

# Edson v. Fogarty - Broker Can Be Liable to Purchaser for Misrepresentation of Fact, Regardless of Reliance, Where Purchaser Could Not Have Discovered Misrepresentation on Its Own

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## *Background*

A real estate broker listed for sale a below grade-level commercial building for sale, which at one time was a grocery store. In listing the property, the broker looked at old listings of the property. The broker believed there was no way to determine the precise zoning classification of the portion of the building listed, and he relied - at least in part - on the zoning classification in the prior listing of the property. After the sale fell through, the prospective purchaser learned the property was actually zoned for residential use, and sued the broker for negligent misrepresentation, fraud and violation of the Real Estate License Act. The trial court granted summary judgment to the broker, concluding that all of the causes of action pled require a showing of reliance.

## *Court's Holding*

The 1st District of the Illinois Court of Appeals reversed the trial court. The Court first found, with little analysis, that reliance was not an element of the fraud claim. More importantly, the Court rejected an argument that the issue of reliance was irrelevant because a misrepresentation about zoning is one of law and not fact. The Court's decision on this issue hinged on the fact that the buyer could not have discovered - through ordinary prudence - prior to buying the space that it was zoned for residential use. Specifically, there was testimony from the broker that there was no way of determining the zoning classification for the specific portion of the property listed for sale. While he did not know the zoning classification, the one he included in the listing did not exist. This was enough for the Court to conclude the misrepresentations were of fact and not law, and the Court reversed summary judgment on the Consumer Fraud Act, common law fraud and negligent misrepresentation courts. The Court also concluded, separately, there is not reliance required in an action against a broker under the Real Estate License Act.

### *Takeaway*

*Edson* makes clear courts can apply a different standard for determining fraud and misrepresentation claims against a broker depending on whether the alleged misrepresentation is one of fact or one of law. Courts look to the misrepresentation itself, and specifically whether the purchaser would have been able to discover through ordinary prudence the veracity of the representation, in determining whether it is one of fact or law. If it is a misrepresentation of fact, the plaintiff need not demonstrate reliance as an element of a fraud or negligent misrepresentation cause of action.