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SUPREME COURT OF FLORIDA

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Chief Deputy Clerk

CASE NO. 86,913

HTP, LTD., etc., et al.,

Petitioners

v.

LINEAS AERAS COSTARRICENSES, S.A., etc., et al.,

Respondents.

On Review Of A Decision Of The Third District Court Of Appeal Of Florida, Case No. 94-2779

INITIAL BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

This case arises out of the 1990 settlement of prior contract litigation between the parties in which the parties had exchanged accusations of fraud. The 1990 Settlement Agreement required, inter alia, future payments by Respondent Lineas Aereas Costarricenses, S.A. ("LACSA"), to Petitioners HTP, Ltd. ("HTP"), Tyler Corporation ("Tyler") and Stephen H. Gamble ("Gamble") to begin not more than two years after the date of settlement. When HTP, Tyler and Gamble requested those later payments from LACSA, LACSA sued on the contract in the Circuit Court, for a declaratory judgment that it was not liable for additional payments. LACSA later amended its complaint to allege fraud by HTP, Tyler and Gamble in the inducement to enter into settlement of the earlier fraud claims. In its amended complaint, LACSA elected to stand on the Settlement Agreement and to seek tort damages only.

Overruling the contentions of HTP, Tyler and Gamble that the claim was barred by the economic loss rule, and inconsistent with Florida law on justifiable reliance, the Circuit Court permitted the case to go to the jury, which returned a verdict for tort damages against HTP, Tyler and Gamble for fraud in the inducement. The judgment entered thereon was affirmed by the Third District Court of Appeal of Florida. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995).

On February 19, 1996, this Court accepted jurisdiction of this case to decide the following question:

DOES THE ECONOMIC LOSS RULE BAR A CONTRACTING PARTY FROM RECOVERING ECONOMIC DAMAGES FROM ANOTHER CONTRACTING PARTY FOR THE INTENTIONAL TORT OF FRAUD IN THE INDUCEMENT?[1]

If this Court were to answer the foregoing question in the negative, HTP, Tyler and Gamble respectfully invite this Court to consider two (2) additional questions which were resolved adversely to them by the Third District in Case No. 94-2779:

DID THE CIRCUIT COURT COMMIT REVERSIBLE ERROR IN DENYING HTP, TYLER AND GAMBLE BOTH A DIRECTED VERDICT AND A JUSTIFIABLE RELIANCE JURY INSTRUCTION ON FRAUD DERIVED FROM THE THIRD DISTRICT'S OPINION IN PIETER BAKKER MANAGEMENT, INC. V. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION?[2]

DID THE CIRCUIT COURT ERR WHEN, OVER THE OBJECTIONS OF HTP, TYLER AND GAMBLE, THAT COURT ADOPTED A JURY VERDICT FORM WHICH PREVENTED THE JURY FROM SEPARATELY CONSIDERING HTP'S COUNTERCLAIM FOR BREACH OF THE 1990 SETTLEMENT AGREEMENT?

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[1] This question has been answered in the affirmative by the Second District Court of Appeal of Florida. See, Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995)(en banc), Raymond James & Associates, Inc. v. PK Ventures, Inc., 666 So. 2d 174 (Fla. 2d DCA 1995), and Linn-Well Development Corporation v. Preston & Farley, Inc., 666 So. 2d 558 (Fla. 2d DCA 1996). The Third and Fourth District Courts of Appeal of Florida have answered this question in the negative. See, HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995), TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996), and Jarmco, Inc. v. Polygard, Inc., ___ So. 2d ___, 21 FLW D478, (Fla. 4th DCA, 1996).

[2] Pieter Bakker Management Services, Inc. v. First Federal Savings And Loan Association, 541 So. 2d 1334 (Fla. 3d DCA), review denied, 549 So. 2d 1014 (Fla. 1989).

STATEMENT OF THE CASE[3]

LACSA is a Costa Rican airline. HTP is a Bermuda corporation. Tyler is a Connecticut corporation and Gamble is a resident of Connecticut. HTP is in the business of brokering the purchase, sale and lease of aircraft, and of advising on aircraft equipment matters.

On September 11, 1992, LACSA sued HTP and Gamble seeking a judicial declaration that LACSA was not obligated to make further payments to HTP and Gamble under a settlement agreement settling prior litigation ("the Settlement Agreement").[4] Lineas Aereas Costarricenses, S.A. v. HTP, Ltd., et al., Case No. 92-19943, General Jurisdiction Division, Eleventh Circuit Court, Dade County, Florida ("Case No. 92-19943").

HTP and Gamble answered LACSA's complaint and HTP counterclaimed against LACSA and its affiliate, LACSA International, Inc. ("LACSA Int.")[5], for breach of the Settlement Agreement (Count I) and for fraud and deceit (Count II).[6]

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[3] The following references will appear in this brief:

(a) Record on Appeal: "R. ."

(b) Trial Transcript: "TR. ."

(c) Trial Exhibits: "PX ."

(d) Petitioners' Appendix: "App. ."

[4] R. 2-31.

[5] LACSA and LACSA International, Inc., will hereinafter be collectively referred to as "LACSA".

[6] R. 32-74.

LACSA on February 11, 1993, answered HTP's breach of contract counterclaim[7] and, invoking the economic loss rule, moved to dismiss HTP's counterclaim for fraud and deceit.[8] HTP, on May 11, 1993, voluntarily dismissed Count II (fraud and deceit) of its counterclaim, without prejudice.[9]

On September 8, 1993, LACSA's motion for leave to file a first amended complaint and a first amended answer to HTP's counterclaim[10] was granted.[11]

LACSA's first amended complaint named HTP, Gamble and Tyler as defendants and characterized them as alter egos.[12] LACSA's first amended complaint alleged in Count I that it had been fraudulently induced by HTP, Tyler and Gamble to enter into the Settlement Agreement; in Count II, that HTP, Tyler and Gamble had perpetrated a constructive fraud upon LACSA resulting in LACSA's execution of the Settlement Agreement; and, in Count III, restated its original claim for declaratory relief based upon its interpretation of the Settlement Agreement. LACSA sought tort damages in Counts I and II. LACSA's first amended answer to

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[7] R. 78-81.

[8] R. 82-83.

[9] R. 158-159.

[10] R. 208-276.

[11] R. 288-289.

[12] Following the decision in HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 634 So. 2d 724 (Fla. 3d DCA 1994), Petitioners filed a pleading in the Circuit Court admitting that, for purposes of the litigation, they were alter egos of one another.

HTP's counterclaim interposed the affirmative defense that it had been fraudulently induced to enter into the Settlement Agreement.

HTP, Tyler and Gamble, on September 23, 1993, answered LACSA's first amended complaint by denying liability,[13] and denied the allegations of LACSA's fraudulent inducement affirmative defense to HTP's counterclaim.[14]

On October 5, 1994, the Circuit Court denied the motion of HTP, Tyler and Gamble for summary judgment[15] and Case No. 92-19943 went to trial before Circuit Judge Martin D. Kahn and a jury on Monday, October 31, 1994. On November 3, 1994, the jury, answering special verdict interrogatories, found that:

(a) HTP, Tyler and Gamble had fraudulently induced LACSA to enter into the Settlement Agreement; and

(b) as a result of that fraud, LACSA had suffered $571,784.00 in damages.

The Circuit Court, on November 9, 1994, entered a Final Judgment on the jury's verdict awarding LACSA tort damages in the total sum, including pre-judgment interest, of $898,687.79.[16] Abiding by the court-approved verdict form, the jury gave no consideration to HTP's counterclaim for breach of the Settlement Agreement.

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[13] R. 307-317.

[14] R. 318-319.

[15] R. 868.

[16] R. 1045-1046.

HTP, Tyler and Gamble, on November 9, 1994, moved (a) for a new trial;[17] (b) for judgment in accordance with their motions for directed verdict;[18] and (c) to alter or amend the Final Judgment.[19] The Circuit Court, on November 22, 1994, denied all three (3) post-trial motions.[20] A Notice of Appeal was filed on behalf of HTP, Tyler and Gamble with the Clerk of the Circuit Court on November 29, 1994.[21] On December 22, 1994, LACSA filed its Notice of Cross Appeal with the Clerk of the Circuit Court.[22]

On December 6, 1994, HTP, Tyler and Gamble posted with the Clerk of the Circuit Court a supersedeas bond in the penal sum of $1,114,372.96,[23] thereby staying the issuance of a writ of execution. An agreed order taxing $6,000.00 in costs was entered by the Circuit Court on December 8, 1994.[24]

The Third District, in Case No. 94-2779 on September 13, 1995, affirmed the Circuit Court's Final Judgment. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., supra. HTP, Tyler and Gamble's motions for rehearing, rehearing en banc and certification were denied on November 15, 1995.

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[17] R. 975-978.

[18] R. 970-974.

[19] R. 966-969.

[20] R. 1047.

[21] R. 1031-1036.

[22] R. 1041-1044.

[23] App. 1-3.

[24] App. 4-5.

On November 20, 1995, HTP, Tyler and Gamble invoked this Court's discretionary jurisdiction.

On December 20, 1995, the Third District denied the motion of HTP, Tyler and Gamble, to withhold its mandate in Case No. 94-2779 pending this Court's disposition of their application for review.

On December 26, 1995, HTP, Tyler and Gamble petitioned this Court for a Writ of Prohibition requiring the Third District to withhold or withdraw its mandate in Case No. 94-2779.[25] That petition was denied on February 23, 1996.

The Circuit Court, on January 16, 1996, in Case No. 92-19943 on LACSA's motion entered an order directing the supersedeas surety, International Fidelity Insurance Company, forthwith to pay the Final Judgment and Agreed Order Taxing Costs, with interest.

Over the protest of HTP, Tyler and Gamble, the surety thereafter paid the Final Judgment and Agreed Order Taxing Costs to LACSA.

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[25] HTP, Ltd., et al. v. The Third District Court of Appeal of Florida, et al., Case No. 87,095, Supreme Court of Florida.

STATEMENT OF THE FACTS

On August 11, 1982, Gamble, as president of Tyler, signed a Consulting/Advisory Agreement with LACSA under which Gamble agreed to render financial advisory services to LACSA with respect to aircraft financing.

Prior to 1984, with Gamble's help, LACSA had entered into a lease agreement with Singapore Airlines ("the Singapore lease") under which LACSA leased from Singapore Airlines a Boeing 727 jet aircraft registered with the Federal Aviation Administration ("the FAA") as N200LR. The Singapore lease granted LACSA the option to purchase N200LR.

As the term of the Singapore lease came to an end, LACSA sought financing in order to purchase N200LR.

On or about March 15, 1984, after LACSA had been unable to obtain other financing, HTP and LACSA entered into a written loan agreement ("the 1984 loan agreement") pursuant to which HTP lent LACSA the $1,900,000.00 which it needed in order to purchase N200LR.[26] Under the 1984 loan agreement, HTP obtained a conditional residual sharing interest ("the RSI") in N200LR, the amount of which was to increase gradually with the increasing time lapse in LACSA's payment of the loan amount. The RSI ultimately equalled 27.5% of the value of the aircraft.

LACSA exercised the purchase option in the Singapore lease and took title to N200LR.

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[26] PX 2. App. 6-36.

In 1987, when neither the HTP loan nor HTP's residual sharing interest had been paid, LACSA refinanced N200LR by borrowing $10,000,000.00 from Lockheed Finance Corp. ("Lockheed") and mortgaging the aircraft. HTP claimed that that transaction and granting a chattel mortgage on the aircraft constituted an anticipatory breach of the RSI provision of the 1984 loan agreement and demanded that LACSA pay more than $3,000,000.00 in breach of contract damages.

On June 24, 1988, LACSA filed a pre-emptive suit against HTP in the U.S. District Court, S.D. Florida, seeking a declaration that LACSA was not indebted to HTP. LACSA International, Inc. v. HTP, Ltd., Case No. 88-1164-Civ-Ryskamp.[27] That action was dismissed on May 8, 1989, for lack of diversity jurisdiction.

On July 26, 1988, HTP sued LACSA for breach of contract, conversion and fraud damages in California State Court. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., et al., Case No. C 693 548, Superior Court, Los Angeles County ("the California State Court action").[28]

Anticipating the dismissal of its Florida Federal Court lawsuit, on January 30, 1989, LACSA sued HTP, Tyler and Gamble in the Eleventh Circuit Court, Dade County, Florida, for breach of contract, conspiracy to violate fiduciary duties, and fraud. Lineas Aereas Costarricenses, S.A. v. Tyler Corporation, et al., Case No. 89-4268 (CA 10), General Jurisdiction Division ("the

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[27] PX 4.

[28] PX 5. PX 20. App. 37-38.

Florida State Court action").[29]

In the Spring of 1989, Gamble, with two expensive lawsuits still pending, engaged Mr. J. Christopher Mallick ("Mallick"), a Texan with Costa Rican business interests, to contact Mr. Mario Quiros ("Quiros"), LACSA's president, and encourage LACSA to begin settlement negotiations directly with Gamble.[30] In his approach to Quiros, Mallick identified himself as a "friend" of Gamble's.[31] Mallick did not inform Quiros that Gamble had promised to pay Mallick for jump-starting settlement negotiations.

Mallick then met with Quiros in Costa Rica and suggested that Quiros and Gamble should meet, without attorneys, to try to resolve the litigation. Quiros agreed, and Gamble and Quiros met in New York City in August, 1989.

Following a second Quiros-Gamble meeting, Quiros appointed Mr. Gerardo Jaspers ("Jaspers"), then LACSA's financial director, to represent LACSA in settlement negotiations with Gamble. Jaspers and Gamble then entered into direct, protracted settlement negotiations.[32]

On December 20, 1989, Quiros wrote a memorandum, entitled "HTP Litigation", to Mr. Shuichi Yaginuma, representing LACSA's

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[29] PX 6.

[30] PX 13.

[31] PX 19. App. 39.

[32] TR. 84-87; TR. 752-754; 777-778; 799.

principal stockholder.[33] Pertinent excerpts from that memorandum follow:

> "I would like to explain the current situation regarding the HTP lawsuit claiming 27.5% ownership of one Boeing 727-200 property of LACSA International.
>
> * * * * * * *
>
> "3- Section 5 of the Loan Agreement granted HTP as additional consideration for making the loan, a Residual Sharing Interest of 27.5 in the aircraft based on whatever the market value is in March of 1991.
>
> "4- This means that if in 1991 the aircraft maintains a value of US$12,000,000.00, LACSA would have to pay HTP the sum of US$3,300,000.00.
>
> * * * * * * *
>
> "8- Thus, we are confronted with the risk of having to pay HTP in 1991 about US$3,300,000.00 for having made that loan.
>
> "9- We have been discussing the possibility of reaching an out of court settlement with HTP and have reached in principle the following agreement:
>
> 1) HTP would suspend all lawsuit against LACSA and LACSA would also suspend its lawsuit against HTP and Steve Gamble.
>
> 2) The 1984 Loan Agreement would be invalidated and cancelled.
>
> 3) As financial settlement LACSA would pay HTP:
>
> a) US$250,000.00 by January 15, 1990.

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[33] PX 56. App. 40-41.

b) US$250,000.00 by April 15, 1990.

c) Grant HTP a 2% fee on sale price of each of the three 727 LACSA owns plus the DC8 when they are sold.

d) LACSA would finish an Advisory Agreement signed by Tyler Corporation valued at US$70,000.00.

"10- The net result of this settlement is that LACSA would be paying HTP about US$1,300,000.00 over the next year with the proceeds of the sale of its 727 aircraft fleet.

"We feel this solution, though painful for LACSA is better than the risk of loosen [sic] the lawsuit and having to pay at that time over US$3.3 million.

"Also, it allows us to sell the 727 involved in the litigation which is necessary in order to buy the spare parts for the Airbus A320."

Until December, 1989, Jaspers and Gamble had negotiated with each other without the participation of counsel. During that month, LACSA engaged the Washington, D.C., office of Squires, Sanders & Dempsey, its long-time regulatory affairs counsel, to assist it in settlement negotiations with Gamble.

In the absence of any agreement by December 31, 1989, Gamble terminated negotiations with Jaspers.

Negotiations resumed, at LACSA's suggestion, after January 3, 1990. Thereafter, Jaspers and Gamble met privately in Miami, Florida, on January 24, 1990, and reached an agreement. On January 26, 1990, a "Memorandum Agreement" of settlement was executed. The Settlement Agreement was signed on February 9,

1990. Quiros signed the Settlement Agreement on LACSA's behalf after consultation with Jaspers who had, in turn, been advised by LACSA's Washington, D.C., counsel.[34]

The Settlement Agreement provided in summary that: (a) the California and Florida State Court actions would be dismissed, with prejudice; (b) the parties would exchange mutual general releases; (c) LACSA would pay the total sum of $571,784.92 to HTP and Tyler no later than May 10, 1990; (d) LACSA would pay HTP an additional $750,000.00 by February 9, 1992, and $100,000.00 by February 9, 1995.

LACSA paid the required $571,784.92 by May 1, 1990. In the more than two years following the execution of the Settlement Agreement, LACSA made no complaint about or objection to the terms of settlement.[35] But LACSA made no later required payments, despite repeated HTP demands. In September, 1992, LACSA initiated Case No. 92-19943, seeking a declaratory judgment that the Settlement Agreement did not require payment of any additional amounts to HTP. During pre-trial discovery proceedings, LACSA allegedly learned that Mallick had been paid for his services by HTP. Thereafter, LACSA amended its pleadings to add a claim that it had been fraudulently induced to enter into the Settlement Agreement. It neither requested rescission of that agreement nor did it did claim that HTP, Tyler and Gamble had breached. It sought only tort damages.

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[34] TR. 120. App. 42.

[35] See, e.g., PX 73. App. 43.

SUMMARY OF ARGUMENT

I. THE THIRD DISTRICT ERRED BY HOLDING THAT THE "ECONOMIC LOSS RULE" DOES NOT BAR A CONTRACTING PARTY FROM RECOVERING ECONOMIC DAMAGES FROM ANOTHER CONTRACTING PARTY FOR THE INTENTIONAL TORT OF FRAUD IN THE INDUCEMENT.

In Casa Clara Condominium Association, Inc. v. Charley Toppino And Sons, Inc., 620 So. 2d 1244 (Fla. 1993), and Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995), this Court held that, under the economic loss rule, for there to be a recovery in "tort", there must be a showing of harm above and beyond disappointed [economic] expectations. Neither then, nor since, has this Court distinguished among types of torts, or excluded "independent" torts from the ambit of the rule in applying the economic loss rule. The Third District disregarded that legal principle when, in Case No. 94-2779, it ruled that the fraud in the inducement purportedly established at trial constituted an "independent tort" not constrained by the economic loss rule. It did so despite the longstanding contractual relationship of the parties that pre-dated the claimed fraud, and in the face of the strong policy of this state against upsetting negotiated, lawyer-assisted agreements settling litigation. Acceptance of the Third District's rule would simply discourage the negotiated settlements of lawsuit and encourage incorporate of a standard fraud claim in breach of contract suits.

II. THE THIRD DISTRICT ERRED WHEN IT HELD THAT THE CIRCUIT COURT HAD NOT COMMITTED REVERSIBLE ERROR BY DENYING HTP, TYLER AND GAMBLE A "JUSTIFIABLE RELIANCE" JURY INSTRUCTION DERIVED FROM THE THIRD DISTRICT'S OPINION IN PIETER BAKKER MANAGEMENT, INC. V. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION.

The Florida Appellate Courts have long held that, after settling a lawsuit involving mutual charges of fraud and dishonesty, one of the parties to the settlement cannot, as a matter of law, justifiably rely upon its adversary's allegedly fraudulent representations to upset the settlement. See, e.g., Pieter Bakker Management, Inc. v. First Federal Savings And Loan Association, supra and Uvanile v. Denoff, 495 So. 2d 1177 (Fla. 4th DCA 1986), review dismissed, 504 So. 2d 766 (Fla. 1987).

The Third District, in Case No. 94-2779, erred when it held that the Circuit Court had correctly refused either to grant a directed verdict for HTP, Tyler and Gamble or to give a Pieter Bakker instruction to the jury in Case No. 92-19943.

III. THE THIRD DISTRICT ERRED WHEN IT HELD THAT THE CIRCUIT COURT HAD PROPERLY REJECTED THE JURY VERDICT FORM PROPOSED BY HTP, TYLER AND GAMBLE AND ADOPTED A JURY VERDICT FORM WHICH PREVENTED THE JURY FROM SEPARATELY CONSIDERING HTP'S COUNTERCLAIM FOR BREACH OF THE 1990 SETTLEMENT AGREEMENT.

It is axiomatic that the Circuit Court, in presenting the jury with a special interrogatory verdict form, was required to provide the jury with a set of instructions consistent with that form. However, although the Circuit Court correctly instructed the jury to consider separately LACSA's tort claims for damages and HTP's breach of contract counterclaim, it erroneously and

inconsistently provided the jury, over objection, with a special interrogatory verdict form under which a jury finding that LACSA had been fraudulently induced to enter into the Settlement Agreement prevented the jury from considering HTP's counterclaim.

Despite the patent conflict between the Circuit Court's "separate consideration" jury instruction and its special interrogatory verdict form, the Third District, in Case No. 94-2779, erroneously affirmed the Final Judgment in Case No. 92-19943.

ARGUMENT

I. THE THIRD DISTRICT ERRED BY HOLDING THAT THE ECONOMIC LOSS RULE DOES NOT BAR A CONTRACTING PARTY FROM RECOVERING ECONOMIC DAMAGES FROM ANOTHER CONTRACTING PARTY FOR THE INTENTIONAL TORT OF FRAUD IN THE INDUCEMENT.

Prior to jury selection in Case No. 92-19943, the Circuit Court considered and denied Appellants' Third Motion In Limine[36] invoking the economic loss rule to bar LACSA from seeking tort damages for its claimed economic losses on a fraudulent inducement theory.[37]

Following the jury's verdict and without any evidence of personal injury or property damage, the Circuit Court entered judgment against HTP, Tyler and Gamble for tort (fraudulent inducement) damages. On appeal, the Third District reasoned:

> "First, we find that the trial court properly ruled that the plaintiffs' cause of action for fraud in the inducement was an independent tort that was not barred by the economic loss rule. Burton v. Linotype Co., 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989), review denied, 564 So. 2d 1086 (Fla. 1990)(`Fraud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered'.)"[38]

661 So. 2d at 1222.

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[36] R. 903-906.

[37] TR 10, 12.

[38] The economic loss rule was not implicated in Burton v. Linotype Co., supra. In that case, the Third District held only that, under the "independent tort" doctrine, punitive, in addition to compensatory, damages could be awarded against the party which had breached a contract and fraudulently induced the injured party to enter into the contract.

Because LACSA neither pleaded nor proved that it had suffered personal injury or property damage, and because the parties had been locked in a contractual relation that long antedated the alleged fraud, the economic loss rule should have barred an award of tort damages against HTP, Tyler and Gamble. Consequently, the Third District's decision in Case No. 94-2779 should be quashed and the cause remanded to the Circuit Court with directions to enter judgment for HTP, Tyler and Gamble.

A. The Evolution Of The Economic Loss Rule

Over the course of the past several years, this Court has developed the rule that, where litigation between parties arises out of a pre-existing contractual relationship, the party seeking relief for injury that arises out of that relationship may not successfully assert a claim for tort damages without a showing of personal injury or property damage. The controlling principle is that the plaintiff's allegedly disappointed economic expectations, arising out of, and protected by, contract law, may not be supplemented by tort damages absent any showing of harm beyond the disappointed economic expectations. That rule has been extended to encompass, and to block, all the inventiveness of disappointed contractors seeking tort remedies. It clearly extends to claims for fraud in the inducement arising out of contractual relationships.

The limitation is applicable in this case, which arose out of a long contractual relationship, because any evidence of personal injury or property damage is totally lacking in the

record. By executing the 1984 Loan Agreement, LACSA and HTP established a contractual relationship. The deterioration of that relationship eventuated in the commencement of litigation in 1987 which involved mutual charges of fraud. That litigation was concluded by the creation of a new contractual relationship in the form of the Settlement Agreement, which was negotiated face-to-face by sophisticated representatives of the parties and freely and knowingly entered into by the parties with the aid of legal counsel. The Settlement Agreement encompassed a release which in pertinent part provided:

> "... each party specifically affirms and agrees that he or it is executing the document freely, voluntarily, without coercion, with full knowledge of the meaning, import and ramifications of its contents, after full and adequate time to reflect and have independent advice and legal counsel concerning execution of this document and with intention to being fully, finally, legally and equitably bound thereby." (Emphasis added)

In the absence of allegations and proof of physical or property damage, the economic loss rule, as set out below, should have barred LACSA from recovering tort (fraudulent inducement) damages resulting from the negotiation and execution of the Settlement Agreement.

HTP, Tyler and Gamble have summarized below the development of the economic loss rule in Florida, requiring the conclusion that the Third District erred in affirming the Circuit Court's tort judgment for LACSA.

In Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987), this Court held that Florida law does not permit a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or property damage to property other than the allegedly defective goods. Justice Overton's majority opinion explained the rationale for that rule:

> "We... find no reasons to intrude into the parties' allocation of risk by imposing a tort duty and correspondent cost burden on the public. We hold contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage. The lack of a tort remedy does not mean that the purchaser is unable to protect himself from loss. We note the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent would have limited application if we adopted the minority view. Further, the purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making."

510 So. 2d at 902.

This Court, in AFM Corporation v. Southern Bell Telephone And Telegraph Company, 515 So. 2d 180 (Fla. 1987), held that a purchaser of services could not recover economic losses in tort without a showing of personal injury or property damage. Justice Overton's opinion concluded:

> "We conclude that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses..."

515 So. 2d at 181-182.

In Casa Clara Condominium Association, Inc. v. Charley Toppino And Sons, Inc., supra, this Court held that Florida's economic loss rule barred homeowners from recovering negligence damages from a supplier of allegedly defective concrete. Justice McDonald's opinion observed:

> "In other words, economic losses are `disappointed economic expectations', which are protected by contract law, rather than tort law... This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party. For recovery in tort `there must be a showing of harm above and beyond disappointed expectations'. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects'..." (Citations omitted)

620 So. 2d at 1246.

In Airport Rent-A-Car, Inc. v. Prevost Car, Inc., supra, this Court answered in the affirmative the following certified question:

> "Whether, under Florida law, the economic loss rule applies to negligence claims for the manufacture of a defective product where the only damages claimed are to the product itself and where the plaintiff claims to have no alternative theory of recovery."

660 So. 2d at 629. Justice Shaw's opinion for this Court explained:

"This Court's opinion in Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993), is of particular importance in our answering the first certified question. In Casa Clara, Toppino supplied concrete used in building the Casa Clara condominiums and single-family homes. Allegedly, some of the concrete contained a high content of salt, thus causing it to crack and break apart. Casa Clara homeowners sued numerous defendants including Toppino, for, inter alia, negligence and strict products liability. The circuit court dismissed all counts against Toppino, pursuant to its finding that the economic loss rule prohibits tort recovery when a product damages itself, thereby causing economic loss, but fails to cause personal injury or damage to property other than itself. The district court affirmed and this Court approved the district court's decision. In so doing, we recognized that the law of contracts protects one's economic losses, whereas the law of torts protects society's interest in being free from harm. See Casa Clara, 620 So. 2d at 1246-47. Finding no reason to burden society as a whole with the losses of one who has failed to bargain for adequate contractual remedies, we concluded that `"contract principles [are] more appropriate than tort principles for recovering economic loss without an accompanying physical injury or property damage."' Casa Clara, 620 So. 2d at 1247 (quoting Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987)). In light of this conclusion, we disapproved several conflicting cases, including Latite Roofing Co., Inc. v. Urbanek, 528 So. 2d 1381 (Fla. 4th DCA 1988), and limited A.R. Moyer, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973), strictly to its facts. Casa Clara at 1248.

"Airport Rent-A-Car [Airport] proffers that the Latite and Moyer cases, in which the parties lacked privity of contract, are indicative of the `no alternative theory of recovery" exception to the economic loss rule. Airport insists that this exception permits tort recovery for purely economic losses when the plaintiff has no alternative

remedy of recovery and that the absence of contractual privity between Prevost and itself places it within the exception. We acknowledge that the Latite and Moyer decisions sanctions the `no alternative theory of recovery' exception; however, we disagree with Airport's assertion that it falls within the exception. As stated above, Casa Clara specifically disapproved Latite, and limited Moyer to its facts, facts which are dissimilar to the ones now under review. In Moyer, the third-party general contractor asserted that the supervisory architect's negligence caused the general contractor to suffer purely economic losses. We stated that

> a third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity.

Moyer, 285 So. 2d at 402. Pivotal to our decision was the supervisory nature of the relationship between the architect and the general contractor. As we stated in AFM Corp. v. Southern Bell Tel. and Tel. Co., 515 So. 2d 180, 181 (Fla. 1987), `we based our decision [in Moyer] on the facts that the supervisory responsibilities vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract'. The facts in this instance are void of supervisory responsibility; accordingly, Moyer is inapplicable.

"Based on the above, we find that the economic loss rule cannot be circumvented by the no alternative theory of recovery exception, absent the required supervisory responsibilities as enunciated in Moyer. Accordingly, the first certified question is answered in the affirmative."

660 So. 2d at 630-631.

The foregoing review discloses that, in interpreting and applying the economic loss rule, this Court has neither:

(a) differentiated among strict liability, intentional tort and negligence; nor

(b) recognized an exception by using the "independent tort" concept.

B. The Policy Considerations That Disfavor Dilution Of The Economic Loss Rule

As previously noted, a basic premise of the economic loss rule is that contract principles are more appropriate than tort principles for recovering economic loss without an accompanying physical injury or property damage.

This Court should not engraft a "fraudulent inducement" exception to the economic loss rule because:

(1) The economic loss rule encourages contracting parties, in their pre-execution negotiations, to engage in the socially desirable process of allocating the risks of non-performance and loss between or among themselves.[39] Should this Court except "fraudulent inducement" from the economic loss rule, it would invite contracting parties not to do so.

(2) Should this Court recognize an exception to the economic loss rule for fraudulent inducement, no competent lawyer would dare omit a fraud in the inducement claim for damages from his or her breach of contract complaint.

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[39] See, e.g., Palau International Traders, Inc. v. Narcam Aircraft, Inc., 653 So. 2d 412, 416 (Fla. 3d DCA 1995).

Consequently, the fraudulent inducement exception [tort principles] would invariably and inevitably swallow the economic loss rule [contract principles]. That consideration applies, a fortiori, in the case of settlement agreements the preservation of which has historically been favored by the public policy of Florida.

C. The Economic Loss Rule As Applied To This Case

HTP, Tyler and Gamble, on one hand, and LACSA, on the other hand, have been contractually bound since 1982. The 1984 loan agreement was executory when the Settlement Agreement was signed and the Settlement Agreement was executory when Case No. 92-19943 was instituted. By affirming the Circuit Court's award of damages in favor of LACSA, the Third District implicitly agreed with LACSA's argument that the Settlement Agreement- by which HTP, Tyler and Gamble released all their claims against LACSA- remains in effect.[40]

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[40] On October 27, 1993, LACSA commenced a second lawsuit seeking damages for having been fraudulently induced into signing the Settlement Agreement. Lineas Aereas Costarricenses, S.A. v. HTP, Ltd., et al., Case No. 93-20229, General Jurisdiction Division, Eleventh Circuit Court, Dade County, Florida. ("Case No. 93-20229"). Named as Defendants in Case No. 93-20229 were: HTP, Tyler, Gamble, the Mobile, Alabama, law firm of Miller, Hamilton, Snider & Odom and the law firm's members ("the lawyers"). HTP, Tyler, Gamble and the lawyers interposed the affirmative defense of res judicata to LACSA's complaint. In addition, HTP counterclaimed against LACSA for breach of the 1984 loan agreement. To HTP's counterclaim, LACSA interposed the affirmative defense of the release provisions of the Settlement Agreement. The Circuit Court summarily dismissed LACSA's Second Amended Complaint and HTP's counterclaim. LACSA appealed and HTP cross-appealed to the Third District, which assigned the matter Case No. 95-1505. In its brief on appeal in that case, LACSA expressly affirmed its position that, in this case below, it had elected the remedy of damages, while standing on the Settlement

Had the Circuit Court and the Third District applied the economic loss rule to bar LACSA's fraudulent inducement attack upon the Settlement Agreement, this outrageous "heads I win, tails you lose" situation would not have occurred. LACSA would then have been relegated to its rescission remedy. If it succeeded in establishing that it had been fraudulently induced into executing the Settlement Agreement, the parties would have reverted to their pre-Settlement Agreement positions.

Agreement rather than rescission. On March 6, 1996, a panel of the Third District heard oral argument in Case No. 95-1505.

II. THE THIRD DISTRICT ERRED WHEN IT HELD THAT THE CIRCUIT COURT HAD NOT COMMITTED REVERSIBLE ERROR BY DENYING HTP, TYLER AND GAMBLE A DIRECTED VERDICT AND BY DENYING A "JUSTIFIABLE RELIANCE" JURY INSTRUCTION DERIVED FROM THE THIRD DISTRICT'S OPINION IN PIETER BAKKER MANAGEMENT, INC. V. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION.

This Court's rulings on economic loss are closely related to, and support, the position of HTP, Tyler and Gamble on "justifiable reliance", discussed below.

It is undisputed that, in 1989, the parties were bitter litigation antagonists. LACSA had charged HTP, Tyler and Gamble with fraud. LACSA mistrusted Gamble and his prior relationship to LACSA's former president, Escalante. In mid-1989, when Mallick approached Quiros, LACSA's then president, and offered to act as intermediary-expeditor, to seek disposition of the California and Florida State Court litigation, LACSA did not know that Mallick was being paid by HTP to try to arrange settlement negotiations. However, LACSA did know that Mallick was in contact with HTP, Tyler and Gamble and that Mallick was Gamble's friend.[41]

From the initiation of substantive settlement discussions in October, 1989, LACSA's Vice President, Jaspers, LACSA's sophisticated Finance Director, took over the representation of LACSA for negotiation. From that point on, there were direct negotiations between HTP's Gamble and LACSA's Jaspers, as LACSA's sole representative.

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[41] PX 10. App. 44-51.

Those facts, in and of themselves, required the Circuit Court to give the "justifiable reliance" instruction requested by HTP, Tyler and Gamble, but it refused to do so. That refusal was reversible error requiring, at least, that the Third District's decision in Case No. 94-2779 be quashed and the cause remanded to the Circuit Court for a new trial.

Relying upon the Third District's decision in Pieter Bakker Management, Inc. v. First Federal Savings And Loan Association, supra, counsel for HTP, Tyler and Gamble at trial proposed the following "justifiable reliance" jury 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 following discussion ensued:

> "THE COURT: The jury is going to decide all this, not me. I think I have made that abundantly clear during this lawsuit, so I don't want to re-argue this matter. I am just looking at the instructions that apply. I am not going to give this instruction, Mr. Metsch, because I am making findings in essence here and I am not going to do that. Now, if you can agree on a substitute, fine.
>
> "MR. METSCH: Well, I made the record, so I am satisfied with Your Honor's ruling.
>
> "THE COURT: Well, number these things as you can indicate that I have denied it because it is instruction number blank.
>
> "MR. METSCH: We'll just read that instruction into the record right now.
>
> "THE COURT: Read it into the record.

> "MR. METSCH: Let the record reflect His Honor denied the following proposed instruction from the Defendants HTP, Tyler and Gamble. Quote, 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, unquote, and the authority cited is Pieter Bakker Management versus First Federal Savings And Loan, 541 So. 2d 1334, Fla. 3rd DCA, 1989..."[42]

Instead of the "justifiable reliance" jury instruction proposed by counsel for HTP, Tyler and Gamble, the Circuit Court erroneously, and to the prejudice of HTP, Tyler and Gamble, advised the jurors:

> "The next issue for your determination is whether LACSA was justified in relying on the representations of Mr. Mallick. The law will not permit a person to rely blindly on a false representation in every instance. The reliance must be justified, which means that it must have been reasonable for LACSA to have relied on Mr. Mallick's representations, under the circumstances.
>
> "In determining whether LACSA's reliance was reasonable, and, therefore, justified, you may consider the circumstances presented, including the pendency of lawsuits in the court of California and Florida between LACSA, on the one hand, and HTP, Tyler and Gamble on the other hand, in which LACSA had accused HTP, Tyler and Gamble of fraud and dishonesty."[43]

The Circuit Court's refusal to give the Pieter Bakker instruction proposed by HTP, Tyler and Gamble was clearly erroneous. Its response plainly demonstrates its recognition

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[42] TR. 685-689.

[43] TR. 903-904.

that that instruction, if given, would have called the jury's attention to the enormous hole in LACSA's case and, almost necessarily, required a verdict in favor of HTP, Tyler and Gamble.

However, the Third District, in Case No. 94-2779, held:

> "Second, the defendants contend that the trial court erred by rejecting the defendants' proposed jury instruction regarding 'unjustifiable reliance' that was prepared pursuant to Pieter Bakker Management, Inc. v. First Fed. Sav. & Loan Ass'n, 541 So. 2d 1334, 1335-36 (Fla. 3d DCA), review denied, 549 So. 2d 1014 (Fla. 1989)('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'.). We disagree
>
> "The instant case is distinguishable from Pieter Bakker because the plaintiffs did not rely upon the representations of the allegedly dishonest parties themselves, rather the plaintiffs relied upon the representations of an undisclosed agent. Wilson v. Equitable Life Assurance Soc'y of the United States, 622 So. 2d 25, 28 (Fla. 2d DCA 1993)(holding that when the relationship between parties is amicable and not 'plagued with distrust', a party may not necessarily be unjustified in relying on the other party's representations). Therefore, we find that the trial court properly rejected the defendants' proposed jury instruction for 'unjustifiable reliance'."

661 So. 2d at 1222.

As the following discussion establishes, the Third District's approval, in Case No. 94-2779, of the instruction which the Circuit Court gave to the jury in Case No. 92-19943, has thrown into turmoil a theretofore stable and sound body of decisional law, requiring this Court's intervention.

In Columbus Hotel Corp. v. Hotel Management Co., 116 Fla. 464, 156 So. 893, 901 (1934), this Court declared:

> "Even if the alleged misstatements and false representations credited to [HTP] had been made prior to entry into the settlement agreement, the circumstances [that] existed at the time of the execution of that contract were such that [LACSA] had no right to rely upon any such representation, in view of the fact that the parties were informed and must have understood at all time that they were in hostile relations to each other and were dealing at arms length."

This Court, in Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980), held that:

> "a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him."

The Fourth District, in Uvanile v. Denoff, 495 So. 2d 1177,1179-1180 (Fla. 4th DCA 1986), review dismissed, 504 So. 2d 766 (Fla. 1987), reversed a fraud damages judgment, which was based upon a jury's verdict, and declared:

> "The doctrine announced in Besett v. Basnett, 389 So. 2d 995 (Fla. 1990) does not permit recovery to the recipient of a fraudulent misrepresentation to blindly rely upon it in every case. Considering the history of the parties' relationship to each other, Denoff's distrust of Uvanile, the negotiations that preceded the ultimate agreement, Denoff's complete knowledge of the corporate affairs, and the disputes the parties had over value of the property dictated that Denoff was not justified in relying upon the misrepresentation. The fact that Denoff was ill does not relieve him of his responsibility."

In Pieter Bakker Management, Inc. v. First Federal Savings And Loan Association, supra, after stating the holdings in Besett v. Basnett and Uvanile v. Denoff, supra, 541 So. 2d at 1335, the Third District declared:

> "Florida law on this issue was restated with approval in Pettinelli v. Danzig, 722 F. 2d 706 (11th Cir. 1984), where the court noted:
>
> > 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. See Sutton v. Crane, 101 So. 2d 823 (Fla. 2d DCA 1958). Thus, the appellants have failed to make a prima facie case of fraud because they had no legal right to rely on any representations under these circumstances.
>
> Id. at 710. See also Zelman v. Cook, 616 F. Supp. 1121 (S.D. Fla. 1985). Furthermore, as in Uvanile, both parties to the June 1984 settlement had abundant knowledge regarding the subject matter of the agreement. This case is, for that reason, distinguishable from Besett which involved a seller with superior knowledge of a product defect." (Emphasis supplied)

541 So. 2d at 1135-1136. See, also, Pepper v. First Union National Bank of Florida, 605 So. 2d 1016, 1017 (Fla. 1st DCA 1992), and Finn v. Prudential-Bache Securities, Inc., 821 F. 2d 581, 586 (11th Cir. 1987).

But for the Third District's decision in Case No. 94-2779, the foregoing "justifiable reliance" pronouncements, as applied to this case, would have compelled the following conclusions:

First, the Circuit Court committed reversible error when it refused to give the justifiable reliance instruction proposed by HTP, Tyler and Gamble, but instead instructed the jury that it could "consider the circumstances presented, including the pendency of lawsuits in the court of California and Florida between LACSA, on the one hand, and HTP, Tyler and Gamble on the other hand, in which LACSA had accused HTP, Tyler and Gamble of fraud and dishonesty." The Circuit Court's justifiable reliance instruction to the jury perverted the foregoing "justifiable reliance" decisions and misled the jury by studiously avoiding the critical issue of the weight to be given to the charges of fraud and dishonesty which had been disposed of by the 1990 Settlement Agreement.

Second, the Circuit Court committed reversible error when it denied the post-trial motions of HTP, Tyler and Gamble for new trial and for judgment in accordance with their motions for directed verdict. It 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.

Regrettably, the Third District's opinion in Case No. 94-2779 has undermined the stature of the decisions in Columbus

Hotel Corp. v. Hotel Management Co., Uvanile v. Denoff, and Pieter Bakker Management, Inc. v. First Federal Savings And Loan Association, supra, and thrown into confusion Florida's theretofore settled body of decisional law concerning the voidability [for fraud] of agreements settling disputes involving the parties' alleged dishonesty. Accordingly, the Third District's decision in Case No. 94-2779 should be quashed and the cause should be remanded to the Circuit Court with a direction that a Final Judgment be entered in Case No. 92-19943 for HTP, Tyler and Gamble or, in the alternative, that a new trial be held.

III. THE THIRD DISTRICT ERRED WHEN IT HELD THAT THE CIRCUIT COURT HAD PROPERLY REJECTED THE JURY VERDICT FORM PROPOSED BY HTP, TYLER AND GAMBLE AND ADOPTED A JURY VERDICT FORM WHICH PREVENTED THE JURY FROM SEPARATELY CONSIDERING HTP'S COUNTERCLAIM FOR BREACH OF THE 1990 SETTLEMENT AGREEMENT.

As the trial of Case No. 92-19943 drew to a close, the parties and the Circuit Court addressed the form of verdict to be given to the jury. The Circuit Court erroneously accepted a form of verdict proposed by LACSA, over Appellants' objections. That form contradicted a related jury instruction that was correctly given by the Trial Court.

Counsel for HTP, Tyler and Gamble proposed a verdict form which would have required the jury separately to consider LACSA's fraud claims and HTP's counterclaim for breach of the Settlement Agreement.[44]

Counsel for LACSA proposed a verdict form which, if the jury were to find that LACSA had been fraudulently induced to enter into the Settlement Agreement, barred the jury from considering HTP's counterclaim for damages for breach of the Settlement Agreement. The Circuit Judge chose the latter jury verdict form.[45]

Complying with Florida Standard Jury Instruction (Civil) 2.4, the Circuit Judge told the jury that:

> "Although these claims have been tried together, each is separate from the other, and each party is entitled to have you

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[44] App. 52-54.

[45] TR.

separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately."[46]

In their Reply Brief in Third District Case No. 94-2779, HTP, Tyler and Gamble at p. 11 argued that:

> "In Florida East Coast Railway Co. v. Jones, 66 Fla. 51, 62 So. 898 (1913), the Supreme Court of Florida held:
>
> > `The charges given by the court are so inconsistent as necessarily to confuse the jury. In one breath he jury is instructed that it may assess the damages for the full amount claimed in the declaration, and in the next breath that the damages must not exceed the contract price for the stock lost as agreed upon in the bill of lading. The assessment made by the jury shows that the contract price was ignored.
> >
> > `An examination of the bill of exceptions does not cure this error, and we can but reverse the judgment based upon this verdict.'
>
> 66 Fla. at 51-52, 62 So. at 898-899.
>
> "The legal principle that inconsistent jury instructions require the reversal of a resulting judgment has been repeatedly applied since 1913. See, e.g., Key West Electric Co. v. Albury, 91 Fla. 695, 109 So. 223 (1926); Allstate Insurance Company v. Vanater, 297 So. 2d 293 (Fla. 1974); Webb v. Priest, 413 So. 2d 43 (Fla. 3d DCA 1982); Veliz v. American Hospital, Inc., 414 So. 2d 226 (Fla. 3d DCA), review denied, 424 So. 2d 760 (Fla. 1982); and Poole v. The Lowell Dunn Company, 573 So. 2d 51 (Fla. 3d DCA 1990)."

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[46] TR. 902.

The Third District ignored the foregoing argument when, in its decision in Case No. 94-2779, it stated:

> "Lastly, the defendants contend that the trial court erred by rejecting their proposed jury verdict form and instead, using a verdict form that instructed the jury to determine whether the defendants had fraudulently induced the plaintiffs to enter into the settlement agreement and if so, to proceed to the question of damages, thereby ignoring the defendants' claim for breach of the settlement agreement. We find that the trial court properly rejected the defendants' proposed verdict form. Additionally, we find that the verdict form was appropriate where the defendants had brought a claim for breach of contract, and the plaintiffs had raised the affirmative defense of fraud in the inducement. Poneleit v. Reksmad, Inc., 346 So. 2d 615, 616 (Fla. 2d DCA 1977)(`[A] party can successfully defend against liability on a claim by showing that he was fraudulently induced to enter into the contract or transaction upon which such liability is asserted'.)"

661 So. 2d at 1222.

The "separate consideration" instruction was inconsistent with the verdict form given to the jury. Had the Third District in Case No. 94-2779 applied the foregoing decisions, it would have reversed the Circuit Court's Final Judgment in Case No. 92-19943 and remanded for a new trial. By quashing the District Court's decision, this Court will confirm that the doctrine condemning inconsistent jury instructions applies to an inconsistency between an instruction and a verdict form.

CONCLUSION

The Third District's decision in Case No. 94-2779 should be quashed. That tribunal should be directed to remand this cause to the Circuit Court for the entry in Case No. 92-19943 of a Final Judgment:

(a) dismissing, with prejudice, LACSA's claim for tort damages; and

(b) holding LACSA liable in damages to HTP for breach of the Settlement Agreement.

In the alternative, the Third District should be directed to remand this cause to the Circuit Court for a new trial in Case No. 92-19943 at which:

(a) the economic loss rule would be held to bar LACSA's claim against HTP, Tyler and Gamble for tort damages;

(b) LACSA would be relegated to the remedy of rescission of the Settlement Agreement;

(c) the jury would be appropriately instructed concerning "justifiable reliance";

(d) a verdict form consistent with Florida Standard Jury Instruction (Civil) 2.4 would be given to the jury.

Respectfully submitted,

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