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SUPREME COURT OF FLORIDA

CASE NO. 86,913

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

Petitioners,

v.

LINEAS AEREAS 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

REPLY BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT[1]

Petitioners HTP, Ltd., et al. ("HTP"), will not burden the Court with a refutation of all the misstatements of fact in the Answer Brief of Respondents Lineas Aereas Costarricenses, S.A., et al. ("LACSA"). Suffice it to say that if HTP's action were, in fact, as horrible as represented by LACSA, then rescission of the Settlement Agreement between the parties would have been the primary relief LACSA would have sought. Significantly, LACSA expressly disclaimed rescission as a remedy.[2]

The Court's concern here is not with which party wears the black hat and which the white, but rather:

(a) with resolution, so far as possible, of the legal issue which was the basis for this Court's acceptance of jurisdiction; and

(b) if appropriate, the correction of errors committed by the Third District other than its refusal to apply the Economic Loss Rule.

This Court accepted for consideration the issue:

> 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?

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[1] References to the Record on Appeal will appear in this Reply Brief as follows: "R. ".

[2] There are obvious reasons why LACSA did not seek rescission. LACSA though the settlement was a good idea. See PX 56 [memorandum to Shuichi Yaganuma from Mario Quiros, dated December 20, 1989, which is included in the Appendix to HTP's Initial Brief at pp. 40-41]. Rescission of the Settlement Agreement would have again exposed LACSA to what it conceded to be the real potential of a liability approximating $3,500,000.00.

The record in this case is not sufficiently wide in scope so as to warrant a generalized response to that question.

The record does, however, identify a discrete segment of contract-related fraud in the inducement claims to which the Economic Loss Rule should apply to bar such claims absent a showing of tort injury independent of the contract, i.e., personal injury or property damage. That class of cases, epitomized by the facts here, includes litigation settlement agreements as well as other situations where the parties have been linked in a continuing contractual relationship pre-existing the charge by one party of fraudulent induce to renew, amend or supplement the pre-existing arrangement. In such cases involving a continuing contractual relationship, and no showing of independent tort injury, the reasons for application of the Economic Loss Rule are especially strong.

Indeed, cases such as this approach the intersection of two streams of legal doctrine involved here, i.e., on the one hand the Economic Loss Rule and, on the other, that line of Florida decisions holding that:

> "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."

Pieter Bakker Management Services, Inc. v. First Federal Savings & Loan Assoc., 541 So. 2d 1334 (Fla. 3d DCA), review denied, 549

So. 2d 1014 (Fla. 1989).[3]

HTP does not contend that these two streams intersect here, but rather that a Bakker-like rationale applies where a continuing relationship is broken by a suit, whether or not accompanied by a breach of contract claim that alleges fraud in the inducement arising out of the relationship, but provides no showing of independent tort injury. That rule should apply to the facts of this case, where there were prior allegations of fraud between the parties and LACSA showed no independent tort injury.

Moreover, LACSA insisted at trial that it had been induced by egregious fraud to enter into an allegedly injurious contract (the Settlement Agreement). Yet LACSA repeatedly and expressly disclaimed any desire or intent to rescind that "injurious" contract. That adamant refusal to seek rescission clearly suggests substantial doubts about the bona fides of LACSA's assertion of fraudulent inducement to enter into an onerous contract.

The nature of the remedy sought, however, commends more than that to this Court's consideration: the party to an allegedly fraudulently induced contract clearly has the right to seek and

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[3] See, also, Columbus Hotel Corp. v. Hotel Management Co., 116 Fla. 464, 156 So. 893 (1934), Pepper v. First Union National Bank of Florida, 605 So. 2d 1016 (Fla. 1st DCA 1992), Uvanile v. Denoff, 495 So. 2d 1177, (Fla. 4th DCA 1986), review dismissed, 504 So. 2d 766 (Fla. 1987), Finn v. Prudential-Bache Securities, Inc., 821 F. 2d 581 (11th Cir. 1987), Pettinelli v. Danzig, 722 F. 2d 706 (11th Cir. 1984), and Zelman v. Cook, 616 F. Supp. 1121 (S.D. Fla. 1985).

obtain rescission if fraudulent inducement is established. With the contract rescinded, the basis for the Economic Loss Rule evaporates and tort damages, if provable, could then be awarded. Where, on the other hand, the contracting party alleging fraudulent inducement insists upon retaining the benefits of the contract, and can make no showing of independent tort injury, the Economic Loss Rule should apply. The applicability of that rationale to this case is apparent.

Here there is no showing of independent tort injury. LACSA insisted upon retaining the benefits of the Settlement Agreement and damages asserted to have resulted from it. Here the evidence is clear that LACSA deemed the allegedly "injurious" contract to be in fact a beneficial one.

HTP in this litigation was not the first to contend, with respect to the Settlement Agreement, that:

(a) the Economic Loss Rule barred the recovery of damages for fraudulent inducement; and

(b) as a matter of law, reliance upon the adverse parties' allegedly fraudulent misrepresentations was unreasonable.

On the contrary, that distinction belongs to LACSA.

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 the Settlement Agreement.[4] Lineas Aereas Costarricenses, S.A. v. HTP, Ltd., et al., Case No.

[4] R. 2-31.

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 for damages for breach of the Settlement Agreement (Count I) and for fraudulently and deceitfully inducing HTP and Gamble to sign the Settlement Agreement.[5]

LACSA on February 11, 1993, answered HTP's breach of contract counterclaim[6] and moved to dismiss HTP's counterclaim for fraud and deceit.[7] The memorandum of law[8] which accompanied the LACSA motion to dismiss Count II of HTP's counterclaim ("LACSA's February 11, 1993, memorandum") was remarkable for its succinct and insightful applications of the (a) Economic Loss Rule and (b) the justifiable reliance element of the tort of fraudulent inducement to enter into the Settlement Agreement.[9] Indeed, impressed with the authoritativeness of LACSA's February 11, 1993, memorandum, HTP on May 11, 1993, voluntarily dismissed Count II of its counterclaim.[10]

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[5] R. 32-74.

[6] R. 78-81.

[7] R. 82-83.

[8] R. 84-93.

[9] The logic of the LACSA/LACSA Int. memorandum of law was so compelling that HTP and Gamble voluntarily dropped Count II (fraud and deceit) of their counterclaim.

[10] R. 158-159.

In this Reply Brief, HTP, Tyler and Gamble will draw upon LACSA's February 11, 1993, memorandum to establish that:

(a) under the Economic Loss Rule, LACSA was not entitled to an award of damages in tort against HTP; and

(b) as a matter of law, LACSA's reliance upon HTP's allegedly fraudulent misrepresentations was unreasonable.

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.

HTP believes that the persuasiveness of the following excerpts from LACSA's February 11, 1993, memorandum, cannot be denied:

> "This case is about HTP's assertion that LACSA is in default for failure to make payments as required under the Settlement Agreement. LACSA has filed this declaratory judgment action to ascertain its obligations under that Agreement. The First Count of HTP's Counterclaim affirmatively alleges breach, on the basis of the same facts that LACSA alleged in its Complaint.
>
> "However, HTP has added a Second Count to its Counterclaim, once again based on the same facts as LACSA's Complaint and the First Count of its Counterclaim. This time, however, HTP has pleaded the matter in tort, as a claim for fraud and deceit.
>
> "Florida law does not permit a party to transform a cause of action for breach of contract into a tort. The reason is simple. Otherwise, the party would be able to make an end run around the limitations on recovery specified in the agreement between the parties. And that is precisely what HTP

seeks to do in this case.[11]

* * * * * * *

"There is yet another reason for dismissing the Second Count of HTP's Counterclaim. Florida law expressly prohibits the transformation of a cause of action for breach of contract into a tort claim. The case law is clear that causes of action for fraud and deceit that involve the same facts as a contracts claim must be dismissed.[12]

* * * * * * *

"Florida courts have not been receptive when a claimant has attempted to restate its breach of contract claim in terms of fraud and deceit. See, e.g., J. Batten Corp. v. Oakridge Investments 85, Ltd., 546 So. 2d 68 (Fla. 5th DCA 1989). In Batten, a contractor sued for breach of the construction contract and fraud. The contractor based his fraud count on the property owner's `fraudulent representation that it would pay the amount due under the contract'. Id. at 69. The appellate court affirmed the dismissal of the fraud count, citing the AFM Corp. decision, where the Florida Supreme Court held that, where there is a valid contracts claim, tort claims based on similar facts are barred. See AFM Corp. v. Southern Bell Telephone and Telegraph Co., 515 So. 2d 180 (Fla. 1987). In general, Florida courts dismiss causes of action for misrepresentation where the misrepresentation `is inherent in and inextricable from the events constituting a breach of the contract'. John Brown Automation, Inc. v. Nobles, 537 So. 2d 614, 617 (Fla. 2d DCA 1988).

"Federal courts applying Florida law have come to the same conclusion. See Serina v. Albertson's Inc., 744 F. Supp. 1113 (M.D. Fla. 1990). In Serina, an employee sued his employer for breach of contract and fraud. The employer had agreed to pay the employee a

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[11] R. 88-89.

[12] R. 89.

> percentage of total store profits. The alleged fraud was that the employer did not disclose that it calculated profits in one way for its corporate records and in a different way when calculating the employee's percentage. After an extensive review not only of Florida law but also on the emerging consensus in other states about the `economic loss rule', which bars suit in tort where there is an adequate contracts remedy, the Serina court held that the fraud count is barred `when the facts surrounding the tort claim are interwoven with the facts surrounding the breach of contract claim'. Id. at 1118.
>
> "HTP's fraud claim falls by the same logic. HTP claims that the Settlement Agreement implicitly contained assurances by LACSA that LACSA owned certain jet aircraft or promised that LACSA would obtain title to them. HTP argues that it was induced to enter into the Settlement Agreement by these representations and that it was damaged when the assurances and promises were not kept.
>
> "This is a claim for breach of contract, precisely as HTP indicates in the First Count of its Counterclaim. The Second Count, for fraud and deceit, must be dismissed."[13]

The Court should note that Count II of the counterclaim referred to in the above quoted paragraph was unrelated, and in the alternative, to the breach of contract claim in Count I, as LACSA was well aware. LACSA thus agreed with HTP's position here that the controlling factor in the application of the Economic Loss Rule is not the breach of the contract but rather the existence of the contractual relationship and the absence of any independent tort injury.

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[13] R. 91-93.

As demonstrated in LACSA's February 11, 1993, memorandum, the Economic Loss Rule barred LACSA from recovering tort (fraudulent inducement) damages from HTP.[14] If LACSA was entitled to any relief against HTP, it was solely the rescission of the Settlement Agreement.

The Third District's decision affirming the Circuit Court's judgment should be quashed. The Third District should be directed to reverse the Circuit Court's judgment for damages and to remand the cause to the Trial Court for entry of judgment for Petitioners.

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

LACSA's February 11, 1993, memorandum addressed the reasonable reliance issue as follows:

> "First, the alleged fraud was supposedly the result of HTP's reasonable reliance on representations made during the course of the negotiations that produced the Settlement Agreement. Unfortunately, HTP has thereby pleaded itself into a corner. One look at the text of the agreements, as attached to the Counterclaim, reveals that the parties foresaw and provided for exactly this type of problem. The two agreements provide, in almost identical wording, that all representations made during negotiations and that are not contained in the text of the agreements are of no force and effect. In

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[14] See, Grace Petroleum Corp. v. Williamson, 906 S.W. 2d 66, 69-70 (Tex. Civ. App.- Tyler 1995) (economic loss to the subject matter of an enforceable agreement sounds in contract, not in tort).

other words, even if HTP proves that such representations were made, it would have been prohibited by the agreements from relying on them. Thus there can be no claim for fraud, and the court for fraud and deceit must be dismissed.[15]

* * * * * * *

"A cause of action must be dismissed if the claimant would not be entitled to recovery even if all of the allegations of the claim were proved. That is hornbook law. See Thompkins v. Metropolitan Dade County, 345 So. 2d 1090, 1091 (Fla. 3d DCA 1977).

"And that is precisely the problem with HTP's Counterclaim for Fraud and Deceit. HTP alleges that `LACSA represented to HTP that it had dominion and control over, and the power to arrange for the sale of each of the aforesaid aircraft; and that it would use its best efforts to do so'. Counterclaim, ¶ 58. HTP also alleges that LACSA INTERNATIONAL `represented to HTP that it held title to at least one of the aforementioned B-727 aircraft on behalf of LACSA'. Id. at ¶ 59.

"Those alleged representations could have been made in only one of two places. Either they were made in the text of the signed Agreements or they were made during the negotiations.

"If the representations are part of the Agreement, and if they were breached, then HTP would have a claim for breach of contract, but no tort claim.

"If, on the other hand, the representations were made during the course of negotiations, then HTP has no claim at all. The reason is simple. HTP signed away the right to rely on representations made during the negotiations. The Memorandum Agreement states that `[t]he parties agree that any representations, warranties, or promises made by any of the parties, whether oral or written, except to the extent specifically contained in the

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[15] R. 89.

> Memorandum Agreement, will be of no further force or effect'. Memorandum Agreement ¶ 6. The Settlement Agreement includes a similar provision. Settlement Agreement ¶ 8.
>
> "Since HTP agreed that all representations made by either side during settlement negotiations are of `no further force or effect', HTP cannot possible have had a basis to rely on them.
>
> "The result is this. Even if HTP were able to prove that the representations it has alleged were made, HTP cannot, as a matter of law, recover. HTP's Counterclaim for fraud and deceit must be dismissed."[16] (Emphasis supplied)

By including ¶ 6 in the Memorandum Agreement and ¶ 8 in the Settlement Agreement, supra, the parties formally recognized the obvious: that they were then embroiled in, and were seeking to settle, litigation in the courts of Florida and California involving cross-allegations of fraud and dishonesty. Consequently, the principle of law announced in Pieter Bakker Management Services, Inc. v. First Federal Savings And Loan Association, supra, was squarely implicated:

> "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."

At a minimum, the Circuit Court should have so instructed the jury; in the alternative, the Circuit Court should have granted HTP's post-trial motion for judgment. The Third District's decision affirming the Circuit Court's judgment should be quashed. The District Court should be directed to reverse the

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[16] R. 90-91.

Circuit Court's judgment for damages and to remand the cause to the Trial Court for further proceedings.

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

This Court, in Whitman v. Castlewood International Corp., 383 So. 2d 618, 620 (Fla. 1980), observed:

> "Special verdicts or interrogatories necessarily require explanatory instructions to the jury."

In Montgomery Ward & Company, Inc. v. Hoey, 486 So. 2d 1368 (Fla. 5th DCA), review denied, 494 So. 2d 1151, 1152 (Fla. 1986), an action for malicious prosecution against a store and its security guard, the jury awarded punitive damages against the former, but not against the latter. Reversing the Circuit Court's judgment on that jury award, the Fifth District declared:

> "Unfortunately, the verdict form did not separate the legal issues on the damage questions as the trial court had separated them in the instructions. The inconsistencies between the instructions and the verdict form in regard to punitive damages are too confusing to resolve short of a new trial. The appellant says the only punitive damage verdict in this case expressly refers to the vicarious liability standard of `some fault'- and this is true. The appellee says the jury was instructed that it could award punitive damages against Montgomery Ward alone if it acted with `malice, moral turpitude, wantonness or willfulness, or reckless indifference to the rights of others', and the jury attempted to award punitive damages against Montgomery Ward in the only space provided for such damages on the verdict form, thereby implying

> the requisite finding- and this is also true."

486 So. 2d at 1371. See, also, Harnly v. Watson, 519 So. 2d 18, 19-20 (Fla. 2nd DCA 1987), and Matalon v. Greifman, 509 So. 2d 985, 986 (Fla. 3d DCA 1987).

The foregoing authorities stand for the legal principle that a conflict between the Trial Judge's jury instructions and the special verdict form creates fertile soil for juror confusion, thereby destroying the confidence of the judiciary and the parties in the jury's decision. Applied to this case, the conflict between the Circuit Court's "separate consideration" standard jury instruction[17] and the special verdict form[18]

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[17] In compliance with Florida Standard Jury Instruction (Civil) 2.4, the jury was instructed that:

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

[18] The special verdict form proposed by counsel for LACSA and LACSA Int. and, over the objection of counsel for HTP, Tyler and Gamble, approved by the Circuit Judge, was answered by the jury as follows:

> "WE, THE JURY, hereby find as follows:
>
> "1. Did Defendant/Counterclaimant HTP, Ltd. (`HTP'), Defendant Tyler Corporation (`Tyler'), and Defendant Stephen H. Gamble (`Gamble') fraudulently induce Plaintiff/Counterclaim Defendant Lineas Aereas Costarricenses, S.A. (`LACSA'), to enter into the settlement agreement?

requires that the resulting judgment be set aside.

The Third District's decision affirming the Circuit Court's judgment should be quashed. The District Court should be directed to reverse the Circuit Court's judgment for damages and to remand the cause to the Trial Court for further proceedings.

Respectfully submitted,

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and

YES __X__ NO _____

If your answer to Question No. 1 is 'yes', your verdict is for LACSA in this action and your should skip to Question No. 7. However, if your answer to Question No. 1 is 'no', please answer Question No. 2.

* * * * * *

"7. What is the total amount of damages sustained by LACSA as a result of the fraud of HTP, Tyler and Gamble?

$571,784.00 damages, which were incurred on February 9, 1990.

If you have answered any amount in response to Question No. 7, then your verdict in this case is for LACSA and you should date and sign this verdict form and return it to the courtroom.

"SO SAY WE ALL this 3 day of November, 1994.

s/ Ruth A. Larson
FOREMAN/FOREWOMAN"

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Reply Brief of Petitioners were mailed this 1 day of May, 1996, to the following attorneys for LACSA and LACSA Int.:

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