NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0562

THOMAS L. MCGUIRE, III AND E. DOUGLAS HENRIKSEN

VERSUS

JOHN J. KELLY

DATE OF JUDGMENT: JAN 30 2012

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 548,103, SEC. 26, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE KAY BATES, JUDGE

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Glen Scott Love Stephen Dale Cronin Baton Rouge, Louisiana	Counsel for Plaintiffs-1st Appellants Thomas L. McGuire, III and E. Douglas Henriksen
Paul H. Spaht W. Scott Keaty Baton Rouge, Louisiana	Counsel for Defendant-Appellee/ 2nd Appellant David C. Voss
Scotty E. Chabert, Jr. Leonard Cardenas, III Baton Rouge, Louisiana	Counsel for Defendant/Plaintiff- In-Reconvention-Appellee John J. Kelly
William C. Kaufman, III Baton Rouge, Louisiana	Counsel for Defendant-Appellee Countrywide Home Loans, Inc.
Charlotte C. Meade William E. Wright, Jr. New Orleans, Louisiana	Counsel for Defendant-Appellee Continental Casualty Company

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BEFORE: CARTER, C.J., KUHN, McDONALD, McCLENDON, AND HIGGINBOTHAM, JJ.

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND RENDERED.

McDonald, J. dissents and will assign reasons.

McClendon, J. dissents, in part, and assigns reasons. (by JMM)

KUHN, J.,

In this appeal, we address a judgment of the trial court dismissing the claims of the plaintiffs, Thomas L. McGuire, III ("McGuire") and E. Douglas Henriksen ("Henriksen"), with prejudice at their cost, and also dismissing the claims of the plaintiff-in-reconvention, John J. Kelly ("Kelly"), with prejudice at his cost. We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL HISTORY

This litigation involves a bay front home and property located in a gated subdivision in Santa Rosa Beach near Destin, Florida. The property was purchased by McGuire, Henriksen and Kelly (collectively known as "the parties") in May 2004 for the approximate price of $1,238,000.00. At the time of the purchase, the property was appraised for $2,500,000.00. The parties purchased the property as an investment, and based on their belief that the property would increase in value, they decided to maintain ownership for one year before selling the property for a profit. Contributions to the down payment of $142,000.00 were made by the parties in the following amounts and proportions: Kelly ($84,916.00; 50%), McGuire ($42,458.00; 25%), and Henriksen ($42,458.00; 25%). The parties obtained secured loans of $968,000.00 and $100,000.00 from two different lenders, resulting in first and second mortgages and a debt of approximately $1 million on the property.[1]

[1] Just prior to the purchase, the parties signed an amended operating agreement with Sandestin Investments, L.L.C. (a company originally formed by Kelly), which provided that the parties "shall participate in, and be allocated, profits, losses and distributions of the Company in the following percentages" of interest: Kelly—55%, Henriksen and McGuire—22.50% each. The agreement also provided that Kelly was the managing member, who had certain powers, including authority to disburse funds and pay debts and that the parties each had a vote equal to their percentage interest. However, the agreement specifically provided that any action to sell, mortgage, or encumber immovable property required an affirmative vote of 60% interest or, in other words, an affirmative vote by Kelly and at least one of the other owners, McGuire or Henriksen. Shortly after the purchase, the parties executed a quitclaim deed transferring the property to Sandestin Investments, L.L.C. In June 2005, the parties had neither listed the property with a realtor nor sold the property and ownership was transferred from Sandestin Investments, L.L.C., back to the individual parties by execution of a warranty deed. The parties then refinanced the second mortgage and obtained a loan for $300,000.00, which was used to pay

On May 23, 2006, Kelly contacted an attorney, David Voss ("Voss"), and asked him to notarize a quitclaim deed transferring the plaintiffs' ownership to Kelly. Voss met Kelly at a local restaurant and bar. Out of the presence of Voss, Kelly forged the plaintiffs' names on the document and presented it to Voss, who notarized the deed without actually seeing McGuire and Henriksen sign.[2] The next day, based on the representation in the notarized quitclaim deed that he was the sole owner of the property, Kelly received a loan for $1,680,000.00 from Countrywide Home Mortgage Loans, Inc. ("Countrywide"), which was secured by a mortgage on the property. The loan funds were used to pay off the first and second mortgages, to pay the refinancing closing costs, and to pay Kelly a "cash out" sum of approximately $362,000.00. The quitclaim deed and the mortgage documents were recorded in the Florida county public records where the property is located.

A few months later, after conducting a check of the public records in Walton County, Florida, plaintiffs McGuire and Henriksen learned of the forged quitclaim deed that purportedly transferred their ownership interest in the property to Kelly. They also learned that the property was encumbered by a new mortgage for $1,680,000.00, approximately $400,000.00 more than the previous mortgage. The plaintiffs filed suit against Kelly, Voss, Continental Casualty Company ("Continental," Voss' liability insurer), Countrywide Home Loans, Inc., ("Countrywide," the mortgagee and lender), and Executive Title of Emerald Coast ("Emerald Coast," the mortgage broker), alleging damages were due as a result of fraudulent activities, conversion of their property, and negligence by Kelly and

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off the original second mortgage, pay closing costs, and pay the parties a "cash out" sum of approximately $188,000.00. During the next year, the cash sum was used to pay for monthly mortgage payments on the property, for property maintenance, for renovations of the home's interior, and for the purchase of a party barge. This refinancing increased the indebtedness on the property to approximately $1,268,000.00. Sometime in late 2005 or early 2006, the property was listed for sale with a real estate agent for the price of $2,600,000.00.

[2] The quitclaim deed was actually dated May 24, 2006, the next day.

Voss. Plaintiffs also alleged Kelly's actions violated La. R.S. 51:1401, *et seq.*, the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA).[3]

Several motions for partial summary judgment were filed by the plaintiffs and defendants, seeking rulings as to several issues in the suit. The trial court ruled on these motions and made several findings, including that: (1) the plaintiffs' signatures on the quitclaim deed were forgeries; (2) Voss breached his duties as a notary public by notarizing the deed without seeing the plaintiffs sign the document; (3) Voss' actions did not constitute fraud; (4) Voss was only liable for his allocable share of fault as to any damages sustained; (5) the plaintiffs may not maintain an action for damages based upon conversion; (6) the "fraud exclusion" in Continental's policy did not exclude coverage; (7) Kelly's reconventional demand for damages based on defamation was denied; and (8) the trial court did

[3] The plaintiffs initially filed suit against Kelly in October 2006, seeking a temporary restraining order (TRO) and preliminary injunction to enjoin Kelly or anyone acting on his behalf, from selling, transferring, exchanging, encumbering, or otherwise alienating the property. A TRO was immediately issued and later, based on a joint motion with Kelly, a preliminary injunction was issued prohibiting Kelly from selling, transferring, encumbering, and alienating the property without the express written consent of McGuire and Henriksen until further orders of the court. Thereafter, the plaintiffs filed two amended petitions seeking damages based on several legal theories. Plaintiffs also added the other defendants. Plaintiffs alleged their signatures on the quitclaim deed were forgeries, that Emerald Coast was liable for failing to verify the signatures on the deed, that Voss' actions constituted fraud and negligence, that Continental was liable as Voss' professional liability insurer, and that Countrywide was a necessary party. Plaintiffs alleged their damages resulted from the loss of proceeds from the potential sale of the property, an additional encumbrance on the property, expenses and costs incurred to obtain relief, payment of debts associated with a property for which they are not title owners, and mental and emotional distress. Kelly filed an answer, denying the allegations and asserting that his actions were taken under his authority as managing partner, had benefitted the plaintiffs, and did not result in damages. Kelly further asserted that if any damages or injury had occurred, any recovery should be reduced based on the plaintiffs' contributory negligence or fault. Kelly also filed a reconventional demand, alleging plaintiffs' public accusation of fraud and other illegal conduct constituted defamation per se, that plaintiffs' threats to take criminal or disciplinary action against himself and Voss unless monetary payment was made constituted extortion, and that he was entitled to a judgment awarding compensation and reimbursement of expenses paid by him. Voss filed an answer and cross-claim in which he denied plaintiffs' claims and, alternatively, pleaded that if he was found liable, he should be reimbursed and receive contribution from Kelly. Continental filed an answer, alleging that its policy excluded damages as a result of Voss' fraudulent, dishonest, and malicious acts. Countrywide denied all the allegations and asserted that, based on the location of the property, all rights and obligations under the mortgage must be determined in a Florida judicial proceeding.

not have the authority to adjudicate ownership interests in the Florida property and declare that plaintiffs each currently owned a 22.5% share of the property.[4]

The matter was tried by the trial court in July 2009, and after receiving post-trial briefs, the court issued written reasons for judgment. On November 9, 2009, the court signed a written judgment in accordance with the written reasons, dismissing the claims of plaintiffs against all defendants, with prejudice, at plaintiffs' cost, and dismissing Kelly's reconventional demand, with prejudice at his cost.[5]

Plaintiffs appealed and several defendants answered the appeal. Additionally, Voss filed his own appeal. Plaintiffs allege several assignments of error, including three assignments that challenge the trial court's conclusions that plaintiffs failed to prove fraud or "constructive fraud" and damages, that Voss was not solidarily liable with Kelly, and that the reasonable measure of damages was not the value of the property at the time of Kelly's and Voss' tortious actions. Kelly also appealed the portion of the judgment denying his reconventional demand for reimbursement for monies he spent related to the property and denying his claim that all court costs should have been assessed against the plaintiffs.

TRIAL COURT'S REASONS FOR JUDGMENT

The trial court's written reasons noted that the facts are largely undisputed, that Kelly admitted forging the signatures of the plaintiffs on the quitclaim deed that "purported to transfer the plaintiffs' ownership interest in the property to John Kelly alone" and that Voss admitted notarizing the deed without witnessing the

[4] The trial court's rulings granted in part and denied in part plaintiffs' motion for summary judgment as to different issues and denied the motions for summary judgment filed by Kelly and Voss. The plaintiffs sought supervisory writs as to that portion of the ruling denying their motion. This Court denied the writ application and declined to exercise its supervisory jurisdiction. See ***McGuire v. Kelly***, 08-1681 (La. App. 1st Cir. 4/28/09) (unpublished.)

[5] We are aware that judgments are appealed and not the reasons for judgment. However, herein the signed judgment specifically referenced the trial court's written reasons and those reasons clearly indicate the court's factual and legal findings.

signatures or verifying the identities of the alleged signers, McGuire and Henriksen. The trial court further found that the day after the deed was notarized, Kelly presented it to Countrywide as proof of his full ownership of the property and, based on that deed, obtained a loan from Countrywide that added an additional $412,000.00 in mortgage indebtedness on the property.

The trial court denied the plaintiffs' claims based on fraud. In doing so, the trial court specifically stated that "[f]raud must be established by proof stronger than mere preponderance of the evidence." Regarding Kelly's actions, the trial court reasoned that Kelly and Voss' actions were improper and that although Kelly's forgery on the quitclaim deed was "certainly untruthful, there is no evidence that he did it to obtain any unjust advantage or to inconvenience his partners." Instead, the trial court concluded that the evidence showed "Mr. Kelly intended to help the plaintiffs by refinancing the property in his own name, however misguided or officious those efforts may seem today." Despite finding that Voss' conduct allowed Kelly to refinance the property, the court concluded that Voss did not commit "an intentional act of fraud." Moreover, the court found that Voss' failure to follow proper notary procedures did not "create [a] basis for recovery absent some proof of actual damages." The court further rejected the plaintiffs' claims for recovery under LUTPA, for conversion of immovable property under Florida or Louisiana law, and under the theory that the forged quitclaim deed was a forced sale of plaintiffs' property.

Based on the finding that a recorded, forged deed is a nullity and cannot actually transfer ownership and that plaintiffs had not instituted legal proceedings in Florida to declare the deed null or to correct the public record, the court concluded the plaintiffs had not shown "any ascertainable damage" and had no basis for recovery in Louisiana. The court noted the plaintiffs had not suffered any discernible monetary loss, had not suffered any mental distress, and "were never

denied use or enjoyment of the property." Instead, the court concluded that although the actions of Kelly and Voss were clearly wrong, the plaintiffs had benefited because at the time of the trial, the property's market value had decreased to about $886,000.00 and the plaintiffs were not obligated to pay the $1,680,000.00 loan and mortgage obtained by Kelly on the property. The court acknowledged that the validity of Countrywide's mortgage was a matter for the Florida courts, but reasoned that "[i]f it were proven that [the plaintiffs] could not set aside the fraudulent mortgage, then I would find that they would be entitled to receive the return of their down payments."

STANDARD OF REVIEW

It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. In order to reverse a trier-of-fact's determination of fact, an appellate court must review the record in its entirety, conclude that a reasonable factual basis does not exist for the finding, and further determine that the record establishes that the trier-of-fact is clearly wrong or manifestly erroneous. ***Hulsey v. Sears, Roebuck & Co.***, 96–2704 (La. App. 1st Cir. 12/29/97), 705 So.2d 1173, 1176-77. If there is no reasonable factual basis in the record for the trier-of-fact's finding, no additional inquiry is necessary to conclude there was manifest error. ***Smegal v. Gettys***, 10-0648 (La. App. 1st Cir. 10/29/10), 48 So.3d 431, 435. If the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. ***Boyd v. Boyd***, 10-1369 (La. App. 1st Cir. 2/11/11), 57 So.3d 1169, 1174.

When findings are based on determinations regarding the credibility of witnesses, the manifest error/clearly wrong standard demands great deference to the trier-of-fact's findings. However, an appellate court may find manifest error or

clear wrongness in a finding purportedly based upon a credibility determination where documents or objective evidence so contradict the witness' story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable trier-of-fact would not credit the witness' story. ***Hulsey***, 705 So.2d at 1177.

With regard to questions of law, appellate review is simply a review of whether the trial court was legally correct or legally incorrect. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. When such a prejudicial error of law skews the trial court's finding as to issues of material fact, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*. If only one of the factual findings is tainted by the application of incorrect principles of law that are prejudicial, the appellate court's *de novo* review is limited to the finding so affected. ***Boyd***, 57 So.3d at 1174.

In this case, the trial court committed legal error when it concluded fraud must be established by proof stronger than a mere preponderance of the evidence, the wrong standard of proof.[6] The proper standard of proving fraud is by a preponderance of the evidence and fraud may be established by circumstantial evidence. See La. C.C. art. 1957; ***ODECO Oil & Gas Company v. Nunez***, 532 So.2d 453, 457 n.3 (La. App. 1st Cir. 1988), ***writ denied***, 535 So.2d 745 (La. 1989). Herein, the application of the erroneous legal standard for fraud was

[6] Prior to January 1, 1985, the jurisprudence held that fraud had to be proven by clear and convincing or strong and clear evidence. See ***Marcello v. Bussiere***, 284 So.2d 892, 894 (La. 1973); ***Hoover v. Mid-South Exploration Company, Inc.***, 479 So.2d 551, 555 (La. App. 1st Cir. 1985). By Act 331 of 1984, effective January 1, 1985, La. C.C. art. 1957 was enacted and changed the standard of proof for fraud to a preponderance of the evidence. According to Article 1957, Comment (b), the article does not allow the prior interpretation.

prejudicial and skewed the trial court's numerous findings as to issues of essential material fact, including credibility, intent, and the existence of damages. Thus, we will conduct a *de novo* review of the record before us to determine the correctness of the judgment as to the numerous rulings by the trial court.

LIABILITY OF KELLY AND VOSS

Under La. C.C. art. 2315, a person may recover damages for injuries caused by a wrongful act of another. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. La. C.C. art. 2315(A). See Restatement (Third) of Torts: Liability for Physical and Emotional Harm & Restatement (Second) of Torts.[7]

Liability may be the result of different theories of tort, including intentional wrongs and negligence. One type of intentional tort is based on fraudulent acts. Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. See La. C.C. art. 1953. Fraud cannot be predicated on mistake or negligence, no matter how gross. Fraudulent intent, which constitutes the intent to deceive, is a necessary element of fraud. ***Whitehead v. American Coachworks, Inc.***, 02–0027 (La. App. 1st Cir. 12/20/02), 837 So.2d 678, 682. Circumstantial evidence, including highly suspicious facts and circumstances surrounding a transaction, may be considered in determining whether fraud has been committed. ***Terrebonne***

[7] Although the Restatement is not binding on Louisiana courts, the restrictions and guidelines established therein for policy reasons do provide guidance to our courts in the adjudication of these claims. See ***Nicholas v. Allstate Insurance Company***, 99-2522 (La. 8/31/00), 765 So.2d 1017, 1021 n.4. In the Restatement of Torts, the word "tortious" is used to denote the fact that conduct whether of act or omission is of such a character as to subject the actor to liability under the principles of the law of torts. The word "tortious" is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion or conduct that is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct that is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care that it is practicable to require. See Restatement (Second) of Torts § 6, Comment (a).

Concrete, LLC v. CEC Enterprises, LLC, 11-0072 (La. App. 1st Cir. 8/17/11), ___ So.3d ___, ***writ denied***, 11-2021 (La. 11/18/11), ___ So.3d ___; ***Sun Drilling Products Corporation v. Rayborn***, 00-1884 (La. App. 4th Cir. 10/3/01), 798 So.2d 1141, 1153, ***writ denied***, 01-2939 (La. 1/25/02), 807 So.2d 840; ***Williamson v. Haynes Best Western of Alexandria***, 95-1725 (La. App. 4th Cir. 1/29/97), 688 So.2d 1201, 1239, ***writ denied***, 97-1145 (La. 6/20/97), 695 So.2d 1355.

In ***Brumfield v. Brumfield***, 477 So.2d 1161 (La. App. 1st Cir.), ***writ denied***, 479 So.2d 922 (La. 1985), the wife sued her husband, an attorney, to have their marriage contract declared null and void on the basis of fraud and improper form. The jury rendered judgment in favor of the wife, and the husband appealed on several grounds, including that the jury's finding of fraud was contrary to the law and evidence. This Court concluded the jury's evaluations of credibility were reasonable, that there was sufficient evidence to conclusively prove fraud, and affirmed the jury's verdict. In ***Brumfield***, this Court stated:

> A charge of fraud is most serious and grave. ... Although Article 1847[8] is found in that portion of the Civil Code dealing with nullity of contracts resulting from defects of consent, including error, it is clear that to constitute fraud the error must be caused by fraudulent misrepresentation. **Buston v. McKendrick**, 64 So.2d 844, 223 La. 62 (La. 1953); **Broussard v. Fidelity Standard Life Insurance Co.**, 146 So.2d 292 (La. App. 3d Cir. 1962).

Brumfield, 477 So.2d at 1167-68 (footnote added).

When discussing the necessary proof for fraud in the ***Brumfield*** case, this Court reasoned as follows:

> [The] tapestry of deception, assuming again that it can be believed, proves fraud beyond any doubt and beyond the requirements of law. All doubts are removed and all legal standards of proof are met when a party asserts the triumph of his own duplicity. The question before us, then, is not only a matter of law and evidence, but of believability.
>
> By its very nature, fraud has as many different styles and disguises as those who engage in it. Some kinds of fraud are more

[8] The definition of fraud is now in La. C.C. art. 1953.

> easily proved than others. In the case of commercial or industrial fraud, for instance, a team of auditors can often go in and examine books, records and inventories, and in a few hours produce tangible proof of deception. It is much different in the case of intimate fraud between lovers. Usually no one is present except the two parties, and records are quite often not kept. Yet there is no doctrine that intimate fraud cannot be successfully proved.

Brumfield, 477 So.2d at 1168.

In the instant case, the trial court concluded Kelly's forgery did not constitute fraud because there was no evidence of Kelly's intent to gain an unjust advantage or cause an inconvenience. Instead, the court found that Kelly intended to help the plaintiffs by refinancing the property in his name. Kelly maintains that his sole intent in the forgery and refinancing was to help the plaintiffs by removing them from the property's mortgage obligation and to continue their relationship. However, Kelly's own testimony reveals he secretly planned for months to become the property's sole record owner and to accomplish his desire to refinance the property. A few months before forging the quitclaim deed, Kelly asked the plaintiffs to agree to refinance the property, but they resisted his suggestion. Nevertheless, Kelly ignored their decision and secretly began a series of actions regarding the property. On March 18, 2006, over two months before Kelly forged plaintiffs' signatures on the quitclaim deed; he represented himself as the property's sole owner and applied for a loan to refinance the property with a Florida mortgage broker. At the time of that application, Kelly signed a disclosure notice stating the property was his secondary residence and was not investment property. However, Kelly and the parties consistently testified that the property had been purchased as an investment. In fact, at the time of Kelly's loan application, the property was listed with a real estate agent.

Other evidence reveals Kelly had a self-serving motive that was unrelated to any desire to help the plaintiffs. Kelly admitted that he was the majority owner in many business entities, that he had different bank accounts for these businesses,

and that he moved money among these accounts. Kelly further admitted that at the May 2006 refinancing, he received a "cash out" sum of about $362,000.00, after payment of costs, that he had used this money as he "saw fit" for his own personal and business needs, and that "most of [the cash sum] was re-distributed back to the original accounts at some point in time."

The record further shows that during his 2008 pretrial deposition, Kelly was asked about all lawsuits against him or his businesses; he stated he had won every lawsuit. When questioned at trial, Kelly admitted he forgot to mention a Texas lawsuit against one of his businesses, Maverick Real Estate Investments ("Maverick"). At a trial in April 2006, a jury verdict was rendered against Kelly and Maverick in the amount of $249,000.00, plus interest, and $22,000.00 in attorney fees. Kelly acknowledged that, in order to avoid having a judgment formally entered against him, he personally and on behalf of Maverick, executed a promissory note on May 1, 2006 to pay the plaintiff a sum of $299,666.97. Kelly denied that this lawsuit and potential judgment was related to his desire to refinance the property, but again stated he had deposited the "cash out" sum in his different bank accounts and that he "used it for whatever purposes [he] thought were appropriate."

Kelly's testimony about the various bank accounts, his deposit of the "cash out" sum, and the bank account used to pay off the promissory note is confusing. A bank statement from one of the Maverick accounts indicates a check was written for the exact amount of the promissory note and cleared that account in July 2006.[9] At first, Kelly denied that this check was used to pay off the promissory note, but when questioned by the trial court, Kelly admitted he must have transferred money into the Maverick account to pay the promissory note. Although Kelly testified he

[9] A copy of the actual check apparently could not be located or was not disclosed by Kelly during discovery.

did not know where he obtained that money, he admitted monies were "coming in and out all the time" and that he was the only person who controlled the checkbook. Even though Kelly would not admit that the "cash out" sum from the refinancing was used to pay the promissory note, his testimony, the documentary evidence, and the dates of certain pertinent events reasonably support a finding that this sum was used for payment of that debt.

In conjunction with the refinancing, new loan, and mortgage, Kelly executed many documents. Kelly denied preparing, signing or instructing anyone else to prepare and sign his name to some of the loan documents introduced at trial. Nevertheless, Kelly testified that the content of the majority of these documents was accurate; he hypothesized that because loan guidelines needed to be met, the mortgage broker obtained the appropriate information from him, prepared the documents or letters, and signed Kelly's name to the documents.

Two of the documents purportedly signed by Kelly were written in May 2006, shortly before the loan closing. One letter was in response to a request for information regarding the property's listing for sale. The letter explained that Kelly had initially listed the bay front home for sale when he planned to use another property as his Florida residence, but when that other property was leased, Kelly took the bay front home and property off the market. The statements in this letter conflict with the testimony of Bobbie Fenn, a Florida real estate agent, who said the property was listed for sale during this entire time period.

The second letter was an explanation about the obvious conflict between the public record, indicating the property's ownership by Kelly and the plaintiffs, and Kelly's assertion in his loan application that he was the sole owner. The letter stated, "[T]his is property that I own with 2 other people and I am refinancing this property in order to have this property in my name only. After this transaction, I will be the only person on the title." Although the letter stated it was written in

response to the question of why Kelly was requesting a "cash out" refinance of the property, it failed to contain an explanation.

To support his claim of a benevolent intent and desire to help the plaintiffs, Kelly asserted that after the first year of ownership, he offered to pay the plaintiffs' portion of the mortgage and expense payments. Kelly testified that when the property was first purchased, the plaintiffs made it clear to him that they could not continue to make payments on the property for a long period of time. Kelly testified McGuire said he could only pay the mortgage note and expenses for about a year. Kelly claimed that after this first year, he paid McGuire's portion of the mortgage note for several months and that McGuire was upset because the amount of the debt obligation on the property prohibited him from obtaining a loan to build a home in Baton Rouge. Kelly also testified that Henriksen struggled to make his portion of the payments. Kelly did acknowledge that as a co-owner he had legal remedies, such as partition of the property, if he did not agree with the co-owners and wanted sole ownership of the property. See Fla. Stat. § 64.011, *et seq.*

The plaintiffs' testimony reflected a different version of their financial ability to pay the property's mortgage and expenses. According to McGuire, each of the men contributed equally during the first year to a bank account used to pay the property's expenses. The first refinancing of the second mortgage with a "cash out" sum to pay expenses was solely Kelly's idea. McGuire denied that he had trouble contributing his portion of the mortgage payment, that he complained about the financial burden, or that he asked Kelly to make his payments. In fact, after the first refinancing, McGuire continued to contribute his portion of expenses and handled the payment of the property's utility bills from a designated checking account, despite Kelly's agreement to take on that duty.

Henriksen corroborated McGuire's testimony and testified that both he and McGuire made their contributions to the property expenses and mortgage

payments. He denied telling Kelly that he was struggling to make the payments. He also noted that the first refinancing of the second mortgage with a "cash out" sum to pay the mortgage note was a result of Kelly's suggestion. Henriksen denied that Kelly had informed plaintiffs in 2006 that this "cash out" amount was almost depleted and that they would need to begin contributing money for the mortgage payments and property maintenance. In addition, Henriksen denied receiving voicemail messages from Kelly stating he was planning on refinancing the property in his own name and that he needed the plaintiffs' signatures on a quitclaim deed to do so.

Both McGuire and Henriksen testified about meetings with Kelly in 2006 before and after the forgery. McGuire recalled only one meeting in early 2006 at Champs Restaurant to discuss renovations to the property. McGuire denied any discussions at those meetings about his inability to contribute to the monthly mortgage payments.

Henriksen recalled more than one meeting, but denied that either he or McGuire indicated their inability to contribute their portion of the payments due on the property. At another meeting at Champs Restaurant that occurred sometime between June and August of 2006, McGuire told Kelly about a potential purchaser for the property, but Kelly rejected the verbal offer of approximately two million dollars as being too low. However, a few weeks later Kelly indicated he was interested in the offer, but he insisted the sale must be closed within thirty days and before Kelly's attorney. McGuire responded that the potential purchaser was no longer interested in the property. Henriksen also testified that during this last meeting, he and McGuire became suspicious when Kelly produced a handwritten paper that reflected the property's mortgage indebtedness was $1,680,000.00. When the plaintiffs questioned this figure, Kelly scratched out the amount and put away the sheet. Subsequently, Henriksen researched the Florida country public

records and discovered the forged deed, the new mortgage, and the increased indebtedness on the property.

The trial testimony further revealed that during the first year of ownership, Kelly suggested to the plaintiffs that they execute a buy/sell agreement that would require each of the owners to first offer their share to the other owners before seeking an outside buyer. The proposed agreement also provided that the selling owner would receive triple the amount of money he contributed to the down payment, regardless of the value of or the equity in the property at the time of the sale. Kelly testified that he requested the plaintiffs sign this buy/sell agreement at least ten times and, despite his continued requests, the plaintiffs refused. Kelly was perplexed as to why the plaintiffs would not enter into the agreement and stated the only reason for their refusal when the market was doing well was "pure greed."

Although Kelly testified that this buy/sell agreement would have benefited all the parties, the evidence indicates Kelly believed he was the only owner who was in a financial position to buy out the plaintiffs. If Kelly had purchased the ownership interest of one or both plaintiffs, he would have acquired over 60% ownership in the property and based on the operating agreement, he would have been able to control many decisions, including whether to mortgage the property. In addition, if Kelly purchased the plaintiffs' share and sold the property (before the market value decreased), his profit would have been considerably greater than if a sale was made with the co-owners.

Kelly admitted forging the plaintiffs' signatures on the quitclaim deed and deceiving Voss by telling him the plaintiffs had signed the deed. Kelly knew he would not have been able to close the refinancing deal the next day and receive the "cash out" sum of about $400,000.00 without being recognized as the sole owner of the property. The executed and notarized quitclaim deed transferring the

plaintiffs' ownership interest to him was required for Kelly to accomplish his plan. The parties disputed the issue of whether Kelly attempted to inform them of the refinancing, but Kelly admitted he did not make any attempt to tell the plaintiffs until a few days before the loan closing. The plaintiffs were neither informed of, nor sent documents about, the loan and mortgage revealing that Kelly had refinanced the property solely in his name. Kelly's secrecy and his actions are circumstantial evidence of his intent to gain an unjust advantage for himself and to cause the plaintiffs to lose their rights as owners.

After conducting a *de novo* review of the evidence, including Kelly's own testimony, and applying the correct burden of proof, we conclude there is sufficient evidence to conclude Kelly committed fraud and misrepresented the truth to plaintiffs, the notary, the mortgage broker, and the mortgagee. The record reveals many facts that indicate a tapestry of deception by Kelly and show that his fraudulent acts began before and continued after his forgery of the plaintiffs' signatures on the quitclaim deed.

An obvious and reasonable conclusion from the evidence is that Kelly's deception was intended to obtain an unjust advantage for himself: to act as the property's sole owner without regard to the plaintiffs' ownership rights. When Kelly made himself the sole public record owner of the property, he obtained an unjust advantage with respect to the property vis-à-vis third parties. At the same time, Kelly intended for plaintiffs to lose their status and rights as co-owners of the property on the public record.[10]

[10] Unlike the trial court, we do not address the issues of whether the forged quitclaim deed and mortgage are nullities under Florida law and whether they legally transferred the plaintiffs' ownership in the property. We agree with Countrywide that the issues of the legal effect of the quitclaim deed and the validity of the mortgage are controlled by Florida law and only Florida courts have jurisdiction over those issues.

The trial court further concluded that plaintiffs had no basis for recovery under either LUTPA or under theories of conversion and forced sale. We agree that the plaintiffs failed to present sufficient evidence to prove these claims.

Plaintiffs also allege Voss is liable for actions on the basis of fraud and/or negligence. The trial court concluded Voss' conduct was inappropriate, clearly wrong, outrageous, and enabled the refinancing of the property without the plaintiffs' consent, but he did not commit an intentional act of fraud.

Florida law, like Louisiana law, provides that a document conveying, transferring or mortgaging real property, or of any interest therein, shall not be effectual against creditors or subsequent purchasers unless the document is recorded. See Fla. Stat. § 695.01(1). See also La. C.C. arts. 1839, 2021, 2035 & 3338. No document conveying title or interest in real property shall be recorded by a clerk of court unless it contains certain items, including the signature and name of the notary public or other officer authorized to take acknowledgments. See Fla. Stat. § 695.26(1)(d). A notary public outside the State of Florida may legalize or authenticate the document. See Fla. Stat. § 695.03(2). See also La. R.S. 35:2(A)(2) & La. C. C. art. 1833.

The purpose of authentic act requirements is to insure the validity of a signature on a document and that the person whose name appears thereon is the person who actually signed the document; the notary and witnesses attest to seeing the party sign the document. ***Zamjahn v. Zamjahn***, 02-871 (La. App. 5th Cir. 1/28/03), 839 So.2d 309, 315, ***writ denied***, 03-0574 (La. 4/25/03), 842 So.2d 410.

In the case of ***Howcott v. Talen***, 133 La. 845, 63 So. 376 (La. 1913) the Supreme Court of Louisiana summarized the responsibility of a notary with regard to identification of persons appearing before him in the following language:

> In fact, so long as he [(the notary)] exercises the precaution of an ordinarily prudent business man in certifying to the identity of the

> persons who appear before him, it may be doubted whether he has any othet [sic] function to discharge ...

Howcott, 133 La. at 852, 63 So. at 379.

A notary is liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties. ***Collins v. Collins***, 629 So.2d 1274, 1276 (La. App. 5th Cir. 1993), ***writ denied***, 94-0422 (La. 4/4/94), 635 So.2d 1110. In ***Collins***, the ex-husband filed suit in Louisiana against his ex-wife and a notary public for the fraudulent sale of immovable property in Florida. The suit alleged the ex-wife went to the notary's office with a man purporting to be her ex-husband and that man forged the ex-husband's name to an act of sale conveying the property to a purchaser. Plaintiff further alleged that the notary violated his notarial obligations by notarizing the act of sale when he knew or should have known that the person signing was not in fact the plaintiff, and/or the notary should have requested identification from that person signing as the ex-husband. The trial court granted the defendants' exceptions of "no right or cause of action." Plaintiff appealed and the Fifth Circuit concluded that a notary is liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties. ***Collins***, 629 So.2d at 1276.[11]

In addition to the holding in ***Collins***, notaries have been found liable to persons who have been defrauded of their money as a consequence of their reliance upon the genuineness of any document executed by a notary public. See ***Summers Brothers, Inc. v. Brewer***, 420 So.2d 197, 204 (La. App. 1st Cir. 1982). Other courts have held that a notary's misrepresentation, silence, inaction or suppression of the truth, including that the notarized documents were forged, constitutes

[11] Moreover, for a plaintiff to recover for a negligent misrepresentation there must be a legal duty on the part of the defendant to supply correct information, a breach of that duty, and damage to the plaintiff caused by the breach. ***Fechtner v. Bice***, 06-2077 (La. App. 1st Cir. 6/8/07), 964 So.2d 1055, 1058, ***writ denied***, 07-1287 (La. 9/21/07), 964 So.2d 345; ***Osborne v. Ladner***, 96-0863 (La. App. 1st Cir. 2/14/97), 691 So.2d 1245, 1257. See also ***Webb v. Pioneer Bank & Trust Company***, 530 So.2d 115, 118-19 (La. App. 2d Cir. 1988)

fraud.[12] See ***Lacour v. National Surety Co. of New York***, 147 La. 586, 592, 85 So. 600, 602 (La. 1920); ***Rochereau v. Jones***, 29 La. Ann. 82 (1877).

In ***Summers Brothers***, the plaintiffs sued several defendants, including a notary, for fraud related to a contract for the leasing of equipment. One of the defendants, Brewer, was an acquaintance of the plaintiffs and approached them about a business opportunity. Brewer purportedly negotiated a contract for plaintiffs with a non-existent company. Based on this contract, the plaintiffs incurred expenses for the purchase and leasing of equipment. Brewer also sold plaintiffs stock in the sham company, and they paid him for expenses and the stock. The plaintiffs accepted the contract as genuine and authentic because it was notarized. When the plaintiffs discovered the contract was a forgery, they sued Brewer and others, including the notary. In rendering judgment in plaintiffs' favor, the trial court concluded that some of the signatures on the contract were forgeries and that the notary public had not followed the law by notarizing the contract after the parties to the contract had signed. ***Summers Brothers***, 420 So.2d at 201.

The notary and other defendants appealed the trial court's judgment regarding their liability, the award of damages, and the finding that they were liable *in solido*. In addressing the issue of the notary's liability, this Court relied on the Supreme Court's opinion in ***Rouchereau***, which concluded that the notary's paraph of promissory notes was a deception and fraud, because the notary knew that the purported identification of the notes with a mortgage was a fraud. In

[12] We acknowledge that La. C.C. art. 1953 requires that a fraudulent misrepresentation or a suppression of the truth be made with the intent either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Moreover, the fraud cannot be predicated on mistake or negligence, no matter how gross, and the fraudulent intent that constitutes the intent to deceive is a necessary element of fraud. See ***Whitehead v. American Coachworks, Inc.***, 02–0027 (La. App. 1st Cir. 12/20/02), 837 So.2d 678, 682. Although Article 1953 was enacted by Acts 1984, No. 331 § 1, effective January 1, 1985, the revision comment (a) notes that Article 1953 did not change the law and restated the definition of fraud contained in former La. C.C. art. 1847, enacted in 1870. Thus, the same definition of fraud existed at the time these cases were decided.

Summers Brothers, this Court concluded the notary's actions were the "same in substance" as in ***Rouchereau.*** This Court stated:

> Even if [the notary] did not know that the signatures on the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The "proof" of validity he supplied was misleading to all who relied on the contract.

Summers Brothers, 420 So.2d at 204.

In affirming the trial court's judgment in favor of the Summers brothers, this Court also concluded that a review of the evidence amply supported the trial court's findings and rejected the notary's contention that his notarial acts were not a proximate cause of the plaintiffs' financial losses or that he was not guilty of "constructive fraud," as suggested by the trial court. ***Summers Brothers***, 420 So.2d at 204.

In the instant case, the quitclaim deed form, which was sent to Kelly from the mortgage broker, required signatures of the parties and two witnesses and a signed acknowledgment by a notary public. Voss, a notary, signed the acknowledgment clause, indicating that the plaintiffs personally appeared before him and acknowledged their signatures on the quitclaim deed. That clause states:

> The foregoing instrument was acknowledged before me this 24th day of May, 2006 by John J. Kelly and Thomas L. McGuire, III, and Eric D. Henrikson who are personally known to me or have produced a driver's license as identification.

Regardless of whether Voss was aware of Kelly's scheme and his forgery of the plaintiffs' signatures, Voss knew that his acknowledgment was false. During the trial, Voss admitted that he did not actually see plaintiffs sign the deed. Furthermore, Voss knew that the plaintiffs did not appear before him and acknowledge their signatures on the deed, nor did he require that they do so. Thus, by executing the acknowledgement clause, Voss intentionally misrepresented the

circumstances surrounding the quitclaim deed. Fraud can result from a party's misrepresentations, silence, or inaction. See La. C.C. art. 1953. Although Voss testified that he never meant to deceive the plaintiffs, he admitted that Kelly told him a notarized deed was required in order for Kelly to become the property's sole owner and accomplish the refinancing. With this knowledge, Voss acted in concert with Kelly to complete the acknowledgement clause in the deed that both men knew to be false. By executing the quitclaim deed and signing the acknowledgment clause, Voss' actions were a deliberate misrepresentation and violated his duties as a notary public in the course of his official notarial duties. Based on our review of the evidence and the jurisprudence, we conclude Voss is liable because his intentional misrepresentations and failure to require plaintiffs to acknowledge the quitclaim deed in his presence caused harm to the plaintiffs.

SOLIDARY LIABILITY

Louisiana Civil Code article 2324 provides, in pertinent part, that:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.
>
> B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

In 1996, Article 2324 was revised to provide that joint tortfeasors are no longer liable *in solido* and are liable only for the proportion of fault allocated to them. However, solidary liability exists between intentional or willful joint tortfeasors. See ***Touchard v. Williams***, 617 So.2d 885, 891 (La. 1993), ***superseded on other grounds by statute***. Under Article 2334(A), evidence of a conspiracy can

be actual knowledge of both parties or overt actions with another, or can be inferred from the knowledge of the alleged co-conspirator of the impropriety of the actions taken by the other co-conspirator. ***Boudreaux v. Jeff***, 03-1932 (La. App. 1st Cir. 9/17/04), 884 So.2d 665, 672; ***Stephens v. Bail Enforcement of Louisiana***, 96-0809 (La. App. 1st Cir. 2/14/97), 690 So.2d 124, 131, ***writ denied***, 97-0585 (La. 4/18/97), 692 So.2d 454.

Because the trial court concluded the plaintiffs had not proved damages, it made no ruling as to whether the defendants were solidarily or jointly liable. Plaintiffs argue that under ***Summers Brothers***, the notary's "constructive fraud" was "purposeful" or "willful," and, thus, Kelly and Voss are liable *in solido*. They further argue that, despite the language of Article 2324, an actual conspiracy is not required because as intentional tortfeasors, Kelly and Voss are liable *in solido*.

Kelly responds that the issue of solidary liability is irrelevant because plaintiffs failed to prove any damages. Kelly further argues he is not liable *in solido* with Voss under Article 2324(A), because the plaintiffs' claims are based on negligence. Voss argues he is not a willful tortfeasor within the meaning of Article 2324(A) and that absent proof of a conspiracy with Kelly, he is not liable *in solido*.

We note that ***Summers Brothers*** rejected the plaintiffs' claim that the notary was liable *in solido* with the originator of the fraud under Article 2324. In ***Summers Brothers***, 420 So.2d at 204, this Court found, as did the trial court, that Article 2324 had no application to the case because the defendants' acts were independent from the fraudulent scheme that was already set in motion before the notary participated in the fraud. Furthermore, the opinion concluded that some of the damages caused to plaintiffs by the notary were the result of his particular wrongdoing and fault and were not the natural and foreseeable consequences of the original schemer's earlier fraudulent acts. Based on these reasons, this Court concluded all the defendants in that case were not liable *in solido*.

The case before us is distinguishable and presents different facts from those in ***Summers Brothers*** relating to the issue of solidary liability. Here, the plaintiffs were harmed by the combined acts of both Kelly and Voss. The plaintiffs' loss of rights of ownership, as reflected by the Florida county public records, and the refinancing by Kelly resulted from the concerted, intentional and illegal actions and discussions between Kelly and Voss to complete the false acknowledgement in the quitclaim deed that enabled Kelly to refinance the property. The forgeries without Voss and Kelly's actions in bringing about the illegal notarization would not have been sufficient to cause harm to the plaintiffs.[13] Kelly requested that Voss execute an acknowledgement clause that they both knew to be false. Nevertheless, Voss complied with Kelly's request to notarize the acknowledgement clause. The fact that Kelly and Voss each acted with full knowledge of the impropriety of executing the false acknowledgement is evidence of conspiracy as required by Article 2324(A). Thus, Kelly and Voss are liable *in solido* for the harm caused by their combined actions.

LIABILITY OF CONTINENTAL

Continental, Voss' professional liability insurer, filed an answer to the appeal in which it argues that the trial court's findings, conclusions, and dismissal of all the claims asserted by the plaintiffs were correct and urges this Court to affirm the trial court's judgment. Continental adopts the legal arguments in Voss' brief, but presents additional argument in the event this Court reverses the trial court's judgment and finds that Voss committed fraud and the plaintiffs are entitled to damages based on mental anguish. Continental argues that although the professional liability policy issued to Voss provides coverage for his notarial duties and acts, the policy provisions exclude coverage based on fraud and for mental

[13] In his pretrial deposition testimony, Scott Zimov, Countrywide's corporate representative, stated that Kelly's loan for $1,680,000.00 would not have been approved without the notary's signature or seal on the quitclaim deed.

anguish damages. Moreover, they argue that such damages are not recoverable in a legal malpractice suit because the foreseeable result of the negligent actions only extends to an economic loss.

Continental's policy includes a provision excluding coverage for "any claim based on or arising out of any dishonest, fraudulent, criminal or malicious act or omission by an Insured ... ." The clear language of this provision excludes coverage for acts that are dishonest. Voss' actions were a deliberate misrepresentation, and thus, were dishonest. Accordingly, we conclude that Continental's policy does not provide coverage to and indemnify Voss for damages awarded against him in this proceeding.

KELLY'S RECONVENTIONAL DEMAND AND CLAIM FOR COSTS

Kelly contends that the trial court erred in denying his reconventional demand against the plaintiffs for reimbursement of payments he made related to the property. Kelly argues that because the plaintiffs still own the property, they owe him for payment of their portion of the current mortgage on the property and for other expenses. Moreover, he claims that the plaintiffs were unjustly enriched by his payoff of their obligation under the prior indebtedness and first and second mortgages at the time he refinanced the property in his name, regardless of how he obtained the money to pay off that obligation.

The plaintiffs filed suit seeking recovery for the damages caused by Kelly and Voss' actions, which slandered their title to the property and effectively resulted in an unlawful taking of their property. Kelly's claim for reimbursement assumes the plaintiffs remain owners of the property, which is an issue that must be addressed by the Florida courts. Therefore, Kelly's reconventional demand for reimbursement is denied.

Kelly also argues that the trial court erred in failing to award him court costs because he was the "prevailing party." In light of our finding that Kelly is liable, we find this argument lacks merit.

ALLOCATION OF FAULT

Louisiana Civil Code article 2323(A) provides that in "any action for damages ... the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined ... ." Subsection (B) provides that the allocation of fault "shall apply to any claim for recovery of damages ... asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability."

Because we have concluded that the combined actions of both Kelly and Voss caused harm to the plaintiffs, we find that Kelly and Voss are each equally and totally at fault.

CONTRIBUTION

Voss filed a cross-claim against Kelly seeking indemnification and contribution in the event that he was found to be liable and damages were awarded against him. The trial court did not rule on this cross-claim, apparently because of its finding that there were no damages. Pursuant to La. C.C. arts. 1804 and 1805, Kelly and Voss, as solidary obligors, are each liable for their own "virile portion," the fault allocated to each solidary obligor. Voss is not entitled to contribution from Kelly, if and when that claim arises, because Voss is wholly at fault.

DAMAGES

Plaintiffs argue that they are entitled to damages based on the value of the property as of May 24, 2006. Plaintiffs note that as a result of the refinancing by Kelly, the property now bears an additional encumbrance and indebtedness in the amount of $412,000.00. Although plaintiffs admitted that the decline in real estate values resulted in a mortgage greater than the property's value at the time of trial,

they argue that on the date of refinancing, the equity in the property was, at a minimum, $1,332,000.00 (based on Countrywide's appraisal of $2,600,000.00 minus the mortgage of $1,268,000.00) and that their combined interest in the equity was, at a minimum, $666,000.00 (50% of $1,332,000.00). Plaintiffs further claim additional damages based on their inconvenience, loss of use and enjoyment of the property, and their emotional distress in the amount of $75,000.00 each.

Kelly contends that plaintiffs have not proven any damages with reasonable certainty, that normal inconveniences or frustration are not compensable, and that to recover for the intentional infliction of emotional distress, the plaintiffs must prove his conduct was outrageous. At trial, the defendants argued that the plaintiffs had not suffered any damages because the forged quitclaim deed was a nullity and did not actually transfer the plaintiffs' ownership. Moreover, they contend that the plaintiffs actually benefited from Kelly's actions that resulted in a payoff of the loan and mortgages that plaintiffs were obligated to pay.

The trial court agreed that the forged quitclaim deed was a nullity and, because it did not actually divest plaintiffs of their ownership interest in the property, they did not suffer "any ascertainable damage." The court asserted that "the only damages" plaintiffs could claim were related to the inconvenience of correcting the Florida county public record, but because plaintiffs had not filed any such legal proceeding, they were not entitled to damages. Had they proved the fraudulent mortgage could not be set aside, the trial court indicated the plaintiffs would have been entitled to the return of their down payments. Moreover, the trial court found plaintiffs did not suffer any mental distress, because they were not denied the use or enjoyment of their property by Kelly. Rather, the plaintiffs voluntarily refused to use the property, and their refusal, even if "understandable on a purely emotional level," was not compensable as mental anguish.

The defendants' arguments and the trial court's reasoning defy the reality of the situation. As noted earlier, the issues of nullity of the quitclaim deed and ownership of the property must be decided in a Florida court. The trial court's reasoning that the plaintiffs had to attempt to restore their rights to the property in Florida in order for damages to be assessed in this suit, essentially means that plaintiffs had the obligation to repair their harm, which was caused by Kelly and Voss. Further, we are aware of Kelly's testimony that he was willing to cooperate in restoring plaintiffs to their prior position. However, it was impossible to do so, because the recordation of the quitclaim deed and the mortgage in the Florida county public records created an equitable lien in favor of the new mortgage holder, Countrywide. See *Tribeca Lending Corporation v. Real Estate Depot, Inc.*, 42 So.3d 258, 262-64 (Fla. App. 4th DCA 2010). Thus, if there was any potential for plaintiffs to mitigate their damages, that possibility was destroyed by the creation of the equitable lien.

The term "damages" refers to pecuniary compensation, recompense, or satisfaction for an injury sustained. The most common type of damages in the delictual context is compensatory damages. ***Wainwright v. Fontenot***, 00-0492 (La. 10/17/00), 774 So.2d 70, 74. Generally, compensatory damages are awarded on the basis of the loss suffered and are designed to replace the loss caused by the wrong or injury. Stated another way, the purpose of a compensatory damage award is to restore the injured party, as closely as possible, to the position he would have been in had the accident or incident never occurred. ***Sharp v. Daigre***, 545 So.2d 1063, 1064 (La. App. 1st Cir. 1989), ***affirmed***, 555 So.2d 1361 (La. 1990); ***Great American Surplus Lines Insurance Co. v. Bass***, 486 So.2d 789, 793 (La. App. 1st Cir.), ***writ denied***, 489 So.2d 245 (La. 1986).

Compensatory damages are further divided into the broad categories of special damages and general damages. Special damages are those that either must

be specially pled or have a ready market value, *i.e.*, the amount of the damages supposedly can be determined with relative certainty, including medical expenses and lost wages. On the other hand, general damages are those that may not be measured with any degree of pecuniary exactitude, are inherently speculative in nature, and cannot be fixed with mathematical certainty. See ***McGee v. A C and S, Inc.***, 05-1036 (La. 7/10/06), 933 So.2d 770, 774. The term "general damages" includes those for mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle which cannot be measured definitively in terms of money. ***In re Medical Review Panel on Behalf of Laurent***, 94-1661 (La. App. 1st Cir. 6/23/95), 657 So.2d 713, 722.

There is no mechanical rule for determining general damages; rather, facts and circumstances of each case control. ***Stockstill v. C.F. Industries, Inc.***, 94-2072 (La. App. 1st Cir. 12/15/95), 665 So.2d 802, 817, ***writ denied***, 96-0149 (La. 3/15/96), 669 So.2d 428. Generally, in the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the trier-of-fact. See La. C.C. art. 2324.1. Non-pecuniary damages for fraudulent acts can include recovery for mental anguish, aggravation, and inconvenience that the wrongful actions caused. See ***Meador v. Toyota of Jefferson, Inc.***, 332 So.2d 433, 438 (La. 1976). See also ***In re Rushing***, 424 B.R. 747, 753-54 (Bankr. M.D. La. 2010)

The actions of Kelly and Voss have or will cause the plaintiffs loss of their time, money, and wages to seek legal representation and to file any legal proceedings in Louisiana and/or Florida. In order for plaintiffs to pursue their remedies in Florida, they would have expenses, including the costs of communicating with Florida legal counsel, possibly hiring experts, traveling to and staying in Florida, and lost wages. Nevertheless, these particular damages are special and must be determined with relative certainty. Since plaintiffs have not

presented any evidence as to the specific amount of these damages, any award of these special damages would be speculative on our part. Moreover, we decline to award the amount of special monetary damages sought by plaintiffs based on the loss of their share of the property. To do so would require this Court to decide the issue of ownership, an issue over which we lack jurisdiction.

This case presents a situation where the damage sustained by plaintiffs is not physical and is hard to quantify. Their damages result from the harm caused to their rights as property owners and their relationship to the property. 73 Corpus Juris Secundum, Property § 44 (2011) provides:

> Ownership of property comprises numerous different attributes, including dominion, control, right, interest, and title. The chief incidents of the ownership of property are the right to its possession, the right to its use, and the right to its enjoyment. Some courts say the chief incidents of ownership of property are the rights of use and enjoyment, and of disposition. It has also been said that the three primary indicia of ownership of personal property are title, possession, and control, which includes the right to sell, dispose of, or transfer. The primary incidents of ownership have been expressed elsewhere as including the right to possession, use, and enjoyment of the property, the right to change or improve the property, and the right to alienate the property at will. [Footnotes omitted.]

Subject to limitations and qualifications, ownership also gives a property owner the right to the natural, proper, and profitable use of the land, the right to income or profits accruing from the property, the right to invite other persons to use the property, or, conversely, to exclude them from doing so, the right to change or improve the property, and the right to sell the property.

Plaintiffs admitted they knew there was a risk that the value of the investment property would decrease. That event, however, is not the source of the plaintiffs' damage. Instead, their harm was a result of the loss of or impingement on their rights as real property owners (actual and/or on the public record.) The combined actions of Kelly and Voss changed the plaintiffs' relationship to the

property; they no longer had full rights of ownership, including the right to enjoy, use, profit, and change the property.

Awards of general damages for mental anguish and inconvenience arising from the loss of use of property have been allowed in cases based on the claim of tortious conversion of property. See ***Alexander v. Qwik Change Car Center, Inc.***, 352 So.2d 188, 190 (La. 1977). The Supreme Court has also concluded that where property has been wrongfully seized through judicial process, damages for mental anguish and inconvenience due to the loss of use of the property are recoverable. See ***Nassau Realty Co., Inc. v. Brown***, 332 So.2d 206, 211 (La. 1976); ***Hernandez v. Harson***, 237 La. 389, 401, 111 So.2d 320, 324 (1958). In ***Hernandez***, the Supreme Court stated:

> Plaintiff is entitled to recover for humiliation, mortification and mental anxiety, and for physical discomfort and inconvenience as a result of the deprivation of use and enjoyment of his car.... Such an item is not confined to proof of actual pecuniary loss. It is true that there is no proof of malice nor was the seizure characterized by harshness and total disregard to the interests of plaintiff. Yet it was illegally and wrongfully executed, coupled with the continued deprivation of its use for an extended period of time, sufficient to have caused mortification, annoyance and physical discomfort.

Hernandez, 237 La. at 401-02, 111 So.2d at 324.

Herein, the testimony indicates that plaintiffs felt cheated and betrayed, and were unable to use and enjoy the property. They did not voluntarily choose to give up their right to use or enjoy the property; rather, their rights were damaged by the actions of Kelly and Voss. Based on our review of the evidence in the record, we find plaintiffs suffered interference and impingement on their rights as owners of real property, inconvenience, and mental anguish caused by the tortious acts of Kelly and Voss. Accordingly, Thomas L. McGuire, III, and E. Douglas Henriksen are each entitled to an award of $150,000.00 for general damages.

CONCLUSION

For the reasons set forth in this opinion, that portion of the trial court judgment dismissing the plaintiffs' claim for damages against defendants, John J. Kelly and David C. Voss, is reversed and vacated. We hereby render judgment in favor of the plaintiffs, Thomas L. McGuire, III, and E. Douglas Henriksen, and against defendants, John J. Kelly and David C. Voss, *in solido*, for general damages in the sum of $150,000.00 to each plaintiff, together with legal interest thereon as provided by law, and for all costs. In all other respects, the judgment of the trial court is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND RENDERED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0562

THOMAS L. MCGUIRE AND E. DOUGLAS HENRIKSEN

VERSUS

JOHN J. KELLY

****

McCLENDON, J., agrees in part and dissents in part.

I agree with the majority that there is sufficient evidence to conclude that Kelly committed fraud by forging his partners' signatures thereby obtaining an unjust advantage. However, I must respectfully disagree with the majority's finding that the actions of Voss, the notary, amounted to fraud. Although there is no question as to the fault of Voss or that his negligence as a notary public is actionable, I cannot find that Voss, who failed to exercise the required care in performing his duties as a notary, committed the intentional act of fraud.

Louisiana Civil Code article 1953 provides:

> Fraud is a misrepresentation or a suppression of the truth made **with** the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. (Emphasis added.)

I find the majority's application of fraud in this case to be too far reaching. As the majority correctly notes, fraud requires the intent to deceive. However, fraud cannot be predicated on mistake or negligence, no matter how gross. Fraudulent intent, which constitutes the intent to deceive, is a necessary element of fraud. **Whitehead v. American Coachworks, Inc.**, 02-0027, p. 6 (La. App. 1 Cir. 12/20/02), 837 So.2d 678, 682.

Voss testified that he believed that the plaintiffs were at J. Alexander's Restaurant when the quit claim deed was executed. He stated that when he entered the restaurant, Kelly was talking to a large group of men who were at

the end of the bar. Voss stated that he thought that plaintiffs were in the group, but that it was "kind of embarrassing" because he had previously met the plaintiffs, but did not recognize them. When Kelly showed him the unsigned document, Voss looked at it and, thinking that plaintiffs were present, stated, "Let's get it signed." Voss said he started watching a basketball game on television, and Kelly went back to the group with the document. When the document came back to Voss, the signatures were affixed to it. At this point, Voss notarized the document. Voss testified that although he did not witness the signatures, he assumed, knowing Kelly and trusting him, that the plaintiffs were there at the bar and had signed the deed. On that basis, he notarized the document.

In finding the notary committed fraud, the majority relies on the cases of **Lacour v. National Surety Co. of New York**, 147 La. 586, 85 So. 600 (La. 1920) and **Rochereau v. Jones**, 29 La.Ann. 82 (La. 1877). However, these cases are distinguishable from the present case as they involved situations where either the notary knew of or participated in the forgery. The majority fails to make said distinction. Further, the appellate court in **Collins v. Collins**, 629 So.2d 1274, 1276 (La. App. 5 Cir. 1993), writ denied, 94-0422 (La. 4/4/94), 635 So.2d 110, also cited by the majority, merely held that a notary may be liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties. The court in that case reversed the granting of the defendants' exceptions of no cause of action and no right of action finding that the plaintiff had stated a cause of action against the notary by alleging that the notary violated his notarial obligation by notarizing an act of sale while he knew or should have known that the person signing was not who they purported to be and/or by failing to request identification. **Collins**, 629 So.2d at 1277.

More troublesome is this Court's decision in **Summers Brothers, Inc. v. Brewer**, 420 So.2d 197, 204 (La.App. 1 Cir. 1982). **Summers** relied upon decisions involving active fraud by the notary, including **Lacour** and

Rochereau, to reach the conclusion that the notary committed fraud when he authenticated a document after it was signed, despite the fact that the notary was unaware that the signatures were forgeries. I find the holding in **Summers** to be misguided. Unlike the present matter, the cases relied on by the **Summers** court all presented situations where the notary was part of the deception and fraud. The **Summers** court blurred the line between negligent and fraudulent actions, and the majority in this matter continues to do so. Here, while Voss admittedly notarized a document that he knew was not actually signed in his presence, without exercising the ordinary care required of a notary, he did not deliberately notarize a document that he knew to be forged. Therefore, I find that Voss's actions amounted to actionable negligence as opposed to fraud.

Additionally, I disagree with the majority's conclusion that Voss is liable in solido with Kelly. Civil Code Article 2324 provides, in pertinent part:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.
>
> B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person ....

Article 2324A requires a meeting of the minds or collusion between the parties for the purpose of committing wrongdoing. **Boudreaux v. Jeff**, 03-1932, p. 11 (La.App. 1 Cir. 9/17/04), 884 So.2d 665, 672. Clearly, Voss's actions although negligent and a breach of his duties as a notary were not a part of a conspiracy with Kelly, nor was there collusion between Kelly and Voss for the purpose of authenticating a forged document. There is simply no evidence that Voss and Kelly were working together or acting as co-conspirators. In fact, Voss was also deceived by Kelly and led to believe that all the parties had signed the document in question. The majority attempts to cloak Voss with co-conspirator status, but there is no evidence in the record that suggests Voss had knowledge

of Kelly's scheme. The majority's *but for* analysis is insufficient to establish in solido liability. Accordingly, I would find Voss liable for 30% of the damages as a joint tortfeasor.[1]

With regard to the plaintiffs' duty to mitigate their damages, the law requires a person injured by the wrongful act of another to mitigate his damages; it also requires him to resort to legal action in order to mitigate those damages. **Weber v. McMillan**, 285 So.2d 349, 352 (La.App. 1974); **Gray v. State, Department of Highways**, 250 La. 1045, 202 So.2d 24 (1967); **Humphreys v. Bennett Oil Corp.**, 195 La. 531, 197 So. 222 (1940). The record does not reflect any action on the part of the plaintiffs to have the property restored in their names, despite Kelly's admission that the signatures were forged and his offers to fully cooperate in recognizing the plaintiffs' interest in the property. Further, the plaintiffs failed to hire legal counsel to attempt to correct the defect in the title or to have the fraudulent act annulled. Had the plaintiffs taken action to restore their title to the property, their damages would have been lessened.

Lastly, I would have awarded specific damages and disagree with the majority's conclusion that no specific damages could be quantified.[2] Clearly, specific damages could be calculated by beginning with the total loan amount acquired by Kelly with the forged documents and subtracting the first and second mortgage payoffs, as well as property taxes, insurance premiums and note payments made by Kelly on the property at issue, from the date of the refinancing to the date of trial. This figure is reflective of the unjust advantage that Kelly gained by forging the signatures of his partners. Further, regarding general damages, given that the plaintiffs made no effort whatsoever to mitigate their damages, I would have awarded only $15,000 each to McGuire and Henriksen over and above the specific damage award.

Considering the above, I respectfully agree in part and dissent in part.

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[1] Because I do not find that Voss is solidarily liable with Kelly, I also disagree with the majority's discussion regarding contribution.

[2] To the extent the majority finds that attorney fees are too speculative, I agree.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0562

THOMAS L. MCGUIRE, III AND E. DOUGLAS HENRIKSEN

VERSUS

JOHN J. KELLY

MAR - 8 2012

McDONALD, J., dissenting:

With all due respect to the majority, I must disagree and respectfully dissent from this opinion. In particular I agree with Judge McClendon's dissent finding that Voss' actions were negligent, but not fraudulent. I also agree with her conclusion that the majority's award of general damages is excessive.

While it is true that judgments are appealed and not the reasons for judgments, here the trial court specifically referenced its reasons for judgment and it is clear that certain factual findings were made. Significantly, the trial court found that neither the actions of Kelly nor the attorney that notarized the quitclaim deed were prompted by the intent required to prove a finding of fraud. Our inquiry then should be, does the record reasonably support that finding or is it clearly wrong?

The trial court cited the definition of fraud, a "misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause loss or inconvenience to the other," and noted that a finding of fraud requires proof stronger that a mere preponderance of the evidence. La. C.C. art. 1953. The majority is correct that the trial court applied the wrong standard of proof for finding fraud. The proper standard for proving fraud is, in fact, by a preponderance of the evidence. However, the majority

correctly notes, "If only one of the factual findings is tainted by the application of incorrect principles of law that are prejudicial, the appellate court's *de novo* review is limited to the finding so affected." *Boyd v. Boyd,* 2010-1369 (La. App. 1 Cir. 2/11/11), 57 So.3d 1169, 1174; *Rideau v. State Farm Mutual Automobile Insurance Co.,* 2006-0894 (La. App. 1 Cir. 8/29/07), 970 So.2d 564. The majority then finds that the trial court's "application of the erroneous legal standard for fraud was prejudicial and skewed the trial's courts numerous findings as to issues of essential material fact, including credibility, intent, and the existence of damages." The majority conducts a *de novo* review of the entire record rather than limiting the error to the affected finding. While the trial court's application of the wrong standard may have had some impact on the findings concerning Kelly, it had nothing to do with the case involving Voss.

I believe Judge McClendon's analysis is correct regarding the erroneous findings and conclusions about the notary, David Voss. Voss filed an application for rehearing that presents excellent arguments concerning the majority's errors. Initially, Voss notes that the trial court signed a judgment on July 22, 2008, granting his motion for partial summary judgment that he did not commit fraud and was only liable for his allocable share of fault for any of the plaintiff's damages. Voss correctly indicates that this judgment was not appealed. The judgment that is on appeal is the one signed on November 9, 2009. This judgment came after the trial, and, again, the court found Voss did not commit an intentional act of fraud.

The majority observes that Voss' act of fraud was in connection with the acknowledgement clause. The majority finds:

> Voss knew that the plaintiffs did not appear before him and acknowledge their signature on the deed, nor did he require that they do so. Thus, by executing the acknowledgement clause, Voss intentionally misrepresented the circumstances surrounding the quitclaim deed. Fraud can result from a party's misrepresentations, silence, or inaction. See La. C.C. art. 1953. Although Voss testified that he never meant to deceive the plaintiffs, he admitted that Kelly

> told him a notarized deed was required in order for Kelly to become the property's sole owner and accomplish the refinancing. With this knowledge, Voss acted in concert with Kelly to complete the acknowledgment clause in the deed that both men knew to be false. By executing the quitclaim deed and signing the acknowledgment clause, Voss' actions were a deliberate misrepresentation and violated his duties as a notary public in the course of his official notarial duties. Based on our review of the evidence and jurisprudence, we conclude Voss is liable because his intentional misrepresentations and failure to require plaintiffs to acknowledge the quitclaim deed in his presence caused harm to the plaintiffs.

This is clearly a case of negligence but falls far short of an intent to deceive. Using the majority's analysis, a notary would never be negligent and would always commit fraud. I disagree with the majority's finding that Voss deliberately misrepresented anything. His failure to have the plaintiffs appear before him was certainly a violation of his notarial duties, but does not constitute fraud or an action in concert with Kelly to intentionally deceive anyone. In finding fraud, the majority fails to consider the key facts surrounding the signing of the quitclaim deed. Voss had performed legal tasks for the three partners in the past. He personally knew McGuire and Henriksen as well as Kelly. When Kelly presented the document to him at the restaurant/bar, it had not been signed and Voss thought the plaintiffs were in a group of 10 to 15 people who were at the bar. He thought they had signed the document when Kelly brought it back to him. I believe these facts indicate a lack of intent by Voss to deceive or defraud. The majority's finding that Voss committed an intentional misrepresentation and was dishonest are not supported by the record.

The majority adopts the plaintiffs' contention that this court's ruling in *Summers Brothers, Inc. v. Brewer,* 420 So.2d 197 (La. App. 1 Cir. 1982), requires a finding of "constructive fraud" on the part of the notary. The *Summers* case is factually distinguishable. Significantly, the plaintiffs in *Summers* were the third parties who relied on the notarized documents; the plaintiffs in the case before us did not rely on the notarized document, but were the individuals whose names

were forged on the quitclaim deed. They were not harmed because they relied on the document. Rather, they were harmed by the actions taken by Kelly in forging their names and having the deed notarized and recorded in Florida. I believe Voss is correct that his actions are more in line with the cases in which the notary believed that the document was being signed in his presence by the person, but that belief was mistaken because of a misrepresentation by a third person. *Quely v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So.2d 756, 761 (La. 1985); *Webb v. Pioneer Bank & Trust Co.*, 530 So.2d 115 (La. App. 2 Cir. 1988).

I agree with Judge McClendon that Voss is not liable in solido with Kelly for any liability Kelly might have. Louisiana Civil Code article 2324 requires a conspiracy between the actors. There is nothing in the record to show collusion between Voss and Kelly to authenticate the quitclaim deed. While Voss was certainly negligent in his notarial duties, there is no evidence that there was any agreement between the two to forge the document. The majority asserts that Kelly admitted deceiving Voss. If the majority is correct then Voss could not have participated in a conspiracy. Therefore, I believe fault should have been allocated between Kelly and Voss and suggest Judge McClendon's allocation is certainly reasonable. Kelly had a long standing relationship with Voss and intentionally deceived him. Voss' actions were merely negligent. Allocating 30% fault to Voss and 70% to Kelly is equitable.

The case against Kelly is certainly stronger than that against Voss. However, even conducting a *de novo* review of his actions, I believe the court was correct. The trial court found that, "[W]hile Kelly's decision to forge the plaintiffs' name[s] on the quitclaim deed was certainly untruthful, there is no evidence that he did it to obtain any unjust advantage or to inconvenience his partners."

I disagree with the majority's conclusions and believe the trial court was correct. There are telephone records confirming Kelly's claim that he tried to reach Hendriksen on the afternoon he met with the notary and also on the following day. Considering all of the facts, the nature of the prior relationships among the parties, the fact that it was Kelly's financial strength that allowed the parties to invest in the property, Kelly's position as managing partner when the property was owned by San Destin Investment, L.L.C., his majority ownership interest, and the prior refinancing, I believe the trial court was correct in finding that Kelly did not intend to defraud his partners. It is important to note that, once confronted by them in the suit, he agreed to do whatever they wanted to correct the transfer and readily agreed to the requested injunctive relief that he would not further encumber or alienate the property without their consent.

The trial court also noted in its reasons for judgment that, while the acts of Kelly and Voss were wrong, the plaintiffs had not proven that they sustained actual damages. Since these findings were not based on an erroneous legal principle, this portion of the judgment should be subject to the manifest error standard and not a *de novo* review. *Boyd v. Boyd* , 57 So.3d at 1174. Even conceding for argument's sake that the measure of damages should be calculated as of May 2006, when the wrongful acts occurred, the plaintiffs must still prove that they were damaged. Plaintiffs direct our attention to the cash portion of the May 2006 refinancing, almost $400,000.00, and correctly claim that a portion of that equity should have been available to them. However, both plaintiffs vigorously complained of Kelly's further encumbrance of the investment. McGuire testified that he intended to pay the monies that would be required to meet the property's obligations out of his pocket, as he had prior to the June 2005 refinancing. Hendriksen repeatedly testified that he did not want the property encumbered further. The fact remains that by July 2006, the money obtained in the 2005 refinancing that was to be used

to meet the note on the property would be exhausted. Neither of the plaintiffs were required to put any more money in the investment after May 2006. More importantly, Kelly is liable for the debt incurred for the use of the equity cashed out in May 2006, and the plaintiffs are not.

It is true that in May 2006, the public records in Florida indicated that plaintiffs had no ownership interest in the Driftwood property, a fact that no doubt shocked the plaintiffs when they initially learned it. However, they were simultaneously relieved of a portion of liability for over $1,200,000.00 in loans. The property was listed for sale with a real estate broker in April 2006 for $2,995,000.00. McGuire testified that he received a verbal offer of $2,000,000.00 around that time and he told the offeror that "the partners will never take that." An offer for $2,200,000.00 was then proposed. When told of the offer, Kelly said that he thought the property was worth at least $2,500,000.00, but three days later agreed to take the offer, with certain conditions. The offer was never reduced to writing. At the time of trial, the property was listed for $1,999,000.00, and the indebtedness on it was $1,800,000.00. There had been no offers to buy. Apparently the real estate market for these types of properties in Destin was not then what it was in 2005. The testimony was, at that time, the properties' values were increasing appreciably monthly. The plaintiffs retain their ownership interests in the property pursuant to the counter letter provided by Kelly. They also retain the right to demand an accounting from Kelly should the real estate market return their investment to its original potential.

This property was purchased in 2004 as an investment. McGuire's testimony was that he intended to hold onto it for a year and then sell it. It was McGuire who originally interested Hendriksen in investing, as they had previously invested in property together. McGuire and Hendriksen were not interested in investing in such an expensive property, and did not have the financial strength to

qualify for financing, even had they wanted to. Hendriksen knew Kelly, who was a real estate developer that had handled transactions of this magnitude. The three ended up as owners in the property, with McGuire and Hendriksen's interest being 22½% each and Kelly's interest being 55%. (Nevertheless, the expenses were split such that 25% each was owed by McGuire and Hendriksen and 50% was owed by Kelly, except for the utilities, which were paid 1/3 each.) At the time of purchase, the property was encumbered by approximately $1,200,000.00 of indebtedness and had appraised for at least $2,600,000.00. However, in spite of the original intention, in 2005 the property was refinanced, and money was taken out to finance improvements and maintenance of the property, including the monthly mortgage indebtedness. All parties agreed to this, and all were liable for their pro rata share of the debt. Effective May 2006, only Kelly was liable for the debt. The property is now worth approximately $886,000.00 and almost $1 million more than that is owed on it. It is easy to see how the trial court reached the conclusion that the plaintiffs did not prove any damages. I find no error in that finding by the court.

Kelly answered the appeal, claiming that the trial court erred in denying his reconventional demand and also in assessing court costs to him. Kelly claims that the plaintiffs are still owners of the property in accordance with their original agreement and seeks reimbursement for their share of the expenses of the property. Although plaintiffs did originally claim an ownership interest in the property, even after the May 2006 transaction, at the time of trial they denied any ownership interest in the property. Even assuming that it has always been Kelly's position that the ownership interest in the property remained unchanged, and he has signed a counter letter to that effect, according to the state of Florida's public records, the property is owned solely by Kelly. Legally, I believe that to be the case at this time. Therefore, until plaintiffs take steps to restore their ownership interests,

Kelly has no right to demand reimbursement for the monies he has invested in the property or compensation from the plaintiffs for unjust enrichment.

I believe the majority is correct when it states that "the issues of nullity of the quitclaim deed and ownership of the property must be decided in a Florida court." However, the majority then awards damages for interference and impingement on the plaintiffs' rights as owners of the property. I agree with Judge McClendon that the plaintiffs have done nothing to restore the property to their name. Until they do so, any claim for damages is premature and speculative at best.

While I agree with the trial court that the plaintiffs failed to prove any damages, if any are due, I agree with Judge McClendon that any general damage award for emotional distress should be in the $15,000 range at most. It is hard to imagine how the majority arrived at a figure that is ten times that suggested by Judge McClendon. While the factual scenario of this case may not be commonplace, neither is it extraordinary. Yet the majority cites no legal authority for its award.

For these reasons, I respectfully dissent. I believe the actions of the notary, Voss, to be negligent, and I do not believe there is any proof that he is solidarily liable with Kelly. His fault should be allocated with that of Kelly. I believe the trial court was correct in finding that Kelly did not intend to defraud the plaintiffs and in finding that the plaintiffs failed to prove any damages. If any damages are due, I find the majority's award to be excessive.