IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

CASE NO: 87,057

KIRK A. WOODSON,

Petitioner,

v.

WILMA MARTIN and MACLEAN REALTY, INC.,

Respondents.

BRIEF OF THE *AMICUS CURIAE*, AIRLINES REPORTING CORPORATION

IN SUPPORT OF PETITIONER KIRK A. WOODSON
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS
CASE NO. : 94-00002
PURSUANT TO RULE 9.125
FLORIDA RULES OF APPELLATE PROCEDURE

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I. SUMMARY OF THE ARGUMENT

The Second District Court of Appeals has certified the following question in the case *sub judice*:

> Is a buyer of residential property prevented by the "economic loss rule" from recovering damages for fraud in the inducement against the real estate agent and its individual agent representing the sellers?

Woodson v. Martin, 663 So.2d 1327 (2d DCA 1995).

Amicus Curiae AIRLINES REPORTING CORPORATION (hereinafter referred to as "ARC") respectfully submits that the answer to this question is "no." If a single unifying thread can be gleaned from this court's several opinions defining the application of Florida's economic loss rule, it is that the doctrine is designed to protect reasonable expectations. However, this reasoning fails when applied to a situation, such as is presented by the case *sub judice*, where a party outside of a contract undertakes intentional actions which wrongfully damage a plaintiff.

The parties to a contract are properly barred from seeking redress in tort for faulty performance of an agreement because parties have bargaining power, express or implied warranties and contract law to protect their expectations. The economic loss rule protects the expectations of a manufacturer by prohibiting suit in tort, absent physical injury or property damage, so that the manufacturer may allocate resources to the risk of foreseeable loss. Similarly, an independent contractor can anticipate an action for breach of contract for faulty performance but should not expect an action to be brought by a third-party sounding in negligence which seeks to recover purely economic damages.

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The underpinnings of the economic loss rule do not support the extension of the doctrine's application to the intentional torts of third-parties not in privity of contract with a prospective plaintiff. A party should be presumed to have knowledge of the consequences of his intentional acts. Such intentional torts fall outside of the expectations of the parties and wilfully damage a plaintiff's rights and anticipated liabilities under an agreement which does not bind the tortfeasor. Because a wrongdoer should be held accountable for his intentional actions and should not be allowed to retain the benefits of tortious conduct, *amicus curiae* ARC respectfully submits that: (1) the Second District Court of Appeal's decision in the instant action should be reversed; (2) the question certified answered in the negative; and (3) the economic loss rule's non-application to intentional torts of third-parties clarified.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae ARC adopts the Statement of the Case and Facts as set forth in Petitioner's Initial Brief but submits the following additional facts which are particular to ARC's interest in these proceedings.

Amicus Curiae ARC is a Delaware corporation having a principal place of business in Virginia and is licensed by the Secretary of State to do business within Florida. ARC acts as a national clearinghouse for the processing of and payment for airline and rail tickets issued by travel agencies. ARC enters into Agent Reporting Agreements with travel agencies allowing the travel agencies to obtain ARC blank, *standard form documents and issue* tickets for travel on airlines and railroads represented by ARC. The travel agency is required to provide a weekly sales report with supporting documentation to a designated processing center. ARC then issues

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an electronic fund transfer (EFT) action upon the bank account designated by the travel agent in payment of the tickets issued. When ARC receives payment for ticket sales from the travel agent's account, these funds are processed and transferred to the appropriate airline in payment for the tickets sold by the travel agent. Funds collected by the travel agency for these transactions are deemed to be the property of the appropriate airline, not ARC.

Travel agencies are often corporations operating from store-front offices. ARC's airline ticket "clearinghouse" system has worked to the advantage of both travel agencies and the airlines for many years. The national clearinghouse system serves an important public purpose by allowing consumers to have convenient access to airline flight and ticketing information for a variety of carriers by simply visiting a travel agency.

On rare occasions, an employee or officer of a travel agency misuses the ARC system by fraudulently selling airline tickets to the public while failing to report the ticket sales to either the travel agency corporation or ARC. In such cases, the offending employee or officer converts the proceeds of the unreported sales to his or her personal use.[1] The wrongful actions of these individuals are classic common-law intentional torts, satisfying the pleading requirements for fraud, conversion and other civil actions. In many cases, the errant employees and officers are prosecuted under applicable criminal statutes.

Because the intentional misconduct of these travel agency employees or officers is occasionally large-scale, such that it outstrips the assets of the contracting corporation, ARC

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[1]In some cases, the travel agency officer or employee does report the sales to ARC, but converts the funds to his or her personal use.

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frequently asserts claims against the wrongdoer personally. Recent developments in Florida's economic loss rule, including the question certified in the case *sub judice*, threaten to disrupt the contractual relationships established through ARC's Agent Reporting Agreements. Florida's economic loss rule should not be applied in a manner which precludes ARC from proceeding against the individual wrongdoers personally. A ruling by this court which would allow such an application of the economic loss rule would result in unjust results -- such a ruling would allow the intentional tortfeasor to escape from liability while, simultaneously, destroying the contractual expectations of the parties to the Agent Reporting Agreement. It is for this reason that ARC has sought leave to participate as *amicus curiae* in the instant action.

ARC's Motion for Leave to Participate as *Amicus Curiae* was filed on May 20, 1996. The Petitioner and Respondents have stipulated that ARC shall file its brief on or before June 3, 1996. On May 24, 1996, this honorable court granted ARC leave to file its brief as *amicus curiae*.

III. ARGUMENT

A. The Economic Loss Rule Should Not Prevent a Plaintiff from Asserting a Cause of Action for Intentional Tort Against a Defendant who is not in Privity of Contract with the Plaintiff

A fundamental principle of American jurisprudence is that "no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 232-33, 79 S.Ct. 760, 762, 3 L.Ed. 2d 770 (1959). Respondents in the case *sub judice* seek to carve out an unwarranted exception to this principle, arguing that a defendant accused of fraud in the inducement should not be held responsible for his intentional misrepresentations based upon the economic loss rule. Respondents contend, in effect, that "a defendant will be permitted to take

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advantage of his own wrong if plaintiff has entered into a contract addressing the general subject matter of the suit and plaintiff and defendant are not in privity." Respondents' proposed use of the economic loss rule is both unjust and contrary to the public policy concerns which gave rise to the doctrine.

The Second District Court of Appeals has certified the following question in the instant action:

> Is a buyer of residential property prevented by the "economic loss rule" from recovering damages for fraud in the inducement against the real estate agent and its individual agent representing the sellers? *Woodson v. Martin*, 663 So.2d 1327 (2d DCA 1995).

ARC respectfully submits that the answer to this question is "no." However, the question certified represents a narrow segment of a broader question which remains to be answered: Does the economic loss rule preclude a plaintiff from asserting a cause of action sounding in intentional tort against a defendant where the general subject matter of the claim is addressed in an agreement but plaintiff and defendant are not in privity of contract? Again, ARC respectfully asserts that the answer to this broader question is "no." To hold otherwise would be to allow a wrongdoer to retain the benefits of his wrongdoing.

In 1993, this court addressed the policy considerations upon which the economic loss rule is grounded and established the parameters of the doctrine in Florida. *Casa Clara Condominium Association v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993). The *Casa Clara* opinion has resulted in greater uniformity in the decisions of lower courts for cases involving products liability and negligence claims. Several state trial and appellate courts, as well as federal

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courts construing Florida's application of the economic loss rule, have extended the reasoning in *Casa Clara* to apply equally to intentional torts committed by defendants who are not in privity of contract with the plaintiffs in those actions. *See HTP Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So.2d 1221 (3d DCA 1995); *Linn-Well Development Corporation v. Preston & Farley, Inc.*, 1995 WL 750672 (2d DCA 1995); *TGI Development, Inc. v. CV Reit, Inc.*, 1996 WL 1104 (4th DCA, 1996); *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490 (3d DCA 1994); *Hoseline, Inc. v. U.S.A. Diversified Products, Inc.*, 43 F.3d 1198 (11th Cir. 1994). The instant action is another such case. The above-cited decisions create an unwarranted extension of the economic loss rule, because the application of the doctrine in these cases affects the unfair result of allowing the intentional tortfeasor to go unpunished despite the absence of a contractual remedy.

The term "economic loss rule" came into vogue in Florida shortly after the United States Supreme Court's opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986). The following year, this court held that "contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage." *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987). *See also AFM Corporation v. Southern Bell Telephone and Telegraph Company*, 515 So.2d 180 (Fla. 1987). The rule is justified, in part, by the sound reasoning that parties to an agreement are protected both by contract law as well as their ability to protect their "interests" by negotiations and contractual bargaining or insurance. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d at 902. Subsequent opinions have

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held that the economic loss rule's purpose is to curtail the expansion of tort theory into areas more properly governed by contract law. *See Sandarac Association, Inc., v. W.R. Frizzell Architects, Inc.*, 609 So.2d 1349, 1353 (2d DCA) *rev. denied* 626 So.2d 207(1992)("an 'exception' to the economic loss rule is actually an expansion of negligence law to protect interests not traditionally protected by negligence law") (emphasis in original).

The decision of the Second District Court of Appeals in the case *sub judice* does not address the situation where a plaintiff is seeking to "expand" existing tort theory in order to satisfy the disappointment of economic expectations under a contract. Intentional torts, such as fraud in the inducement, are a well-established part of Florida's common law. To the contrary, the instant action represents an attempt to expand the scope of the economic loss rule to foreclose a legitimate and recognized claim to recover for the allegedly intentional and willful acts of a defendant who is not a party to the contract. The well-considered reasoning in this court's prior economic loss rule opinions fails when it is applied to the intentional torts of a third-party and stranger to the contract, because the wilful acts of such defendants disrupt the very contractual expectations which the economic loss doctrine is designed to protect.

1. The Development of the Economic Loss Rule in Florida

The Honorable Judge Altenbernd, in his cogent dissent to the Second District Court of Appeal's majority opinion in the instant action, noted "that Florida seems to have at least three (3) distinct, but often overlapping, economic loss rules in operation today." *Woodson v. Martin*, 663 So.2d at 1331. Whether the economic loss doctrine is a single rule or an amalgamation of several different principles, the rationale and public policy underlying every permutation of the rule is

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fundamentally the same. The economic loss rule is designed to protect the expectations of parties to a contract. The reasoning behind the economic loss rule is sound, and ARC does not support a retreat from any of this court's opinions addressing the subject. Rather, ARC maintains that the further extension of the economic loss rule to bar a claim for intentional tort against a defendant who is not party to plaintiff's contract is not justified by the purposes for which the doctrine was created. As Justice Shaw commented in his opinion concurring and dissenting with the majority in *Casa Clara*, the economic loss rule "is stretched when it is used to deny a cause of action to an innocent third party who the defendant knew or should have known would be injured by the tortious conduct." *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d at 1249.

The principle of law embodied by the term "economic loss rule" is not a recent construct of this State's courts. It has its origins in the doctrine of privity. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d at 902, *see, e.g. Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d 100, 103 (Fla. 1969)(no tort liability absent a breach of duty apart from a contract). Only the term "economic loss rule" is of recent origin.

The seminal case in the evolution of Florida's economic loss rule is *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987). There, plaintiff *Florida Power & Light* asserted claims against *Westinghouse* for breach of warranty and negligence concerning the design, manufacture and provision of two (2) allegedly defective nuclear steam supply systems. *Id.* at 900. After partial summary judgment was granted in favor of *Westinghouse* on the negligence claim, the Eleventh Circuit Court of Appeals certified the following question to this

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court:

> Whether Florida law permits a buyer under a contract for goods to recover economic losses and tort without a claim for personal injury or property damage to property other than the allegedly defective goods. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 785 F.2d 952, 953 (11th Cir. 1986).

The certified question was answered in the negative; the court held that, absent physical injury or property damage, the parties to a contract should not seek judicial relief in tort. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d at 902. Such a holding "encourages parties to negotiate economic risks through warranty provisions and price." *Id.* at 901. When a product purchased is damaged or defective "the product has not met the customer's expectations, or ... the customer has received 'insufficient product value'." *Id.* quoting *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 106 S.Ct. at 2303.

In a similar case involving a contract for services, this court reached the same conclusion. *AFM v. Southern Bell Telephone and Telegraph Company*, 515 So.2d 180 (Fla. 1987). The *AFM* Court held that personal injury or property damage is required to sustain an action seeking recovery of economic losses resulting from a breach of contract, noting that "[i]t is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence." *Id.* at 181, *citing Electronic Security Systems Corp. v. Southern Bell Telephone and Telegraph Co.*, 482 So.2d 518 (3d DCA 1986).[2]

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[2] This language gave rise to the so-called "independent tort exception" to the economic loss rule.

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The economic loss rule, as proscribed in *Florida Power & Light* and *AFM*, is founded in basic considerations of contract law. The *parties* to a contract have the ability to bargain for an allocation of risks. Express warranties may be inserted or deleted from the agreement, and pricing may be dictated by considerations not apparent from the face of the contract. In addition, the *parties* to an agreement may avail themselves of implied warranties and other statutory rights. The final executed agreement embodies an array of economic decisions which should properly be determined under principles of contract rather than tort law. *See Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d at 902.

The economic loss rule, as enunciated in *Florida Power & Light* and *AFM*, protects the economic and contractual expectations of the parties to an agreement by declining to interject negligence law as a device for resolving disputes arising from private, negotiated expectations. Lower courts, following the lead of *AFM* and *Florida Power & Light*, have expanded the application of the doctrine to foreclose numerous actions sounding in intentional tort asserted by one party to an agreement against another contracting party.[3] ARC does not contest the extension of this aspect of the economic rule to intentional torts. Where plaintiff and defendant are bound by an agreement, whether the breach of the contract is unintentional or willful is immaterial.

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[3]*See Swaebe v. Sears World Trade, Inc.*, 639 So.2d 1120 (3d DCA 1994)(breach of contract may not be converted into a tort action absent a separate and independent tort); *Sanchez v. Encinas*, 627 So.2d 489 (3d DCA 1993)(civil theft claim is barred where the relationship of the parties is contractual in nature); *Gambolati v. Sarkisian*, 622 So.2d 47 (4th DCA 1993) (economic loss rule forecloses actions for civil theft and conversion between parties to a contract); *Futch v. Head*, 511 So.2d 314 (1st DCA) *review denied*, 518 So.2d 1275 (1987)(breach of contract will not support a claim under Florida's RICO statute)(additional citations omitted).

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Even in the case of an intentional breach of contract *by a party*, the wrongful act remains a breach of contract -- no more, no less. The economic loss rule properly bars tort actions arising from failure of performance between contracting parties.

2. The Economic Loss Rule and its Application to Products Liability and Negligence

The economic loss rule has recently been held to apply to certain products liability and negligence claims asserted by purchasers of property against defendants who are not in privity with the transaction.[4] The rationale and public policy concerns underlying such a use of the doctrine is neither new nor innovative, but rather, unified existing principles of products liability, third-party beneficiary theory and privity of contract.

In 1993, this Court entered its opinion in *Casa Clara Condominium Association, Inc., v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993). In that action, various plaintiffs brought suit against defendant *Toppino* for breach of implied warranty, products liability, negligence and other non-contractual causes of action based upon *Toppino's* alleged provision of contaminated or defective concrete. The plaintiffs, who lacked privity of contract with *Toppino*, were owners of condominiums and homes built with the defendant's concrete. None of the plaintiffs had suffered personal injury or property damage distinct from the defects in their homes.

In declining to exclude homeowners from the application of the economic loss rule, the court termed plaintiffs' claims as arising from "'disappointed economic expectations' which are

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[4]Application of the economic loss rule to cases of this type apparently prompted Judge Altenbernd, in his dissent in the case *sub judice*, to suggest that three (3) distinct versions of the doctrine are in effect in Florida; separate forms of the principle apply to contracts, products liability and negligence cases. See *Woodson v. Martin*, 663 So.2d at 1331.

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protected by contract law, rather than tort law." *Id.* at 1246 *citing Sensenbrenner v. Rust Orling & Neale Architects, Inc.*, 236 Va. 419, 374 S.E. 2d 55, 58 (1988); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash. 2d 406, 745 P.2d 1284 (1987). Distinguishing "between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party", *id.* at 1246, the court held that statutory and common law warranties and duties, the right of inspection and the plaintiff's bargaining power constituted protection sufficient to obviate any need to resort to tort law. *Id.* at 1247. The economic loss rule was applied to protect the expectations of both the parties to the homeowners' contracts as well as the expectations arising from the subcontract with *Toppino*.

Following close on the heels of *Casa Clara* was *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995). In that case, plaintiff *Rent-A-Car* asserted claims sounding in strict products liability, negligence and breach of warranty against the manufacturer of two (2) buses which caught fire, allegedly due to design defects. The court -- consistent with its rationale in other cases -- held that the economic loss rule applied, thereby precluding plaintiff's strict liability and negligence theories because neither physical injury no property damage other than damage to the manufactured products themselves had been pleaded. The breach of warranty claims failed for lack of privity. *Id.*

The application of the economic loss rule in *Casa Clara* and *Airport-Rent-A-Car* protected the expectations of manufacturers and suppliers. A manufacturer can expect to be sued in tort if its product causes injury or property damage. An independent contractor may anticipate a breach of contract suit if its services or materials are deficient but would not expect a negligence claim

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asserted by a third-party who has not suffered physical injury or property damage. Both cases reinforce the public policy concerns outlined earlier in *AFM* and *Florida Power & Light;* the economic loss rule protects the expectations of the parties while allowing resources to be allocated to account for risk of loss.

The Supreme Court's decisions in *Casa Clara* and *Airport Rent-A-Car* were wholly in line with well-established products liability, third-party beneficiary and privity law. In 1976, this court decided the case of *West v. Caterpillar Tractor Company, Inc.*, 336 So.2d 80 (Fla. 1976), where it held that when a defective product causes personal injury or property damage, the plaintiff's claims should be based upon strict liability in tort. *Id.* at 87. However, if plaintiff is in privity of contract with the manufacturer, an action for breach of implied warranty may lie. *Id.* at 91.[5]

The negligence claims asserted in *Casa Clara* could have been disposed of by reference to third-party beneficiary law and the doctrine of privity. Where a defendant's duty to provide goods or services is imposed by virtue of contract and plaintiff and defendant are not in privity, plaintiff may only assert a claim against defendant provider only if the plaintiff was an intended third-party beneficiary. *Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d at 103-104. *See also First American Title Insurance Co. Inc. v. First Title Service Co. of the Florida Keys, Inc.*,

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[5] In a subsequent case, the *West* opinion was clarified by the Third District Court of Appeals which held that, absent personal injury or property damage, no tort action could lie, and absent privity of contract, no warranty action could be sustained. *Affiliates for Evaluation and Therapy, Inc. v. Viasyn Corp.*, 500 So.2d 688 (3d DCA 1987). This court specifically approved the *Affiliates'* opinion in *Kramer v. Piper Aircraft Corporation*, 520 So.2d 37, 39 (Fla. 1988).

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457 So.2d 467 (Fla. 1984)(title abstracter liable to purchaser's title insurance company under principles of subrogation because purchasers were intended and known beneficiaries); *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So.2d 9 (Fla. 1990) accountant may be held liable for his negligence despite lack of privity with plaintiff if plaintiff was a third-party beneficiary); *Angel, Cohen & Rogovin v. Oberon Investment, N.V.*, 512 So.2d 192 (Fla. 1987)(attorneys not liable for negligence to plaintiff where there was not privity of contract between the parties and plaintiff was not an intended third-party beneficiary).

Whether decided on the basis of the economic loss rule or other principles of law, the *Casa Clara* and *Airport Rent-A-Car* decisions are well-reasoned and sound. The reasoning behind these cases fails, however, when it is applied to situations involving a plaintiff suffering economic damages due to a contractual relationship where the damages are caused by the intentional tort of a third-party not in privity of contract with the plaintiff. The intentional torts of a third-party disrupt the contractual expectations which the economic loss rule is designed to protect.

3. The Intentional Tort of a Defendant not in Privity of Contract with a Plaintiff does not Implicate the Same Public Policy Issues Which Support the Economic Loss Rule; Such Claims Should not be Foreclosed

In the final analysis, the economic loss rule, whether applied as one or several separate principles of law, is predicated upon a single word; "expectations." When a party enters into an agreement, whether the subject is the provision of services or the sale of real or personal property, that party has certain expectations concerning the foreseeable consequences of the contract. The parties to a contract can plan and provide for a failure in performance, and a party who negligently or willfully breaches an agreement can expect to be sued in contract, not in tort. A

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manufacturer can allocate financial resources in a cost-effective manner for research, development and testing of its product. In allocating such resources, the manufacturer expects that if it produces a defective product it will be sued for breach of warranty by a plaintiff in privity and for strict liability in the event the product causes personal injury or property damage to a plaintiff not in privity. A supplier of products or services can expect exposure for breach of contract if his goods or services fail to comply with the agreement. However, such a supplier cannot anticipate being sued in tort by a stranger to the contract unless the plaintiff was a known and intended third-party beneficiary. The parties to a contract can plan for and bargain to allocate the risk of loss for expected contingencies. As this court has commented, such expected contingencies are often insurable.[6] The intentional acts of a third-party which damage a party's rights under a contract are neither expected, nor, generally, insurable.

The case *sub judice* involves a claim for fraud in the inducement by the purchaser of a home against the seller's brokers. Fraud in the inducement has frequently been recognized as an "independent tort" not barred by the economic loss rule. *See Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734 (11th Cir. 1995); *Williams Electric Company, Inc. v. Honeywell, Inc.*, 772 F.Supp. 1225 (N.D. Fla. 1991); *Audiotext Communications Network, Inc. v. U.S. Telecom, Inc.*, 912 F.Supp. 469 (D.Kan. 1995)(decided under Florida law); *TGI Development, Inc. v. CV Reit, Inc.*, 1996 WL1104 (4th DCA 1996); *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So.2d 1221 (3d DCA 1995).

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[6]See *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d at 902.

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To limit the ruling on the question certified to the narrow issue of fraud in the inducement leaves unanswered the broader question of whether a defendant, through intentional misconduct, can affect a plaintiff's contractual rights while, simultaneously, evade liability by brandishing the shield of the economic loss rule.

All of this court's previous opinions construing and applying the economic loss rule have addressed unintentional torts, either in the context of negligence or products liability. *See Florida Power & Light; AFM; Casa Clara* and *Airport Rent-A-Car.* In *Max Mitchell,* this Court, in *dicta*, suggested that a cause of action may lie against a third-party for fraud. *First Florida Bank, N.A. v. Max Mitchell & Company,* 558 So. 2d at 14 ("the absence of privity shall continue to be no bar to charges of fraud"). ARC respectfully petitions this honorable court to take this opportunity to clarify the broader issue of the economic loss rule's application to the intentional torts of third-parties. Leaving the broader issue unaddressed would encourage further litigation testing the limits of the economic loss rule.

The *Casa Clara* decision has been cited by lower courts as a basis for denying relief for the intentional torts of third parties not in privity of contract with the plaintiff. *See Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d at 495, 496 (causes of action for conversion and waste against third-party held barred by the economic loss rule. The *Ginsberg* court conspicuously omitted any discussion concerning plaintiff's claims for civil theft). The Third District Court of Appeals' ruling in *Ginsberg* extended the economic loss rule far beyond the parameters enunciated in *Casa Clara.* In *Ginsberg*, plaintiff *Lennar* purchased certain mortgages from the RTC which covered apartment complexes owned by Loch Lomond I Associates Limited Partnership and

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Community Acres Associates Limited Partnership. Defendant *Ginsberg*, as general partner of both of these limited partnerships, executed the mortgages and was therefore a party to the agreements. The Loch Lomond and Community Acres properties were managed by defendant MLG Properties, Inc., a party not in privity with plaintiff *Lennar*. After Loch Lomond and Community Acres defaulted on the mortgages, *Lennar* brought suit against MLG Properties, Inc. and other defendants. *Lennar* asserted claims for conversion, waste and civil theft against MLG Properties, Inc., alleging that MLG had intentionally converted to its own use rent monies which were properly the property of *Lennar*.

The Third District Court of Appeals reversed the trial court's default judgment entered against MLG with directions that *Lennar's* claims be dismissed on the basis of the economic loss rule. The Third District Court of Appeals predicated its decision primarily upon *Casa Clara*. *Lennar* and its predecessor in interest, the RTC, could not have adequately protected themselves from the intentional tort of a third party. In addition, presuming the allegations against MLG to be true, if a defendant embarks upon an intentional course of action with the knowledge that the action will damage a specific party, the defendant should not be held harmless by using the economic loss rule as a shield. The intentional acts of a third-party interfere with contractual expectations. Because the economic loss rule's purpose is to *protect* the expectations of the parties to a contract, the doctrine should not apply to the intentional acts of a stranger to the agreement. To hold otherwise would be contrary to the public policy considerations behind the rule.

In contrast with *Ginsberg* is the Third District Court of Appeal's opinion *Littman v. Commercial Bank & Trust Company*, 425 So. 2d. 636 (Fla. 3d DCA 1983). Plaintiff *Commercial*

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held a security interest on a forklift. When the debtor declared bankruptcy, the forklift was sold, subject to the security interest, to defendant, Parkland Enterprises. Parkland's principal and officer, defendant *Littman*, personally arranged for the resale of the forklift to a third party, ignoring plaintiff's security interest. Even though defendant *Littman*'s corporation was the purchaser of the forklift and *Littman* was not a party to the contract, the court found *Littman* personally responsible for his intentional interference with the security lien. *Littman's* intentional actions interfered with the expectations created by a valid security interest. He was properly held liable for his wrongful acts. Respondent's view of the economic loss rule in the instant action may have resulted in a contrary, unjust decision in the *Littman* case.

Respondent herein, defendants MLG in *Ginsberg,* and *Littman* all allegedly performed intentional acts for personal gain. None of the intentional acts caused physical injury or property damage and none of the parties were in privity of contract with the plaintiffs in these actions. The respective plaintiffs, by entering into their contracts, could not have anticipated or expected that a third party's intentional act might cause them economic damage. However, these defendants, all knowing of the prospective or existing contracts of the plaintiffs, pursued an intentional course of action which each could readily expect would cause plaintiffs to sustain a loss -- as it did. The rationale behind the economic loss rule, which principally rests upon expectations of the parties to a contract, is sound and valid when applied to unintentional torts but fails when it is extended to the intentional acts of a defendant not in privity of contract with a plaintiff. The intentional torts of such a third-party destroy the expectations embodied within a contract -- the same expectations protected by the economic loss rule.

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In the case of *amicus curiae* ARC, as set forth in the Statement of Facts, *supra*, when an employee, agent or officer of a corporate travel agency intentionally fails to report ticket sales and converts the proceeds of such sales for his personal use, this is not an event within the expectations of the parties to the Agent Reporting Agreement. It is an intentional tort and, in some cases, a criminal act. ARC should not be precluded by the economic loss rule from seeking recovery for the wrongful, intentional acts of such individuals. A defendant should not be allowed to retain the benefits of his fraud merely because a plaintiff has entered into a contractual relationship with another party.

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, *amicus curiae* Airlines Reporting Corporation prays that this Honorable Court reverse the Second District Court of Appeals ruling in the case *sub judice* and hold that the economic loss rule does not preclude a cause of action sounding in intentional tort against a defendant who is not in privity of contract with a plaintiff, even absent physical injury or property damage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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