

IN THE SUPREME COURT OF FLORIDA  
CASE NO. 86,913 (DCA No. 94-2779)

HTP, LTD., et al., )  
 )  
 Petitioners )  
 )  
 vs )  
 )  
 LINEAS AEREAS COSTARRICENSES )  
 S.A., et al. )  
 )  
 Respondents )

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

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RESPONDENTS' ANSWER BRIEF ON JURISDICTION

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## ISSUE PRESENTED

**Does the Economic Loss Rule Bar a Cause of Action for Fraud in the Inducement When the Fraud Has Been Held to Represent a Tort Independent from Other Claims?**

## INTRODUCTION

On November 3, 1994, a jury in Miami, Florida, found that Petitioners -- HTP, Ltd., the Tyler Corporation, and Stephen H. Gamble -- committed fraud. Petitioners were held liable for secretly planting a mole in the highest echelons of the management of Respondents, Lineas Aereas Costarricenses, S.A. and LACSA International, Inc. (together "LACSA"), and instructing him to induce LACSA, by means of fraudulent misrepresentations, to enter into two settlement agreements.

Petitioners argued to the appellate court that they should not have to pay damages for their intentional tort because LACSA's claim for fraud in the inducement is barred by the economic loss rule. The appellate court rejected Petitioners' argument on the grounds that their fraud constituted a tort independent from other claims.

Petitioners now seek discretionary review in this Court, arguing that the appellate opinion below conflicts with other appellate precedent in this jurisdiction. Petitioners point in particular to a recently certified case in which the Second District held that, on the facts presented in that case, a fraud in the inducement claim was barred by the economic loss rule, see Woodson v. Martin, \_\_\_ So. 2d \_\_\_, 20 Fla. L. Weekly D2556 (Fla.

2d DCA, Nov. 17, 1995)(en banc), and to the decisions of this Court that have held that tort law is concerned exclusively with personal injury and property damage -- and that economic loss is recoverable only in contract. See AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987); Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993); Airport Rent-A-Car, Inc. v. Prevost, Inc., 660 So. 2d 628 (Fla. 1995).

There is, however, no conflict. All of the cases Petitioners have cited agree with the decision below that a cause of action in tort survives the economic loss rule when the tortious conduct results in an independent tort unrelated to a breach of contract.

Since nothing in the cases Petitioners have cited points to a conflict, Petitioners' request for discretionary review must be denied.

#### **STATEMENT OF FACTS**

Petitioners have chosen not to discuss their fraud. Yet even a brief recital of the deception Petitioners practiced in this case makes clear that their tortious conduct was independent of any contract-related claims.

LACSA is the national air carrier of Costa Rica. Beginning in 1982, LACSA paid Stephen H. Gamble, as president of the Tyler Corporation, \$65,000 a year for his advice and assistance in the lease, purchase, and sale of aircraft used in LACSA's operations. Gamble assisted LACSA in two transactions. LACSA subsequently discovered that Gamble was taking money from both sides in

these transactions.

In one of the deals, Gamble recommended that LACSA borrow \$1.9 million from HTP, Ltd., a Bermuda company. The money was borrowed and repaid in full, with interest. HTP later claimed an additional \$3 million interest in the aircraft that was the subject matter of the transaction. Gamble concealed from LACSA that he owned and controlled HTP.

In 1988, HTP sued LACSA in California for the \$3 million, as well as for conversion and fraud. During discovery, LACSA learned of Gamble's double-dealing and that he was assisting HTP in the lawsuit against LACSA. As a result, in 1989, LACSA sued Petitioners in Dade County, Florida, for breach of their consulting agreement, conspiracy to violate fiduciary duties, and fraud.

As the litigation proceeded and more wrongdoing was exposed, it became clear that Gamble would have to pay for his improprieties. In order to avoid that result, Petitioners concocted a plan. In June 1989, HTP hired J. Christopher Mallick, who had previously provided business advice to LACSA's new president, Mario Quiros. Mallick was to maneuver Quiros into renouncing LACSA's lawsuit against Petitioners and to convince LACSA to pay yet more money to HTP. Mallick was to be paid according to the results he was able to produce, with a bonus at the end which Mallick expected to be \$100,000. By the time the settlement agreements were signed, Petitioners had paid Mallick \$32,500.

The scheme was kept secret. The agreement between Mallick and HTP contained a confidentiality provision which prevented either party from divulging its contents. The confidenti-

ality was not breached until the trial judge in this case ordered the production of the documents that exposed the fraud.

On instructions from Petitioners, Mallick presented himself to Mario Quiros as a well-wisher who wanted to aid Quiros in making a success of his new position. Mallick eventually isolated Quiros from LACSA's trial counsel and assumed the role of trusted confidant. He pretended to assist LACSA in settling the lawsuit against Petitioners to LACSA's best advantage. Neither Quiros nor anyone else at LACSA ever knew that Mallick was Petitioners' agent. As a result, LACSA spoke confidentially to Mallick of the lawsuits and of the weaknesses it perceived in its cases. Mallick passed this inside information on to Gamble. For almost seven months, Gamble used Mallick as his puppet, eavesdropping on confidential discussions, discrediting LACSA's trial counsel, disseminating misinformation, and painting a picture of certain loss if the lawsuits continued.

The scheme worked. In early 1990, LACSA signed the settlement agreements, surrendering its claims against Petitioners and, in addition, paying them over half a million dollars.

Petitioners' fraudulent activities would have remained undiscovered had they not insisted, in 1992, that LACSA owed yet more monies under the settlement agreements. LACSA sued for a judicial declaration that it had fully complied with the terms of the settlement agreements and did not owe additional monies. HTP counterclaimed for breach of the settlement agreements. A year later during discovery, LACSA uncovered the facts of the fraud, amended its complaint to allege fraud in the inducement, and before trial, dropped the count requesting declaratory relief.

After a full trial, the jury concluded that Petitioners were liable for fraud and awarded LACSA compensatory damages.

**SUMMARY OF ARGUMENT**

The appellate court below held that LACSA's claim for fraud in the inducement was not barred by the economic loss rule because Petitioners' conduct constituted a tort independent of any contract-related claims. Since both requirements of the independent tort doctrine are satisfied in this case, the opinion below does not conflict with any Florida precedent.

**ARGUMENT**

Petitioners seek discretionary review in this Court. In order to establish this Court's jurisdiction, they must demonstrate that the decision below expressly and directly conflicts with a decision of another district court of appeal or with a decision of this Court on the same question of law. Fla. Const. Art. V, § 3(b)(3); Fla. Rules App. Pro. Rule 9.030 (a)(2)(A)(iv). Petitioners cannot make the requisite showing in this case.

The appellate court below found as follows: "the trial court properly ruled that [LACSA's] cause of action for fraud in the inducement was an independent tort that was not barred by the economic loss rule." HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221, 1222 (Fla. 3d DCA 1995).

Petitioners argue that the decision below conflicts with appellate precedent because there is no independent tort exception to the economic loss rule. "Nothing in this Court's 'economic loss rule' jurisprudence even hints at the existence of an exception for 'independent torts'." Petitioners' Amended Brief on Jur-



isdiction at 7-8 n. 6.

Petitioners are mistaken. In its seminal cases on the economic loss rule, this Court made clear that a tort action is not barred by the economic loss rule if what is involved is "a tort 'distinguishable from or independent of [the] breach of contract.'" AFM Corp. v. Southern Bell Tel. & Tel. Co., *supra*, 515 So. 2d at 181, quoting Lewis v. Guthartz, 428 So. 2d 222, 224 (Fla. 1982).

This Court has established two criteria to determine whether the tortious conduct complained of is independent. First, there must be "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 tort is not independent if the aggrieved party might have protected itself by agreement from the loss -- in other words, when "losses [are] 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 case at bar, both elements of the independent tort doctrine are present. First, the tortious conduct is entirely unrelated to any breach of contract -- in fact there was no breach. LACSA's loss was caused not by Petitioners' breach, but rather by their deception.

Second, LACSA could not have protected itself against Petitioners' fraud by agreement. Unlike the known possibility of a product defect, which can be protected against by a warranty provision in the agreement, the risk to LACSA was unknown and intentionally remained hidden until long after the settlement agree-

ments were concluded.

The opinion of the Second District in Woodson is not to the contrary. In Woodson, the plaintiff had claims against the seller of his home for breach of contract. See Woodson v. Martin, supra, 20 Fla. L. Weekly at D 2556. The fraud in the inducement coincided precisely with the breach of contract. Moreover, the plaintiff had, in fact, protected himself by means of the appropriate contractual provisions. Woodson presents neither of the elements required to demonstrate the existence of an independent tort.

When the controlling factual elements of the allegedly conflicting cases are distinguishable, or if the points of law settled in the two cases are not the same, no conflict arises capable of supporting certiorari jurisdiction before this Court. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962).

In the case at bar, Petitioners' conduct was expressly found to constitute a tort independent of any contract-related claims. To permit recovery for the losses Petitioners caused does not conflict with any Florida precedent. There is no basis here for certiorari jurisdiction.

#### **CONCLUSION**

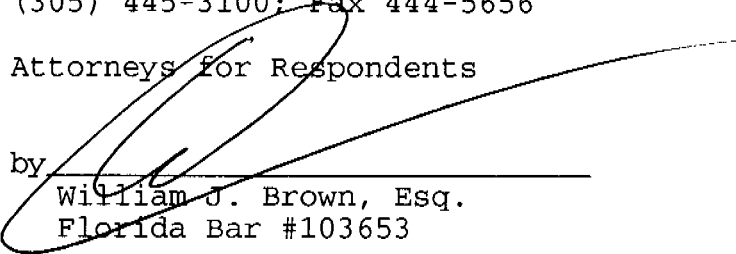
For the foregoing reasons, Petitioners' request for discretionary review in the Supreme Court of Florida must be denied.

Respectfully submitted,

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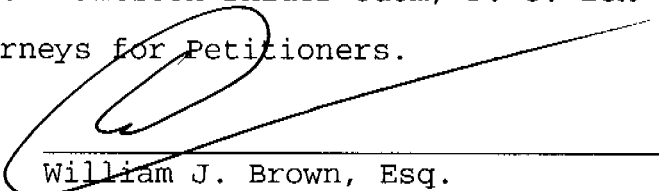
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Brief on Jurisdiction was served by mail this 21 day of December, 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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