OA 5-29-96

017

IN THE SUPREME COURT OF FLORIDA

HTP, LTD., et al.,

Petitioners

vs

LINEAS AEREAS COSTARRICENSES S.A., et al.

Respondents

CASE NO. 86,913

Discretionary Review of a Decision of the District Court of Appeal of Florida Third District, Case No. 94-2779

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

A jury in Miami, Florida, found the Petitioners in this case -- HTP, Ltd., the Tyler Corporation, and Stephen H. Gamble -- liable for fraud. At the time of the fraud, two lawsuits were pending between Petitioners and Respondents -- Lineas Aereas Costarricenses, S.A., and LACSA International, Inc. (together "LACSA"). Petitioners recruited a spy, pledged him to secrecy, and planted him in the highest echelons of LACSA's management. The goal was to mislead LACSA into abandoning its lawsuit against Petitioners and to pay a significant sum of money to settle Petitioners' claims against LACSA. The spy, J. Christopher Mallick, gathered confidential information from internal LACSA discussions and relayed it to Petitioners. Petitioners used that information to formulate a strategy of fraudulent misrepresentation to lure LACSA into settlement. Settlement agreements were signed. Petitioners found the agreements to be beneficial and had no reason to -- and did not -- breach them. However, they did later contend that LACSA owed further payments under those agreements.

Before the appellate court, Petitioners argued that, for two reasons, they should not have to pay damages for their intentional tort. First, they argued that LACSA's claim for fraudulent inducement is barred by the economic loss rule. Both the trial and appellate courts rejected Petitioners' argument on the grounds that Petitioners' fraud constituted an independent tort.

Second, Petitioners contended that the trial court should have instructed the jury that, because LACSA had earlier accused Petitioners of fraud, LACSA could not reasonably rely on Petitioners' representations. The appellate court rejected Peti-

tioners' argument. The court pointed out that LACSA had relied exclusively on the fraudulent misrepresentations of Petitioners' undisclosed agent and not on representations made by Petitioners themselves.

Petitioners' final argument to the appellate court involved their attempt to enforce the fraudulently-induced settlement agreements. They sought damages for LACSA's alleged breach of those agreements. In particular, Petitioners argued that the verdict form used at trial should have explicitly required the jury to find the amount that Petitioners should recover on their claim for breach. Once again, both the trial and the appellate courts rejected Petitioners' challenge. These courts held that such a verdict form is correct in cases in which a fraudfeasor counterclaims for breach of contract and is met with the affirmative defense of fraud in the inducement.

This Court granted discretionary review in this case because of a conflict between the decision below, HTP, Ltd., v. Lineas Aereas Costarricenses, S. A., 661 So. 2d 1221 (Fla. 3d DCA 1995), and a decision of the Second District, Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995).

The Woodson court held that causes of action for fraud in the inducement are barred by the economic loss rule. The court reasoned that, while damages for injury to person or property are properly recoverable in tort, damages for economic loss can only be received in a contract action. Woodson v. Martin, supra, 663 So. 2d at 1329.

The Second District is wrong about that. Tort law frequently provides a remedy for purely economic loss -- the causes

of action for fraud and intentional interference with contractual relations may serve as examples.

Moreover, there is nothing in the case law of this Court to suggest that actions for fraud in the inducement are always barred by the economic loss rule. This Court has carefully excepted from the operation of the economic loss rule those torts that are independent of a breach of contract.

Though this Court has not yet expressly decided the relationship between fraud in the inducement and the economic loss rule, every other appellate court with jurisdiction over Florida cases has done so. With the exception of the Second District, all of those courts have held that causes of action for fraud in the inducement survive the economic loss rule.

There is more. Diligent research has revealed no case in any American jurisdiction that holds that, as a general rule, fraud in the inducement claims are barred by the economic loss rule. In fact, research into both other common law systems as well as principal systems of the civil law do not show any variation -- all of the systems investigated permit a fraud in the inducement claim to be brought, despite the fact that a contract was concluded and despite the fact that the only harm was economic loss. As a result, it is probable that the Second District Court of Appeal for the State of Florida is the only court in a modern legal system to have promulgated such a bar to claims for fraud in the inducement.

The conclusion in Woodson must be rejected, and the opinion below affirmed.

STATEMENT OF FACTS[1]

Petitioners' Statement of Facts is incomplete. It is Hamlet without the Prince of Denmark. They have forgotten to discuss their fraud.

LACSA is the national airline of Costa Rica. In 1982, Gamble, as president of Tyler Corporation, signed a consulting agreement with LACSA (the "Consulting/Advisory Agreement"). (PX. 1, App. 3-6.) LACSA paid $65,000 a year for Gamble's advice and assistance in the lease, purchase, and sale of aircraft used in LACSA's operations. Gamble assisted LACSA in aircraft transactions with Dan Air and Singapore Airlines.

In both transactions, in addition to the consulting fee paid by LACSA, Gamble took money from those with whom LACSA was doing business. (TR. 710 lines 23-25, 713 lines 1-3.) Gamble had a non-disclosure agreement with Singapore Airlines (TR. 710 lines 11-13) and sent an urgent telex to Singapore when he learned that information about his secret commissions was in danger of being divulged to LACSA. (TR. 664 line 25 - 665 line 3.) In the course of Gamble's cross-examination at trial, he was caught in a series of misstatements about his commission arrangements. (TR. 712 line 22 to 715 line 5.)

In order for LACSA to complete the purchase of an aircraft from Singapore Airlines, Gamble arranged for LACSA to borrow $1.9 million from HTP. (PX. 2, The 1984 Loan Agreement.) The money was borrowed at 12.8% interest and repaid in full. (TR. 675

[1] The following references will appear in this Brief:
Record on Appeal "R. "
Trial Transcript "TR. "
Plaintiffs' Trial Exhibits "PX "
Respondent's Appendix "App. "

lines 13-23.) Nonetheless, HTP later claimed a right to a $3 million interest in the aircraft. The effective interest rate on the loan was, therefore, approximately 51% per annum ($998,484 per year). (TR. 677 line 5 to 678 line 14.)

Gamble never disclosed to LACSA that he owned and controlled HTP. However, in order to avoid LACSA's discovery requests, Gamble admitted before the appellate court below that he dominated, controlled, and directed both HTP and Tyler and that he used both as his alter egos, instrumentalities, or agents. See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 634 So. 2d 724, 725 n. 1 (Fla. 3d DCA 1994). HTP is a shell corporation in Bermuda. Both HTP and Tyler are essentially operated out of Gamble's home in Connecticut. (TR. 668 line 10 to 673 line 4.)

The Consulting/Advisory Agreement was canceled in 1988 when Gamble's double dealing was discovered. (TR. 531 line 25 to 532 line 16.) In July 1988, HTP sued LACSA in California for breach of the 1984 Loan Agreement, conversion, and fraud. (PX. 5.) LACSA raised Gamble's improper dealings and the breach of fiduciary duties as affirmative defenses to HTP's claims. (PX. 5, 7th Affirmative Defense.) In January 1989, after an initial suit in federal court was dismissed for lack of diversity jurisdiction, LACSA sued Gamble, HTP and Tyler in Dade County Circuit Court for breach of the Consulting/Advisory Agreement, conspiracy to violate fiduciary duties, and fraud. (PX. 6.)

Throughout the events relevant to this lawsuit, Petitioners have been represented by the law firm of Miller Hamilton Snider Odom & Bridgeman (collectively, the "Lawyers."), particularly by two lawyers in the firm, Lester M. Bridgeman and Louis T.

Urbanczyk. As the California trial date approached, it became increasingly likely that Gamble's improprieties would lead to legal liability. Petitioners did not wish to run the risks involved in defending their case at trial against LACSA. They also decided not to approach LACSA through its litigation counsel, William J. Brown, a Miami lawyer, in search of settlement. Instead, they decided, as Bridgeman explained at trial, to pursue "some other way." (TR. 397 line 21.)

Jack Miller, the senior partner of the Miller Hamilton law firm, contacted Mallick. (TR. 391 lines 23-25.) Mallick told Petitioners that he knew LACSA's new president, Mario Quiros. (TR. 666 lines 13-24; TR. 718 line 22.) Gamble knew that Mallick had previously provided Quiros with advice. (TR. 666 line 25 to 667 line 2.) Negotiations ensued. Bridgeman recorded the original proposals that led to an agreement; Urbanczyk negotiated the fees. (PX 11, App. 42 ¶ 2.)

On June 27, 1989, HTP entered into a consulting services agreement with Mallick's company, Transcontinental (the "Consulting Services Agreement."). (PX. 13, App. 9-12.) Mallick's task was to use his relationship with Quiros to produce a settlement of the two pending lawsuits that would be favorable to Petitioners. Mallick received $5,000 by wire transfer when he signed the Consulting Services Agreement. He was to be paid $7,500 at the conclusion of the first private meeting between LACSA and HTP. A sum of $10,000 was to be paid when a tentative settlement agreement was reached. Upon final payment by LACSA, Transcontinental was to receive an additional $10,000, together with a bonus, which was to be negotiated between HTP and Transcontinental. A total of

$32,500 was paid to Mallick. (PX. 65, App. 13-16.) At the time he signed the Consulting Services Agreement, the negotiations led him to expect an eventual bonus of $100,000. (PX. 55, App. 17.) The bonus, however, was never paid.

All of this was to be kept secret. The Consulting Services Agreement contains a confidentiality provision that prevented either HTP or Transcontinental from divulging its contents to any third party. (PX. 13, App. 11 ¶ 5.) And it was kept secret. Neither party divulged anything about the relationship between them to LACSA until Judge Wilson ordered Petitioners to produce the documents relating to the fraud. (TR. 536 lines 1-7.)

Mallick's marching orders came from Gamble and the Lawyers. A week before the Consulting Services Agreement was signed, Urbanczyk wrote to inform Mallick what would be expected of him. Among Mallick's duties was the discovery of information about internal discussions within LACSA. (PX. 10, App. 22.) Moreover, the record contains, in Gamble's own handwriting, the criteria by which the amount of Mallick's bonus would be determined. (PX. 33, App. 26.) As Gamble wrote, Mallick's bonus depended on "Transcontinental's demonstration of its ability to 'ploy' the parties HTP is dealing with." (PX. 33 ¶ 4.D, App. 26; TR. 454 line 10 to 455 line 1.) Another factor to be used to calculate Mallick's bonus was how successfully Mallick isolated Quiros from others in LACSA. (PX 33, App. 26 ¶ 4.E; TR. 704 lines 14-25; TR 719 lines 14-20.)

The day after he signed the Consulting Services Agreement, Mallick met with Quiros over lunch in Costa Rica. (PX. 13, App. 8; PX. 12, App. 27) Mallick used the occasion to congratu-

late Quiros on his new position as LACSA's president and to offer his assistance. (TR. 81 lines 4-10.) During their second meeting, Mallick mentioned that he was aware that LACSA had legal problems in the United States and asked about the litigation. Quiros responded. (TR. 83 lines 3-13.) During frequent discussions with Quiros, Mallick persuaded Quiros that he wanted to act as "kind of a friendly arranger," as someone who "wanted to help" Quiros in the position of president to which he had just been named. (TR. 89 lines 19-24.) Mallick was so successful in earning Quiros' trust and confidence that Mallick accompanied Quiros to Dallas, Texas, during critical negotiations with the president of American Airlines. (PX. 41, App. 30; TR. 776 lines 16-25, 777 lines 8-12.)

In their Initial Brief, Petitioners state as a fact that, "[i]n his approach to Quiros, Mallick identified himself as a 'friend' of Gamble's." Initial Brief at 10 and 33. Petitioners' statement is without support in the record. Quiros introduced Mallick to his fellow LACSA officers as his own friend, not as a friend of Gamble's. (TR. 238 lines 22-24; 740 lines 6-8; 807 lines 18-19.) It is also undisputed that Mallick was <u>not</u> a friend of Gamble's. (TR. 421 lines 3-8; TR. 360 line 25 to 361 line 5.) Bridgeman and Gamble testified that they had never met Mallick prior to his participation in the fraudulent scheme. (TR. 625 lines 20-22 (Gamble); TR. 362 lines 9-12 (Bridgeman).) There is a reference to a "friend" of Gamble in the minutes of a meeting of LACSA's Board of Directors, but Mallick's name is not mentioned. (PX. 19.) Gerardo Jaspers, LACSA's Director of Finance, stated that the reference was not to Mallick. (TR. 740 lines 6-8; TR. 807 lines 18-21.)

It is undisputed that Mallick did not inform Quiros that he had entered into the Consulting Services Agreement and that he was being paid to get Quiros to meet with him. He also did not inform Quiros that he would receive a bonus if he could convince Quiros to settle the lawsuit on terms favorable to Petitioners. Instead, Mallick presented himself, under false pretenses, as someone who came to help a former acquaintance in fulfilling his new job as LACSA's president. (TR. 121 lines 13-25.)

Quiros was, in fact, unaware that Mallick was acting as Petitioners' agent. "I am sure that if I knew that Mr. Mallick was being retained by HTP or [Bridgeman], I would have not let Mr. Mallick influence any decision or getting information on LACSA. I would have been dealing with a representative of the other party in the litigation." (TR. 135 line 23 to 136 line 5.)

Mallick used the position of trust he acquired in his relationship to Quiros to solicit confidential information and pass it on to Gamble. (TR. 135 lines 11-13; PX. 84 M24, App. 31, Mallick Report to Gamble (Dec. 4, 1989).) As Quiros testified, "[Mallick] seemed to be somebody trying to help and not somebody paid for visiting me, talking to me, getting me to meetings. And I confided with him, I showed him documents, we discussed with him matters of the cases, our thoughts on how to proceed, our thoughts, our worries on the cases .... [H]e had my confidence. He was somebody that came in to help us, to help me as a new president in LACSA to get rid of very old litigation, some problems, but not as somebody paid." (TR. 121 lines 13-25.)

Mallick's repeated discussions with Quiros were instrumental in producing the settlement agreements. "I think [Mallick]

worked on these since the beginning, and he was there all the time when we were discussing. He was present, he was asking questions. He was asking me what we had decided, what we were thinking .... His participation was material in deciding not to continue the litigation and to take the decision without the advice of the lawyer that was taking care of the litigation." (TR. 136 line 21 to 137 line 1; 137 lines 9-13.) Quiros testified that Mallick's activity permeated the entire settlement, from the decision to settle in the first place to the terms of the settlement agreements. "As I told you, my feeling is that the whole business was influenced by Mr. Mallick's participation, and the decisions we made to go into a settlement, the kind of settlement we went into are all part of his dealings with LACSA on the retainer, this disgusting agreement which you had with him." (TR. 139 lines 15-21.)

Gamble used Mallick as his secret spokesperson within the inner circles of his litigation opponent. There is documentary evidence of a striking example of Gamble's manipulations. It involves a handwritten draft of a letter to Quiros in Gamble's hand, together with a typed copy of a virtually identical letter sent by Mallick to Quiros. (PX. 26-28, App. 35-37 (Gamble's draft)); PX. 31, App. 38-39 (Mallick's typed version).) Mallick was working with Gamble, "for over seven months, almost daily ...."(PX. 64, App. 41, Letter from J. Christopher Mallick to Lester M. Bridgeman (March 19, 1990).)

Once LACSA began to rely on Mallick as a source of information, Gamble and the Lawyers were able to plant ideas in the heads of LACSA's officers. "Mr. Mallick had a definite influence

in painting for me a picture of horror through litigation in this case and heaven in the settlement." (TR. 130 lines 12-14.) Mallick also misrepresented to Quiros that Gamble's lawyers had obtained Brown's litigation files. (TR. 564 lines 2-5.)

Petitioners attempt in three ways to minimize the influence Mallick had on LACSA's decision to enter into the settlement agreements.

First, they claim that LACSA knew that Mallick was in contact with HTP. Initial Brief at 27. Petitioners cite to a memorandum written by Urbanczyk to Mallick on June 22, 1989, as the scheme was incubating. In the memorandum, Urbanczyk summarized Petitioners' position in the pending lawsuits and provided instructions to Mallick. (PX. 10, App. 19-22.) Perhaps Petitioners meant to imply that LACSA was somehow aware of this document. The fact, however, is that Petitioners failed to produce the document, and disclosed it only under the threat of a contempt order. (TR. 535 line 23 to 536 line 7.)

Second, Petitioners argue that it was not Quiros, but rather Gerardo Jaspers, LACSA's Director of Finance, who negotiated for LACSA. Since Mallick was speaking with Quiros, Petitioners reason, Mallick could have had little influence. Initial Brief at 27. The reality is, however, otherwise. As Jaspers himself testified, the decision to go to settlement was made by Quiros. (TR. 806 lines 8-14.) Moreover, Jaspers also was in continuous contact with Mallick. (PX. 25, App. 33.) Mallick's influence permeated the entire process.

Finally, Petitioners claim that LACSA relied on its regulatory affairs counsel in Washington D.C., Squire, Sanders &

Dempsey, to assist it in the negotiations with Gamble. Initial Brief at 12. Petitioners cite no support in the record for this assertion, nor is there any. Quiros stated exactly the contrary. "I have already told you, that Squire, Sanders and Dempsey participated in the drafting of the Agreement, but they were not participants in telling LACSA go to a settlement with HTP. That is a different -- I want you to understand it is a different thing. One thing is to review the Settlement and a completely different thing is to go to the lawyer and I say, 'look, we are going to a settlement and we are doing no consulting on the things in relation to that, we are just going to a settlement ....'" (TR. 127 line 15 to 128 line 1.)

John Cravens, LACSA's in-house counsel in charge of legal matters in the United States, testified that while Quiros discussed the situation with his brother and uncle, both Costa Rican lawyers (TR 261 line 20 to 262 line 1), he was unaware of any lawyers who were actively advising LACSA at the time the settlement agreements were being discussed or signed. (TR. 260 lines 17-20.) Cravens, now again in LACSA's employ, was essentially forced out of his position when Mallick appeared. (TR. 176 lines 5-15.)

Petitioners' assertion that LACSA was counseled by its regulatory affairs lawyers is, however, not merely false. It is also extremely revealing in what it omits. LACSA employed Squire, Sanders & Dempsey for advice regarding the administrative requirements of the Federal Aviation Administration. The Squire firm was never LACSA's litigation counsel. (TR. 482 lines 23-25.) For the two cases that were pending when Mallick began discussions with

Quiros, Brown was LACSA's lawyer. Mallick's task was in part to isolate LACSA's officers -- especially Quiros -- from Brown. "What [Mallick] was telling me was that we would be better off if we left the litigation apart, and we would be better off if we did [not] use the counsel of Mr. Brown or anybody else in the matter of whether we should get to a settlement or not." (TR. 126 line 24 to 127 line 4.) Petitioners have conceded as much themselves. Both in his opening statement (TR. 43 lines 20-25) and while testifying as a witness (TR. 364 lines 1-6), Bridgeman told the jury that a determination was made that there was no point in attempting to go through Brown. He conceded, however, that he had never before attempted to circumvent an opposing attorney as he did in this case. (TR. 363 line 18 to 364 line 10.)

The settlement agreements were signed in January and February 1990. LACSA agreed to pay HTP $250,000 at the signing of the settlement agreements. LACSA paid as agreed. LACSA also signed a promissory note, due 90 days later, for another $250,000, which was also paid when due. LACSA further agreed to pay, and did pay, approximately $70,000 to Tyler. Two years later, the proper interpretation of the settlement agreements became a matter of considerable dispute between the parties. The dispute related to provisions in the agreements that provided for an "additional consideration" to be paid to HTP under specified circumstances. The claim was eventually raised to $850,000. (PX. 79)

From the moment LACSA learned of HTP's claim, LACSA rejected it. (PX. 78, App. 34, Letter from John Cravens to Lester Bridgeman (Sept. 11, 1992).) As Quiros testified, everything had been paid to HTP that was required of LACSA. (TR. 137 lines 14-17)

There is a sad but revealing postscript to the scheme by which Mallick, Gamble, and the Lawyers defrauded LACSA. For when it came time for Gamble to pay Mallick the bonus which was clearly contemplated in the Consulting Services Agreement and for which Mallick had so diligently labored, Gamble, once again working with the Lawyers, cheated Mallick too.

After the settlement agreements were finally signed, Mallick did his best to get himself paid. On March 15, 1990, he wrote to Gamble, with copies to Miller, Urbanczyk, and Bridgeman. Mallick reminded Gamble of their phone conversation of December 12, 1989, during which a bonus of $50,000 ("or approximately 50% of what I had expected going in") was discussed. "Our contract calls for a bonus to be paid. I entered this agreement in good faith. I have earned the bonus and hereby respectfully request HTP, Ltd. to remit to me US$50,000.00 immediately as per our agreement." (PX 63, App. 32.)

Gamble's response came in a letter from Bridgeman. (PX. 65, App. 13-16, Letter from Lester M. Bridgeman to J. Christopher Mallick (Mar. 19, 1990).) Bridgeman reviewed the history of the relationship, indicating that he had personal knowledge of the matter because he had participated since the beginning. (PX. 65, App. 13.) Bridgeman explained that a bonus was not owing, because HTP had not received from the settlement with LACSA what it had hoped to receive. LACSA had made two payments of $250,000, but "HTP, too, is disappointed in having received neither the promise nor the fact of a substantially greater amount." (PX. 65, App. 16.)

Mallick made one last appeal to Gamble's good faith.

"There was never any question as to whether there was to be a bonus. The only discussion was, when and how much. Steve knows this to be true." (PX. 64, App. 41.) At this point, Mallick was suddenly confronted with the undeniable irony of the situation. He had assisted Gamble and the Lawyers in deceiving LACSA, only to find himself in the position of Gamble's next victim. "In writing this letter, it is beginning to resemble the sort of correspondence you all had with LACSA in the early stages of the law suit." (PX. 64, App. 41.)

There is almost tragedy here.

In sum, Quiros and the other LACSA officers were taken in by a scheme orchestrated by Gamble and the Lawyers. LACSA's management confided in Mallick and provided him with an arsenal of confidential information. Gamble and the Lawyers in turn used that information to instruct Mallick on the type of misrepresentation most likely to bring LACSA to its knees.

This is the fraud about which Petitioners' Initial Brief is silent.

ISSUE PRESENTED

Does Fraud in the Inducement Remain a Valid Cause of Action in the State of Florida?

SUMMARY OF ARGUMENT

Discretionary jurisdiction has been granted in this case because of a conflict between the Second and the Third District Courts of Appeal. In Woodson v. Martin, the Second District seems to have abrogated the cause of action for fraud in the inducement in any case in which the damages result only in economic loss. In the case at bar, the Third District, on the contrary, held that,

when the fraud in the inducement represents an independent tort, the fraud claim is not barred by the economic loss rule. Even before arguing the merits of the Woodson decision, it is worth noting that the Second District stands all by itself. In its economic loss rule jurisprudence, this Court has always emphasized that the economic loss rule does not bar claims that are independent of a breach of contract. The four other District Courts of Appeal in Florida have now all held that fraud in the inducement is not barred by the economic loss rule. In fact, diligent research has revealed no American jurisdiction that sets up an absolute bar to a claim for fraud in the inducement merely because it results in economic loss. Other common and civilian jurisdictions agree.

The reason for the universal rejection of the Second District's position is easy to understand. The victim of a fraudulently-induced contract almost never suffers anything other than economic loss. If the cause of action for fraud in the inducement is barred as soon as the contract is concluded, then the fraud becomes immune from attack whenever it succeeds. All the Ponzis of the world would take the next flight to Florida.

In the instant case, the reasons to reject the bar, and to permit LACSA to sue for the damages caused by the fraud, are particularly compelling. For, in this case, Petitioners never breached the settlement agreements. They did not have to. Once they manipulated LACSA into accepting their terms, they had no reason not to perform their own part of the "bargain." If fraud in the inducement does not survive in a case in which there has been no breach of contract by the fraudfeasor, then there is no substance to the doctrine of the independent tort, no remaining

force in the cause of action for fraud in the inducement, and, for all practical purposes, no judicial remedy for harm caused by intentionally deceptive conduct.

After this Court granted discretionary review, Petitioners raised two further arguments for reversal that also were rejected by both the trial and the appellate courts. In the first argument, Petitioners assert that LACSA's reliance on the fraudulent misrepresentations was unjustified. Second, Petitioners attempt to reinstate their counterclaim for LACSA's alleged breach of the fraudulently-induced settlement agreements.

As far as the justifiable reliance issue is concerned, Petitioners argue that, as a matter of law, LACSA could not justifiably rely on the fraudulent representations made by Petitioners. Petitioners contend the jury should have been instructed that, when parties to a suit for fraud discuss settlement, the victim cannot rely on representations made by the alleged tortfeasor during the settlement negotiations. LACSA had sued Petitioners for fraud. However, LACSA never relied on representations made by Petitioners. LACSA relied rather on the representations made by Mallick, Petitioners' undisclosed and paid agent. The rule does not apply to such a situation.

Finally, Petitioners argue that, even though LACSA was fraudulently induced to enter into the settlement agreements, LACSA still owes damages for its breach. There are two answers to this claim. First, if the agreement was fraudulently induced, no damages can be recovered for its breach -- even if the fraudulent party has already performed. Second, the jury in this case has already taken into account HTP's claim for breach of the settle-

ment agreements. The trial court instructed the jury that it could only award damages to LACSA if it found that LACSA had suffered a loss. The calculation of the amount, if any, owing to HTP under the settlement agreements was a necessary element of the loss determination. Even if Petitioners were correct in asserting that they may recover despite their fraud, there is nothing left for them to collect.

The lower court's opinion should be affirmed.

ARGUMENT

Petitioners make three arguments for reversal. The first regards the question for which this Court granted discretionary review. Petitioners argue that, in Florida, the cause of action for fraud in the inducement is barred by the economic loss rule. Second, Petitioners argue that, because, in an earlier action, LACSA had sued Petitioners for fraud, the jury should have been instructed that LACSA may not rely on Petitioners' fraudulent misrepresentations. Third, Petitioners argue that the verdict form should have explicitly required the jury to decide whether LACSA breached the settlement agreements.

None of Petitioners' arguments has merit.

I. Fraud in the Inducement Should Not Be Abandoned As a Cause of Action in Florida.

This Court granted discretionary review in this case to resolve a conflict between the Second and the Third District Courts of Appeal. In Woodson v. Martin, the Second District held that the nature of the damages suffered determines whether a plaintiff should sue in tort or in contract. See Woodson v.

Martin, 663 So. 2d 1327, 1329 (Fla. 2d DCA 1995)(en banc). When harm results only in economic loss, tort actions are barred by the economic loss rule, and suit must be brought in contract. Id.

In contrast, the Third District, in the case at bar, held that independent torts are not barred by the economic loss rule. See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995). Since the trial court, in this case, properly ruled that Petitioners' fraud was independent of any contract claim, the Third District permitted the tort action.

In essence, this Court must choose one of these two results. The decision of the Third District is supported by this Court's jurisprudence in the context of the economic loss rule as well as by the universality of courts, inside Florida and out, in America and abroad, in common law and civilian jurisdictions. Moreover, without the cause of action for fraud in the inducement, there would be, in practice, no further judicial remedy for intentionally deceptive behavior. The risk is especially great in cases such as HTP, Ltd., because here LACSA could not have sued for breach of contract -- the Petitioners never breached the settlement agreements. As far as the Woodson decision is concerned -- as Judge Altenbernd wrote in dissent -- it essentially abolishes the cause of action for fraud in Florida. Woodson v. Martin, 663 So. 2d at 1331 (Altenbernd, J., dissenting). One wonders who, beside professional parasites, may ever benefit from such a rule.

This Court should choose HTP, Ltd. over Woodson.

A. This Court's Case Law Expressly Contemplates an Independent Tort Exception to the Economic Loss Rule.

In HTP, Ltd., the Third District carefully followed this Court's precedent. This Court has indicated that the economic loss rule bars only those tort claims that coincide with breach of contract claims. When there is "a tort 'distinguishable from or independent of [the] breach of contract,'" this Court has made clear that the economic loss rule does not bar the tort action. AFM Corp. v. Southern Bell Telephone & Telegraph Co., 515 So. 2d 180, 181 (Fla. 1987). Imposing liability in such a case does not threaten to drown contract law in a sea of tort. See Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993).

Similarly, in Airport Rent-a-Car, this Court recognized the independent tort exception to the economic loss rule, but held that the alleged tort is not independent if it is "flowing from a contractual breach." Airport Rent-a-Car v. Prevost Car, Inc., 660 So. 2d 628, 632 (Fla. 1995).

The purport of this Court's jurisprudence is clear. Independent torts are not barred by the economic loss rule. A tort is independent if it does not flow from a breach of contract. When, as in the instant case, the fraudfeasor did not breach the contract, the fraud clearly constitutes an independent tort not barred by the economic loss rule.

B. Other Courts Are Unanimous That The Economic Loss Rule Does Not Bar a Cause of Action for Fraud in The Inducement.

There is rarely this degree of unanimity on anything in

American law. With the exception of this Court, all of the appellate courts that review Florida decisions have now pronounced on the relationship between fraud in the inducement and Florida's economic loss rule. With the exception of the Second District, all of those courts have held that the one is not barred by the other. See Monco Enterprises, Inc. v. Ziebart Corp., 21 Fla. L. Weekly D 755, (Fla. 1st DCA, March 25, 1996); HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995); Burton V. Linotype Co., 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989); Jarmco, Inc. v. Polygard, Inc., 668 So. 2d 300 (Fla. 4th DCA 1996); TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996); Acadia Partners, L.P. v. Tompkins, 21 Fla. L. Weekly D795 (Fla. 5th DCA March 22, 1996)(by implication, citing Ashland Oil, Inc. v. Pickard, 269 So. 2d 714 (Fla. 3d DCA 1972) ("...[O]ne who has been fraudulently induced into a contract may elect to stand by that contract and sue for damages for the fraud."); Lee v. Paxson, 641 So. 2d 145 (Fla. 5th DCA 1994) (Griffin J., concurring)(the "argument that the economic loss rule bars the fraudulent inducement claim is specious"); Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 742 (11th Cir. 1995) (applying Florida law); Brass v. NRC Corp., 826 F.Supp. 1427, 1428 (S.D. Fla. 1993); Kingston Square Tenants Ass'n v. Tuskegee Gardens Ltd., 792 F.Supp. 1566, 1576 (S.D. Fla. 1992); Royal Palm Sav. Ass'n v. Pine Trace Corp., 716 F.Supp. 1416, 1420 (M.D. Fla. 1989)(by implication); Williams Electric Co. v. Honeywell, Inc., 772 F.Supp. 1225, 1238 (N.D. Fla. 1991).

The unanimity does not stop at Florida's borders. Other American jurisdictions agree. It would be superfluous to cite to

the opinions, since briefs in similar cases now before this Court[2] have done so. The fact is that diligent research fails to reveal a single case in any American court in which the economic loss rule bars the cause of action for fraud in the inducement when the fraud is independent of any breach of contract.

Both other common law and civilian jurisdictions reach the same result. In England, the leading case was decided by Lord Denning. See Doyle v. Olky (Ironmongers) Ltd., [1969] 2 Q.B. 158. Doyle involved the sale of a business, the nature of which had been misrepresented by the defendants. The court permitted the claim for fraud in the inducement, even though the damages coincided with those for breach of contract. See also McGregor on Damages, ¶ 1717-21 (15th ed., London 1988); A. S. Burrows, Remedies for Torts and Breach of Contract 150-54 (London 1987).

Among the civilian jurisdictions, those systems influenced by German law generally permit a plaintiff to sue both in contract and in tort, even for purely economic loss, provided that the elements of each cause of action are met. See P. Schlechtriem, Schuldrecht: Besonderer Teil, ¶ 924-25 (2d ed., Tübingen, 1991). The economic loss rule is present principally in legal systems influenced by French law. French case law has established a rule of non-cumulation of actions in tort and contract. (la règle de non-cumul.) The purpose of the rule is to protect the contract from being overwhelmed by duties derived from tort law. See G. Viney, Traité de droit civil: Introduction à la responsabilité ¶ 234 (2d ed., Paris 1995). To protect the contract, French law precludes a suit in tort, even for fraud, when

[2] For example, see Petitioner' Initial Brief on Merits at 19-25, Woodson v. Martin, Supreme Court Case No. 87,057.

the following three conditions have been met: there is a valid contract between the victim and the person responsible for the harm at the moment the harm occurs; the harm results from the non-performances of an obligation born of that contract; and the harm is caused between persons who are parties to the contract or their privies. See G. Viney, supra, ¶ 181-87. In other words, in the most restrictive of the civilian jurisdictions, when, as in the case at bar, the harm does not arise from the breach of a valid contract, there is no bar to the suit in tort.

The collective judicial wisdom in modern legal systems around the globe rejects the Woodson result. This Court should do likewise.

C. The Purpose of the Economic Loss Rule Would Not Be Furthered By Barring the Action For Fraud in the Inducement in this Case.

The justification for Florida's economic loss rule, as this Court has repeatedly explained, is that contract principles are more appropriate than tort principles for resolving disputes related to the disruption of a contractual relationship that results merely in economic loss. See AFM Corp. v. Southern Bell Tel. & Tel. Co., supra, 515 So. 2d at 181. Otherwise, "'contract law would drown in a sea of tort.'" Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., supra, 620 So. 2d at 1247, quoting East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986).

This Court has developed two criteria to determine whether the tortious conduct complained of is so closely related to the disruption of the contractual relationship that the tort

action should be barred, or rather, whether the action may proceed because the tort is independent. First, the tort action may proceed only if there is some additional conduct beyond that which results in the breach of contract. AFM Corp. v. Southern Bell Tel. & Tel. Co., supra, 515 So. 2d at 181. Second, the aggrieved party must not have been able to protect itself by agreement from the loss -- in other words, these are not "losses sustained by those who failed to bargain for adequate contractual remedies." Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., supra, 620 So. 2d at 1247.

In the instant case, both elements of the independent tort action are present. First, the tortious conduct that LACSA complains of is entirely unrelated to any breach of contract -- in fact, in this case, there was no breach. LACSA's loss was caused not by Petitioners' breach, but rather by Petitioners' prior deception.

Second, LACSA could not have protected itself against Petitioners' fraud by agreement. Unlike the possibility of a product defect, which can be protected against by a warranty provision in an agreement, the risk to LACSA was unknown and was intentionally concealed by the fraudfeasors until they were forced to disclose the information during discovery, long after the settlement agreements were concluded.

The purpose of the economic loss rule is not furthered by precluding a suit for fraud in the inducement that does not coincide with any possible contract claim.

D. LACSA's Only Practical Alternative Was to Sue for Fraud.

By implication more than by direct statement, Petitioners make one final argument related to the economic loss rule. Petitioners suggest that, before the Settlement Agreements, the parties had woven together a web of contractual relations. Petitioners' misrepresentations, therefore, should be considered to be a breach of duty within the contractual relationship rather than an independent tort. The economic loss rule therefore should limit LACSA to a suit on the earlier contractual relationships. Initial Brief at 25-26.

Petitioners have simply ignored the obvious. By the time that LACSA discovered the fraud, all of its claims on the underlying contracts had long since been released and dismissed with prejudice. For the economic loss rule to bar LACSA's suit for fraud, as Petitioners concede, LACSA must have had some possibility to sue in contract. The releases executed pursuant to the settlement agreements were standing in the middle of that road.

As a practical matter, LACSA could not even have sued for rescission. When this lawsuit was brought in 1992, ten years had elapsed since Gamble had entered into the Consulting/Advisory Agreement. Over eight years had passed since Gamble had, on top of his consulting fee from LACSA, taken commissions from those with whom LACSA was negotiating. Lawsuits, especially those for fraud, go through a natural aging process. To prove a cause of action for fraud, the plaintiff needs access to documents and to testimony. Yet, shortly after matters are concluded, the handwritten notes and telephone messages are discarded. After a few years, company files are destroyed. After a half dozen years,

some of those who worked on the deal have moved away and found new employment. When the fraud involves discussions with senior management, age too becomes a factor. Officers retire, become ill, pass away. When a decade has passed since the events, as it now has, the traces once left of the fraud have long since vanished.

In this case, for example, Gamble claimed that he had mentioned to LACSA's president the fact that he was being paid by both sides of the transactions in which LACSA was involved. (TR. 711 lines 14-19.) Unfortunately, those who were LACSA's officers at the time are gone -- they were terminated -- and so are their files.

In fact, as Brown testified, LACSA's claims for fraud and breach of fiduciary duty against Gamble were lost once Mallick's influence was felt. (TR. 537 line 23 to 538 line 13.) That was one of the goals of the fraudulent scheme. Once Mallick proved to be able to deceive LACSA, Petitioners and the Lawyers did everything to prevent the preservation of evidence on the underlying suits against Gamble. As Brown testified, "Mr. Urbanczyk, Mr. Bridgeman's partner, sends me a letter canceling the California deposition ... and for no reason, I'll never forget getting that, but it was so unusual for them, he said, 'regardless of whatever I said on Friday, there are no depositions next week.'" (TR. 512 lines 3-10.)

Rescission involves restoring the parties to status quo ante. Royal v. Parado, 462 So. 2d 849 (Fla. 1st DCA 1985). Once the settlement agreements were entered into, the delay, the loss of momentum, and the disappearance of witnesses all made it impos-

sible for LACSA to pursue its original lawsuits.

If LACSA had not sued for the damages it suffered from the fraud, it would have had no remedy at all for the wrong. And as the courts conclude, particularly in this context, lex semper dabit remedium (the law always provides a remedy). Weathers-Mathers v. McGuire, 616 So. 2d 1187, 1188 (Fla. 4th DCA 1993).

II. The Jury Instruction Regarding "Justifiable Reliance" Was Proper.

Petitioners also challenge the Third District's second holding in this case. Petitioners argue that the trial court erred when it rejected their proposed jury instruction with regard to "unjustified reliance." Following the holding in the Pieter Bakker opinion, see Pieter Bakker Management, Inc. v. First Federal Savings and Loan Ass'n, 541 So. 2d 1334, 1335-36 (Fla. 3d DCA), rev. denied, 549 So. 2d 1014 (Fla. 1989), Petitioners requested the following instruction: "When negotiating or attempting to compromise an existing controversy over fraud and dishonesty, it is unreasonable to rely on representations made by the allegedly dishonest parties."

The Third District affirmed the trial court's refusal to give the requested instruction. The appellate court held that the case at bar differs from Pieter Bakker in one significant respect -- namely, that LACSA never relied on statements made by Petitioners themselves. The misrepresentations upon which LACSA relied were made rather by Petitioners' undisclosed agent. The court explained that point clearly to the jury. "In this case," Instruction No. 5 reads, "LACSA contends that Mr. J. Christopher Mallick, the agent of HTP, Tyler, and Gamble, knowingly committed

a fraud on LACSA by inducing LACSA to sign the Memorandum Agreement, dated January 26, 1990, and the Settlement Agreement, dated February 9, 1990." (App. 43, Instruction No. 5.)

There was nothing hostile or antagonistic about LACSA's relationship with Mallick. To the contrary -- Mallick represented himself as being a friend of Quiros. That was the mechanism of the fraudulent scheme.

Petitioners attempt to circumvent this holding in the following way. Petitioners assert that "[i]t was undisputed at trial that, when Mr. Mallick in 1989 had approached LACSA's President, Mr. Quiros, about settling the pending California and Florida lawsuits, he (Mr. Mallick) had identified himself as a friend of Mr. Gamble's. Having been put on notice of Mr. Mallick's friendship with Mr. Gamble, LACSA's President, Mr. Quiros, as a matter of law could not have 'justifiably relied' upon anything said or written to him by Mr. Mallick." Initial Brief at 33.

There is much to say about Petitioners' assertion. The first point is that it is not supported by the record on appeal. (See Statement of Facts, supra, at 8.) It is undisputed that Mallick was not Gamble's friend. It is also undisputed that Mallick presented himself to Quiros not as Gamble's friend but rather as a friend to Quiros himself. The only shred of evidence that might be interpreted to the contrary is included in the minutes of one meeting of LACSA's Board that suggests that an "amigo" of Steve Gamble facilitated the meeting between the parties. Mallick's name was not mentioned, though he was well known to LACSA's management at the time. It is for this reason that, when

requested by the Appellants to give the Pieter Bakker instruction, the trial court balked. It refused to give an instruction that rested on a finding that LACSA knew that Mallick was Gamble's agent -- because that simply was not the tale told by the evidence. (TR. 688 lines 9-14.)

Moreover, Petitioners have already lost this argument before the jury. The essence of the fraudulent scheme, as that scheme was presented to the jury, was not only that Mallick concealed from LACSA the fact that he was working for Gamble and the Lawyers, but also that he was being paid to do so. This was a question of fact, and it is too late now to reopen it.

Furthermore, even if it had been the case that Mallick was a friend of Gamble's, and even if Quiros had been aware of that fact, Quiros might still justifiably have relied on Mallick's representations. That is one of the things friends do. They mediate disputes between mutual acquaintances. It is a perversion of the notion of friendship to suggest that reliance on a friendly intermediary is always unjustified.

Of course, if Quiros had known that Mallick was actually Gamble's agent, the rule in Pieter Bakker might well apply. But Petitioners have not asserted -- nor, on the basis of the record, might they have done so -- that LACSA knew that Mallick was Gamble's agent. Moreover, it would be absurd to permit a party to isolate itself from liability for fraud by hiring an agent and camouflaging that fact from the victim.

The subsequent case law has held that Pieter Bakker prevents reliance only in cases of acknowledged strife between those who are doing the negotiating. For example, when the relationship

between a sales representative and his company was amicable and not "plagued with distrust," the representative was not necessarily unjustified in relying on the company's representations. Wilson v. Equitable Life Assurance Society, 622 So. 2d 25, 28 (Fla. 2d DCA 1993). The representations that may not be relied on by the victim of the earlier fraud are those made directly by the hostile antagonist. Pepper v. First Union Nat'l Bank, 605 So. 2d 1016, 1017 (Fla. 1st DCA 1992).

All of the additional cases Petitioners cite make the same point -- the courts do not permit a plaintiff to rely on the representations of a defendant whom the plaintiff distrusted and suspected of dishonesty. See Uvanile v. Denoff, 495 So. 2d 1177, 1180 (Fla. 4th DCA 1986), rev. dismissed, 504 So. 2d 766 (Fla. 1987); Pettinelli v. Danzig, 722 F.2d 706, 710 (11th Cir. 1984) ("it is unreasonable to rely on representations made by the allegedly dishonest parties"); Zelman v. Cook, 616 F.Supp. 1121, 1133-34 (S.D. Fla. 1985).

The leading case in this regard makes clear that the reliance requirement for fraud should not be used to protect a party that committed fraud at the expense of a merely negligent victim. "[W]hen the choice is between the two -- fraud and negligence -- negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter." Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980).

LACSA was in no way aware that, as it relied on Mallick, it was being misled by Gamble and the Lawyers. The jury instruc-

tion Petitioners requested of the trial court would have been inapposite. It was therefore proper for the court to refuse it.

However, even if the instruction had been proper and the trial court had erroneously rejected it, that would not necessarily constitute grounds for reversal. A refusal to give a requested jury instruction constitutes prejudicial error only when the failure to give the instruction actually misleads the jury. Canales v. Compania De Vapores Realma, S.A., 564 So. 2d 1212, 1214 (Fla. 3d DCA 1990).

In the case at bar, the jury could not possibly have been misled. The reason is that the instruction actually given by the court both presented an accurate statement of the law and dealt with the very issue that troubles Petitioners. Instruction No. 8 (App. 44) charged the jury on the reliance questions. It specifically indicated to the jury that a plaintiff may not rely on every misrepresentation. The instruction requested the jury to consider precisely the same circumstances to which Petitioners' wished to call the jury's attention in their rejected instruction. The factors included the pendency of litigation between the parties and the fact that Petitioners had been accused of fraud and deceit in the earlier litigation.

The only difference between the instruction actually used to charge the jury and Petitioners' proposed instruction is that the court's instruction accurately reflected the facts of this case, while Petitioners' instruction did not.

The appropriate factors were presented to the jury. There are no grounds here for reversal.

III. The Verdict Form Was Proper.

Petitioners' final challenge to the Third District's opinion involves their desire to obtain damages for what they allege to be LACSA's breach of the settlement agreements. Petitioners argue that, even if they are liable in damages for having fraudulently induced LACSA to enter into the settlement agreements, they still deserve to recover for any breach of those agreements. Since the verdict form used at trial did not require the jury separately to consider Petitioners' claim for breach, Petitioners argue here that the jury did not consider their claim. In particular, they argue that the trial court erred by refusing their proposed verdict form and instead employing a verdict form similar to the one used in the Poneleit case. See Poneleit v. Reksmad, Inc., 346 So. 2d 615, 616 (Fla. 2d DCA 1977). The verdict form actually used instructed the jury first to determine whether the Petitioners had fraudulently induced LACSA to enter into the settlement agreement and, if so, to proceed to the question of damages.

The Third District approved the use of the verdict form chosen by the trial court. The court held that the verdict form proposed by Petitioners was incorrect and that the form used by the court was appropriate when a breach of contract claim is met with the defense of fraud in the inducement.

Petitioners' argument is mistaken in two regards. First, as the Third District indicated, Florida law permits the victim of a fraud to assert the fraud as an affirmative defense against a suit for breach of the fraudulently induced agreement. Thus, the trial court in this case would have been justified in

instructing the jury that, should the jury find that LACSA was fraudulently induced to enter into the settlement agreements, the jury, as a matter of law, may not permit Petitioners to recover for the breach of those agreements.

That, however, is not what the trial court did. Yet, Petitioners now argue that the trial court did just that, and that is Petitioners' second error. In fact, LACSA initially suggested such a jury instruction, and the trial court rejected it.

Instead, the trial court granted instructions and a verdict form favorable to Petitioners. Two instructions are relevant here -- the instruction on recovery for breach of the settlement agreements and the instruction defining the nature of the cause of action for fraud. As far as breach of contract is concerned, as Petitioners note, the court instructed the jury that, should it find that LACSA breached its obligations under the settlement agreements, damages must be awarded to HTP.

Concerning LACSA's cause of action for fraud, the trial court instructed the jury that it may find fraud only if LACSA was injured, and that LACSA may only recover for the loss reasonably suffered.

The verdict form translated these instructions into an operative framework. The jury was first asked whether LACSA should recover for the fraud. Implicit in that interrogatory was a determination of whether LACSA suffered damage. Since the jury answered that question in the affirmative, it then was asked to calculate the actual amount of damage that LACSA suffered. This calculation required the jury to decide whether LACSA was better or worse off after having signed the settlement agreements. That

calculation in turn rested on the jury's analysis of the evidence concerning the value of the various lawsuits related to this case -- including HTP's suit on the 1984 Loan Agreement, LACSA's suit on the Consulting/Advisory Agreement, and HTP's claim that LACSA breached the settlement agreements. After adding up its valuations of the various lawsuits and netting out the difference, the jury decided that LACSA had been shortchanged by the fraud.

In other words, Petitioners' claim for additional monies under the settlement agreements was not only presented in full to the jury, it was actually included in the jury's calculation of damages. The Florida courts have approved instructions and verdict forms that have structured the jury's decision process in this manner.

The trial court bent over backward in this case to assure that Petitioners' rights were respected and their claims on the settlement agreements evaluated. There are no grounds here for reversal.

A. A Fraudulent Party May Not Recover for Breach of the Fraudulently Induced Agreement.

Petitioners argue that, even if they were found to have fraudulently induced LACSA's assent to the settlement agreements, they should still be permitted to recover damages for breach of those agreements.

That is not the case. Florida law permits the victim of a fraud to assert the fraud as a complete defense to the claims of the fraudulent party. This defense does not require a rescission of the agreement -- it is available even if the defrauding party has already performed. The defense is based on the courts' un-

willingness to assist a fraud. In a similar fact situation, the Third District reversed a trial court judgment that awarded breach of contract damages to the defrauding party. "[T]he courts will not encourage conduct which is thus repugnant to public policy by serving as an instrument for the enforcement of any supposed right which arises from it." Phillips Chemical Co. v. Morgan, 440 So. 2d 1292, 1296 (Fla. 3d DCA 1983).

Thus, the trial court would have been fully justified in instructing the jury that, should it find that Petitioners induced LACSA's assent to the settlement agreements by fraud, it must deny Petitioners' claim for breach of those agreements.

B. The Jury Has Already Determined Whether Petitioners Suffered Loss From Any Breach of the Settlement Agreements.

Though the trial court would have been justified in instructing the jury that, should Petitioners be found to be liable for fraud, they may not recover for any breach of the settlement agreements, that is not what the court did. LACSA drafted and expressly requested that such an instruction be given. (PX. 85, App. 45.) The court refused to give it. (TR. 895 lines 12-16.)

Instead, the trial court did everything necessary to accommodate Petitioners' position, as regards both the jury instructions and the verdict form.

As far as the instructions are concerned, the court gave two relevant instructions. The first addressed HTP's claim that LACSA breached the settlement agreements. The court instructed the jury as follows: "If you find that LACSA and LACSA International breached their obligations under the Memorandum Agreement

and the Settlement Agreement, you must award HTP damages in an amount that will fully compensate HTP for all losses and harm that the breach caused HTP." (TR. 906 lines 3-10.)

The second relevant instruction related to the elements of LACSA's cause of action for fraud. The trial court included within the list of the elements LACSA was required to prove that "[t]he person induced is injured while acting in reasonable reliance on the false representation." (TR. 903 lines 2-4.) The court elaborated in another instruction: "If you determine that LACSA is entitled to recover damages, those damages should be in the amount that will reasonably compensate it for its injury or losses." (TR. 905 lines 13-20.) In other words, the court instructed the jury that it may find for LACSA on the fraud count only if LACSA had demonstrated that it was injured by the misrepresentations and only in an amount that would compensate LACSA for its loss. The court asked the jury to consider "the facts and circumstances" of the case (TR. 905 lines 17-18) in order to decide whether LACSA had suffered a loss.

Injury, in Florida, is one of the essential requirements of a cause of action for fraud in the inducement. George Hunt, Inc. v. Wash-Bowl, Inc., 348 So. 2d 910, 912 (Fla. 2nd DCA 1977). Jury instructions essentially identical to those given by the trial court in the case at bar have been held proper to focus the jury on this requirement and to assure that the jury actually evaluates the extent and amount of the harm to the victim. Id.

The verdict form provided the jury with the means to follow their instructions. The first question asked of the jury was whether Petitioners were liable for fraud. A finding of fraud

necessarily encompasses a finding of injury. Once the jury found fraud, the verdict form asked the jury to measure the damages that would compensate LACSA for its loss. (R. 943-45.)

LACSA had been misled by Mallick about the value of its lawsuit against Tyler and Gamble as well as about the value of HTP's claim on the 1984 Loan Agreement. How was the jury to evaluate whether LACSA suffered injury by its assent to the settlement agreements? Only by adding together what LACSA gained by virtue of the settlement and subtracting from that sum what LACSA gave up. It is, of course, not possible to reconstruct the jury's calculations. However, the evidence on the various elements of gain and loss was extensive.

One of the benefits LACSA gained was the dismissal of HTP's California lawsuit. In that case, HTP claimed a 27.5% interest in an aircraft under the 1984 Loan Agreement. (TR. 372 lines 13-19.) Bridgeman testified that HTP's lawsuit was worth $3 million. (TR. 373 lines 20-24.) Brown, an expert in commercial litigation relating to aircraft, having been involved in the field since 1979 (TR. 473 lines 5-12), testified that HTP's California litigation was without merit. (TR. 488 lines 18-20.) Cravens, LACSA's in-house counsel in charge of litigation in the United States, testified that, in his opinion, LACSA owed nothing further under the 1984 Loan Agreement (TR. 166 lines 5-12.)

On the other hand, LACSA gave up several advantages when it entered into the settlement agreements. First, it paid slightly in excess of $570,000 to HTP and Tyler over a three-month period. This fact was stipulated to by both parties. (TR. 842 lines 3-8; 846 lines 1-2.) Second, LACSA released and dismissed

its lawsuit for breach of fiduciary duty against Gamble and Tyler on the Consulting/Advisory Agreement. Gerald Richman, Esq., past president of the Florida Bar Association, provided expert testimony as to the merits of LACSA's lawsuit. (TR. 525 lines 2-9.) Brown also gave expert testimony about the value of that lawsuit, stating that LACSA's claim against Tyler was worth $3 million. (TR. 530 line 21 to 531 line 10.)

Finally, there was a dispute about whether LACSA also gave up something else, namely, a promise to pay $850,000 as additional consideration for the settlement agreements. Petitioners presented in detail their interpretation of the settlement agreements to the jury. LACSA's witnesses Quiros and Cravens testified that, under the agreements, nothing further was owing. (TR. 137 lines 14-17 (Quiros); TR. 189 lines 9-11 (Cravens).)

The jury was asked to reach a conclusion about the value of each of these claims. The jury listened to the extensive evidence and netted out the value of what LACSA gained and lost by signing the settlement agreements.

Since it had been stipulated by both parties that the other lawsuits had been released and dismissed and that the 1984 Loan Agreement had been canceled (TR. 842 lines 9-23), the jury's only option was to award to LACSA the difference in value of what it lost because of the fraud. And that is precisely what the jury did.

As a result, there is simply no further claim for Petitioners to assert. Their claim for additional recovery under the settlement agreements was necessarily considered by the jury, evaluated, and incorporated into the verdict. This is the typical

result in the Florida courts when one party alleges a partial breach of a payment obligation and the other party defends by alleging fraud in the inducement. See, e.g., Poneleit v. Reksmad, Inc., 346 So. 2d 615, 616 (Fla. 2d DCA 1977).

In Poneleit, for example, the buyer paid $18,000 for a clothing business -- $12,000 in cash and the remaining $6,000 as a promissory note. After discovering that the seller had used phony tax returns to misrepresent the business, the buyer sued for damages for fraud in the inducement. The seller counterclaimed on the note.

As in the case at bar, the jury found for the buyer-plaintiff on the fraud claim -- there in the amount of $8,000 -- and against the seller on the counterclaim. The seller appealed -- as do Appellants here -- on the grounds that the buyer should at least be required to pay the consideration to which it agreed. The appellate court rejected the seller's claim. It reasoned that the $8,000 damage award already took into account the conflicting claims that the parties had asserted. "In essence, the jury concluded that the [buyer] was entitled to recoup $8,000 of the $12,000 he paid to appellee at closing and be relieved of his obligation on the note." Id. at 616.

There is nothing wrong either with the jury instructions or with the verdict form in this case. Petitioners' claim for breach of the settlement agreements should have been barred by their fraud. As it was, the trial court permitted the jury to hear evidence about all of Petitioners' claims and instructed the jury to do the sums and to net out the difference. In essence, what Petitioners request is that the jury be permitted to evaluate

their claim for additional consideration under the settlement agreements and to be instructed to award them what they are owed. That is precisely what the jury has already done.

There are no grounds here for reversal.

CONCLUSION

For the foregoing reasons, the decision of the Third District Court of Appeal should be approved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Answer Brief on Merits was served by hand/~~fax~~/mail this 12 day of April, 1996, on: Lawrence R. Metsch, Esq., Metsch & Metsch P.A., 19 West Flagler Street, Suite 416, Miami, Florida 33130; and Lester M. Bridgeman, Esq., Miller Hamilton Snider Odom, P. O. Box 46, Mobile, Alabama 36601, attorneys for Petitioners.

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