.37-38) They agreed that Mr. Stevens would talk with Kirk Jones and then get back to Mr. Rockwell with a decision. (T.57)

When Mr. Rockwell and Mr. Stevens met at Lot 335, Mr. Rockwell again stated his concern that there would be water on the lot. (T.50) This exacerbated Mr. Stevens' concerns, and he contacted Mr. Jones again about the potential for water on the lot. (T.50)

Mr. Stevens told Kirk Jones about Mr. Rockwell's concerns, and Mr. Stevens again asked whether the lot would have water problems. (T.51) Kirk Jones responded that there were no water problems with the lot and that, if there were, they would re-grade, build retaining walls, do whatever they had to do to resolve any problems. (T.41-42, 51) Defendant-Respondent Markirk Construction was the grading contractor as well as the developer for the Subdivision. (T.218) It was Markirk Construction's equipment and employees who moved the dirt, not a subcontractor. (T.185) Markirk Construction was the grading contractor for the 18th Plat, and Kirk Jones was responsible for making

sure the grading was done. (T.185) Markirk Construction had graded every lot in the subdivision, and so any dirt moved around on any lot was done under Kirk Jones' direction and control. (T.219)

Mr. Stevens' memory on this conversation is very clear, because this purchase "turned into the biggest deal of my life, period." (T.42) Kirk Jones' statement was the basis for Mr. Stevens' purchase of Lot 335, and it provided the reassurance that he needed before he bought the lot. (T.42) Kirk Jones' statement was the basis on which Mr. Stevens relied in purchasing Lot 335. (T.43) After that conversation with Kirk Jones, Mr. Stevens paid his deposit for the purchase of Lot 335. (T.43)

March 22, 2000 - Mr. Stevens puts a deposit on Lot 335.

On March 22, 2000, the day after speaking with Mr. Rockwell and then with Kirk Jones, Mr. Stevens entered into a "Lot Hold" agreement on Lot 335, putting down a deposit of $1,000 to reserve Lot 335 for his later purchase.

Also on March 22, 2000, Mr. Stevens sent a fax to Mr. Rockwell discussing various aspects of the house and providing a rough sketch. (T.59-60)

April 20, 2000 – Defendant-Respondent Kirk Jones makes his second representation to Mr. Stevens.

On April 20, 2000, Mr. Stevens again met with Mr. Rockwell at Lot 335. They talked about the placement of the house on the lot, the location of the door for the walkout basement, a rough estimate of the cost to build the house, and they again discussed the water concern, agreeing that Mr. Stevens would discuss this issue once again with Kirk Jones. (T.60-62)

At the time Mr. Stevens had this second conversation with Kirk Jones, Lot 335 was, obviously, just a dirt lot. (T.51) The house to the east was under construction and may have been framed in by that time, but its yard area was also dirt. (T.51-52) And all the lots on the uphill side were dirt. On some of the lots, foundations were in, and some had had their rough-in framing done. And for other lots, excavation had not even begun. (T.52) So the subdivision was still under development. (T.52) At the time Kirk Jones made his second representation to Mr. Stevens, the status of development of the subdivision was such that the promises made by Kirk Jones could have been performed, whether they involved a need to re-grade the area, build retaining walls, or do whatever else was necessary to solve a water problem. (T.52-53)

This second meeting between Mr. Stevens and Kirk Jones at Lot 335 occurred before Mr. Stevens purchased the lot. Kirk Jones told Mr. Stevens twice that he would not have any flooding problems with Lot 335, and Kirk Jones said it very specifically and adamantly the second time. (T.166)

June 2000 – Mr. Stevens buys Lot 335 and contracts with Rockwell Construction.

Mr. Stevens entered into a Contractor Agreement, dated June 13, 2000, with Rockwell Construction for the construction of his house. (T.65-66) Several amendments or revisions were made to the Contractor Agreement during the course of construction of the house. (T.67-68). The house was completed and final payment was made in mid-March, 2001, at which time the Stevens moved in. (T.68-69)

Late 2000 - Defendant-Respondent Kirk Jones goes back on his word.

In late 2000, during the course of construction, Mr. Stevens became aware of

water problems with the lot and had conversations with Kirk Jones about this. Although he had expressed some concern before Mr. Stevens purchased the lot, now Mr. Jones was saying he was not responsible and that Mr. Stevens needed to talk to someone else, including Doug Shrout, and Mr. Jones pointed fingers several ways. (T.76)

Early 2001 – Mr. Stevens begins to take steps to protect house from flooding.

Because the developer was not doing what he had said he would do to fix the problem, Mr. Stevens knew he would need to put money into his yard. He had Rockwell Construction stop the interior finish work in the basement and instead cut terraces in the backyard, i.e., to excavate some of the dirt from the backyard to accommodate the placement of large landscaping stones in the backyard. (T.73-74)

The back of Mr. Stevens' house faces north, toward a hill, as does the east side of his lot. Any surface water from those higher elevations, whether due to rainfall, snowfall, lawn sprinklers, etc., flows down the hills and across his backyard. Mr. Stevens had Rockwell Construction excavate dirt from the backyard, to push the flat part of the backyard to the north as far as possible, both to keep the water away from his basement as well as to dissipate the flow of water across the yard in an attempt to prevent the water from cutting a gully in the backyard. (T.73-75)Flattening out the backyard in this fashion resulted in the creation of a "hill" of dirt toward the north part of his lot that Mr. Stevens planned to hold in place with a retaining wall composed of large landscaping stones. (T.74-75)

March 2001 – House is completed and Mr. Stevens installs landscaping stone.

Rockwell Construction finished the requested terracing work in approximately

January 2001 (T.75), and the house was completed in mid-March 2001. (T.78)

After moving into the house in March 2001, Mr. Stevens purchased the landscaping stones for the retaining wall, and the seller of the stone unloaded it in the front yard. (T.78)

At the time, Mr. Stevens was working for KC Bobcat, so he was able to use one of their machines to haul the landscaping stones to the backyard; however, because the machine weighed 8,000 pounds, the stone weighed 2,000 pounds, and the backyard was so frequently swampy and wet, it took several months to move the stone and place it in the backyard. (T.80-81) As a result of this delay in the completion of his landscaping, he received threatening letters from both his Homeowners' Association in June 2001 and from the City of Blue Springs in September 2001. (T.77-83)

Damages suffered as a result of Defendants—Respondents' misrepresentations.

The area where the water floods is the best flat part of his yard, where he could have installed a pool and a little kids' area, because the remainder of the backyard slopes uphill at the back of his yard to the north. (T.17-18) Due to the water drainage across the backyard, however, he could not place a swing set or a pool in the backyard, or enlarge his patio. (T.98-99) He could not play catch with his son in the backyard, and the backyard has been rendered useless for any type of structure, toys, usage, entertainment, or having friends over. (T.99) He has never had a big event in the backyard, ever. (T.99) There have been times when it would have been nice, but it just cannot be used. (T.99) When it dries up, you could, but there would still be divots and ruts and weeds carried down from four yards uphill. (T.99-100) It's just not a place to take people and

hang out. (T.100)

Mr. Stevens took a videotape (Plaintiff's Tr. Ex. 2B), on which he captured the effect of rainfall on his property on several occasions, beginning on April 24, 2003. (T9) The videotape shows rainwater flowing downhill, in two streams, from the yard of the neighbor to the east. The two streams converge at Mr. Stevens' yard and then flow downhill to the neighbor's property to the west. (T.10-11) The videotape depicts the effect of a typical rain, not a "gully washer" but the kind of rain that happens several times each year, consistently. (T.10-11) As the water moves downhill from east to west, the quantity of water builds, the speed intensifies, and the water moves with force, leading to erosion, silt deposits, and soggy ground, preventing the installation of a swing set, a pool, a patio, essentially rendering the backyard "useless." (T.11) The water is deep and fast-moving. (T.12) It turns up the soil and results in mud and silt moving through the area. (T.12) And the area through which the water flows is widening over time. (T.12) The velocity of the water flowing downhill results in "whitecapping" waves. (T.12) The area of waterflow is moving closer to his house (T.13) He has done the best he could, given the slope of the property, to try to drain as much water from the backyard to the front of the house, to the street. (T.13)

Mr. Stevens took a second videotape in May 2012 (Plaintiff's Tr. Ex. 2B), which shows the damaged condition of his yard. (T.100-109)

Mr. Stevens also took certain photographs (Plaintiff's Tr. Ex. 3-A through 3-O), capturing the damaging effects of the floodwater across his lot, and the materials he has purchased and the labor he has performed in attempting to repair the damage. These are

all representative of his experiences from 2001 through the date of trial. (T.84-97)

Mr. Stevens saved some of the receipts for the amounts he incurred in attempting to repair the damage and the checks he wrote for such expenses, but these are not the sum total of the amounts he has incurred. (Plaintiff's Tr. Ex. 29-30) (T.97-98, 169-70)

Most ominously, he built a 10 x 10 patio behind his house, and the water has now begun to come up on the patio. (T.14) Further, the rock wall is now becoming affected by the water and it is collapsing and falling in areas. (T.113) When the rains come, it makes the ground soft and the weight of the rocks, in combination with the silt deposits on the face of the wall, is causing the rock wall to fall in areas, especially in the middle where there is soil erosion, as shown in the May 2012 video. (T.113) He had placed another layer or two of rocks beneath the walls to provide a solid surface for the walls to sit on, but this footing is sinking as well. (T.114)

Mr. Stevens has listed his house for sale but has had no luck selling it. (T.101-102) Mr. Stevens' house is currently listed for sale. (T.121) He has listed it on and off since 2007 or 2009. (T.121) In 2009, he had it listed to move. (T.121) The house is currently listed at $312,500. (T.121-22) He has dropped the price from its starting point of $330,000, which was the price recommended by his realtor (T.122) This was after he had disclosed the backyard problem to the realtor. (T.122) He has been told that there were a couple of people over time who were interested in it, but then he never heard from them again. (T.122-23) He has not been able to sell the house even after dropping the price to $312,500. (T.123)

In sum, from the time he bought the lot until today, he has had problems with

flooding, with damage to the yard, with expenses incurred to fix the yard, he has never been able to use the yard, and he cannot sell the house. He "didn't [intend to] buy a lifelong project"; he "bought a house to enjoy." (T.17)

POINT RELIED ON

I. THE TRIAL COURT ERRED IN (1) GIVING INSTRUCTION NO. 6, THE VERDICT DIRECTOR REQUESTED BY DEFENDANTS, WHICH WAS BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE SECOND ALTERNATE TO PARAGRAPH FOURTH ("[DEFENDANT KNEW THAT IT WAS FALSE AT THE TIME THE REPRESENTATION WAS MADE]"), AND IN (2) (A) REFUSING TO GIVE THE VERDICT DIRECTOR REQUESTED BY PLAINTIFF, WHICH WAS BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE THIRD ALTERNATE TO PARAGRAPH FOURTH ("[DEFENDANT MADE THE REPRESENTATION WITHOUT KNOWING WHETHER IT WAS TRUE OR FALSE]"), OR (B) REFUSING TO GIVE TWO VERDICT DIRECTORS AS REQUESTED BY PLAINTIFF BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE THIRD ALTERNATE TO PARAGRAPH FOURTH FOR MISREPRESENTATION OF THE EXISTING CONDITION OF LOT 335 AND USING THE SECOND ALTERNATE TO PARAGRAPH FOURTH FOR MISREPRESENTATION OF DEFENDANTS' PRESENT INTENT AS TO FUTURE PERFORMANCE, AND (3) AND IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON THIS ERROR, BECAUSE RULE 70.02(A) DIRECTS THAT JURY INSTRUCTIONS "SHALL BE GIVEN OR REFUSED BY THE COURT ACCORDING TO THE LAW AND THE EVIDENCE IN THE CASE," AND THE FORMS OF VERDICT DIRECTOR(S)

REQUESTED BY PLAINTIFF HAVE BEEN DETERMINED BY THIS COURT IN PRIOR REPORTED CASES TO BE THE PROPER VERDICT DIRECTOR(S) IN CASES SUCH AS THE ONE AT BAR, AND INSTRUCTION NO. 6 AS GIVEN BY THE CIRCUIT COURT MISDIRECTED, MISLED, OR CONFUSED THE JURY AND WAS PREJUDICIAL TO PLAINTIFF IN THAT INSTRUCTION NO. 6 CAUSED THE JURY TO RETURN VERDICTS IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF.

MAI 23.05 2012.

Judy v. Arkansas Log Homes, Inc., 923 S.W.2d 409 (Mo. App. W.D. 1996).

Wolk v. Churchill, 696 F.2d 621 (8th Cir. 1982).

Klecker v. Sutton, 523 S.W.3d 558 (Mo. App. W.D. 1975).

ARGUMENT

I. THE TRIAL COURT ERRED IN (1) GIVING INSTRUCTION NO. 6, THE VERDICT DIRECTOR REQUESTED BY DEFENDANTS, WHICH WAS BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE SECOND ALTERNATE TO PARAGRAPH FOURTH ("[DEFENDANT KNEW THAT IT WAS FALSE AT THE TIME THE REPRESENTATION WAS MADE]"), AND IN (2) (A) REFUSING TO GIVE THE VERDICT DIRECTOR REQUESTED BY PLAINTIFF, WHICH WAS BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE THIRD ALTERNATE TO PARAGRAPH FOURTH ("[DEFENDANT MADE THE REPRESENTATION WITHOUT KNOWING WHETHER IT WAS TRUE OR FALSE]"), OR (B) REFUSING TO GIVE TWO VERDICT DIRECTORS AS REQUESTED BY PLAINTIFF BASED ON MAI 23.05, "FRAUDULENT MISREPRESENTATION," USING THE THIRD ALTERNATE TO PARAGRAPH FOURTH FOR MISREPRESENTATION OF THE EXISTING CONDITION OF LOT 335 AND USING THE SECOND ALTERNATE TO PARAGRAPH FOURTH FOR MISREPRESENTATION OF DEFENDANTS' PRESENT INTENT AS TO FUTURE PERFORMANCE, AND (3) AND IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON THIS ERROR, BECAUSE RULE 70.02(A) DIRECTS THAT JURY INSTRUCTIONS "SHALL BE GIVEN OR REFUSED BY THE COURT ACCORDING TO THE LAW AND THE EVIDENCE IN THE CASE," AND THE FORMS OF VERDICT DIRECTOR(S)

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Klecker v. Sutton, 523 S.W.3d 558 (Mo. App. W.D. 1975).

Introduction

There are essentially two types of fraudulent misrepresentations – (1) false representations of existing facts, and (2) false promises of future performance. In a case involving a false representation of an existing fact, the proper statement of intent is that the defendant made the representation "without knowing whether it was true or false." For a false promise of future performance, the proper *scienter* hypothesis is that defendant "knew at the time the misrepresentation was made that it was false."

In the case at bar, Plaintiff-Appellant Stevens presented evidence that Defendants-Respondents had made both types of fraudulent misrepresentation to him: (1) they had made a false representation of an existing fact by assuring Plaintiff-Appellant Stevens that Lot 335 **– in the present, existing condition in which it was sold** -- would not

flood, given the manner in which the subdivision had been designed and developed; and (2) they had made a false promise of future performance by assuring Plaintiff-Appellant Stevens that they would remedy the problem if Lot 335 did flood, while never intending, at the time they made the promise, to actually provide such a remedy in the future.

Here, Plaintiff-Appellant Stevens properly proffered the third alternate for Paragraph Fourth of MAI 23.05, which is to be used in the case of misrepresentation of an existing condition, and in the alternative Plaintiff-Appellant suggested use of the third alternate to submit the misrepresentation of an existing condition and use of the second alternate to submit the misrepresentation of present intent with respect to future performance. Defendants-Respondents argued for use of the second alternate ("that defendant knew that it was false at the time the representation was made") which is, as made clear by the Notes on Use, to be submitted only in the case of a misrepresentation of a future event. By Instruction No. 6, the Court submitted the case to the jury using the second alternate as suggested by Defendants-Respondents. The submission of this case pursuant to Instruction No. 6 with use of the second alternate to Paragraph Fourth of MAI 23.05 was erroneous under the law and the facts of this case, and was prejudicial to Plaintiff-Appellant given that use of Instruction No. 6 caused the jury to return defense verdicts in this case.

Standard of Review

Missouri Rule of Civil Procedure 70.02(a) states that the Circuit Court "shall" give or refuse jury instructions "according to the law and the evidence in the case." In the context of Rule 70.02(a), the word "shall" is understood not to allow an exercise of

discretion on the part of the Circuit Court if the requested instruction is required by law and supported by the evidence. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 397 (Mo. App. W.D. 2011).

There are three situations in which an instruction is found to be "required by law":

The first is "[w]henever Missouri Approved Instructions contains an instruction applicable in a particular case." Rule 70.02(b).

Second, an instruction is required by law if the instruction is not found in the Missouri Approved Instructions but is required by statute. *See, e.g.*, *In re Care and Treatment of Lewis v. State*, 152 S.W.3d 325, 329-30 (Mo. App. W.D. 2004).

And, finally, an instruction is required by law "if the law has been materially altered following the promulgation of the applicable MAI instruction, such that the applicable instruction no longer complies with the substantive law, thus requiring the giving of a modified version of the approved MAI instruction." *State v. Edwards*, 60 S.W.3d 602, 612 (Mo. App. W.D. 2001).

This Court's review of the Circuit Court's action is *de novo* if the questioned instruction is one required by law and supported by the evidence. *Marion v. Marcus*, 199 S.W.3d 887, 892-94 (Mo. App. W.D. 2006). Conversely, where the requested instruction is not required under any of the three circumstances set forth above, this Court reviews the Circuit Court's action for abuse of discretion. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 396 (Mo. App. W.D. 2011).

The case at bar involves an instruction "required by law" given that the verdict director requested by Plaintiff-Appellant Stevens is a sanctioned version of MAI 23.05.

Further, the alternates to Paragraph Fourth requested by Plaintiff-Appellant Stevens were found to be proper in *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409 (Mo. App. W.D. 1996) (log homes manufacturer's representation that, *inter alia*, joints were designed to be weather-tight was a statement of existing fact, not a representation as to future intent and thus use of third alternate to Paragraph Fourth of MAI 23.05 was held to be proper), and *Klecker v. Sutton,* 523 S.W.3d 558 (Mo. App. W.D. 1975) (holding that first or second alternate to Paragraph Fourth of MAI 23.05 applies to situations involving defendant's promise of future performance but not to situations involving misrepresentation of existing condition).

Therefore, this Court is to determine whether the jury was properly instructed as a matter of law, *Klotz v. St. Anthony's Medical Center,* 311 S.W.3d 752, 767 (Mo. banc 2010); *Koppe v. Campbell,* 318 S.W.3d 233, 243 (Mo. App. W.D. 2010), and the Court reviews this issue *de novo. Wagner v. Bondex International, Inc.,* 368 S.W.3d 340, 355 (Mo. App. W.D. 2012); *Koppe, supra,* 318 S.W.3d at 243.

In reviewing the claim of error, however, the Court views the evidence and inferences that may be drawn therefrom in the light most favorable to the submission of the instruction. *Wagner v. Bondex International, Inc.,* 368 S.W.3d 340, 355 (Mo. App. W.D. 2012); *Mehrer v. Diagnostic Imaging Ctr., P.C.,* 157 S.W.3d 315, 323 (Mo. App. W.D. 2005).

Further, in order to reverse on instructional error, the Court must find that the instruction "misdirected, mislead, or confused the jury." *Sorrell v. Norfolk S. Railway Co.,* 249 S.W.3d 207, 209 (Mo. banc 2008); *Wagner v. Bondex International, Inc.,* 368

S.W.3d 340, 355 (Mo. App. W.D. 2012) *Koppe v. Campbell*, 318 S.W.3d 233, 243 (Mo. App. W.D. 2010). The Court also must find that the error resulted in prejudice that materially affected the merits of the underlying action. *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 767 (Mo. banc 2010).

Argument and Authorities

This case provides to the Court an opportunity to further clarify and refine the requirements for submission of MAI 23.05 in fraudulent misrepresentation cases. In the case at bar, Plaintiff-Appellant Stevens alleges that, to induce his purchase of the subdivision lot on which he built his home, Defendants-Respondents made two fraudulent misrepresentations, one as to an existing condition and one as to a future event. With respect to the misrepresentation of an existing condition, Defendants-Respondents assured Plaintiff-Appellant that the lot "would not flood" – in other words, that the lot in its existing condition was essentially "flood-proof." Defendants-Respondents went on to make a misrepresentation as to a future event, assuring Plaintiff-Appellant that, if the lot did flood, Defendants-Respondents would do "whatever was necessary" to resolve the problem.

MAI 23.05 provides that its Paragraph First should include a description of the misrepresentation in question, while its Paragraph Fourth posits the mindset of the defendant at the time the misrepresentation was made:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant *(describe act such as "represented to plaintiff that the motor vehicle was never in an accident")*, and

Second, such representation was made by defendant with the intent that plaintiff rely on such representation in *(purchasing the motor vehicle)*, and

Third, the representation was false, and

Fourth, [defendant knew that it was false][defendant knew that it was false at the time the representation was made][defendant made the representation without knowing whether it was true or false], and

Fifth, the representation was material to the *(purchase of the motor vehicle)*, and

Sixth, plaintiff relied on the representation in *(making the purchase)*, and such reliance was reasonable under the circumstances, and

Seventh, as a direct result of such representation, plaintiff sustained damage.

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number __ *(here insert number of affirmative defense instruction)*].

Notes on Use 1, the footnote appearing at the end of the list of Paragraph Fourth's three alternates, instructs that the second alternate is required for submission of a misrepresentation of a future event, while the third alternate is not appropriate for submission of a misrepresentation of a future event. Thus, according to the Note on Use,

a plaintiff submitting on the misrepresentation of an existing condition would be entitled to posit the third alternate, that:

> Fourth, defendant made the representation without knowing whether it was true or false . . . .

On the other hand, Note on Use 1 provides that a plaintiff submitting on a defendant's misrepresentation of a present intention regarding future performance would submit on the second alternate, as follows:

> Fourth, defendant knew that it was false at the time the representation was made . . . .

As noted, the case at bar presented both types of misrepresentations: misrepresentation of an existing condition (that the existing condition of the lot was such that it would not flood) and misrepresentation of future performance (that if the lot did flood, Defendants-Respondents would take whatever steps might be necessary to provide appropriate remedies). At the instructions conference, however, the Circuit Court was swayed by Defendants-Respondents' argument that the case involved only a misrepresentation of a future event, because only a flood occurring in the future would show whether the lot was flood-proof and whether the Defendants-Respondents would provide any promised remedy. Based on this argument, the Circuit Court submitted, as Instruction No. 6, the version of the verdict director submitted by Defendants-Respondents and given by the Circuit Court, which provided as follows:

INTRODUCTION NO. 6

Your verdict must be for plaintiff Shawn Stevens and against defendant

Kirk Jones if you believe:

First, 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

Second, such representation was made by defendant Kirk Jones with the intent that plaintiff Shawn Stevens reply on such representation in purchasing Lot 335, and

Third, the representation was false, and

Fourth, defendant Kirk Jones knew that it was false at the time the representation was made, and

Fifth, the representation was material to plaintiff's decision to purchase Lot 335, and

Sixth, plaintiff Shawn Stevens relied on the representation in purchasing Lot 335, and such reliance was reasonable under the circumstances, and

Seventh, as a direct result of such representation, plaintiff Shawn Stevens sustained damage.

This submission was improper under the authorities cited in Notes on Use 1 to Paragraph Fourth of MAI 23.05, including this Court's decision in *Klecker v. Sutton*, 523 S.W.3d 558 (Mo. App. W.D. 1975) (holding that the "future event" standard applies to situations involving a defendant's promise of future performance but not to situations involving misrepresentation of an existing condition,), and the Eighth Circuit's decision in *Wolk v. Churchill*, 696 F.2d 621 (8th Cir. 1982) (noting that misrepresentation of an

existing fact may be submitted on a finding that defendant knew of the falsity of the misrepresentation or did not know whether it was true or false, while misrepresentations of present intent to perform in the future must be submitted on a finding that defendant knew that the representation was false at the time it was made).

Notes on Use 1 to MAI 23.05, which provides guidance on the statement of intent to be used with different types of misrepresentations, cites *Klecker v. Sutton*, 523 S.W.2d 558 (Mo. App. W.D. 1975). *Klecker* involved fraudulent misrepresentations made by defendant leading to plaintiff's purchase of a food service franchise along with an "equipment package."

In its fraudulent misrepresentation discussion, *Klecker* cited the then-recently-decided case of *Brennaman v. Andes & Roberts Brothers Construction Co.*, 506 S.W.2d 462 (Mo. App. W.D. 1973), which recognized and analyzed the apparent divergence in the case law relating to fraudulent misrepresentations. Specifically, *Brennaman* considered whether plaintiffs had an actionable claim against defendant developer / contractor for its misrepresentation that it would build a house for plaintiffs that complied with "FHA plans and specifications." The *Brennaman* Court noted that the question presented was the availability of relief to a fraud claimant where the material fact misrepresented was the defendant's state of mind, i.e., defendant's contemporaneous intention not to perform the agreement. *Brennaman, supra,* 506 S.W.2d 462, 464. *Brennaman* listed the cases (now discredited) in which relief was denied based on the conclusion that fraud cannot be predicated on a mere promise, even though accompanied by a present intention not to perform, on the ground that even under such circumstances

defendant is not misrepresenting an existing fact. *Brennaman* then considered the contrary cases (which constitute the modern rule), which hold that the defendant's state of mind, i.e., his intention to perform the promise, may be misrepresented and thus may constitute an actionable misrepresentation of fact. However, because the essence of fraud is the misrepresentation of an existing fact, plaintiff must establish defendant's current intention not to perform at the time the promise is made. *Brennaman*, *supra*, 506 S.W.2d 462, 465.

With the *Brennaman* reasoning in mind, the *Klecker* Court returned to its consideration of the misrepresentation made to plaintiff as posited in the verdict director premised on MAI 23.05. The Court noted that the form of MAI 23.05 then available did not include the theory of a defendant's fraudulent misrepresentation of his existing state of mind but the Court stated its belief that any such instruction would require "a finding on the issue of falsity *at the time* of the making of the representation." *Klecker v. Sutton*, *supra*, 523 S.W.2d 558, 562. Thus, it appears that the reasoning in *Klecker* may have been the basis, at least in part, for the inclusion in MAI 23.05 of the three alternate statements of the defendant's intent at the time of making the fraudulent misrepresentation in question.

As applied to the case at bar, *Klecker* makes clear that the use of the "future event" statement of intent in MAI 23.05 (i.e., "defendants knew that it was false at the time the representation was made") applies to situations involving a defendant's promise of future performance, but not to the situation of misrepresentation of an existing condition.

Therefore, use of this alternate with respect to defendants' misrepresentation that the lot was "flood-proof" was error and this error was prejudicial to plaintiff.

In addition to its citation to *Klecker, supra,* footnote no. 1 to MAI 23.05 cites to *Wolk v. Churchill*, 696 F.2d 621 (8th Cir. 1982). *Wolk* is a helpful case, and particularly applicable to the case at bar, because it involved both misrepresentations of existing fact as well as misrepresentations of a present intent to perform in the future. *Wolk*'s discussion included the different statements of intent applicable to each type of misrepresentation that are to be included in the respective verdict directing instructions.

Specifically, plaintiffs Wolk, who had sold a business to defendants Churchill, brought suit against defendants for payment. Defendants counterclaimed on plaintiffs' alleged fraudulent misrepresentations that had induced defendants' agreement to purchase the business. The District Court had instructed as follows on defendants' Churchill fraudulent misrepresentation claim against plaintiffs Wolk :

> Your verdict must be for the defendants on their counterclaim for fraudulent misrepresentations if you believe, first, plaintiff Charles Wolk represented to the defendants that there were no business liabilities or obligations of any nature, whether absolute, accrued, contingent or otherwise, except as disclosed by the plaintiffs to the defendants, that the plaintiffs had no knowledge of any developments or threatened developments of the nature that would be materially adverse to the business, that the plaintiffs would transfer United States Patent 3991857 to the defendants, that the plaintiffs would reduce the payment balance by any

amount not collected by the defendants on the sale of certain washer units, not to exceed $28,532.40, and that an injunction preventing the sale of these washer units would be lifted in November, 1978, to enable their sale to satisfy past due amounts in the union pension fund owed by the business, that no litigation was pending or threatened or in prospect against or relating to said business, that the plaintiffs owned all of the outstanding capital stock of said business, intending that the defendants rely upon any such representation, in purchasing the assets and stock of Ormsby Osterman, Incorporated;

And second, that any of the representations were false;

And third, that plaintiff Charles Wolk did not know whether the representations were true or false;

And fourth, any of the representations were material to the purchase by the defendants of the assets and stock of Ormsby Osterman, Incorporated;

And fifth, defendants reasonably relied upon any of the aforesaid representations in making the purchase;

And sixth, as a direct result of any such representations, the defendants were damaged.

Wolk, supra, 696 F.2d at 623-24.

On appeal, the Eighth Circuit noted that, in Missouri, the proper statement of intent on a claim of fraudulent misrepresentation of an existing fact is defendant's

knowledge of the falseness of the representation or ignorance as to its truth or falsity. The Eight Circuit agreed with plaintiffs that defendants' counterclaim for misrepresentations arising out of a promise of future performance must be supported by the showing of an existing intent not to perform at the time the promise was made:

> The instruction given by the district court correctly summarized the general intent standard necessary to sustain a claim of fraudulent misrepresentation in Missouri - the speaker's knowledge of the falsity of a representation or ignorance of its truth. *See Cotner v. Blinne,* 623 S.W.2d 615, 618 (Mo. App. 1981). As discussed in our consideration of Wolk's first objection to this instruction, however, some of the listed misrepresentations were promises which Wolk allegedly had failed to perform. As to such promises, a showing of intent not to perform at the time the promise was made is necessary to support a fraud claim - the intent to perform is an existing fact and the speaker must know that intent is falsely represented, not just be unsure of the likelihood of her or his own future performance. *Ogilvie v. Fotomat Corp., supra,* 641 F.2d at 585; *Dillard v. Earnhart, supra,* 457 S.W.2d at 670-671; *McGuire v. Bode, supra,* 607 S.W.2d at 168; *Bauer v. Adams, supra,* 550 S.W.2d at 853; *Klecker v. Sutton,* 523 S.W.2d 558, 562 (Mo. App. 1975).
>
> The verdict-directing instruction in the present case did not properly make this distinction: the district court stated that the intent necessary as to each misrepresentation was only that Wolk "did not know whether the

representations were true or false." Thus, the jury was allowed to assess liability and damages under an erroneous legal standard as to any misrepresentations which were promises of future action by Wolk. We find that this error could have affected the damages awarded by the jury on the counterclaim, and that Wolk is entitled to some relief on appeal because of the error. Ordinarily, the relief requested by Wolk, a new trial, would be the proper remedy for such error. In the present case, however, the error was limited to those listed misrepresentations which were, in essence, promises made by Wolk. We find that only two of the listed misrepresentations fall into this category-Wolk's promise to transfer the patent on the scissors lift, and Wolk's promise to reduce the payment balance on the note by any amount, up to $28,532.40, not recovered on the sale of certain washer units in the company's inventory.

The highest value reasonably attributable to the patent on the record was $40,000, as Wolk himself testified. Also, if the jury believed that Wolk's promise to pay the difference in the sale price of the washer units and $28,532.40 was a fraudulent misrepresentation, the most damage to the Churchills which reasonably could be attributed to this misrepresentation would be $28,532.40, assuming that the units were without value and that Wolk refused to abide by the reimbursement provision. Thus, the maximum amount of actual damages assessed by the jury which reasonably could be attributed to the error in the verdict-directing instruction on fraud is

> $68,532.40 - $40,000 for the patent and $28,532.40 for the washer unit reimbursement. The remainder of actual damages awarded by the jury can be attributed to the numerous undisclosed liabilities found in the record, concerning which the instruction on fraud was entirely proper.

Wolk, supra, 696 F.2d at 626-27 (footnotes omitted). Therefore, the Eighth Circuit distinguished between misrepresentations of existing fact and misrepresentations of present intent to perform in the future. Misrepresentations of existing fact may be submitted on a finding that defendant knew the falsity of the misrepresentation or did not know whether it was true or false. Conversely, misrepresentations of present intent to perform in the future must be submitted on a finding that defendant knew that the representation was false at the time it was made. *Id.*

The *Wolk* holding is entirely applicable to the case at bar. Defendants' misrepresentation as to the existing condition of Lot 335 (i.e., that it was "flood-proof" at the time it was sold to plaintiff, because of the manner in which the subdivision was designed and developed) should have been submitted with plaintiff's hypotheses of defendants' intent – that defendants made the representation without knowing whether it was true or false. Therefore, Instruction No. 6, with its sole statement of intent that "defendant Kirk Jones knew that it was false at the time the representation was made" was prejudicially erroneous to plaintiff.

In addition to Footnote 1 relating to Paragraph Fourth, MAI 23.05 includes several Notes on Decisions illustrating the proper use of this instruction, including Note 10 which cites to this Court's opinion in *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409 (Mo.

App. W.D. 1996). *Judy* is controlling in this case, and was brought to the Circuit Court's attention by Plaintiff-Appellant at the instructions conference.

Judy involved fraudulent misrepresentation claims arising out of defendant's design, manufacture, and supply of log home kits. Plaintiffs alleged their log homes rotted because of the improper design of the joints between the logs, which allowed water absorption and resulted in decay of the logs. The defendant's operative misrepresentation was that "the joints were designed to be weather-tight, the homes were to be long-lasting and durable, and that the logs were penta treated to minimize the threat of rot." *Judy, supra,* 923 S.W.2d at 421. The Circuit Court in *Judy* had properly submitted the case using MAI 23.05's alternate for misrepresentation of an existing condition, positing that the defendant "did not know whether the representations were true or false." *Judy, supra,* 923 S.W.2d at 420. This Court affirmed the use of this alternate, given that the case involved the defendant's statement of existing facts, not representations as to future intent: "These were not representations of an intention to perform or of a state of mind. They were present representations intended to induce plaintiffs to purchase their log homes." *Judy, supra,* 923 S.W.2d at 421.

The *Judy* holding makes clear that the misrepresentation as to the lot's existing condition at the time Plaintiff-Appellant was induced to buy it (that the lot was designed and constructed in such a manner that it would not flood) should have been submitted under the third alternate to Paragraph Fourth, and thus should have posited that Defendants-Respondents "made the representation without knowing whether it was true or false" instead of positing that they "knew it was false at the time the representation

was made."

At the instructions conference in the case at bar, the following colloquy took place:

> THE COURT: Let's go on the record. We can make a record of it. Let the record reflect at this time that Instruction No. 6 is MAI No. 23.05. It is -- there is a dispute in this instruction. The dispute arises from Paragraph No. 4 in that, and the dispute arises regarding a -- whether it is a future event or not. Ms. Lineberry, you may make your record.
>
> MS. LINEBERRY: Yes, Your Honor. I am referring to and relying on Judy, J-u-d-y, vs. Arkansas Log Homes, Inc. Citation is 923 S.W.2d 409, 1996, decided by the Western District. This case involves a situation in which Plaintiff submitted MAI 23.05 using the alternative that the defendant did not know whether the representations were true or false. When Plaintiffs submitted their proposed instructions, they used the same alternative for MAI No. 23.05 that was proposed to the Court.
>
> The Judy case involved a situation which is completely apropos to the case at hand. In the Judy case the plaintiffs brought a claim alleging fraudulent misrepresentation against the defendant, which was the [T.224] manufacturer of a log home. The plaintiffs alleged that the manufacturer sold the home to them based on the representations that the joints of the log homes were designed to be weathertight, the homes were to be long lasting and durable, and the logs were penta, p-e-n-t-a, treated to minimize the threat of rot. The court said that it is clear that the defendant's representations in this case were not as to future events.

Rather, they were statements of fact that the joints were designed to be weathertight, the homes were to 10 be long lasting and durable, and that the logs were penta treated to minimize the threat of rot.

As I said, the court found that these were statements of fact. These were not representations of an intention to perform or of a state of mind. They were present representations intended to induce Plaintiffs to purchase their log homes. That is on all fours with the case at bar, where the defendant represented that the lot in its current condition would not flood.

Now, there is no reference to the grading of the subdivision in this instruction. The instruction is very open-ended in terms of what the jury is asked to find, just as is set forth in 23.05. Basically, 23.05 says 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. And we have a situation here that is [T.225], as I say, on point with the Judy home case in which the Court of Appeals found that the trial court properly submitted the fraudulent misrepresentation claim under 23.05 using the alternative that ALH did not know whether the representations were true or false because these were present representations intended to induce Plaintiffs to purchase their log homes, just as in the case at bar, the representations that the house -- or, excuse me, that the lot would not flood was a representation as to present conditions that induced Plaintiffs to purchase Lot 335.

THE COURT: Mr. Buchanan.

MR. BUCHANAN: I haven't read the case, but what she has read, the

representations were in that case that the logs were treated a certain way, they were rot resistant, or whatever, and that the joints were apparently – the representation as she read it, that they were airtight or watertight or whatever.

The representation in this case is that it would not flood in the future. If that's not a future event, I don't know what it is. Plus, that if it did -- and there's no assurance -- that if it did, Defendants would remedy any flooding problem experienced on Lot 335. That's completely different than what she's just cited. I haven't read this. I haven't seen the procedural posture on any of these things that she's talked about. But based on what she read, that's a 1 different situation. They're saying there that you represented, Mr. Defendant, that this log home was treated with Penta, which is an anti -- destroys insects and things like that, as I understand it's like a wood preservative. Those are representations of a present condition than when we're saying, this will not flood in the future.

And the flooding here is not because this lot was represented to be watertight, that no water could ever be on it. It's if it's flooding. And it's not going to just be the water from the air, from the rain; it's going to be upstream, which is something other than the lot itself. So it's a different situation.

THE COURT: Mr. Gall.

MR. GALL: I join with Mr. Buchanan's objection -- or comments.

THE COURT: 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 will be denied but I will

mark your instruction as denied for the record.

MS. LINEBERRY: Well then, Your Honor, may I also let the record reflect that I would propose that if the Court is concerned about whether the second representation [T.227] goes to a future event, that I would be perfectly fine with the notion of breaking the two out and saying that, number one, the representation that Lot 335 would not flood is a representation as to present condition and that Defendants made that representation without knowing whether it was true or false; and then with respect to the second representation, using the alternative that Defendants made that representation with the intent that Defendants knew it was false at the time the representation was made.

But I -- based on the Judy case, I don't think it's right to submit the hypothetical that the lot would not flood under the alternative as currently reflected in the instructions, based on the Judy case. Based on the Judy case, I don't think this is the right way to submit this case.

THE COURT: I understand, ma'am. I'll mark your instruction as offered and denied. [T.228]

The latter suggestion made by counsel for Plaintiff-Appellant, that the two misrepresentations be broken out and submitted separately, as a misrepresentation as to a present condition and as a misrepresentation as to a present intent as to future performance, was based on Committee Comment N to MAI 23.05, titled "Cases involving multiple misrepresentations." This Comment suggests that, in cases involving multiple misrepresentations, separate verdict directors be submitted with respect to each alleged misrepresentation:

Cases involving multiple misrepresentations.

> N. Submission of multiple representations in a single verdict directing instruction may create a problem in determining whether all requisite elements (i.e., falsity, materiality, knowledge, etc.) have been found as to the same representation. A possible approach would be to submit a separate verdict directing instruction as to each alleged misrepresentation, all in a single package with a single damage instruction and a single verdict form.

The approach suggested in this paragraph would have been appropriate for the case at bar. The misrepresentation of the lot's existing "flood-proof" condition could have been submitted by use of a verdict director using the third alternate to Paragraph Fourth of MAI 23.05 ("defendant made the representation without knowing whether it was true or false"). The misrepresentation as to the intent to provide future curative measures if the lot did flood could have been submitted by use of a separate verdict director using the second alternate to Paragraph Fourth ("defendant knew that it was false at the time the representation was made").

It is critically important to note that the fact that plaintiff had to wait until sometime in the future to determine the inaccuracy of the representation is irrelevant. The great majority of cases involving a fraudulent misrepresentation -- whether involving a statement of existing condition or a future promise -- are proven or disproven by the occurrence of a future event. This does not mean that a "future event" is involved that requires use of the second alternate to Paragraph Fourth, because in that event all

fraudulent misrepresentation cases would be "future event" cases, which is clearly not the case under MAI 23.05. As explained by one of the leading cases, even though both types of fraudulent misrepresentation cases involve proof or disproof of the representation by a future event, there is a significant difference between the misrepresentation of the existing condition of a product or commodity (i.e., whether the lot was "flood-proof") and the misrepresentation of an intent to perform (i.e, whether defendants would remedy the lot if it did flood):

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

Brennaman v. Andes & Roberts Brothers Construction Co., 506 S.W.2d 462, 465-66 (Mo. App. W.D. 1973).

Under this Court's decisions in *Klecker v. Sutton*, 523 S.W.3d 558 (Mo. App. W.D. 1975), cited in Notes on Use to Paragraph Fourth, and *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409 (Mo. App. W.D. 1996), cited in the Committee Comments,

and related cases, the Circuit Court clearly committed reversible error by submitting Instruction No. 6. Counsel for Plaintiff-Appellant brought this error to the Circuit Court's attention prior to submission of the case to the jury, and this error was prejudicial to Plaintiff-Appellant in that it resulted in a defense verdict.

This case provides an opportunity for this Court to clarify the use of MAI 23.05 in multiple misrepresentation cases involving both misrepresentations as to existing conditions and promises as to future events, by reversing the Judgment of the Circuit Court and remanding the case for a new trial with instructions that the Circuit Court submit the case in the manner suggested in Committee Comment N. titled "*Cases involving multiple misrepresentations.*"

CONCLUSION

For the foregoing reasons, submission of Instruction No. 6 was prejudicially erroneous to plaintiff, and therefore this case should be remanded for a new trial with instructions to the Circuit Court to submit two verdict directors based on MAI 23.05, using the appropriate alternates to Paragraph Fourth.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WESTERN DISTRICT SPECIAL RULE XLI; RULE 84.06

Pursuant to Western District Special Rule XLI and Rule 84.06(c)), counsel for Plaintiff-Appellant Shawn Stevens certifies that this brief includes the information required by Rule 55.03 (with the exception that this brief has been signed electronically as required by the Western District's Instructions for Filing Briefs).

Counsel for Plaintiff-Appellant certifies that this brief complies with the limitations contained in Special Rule XLI and Rule 84.06(b). In reliance on the word count of the word-processing system used to prepare this brief, counsel for Plaintiff-Appellant certifies that this brief contains 9,862 words, exclusive of the Table of Contents, Table of Authorities, and Appendix.

___/s/ Margaret D. Lineberry_____
Attorney for Plaintiff-Appellant
Shawn Stevens

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing *Brief of Plaintiff-Appellant Shawn Stevens,* with its accompanying *Appendix to Brief of Plaintiff-Appellant Shawn Stevens,* was filed with the Missouri Court of Appeals, Western District, through its electronic filing system, on this 10th day of June, 2013, and that, through such electronic filing, was also thereby served on the following registered users of the electronic filing system:

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