

**SUZANNE M. CUNNINGHAM
AND GLENN D.
CUNNINGHAM**

*

NO. 2004-CA-0637

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COURT OF APPEAL

VERSUS

*

FOURTH CIRCUIT

LILLIAN SCHON SMALL

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-17357, DIVISION "J"
Honorable Nadine M. Ramsey, Judge

* * * * *

Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge Terri F. Love, and
Judge David S. Gorbaty)

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ESTATE

OF DEFENDANT-APPELLANT, LILLIAN SCHONE SMALL

AFFIRMED

Kurt E. Schon, Executor of the Succession of Lillian Small, suspensively appeals the judgment of the district court in favor of Suzanne M. Cunningham and Glenn D. Cunningham, resulting from a suit to annul a contract for fraud. We affirm.

On or about October 13, 1993, the Cunninghams visited the French Quarter art gallery of Lillian Schon Small. After discussing with Ms. Small their desire to purchase a piece of artwork both as an investment piece and for their family to enjoy, the Cunninghams reviewed several pieces of artwork. The couple testified that they relied on the expertise of Ms. Small and ultimately decided on a purported piano-key ivory etching entitled “The Knight, Death, and the Devil” for \$12,000, which they believed to be an original etching by renowned German Renaissance artist, Albrecht Durer. The Cunninghams testified that they agreed to purchase the piece of artwork on a layaway plan requiring \$1,000 payments made monthly over the course of a year.

The Cunninghams left New Orleans without signing a purchase

agreement or making a deposit, but later received the agreement via mail at their home in Tulsa, Oklahoma. Although the purchase agreement stated that the etching was the work of master artist, Frank Cherry, the Cunninghams testified that it had always been referred to by Ms. Small as a work by Albrecht Durer. Mr. Cunningham went on to sign the agreement and the couple received the artwork on December 1, 1994. Mr. Cunningham testified that in late 1995 or early 1996, he received a valuation of the work that did not square with his understanding of the work's potential value. Mr. Cunningham further testified that he was referred to an individual who did appraisals for a museum in Tulsa. The appraiser concluded that the work was not what it was represented to be.

On October 2, 1997, the Cunninghams filed a petition for damages to rescind the sale of the etching due to fraudulent misrepresentations as to the value of the artwork. Despite several attempts to serve Ms. Small, the Cunninghams later discovered her June 14, 1998 death, and filed a motion to substitute Kurt E. Schon as administrator of Ms. Small's estate. Mr. Schon subsequently filed an Exception of Prescription. In November of 2002, the Cunninghams consulted art historian and expert, Michael Plante, and learned that the work was not an etching made on ivory. At trial, Mr. Plante testified that "he had never seen anything like it before"

and concluded that the work appeared to be done by some type of transfer that had been Xeroxed on the surface. Mr. Plante's examination of the work also revealed that there was no history of a master artist, Frank Cherry. In addition, he testified that the backing of the frame was stamped "Made in Mexico," and was likely to have been made within the last 20 years. Mr. Plante assigned the work a value of \$50. On December 12, 2002, the Cunninghams filed a Supplemental and Amending Petition, which specifically pleaded Ms. Small's fraudulent misrepresentation as to the identity and mastery of the artist, the composition and/or medium of the artwork, the process of creation, and the value and investment potential of the work. After a bench trial, the district court rendered judgment in favor of the Cunninghams and awarded them \$12,000 in damages plus costs and attorney fees. This timely appeal follows.

It is axiomatic that appellate courts may only disturb a trial court's findings of fact that are manifestly erroneous or clearly wrong. *Brown v. Schwegmann*, 02-1509, p.5 (La.App. 4 Cir. 12/10/03), 861 So.2d 862, 864-65. However, an appellate court is not bound to accept a trial court's determination that is derived from overlooking an applicable legal principle. *Mart v. Hill*, 505 So.2d 1120, 1127 (La.1987). Although the factual findings of the trial judge are accorded great weight, it is the duty of the reviewing court to determine if the fact finder's conclusions are justified and the reviewing court is not required to affirm the trial court's conclusion merely because some record evidence would furnish a reasonable factual basis for the contested findings. *Brown*, 02-1509 at p.5, 861 So.2d at 865.

In his sole assignment of error, Mr. Schon argues that the judgment of the district court was manifestly erroneous in light of the evidence presented at trial. We disagree.

Fraud is defined as 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. La. C.C. art. 1953. While every fraudulent misrepresentation will not vitiate consent, an error induced

by fraud must concern a circumstance that has substantially influenced that consent. La. C. C. art. 1955. Unlike unilateral error, which requires error as to the specific cause for making the contract error, an error in fraud need not be based on the cause of the obligation, or the reason why the party bound himself. *See Id.*; La. C.C. art. 1950.

In the instant suit, the record reflects the Cunninghams reliance on the expertise of Ms. Small in selecting the purchased work. Mrs. Cunningham testified that Ms. Small appeared to be well versed in all of the art that the couple viewed and presented herself as the owner of a more exclusive gallery who procured art for private collections. Mrs. Cunningham also testified that the couple emphasized to Ms. Small their desire to purchase artwork as an investment piece. Moreover, when the Cunninghams became interested in the Albrecht Durer piece, Ms. Small emphasized how the antique framing, the backing, ivory, and etching process added value to the work. When the couple returned to the gallery, Mrs. Cunningham testified that Ms. Small stated that Mr. Cunningham had picked out “the best etching, the best piece of artwork in the whole place.” Despite their confidence in Ms. Small’s statements, the expert testimony of Mr. Plante revealed that the

work was not what it was represented to be in the purchase agreement.

Although Mr. Schon contends that the Cunninghams could not have believed that the work was an original since the purchase agreement clearly named the artist as Frank Cherry, the testimony of Mrs. Cunningham indicates that the work was always referred to by Ms. Small as a “Durer work”. While it is arguable that the idea of buying an original piece by Albrecht Durer was the principal cause in buying the work, error induced by fraud need not concern the cause of the obligation to vitiate consent. La. C.C. art. 1955. In addition to the Cunninghams belief that the work was an original, the record reflects that they were lead to believe that the etching process done on ivory, the backing, and antique framing increased the overall value of the work. As it appears from the record that these circumstances substantially influenced the Cunningham’s decision to purchase the artwork, we find no error by the district court.

Decree

For the reasons stated herein, we affirm the judgment of the district court in favor of Suzanne M. Cunningham and Glenn D. Cunningham.

AFFIRMED