IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,057

KIRK A. WOODSON,

Petitioner,

v.

WILMA MARTIN and MacLEAN REALTY, INC., a Florida corporation,

Respondents.
_____/



**BRIEF OF**
**AMICUS CURIAE**
**PRODUCT LIABILITY ADVISORY COUNCIL, INC.**
**IN SUPPORT OF RESPONDENTS**

On Certified Question From
The Second District Court of Appeal

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY
COUNSEL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 22091
(703) 264-5300

Of Counsel

POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
4000 International Place
100 SE Second Street
Miami, Florida 33131
(305) 530-0050
By: WENDY F. LUMISH
Florida Bar No. 334332
GARY M. PAPPAS
Florida Bar No. 705853

## TABLE OF CONTENTS

## TABLE OF CONTENTS (cont'd)

## TABLE OF AUTHORITIES

**CASES:** **Page**

## TABLE OF AUTHORITIES (cont'd)

## TABLE OF AUTHORITIES



**OTHER AUTHORITIES**

## STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is an organization established to express the views of its members, as friends of the Court, in cases involving significant products liability issues.

PLAC participated as amicus curiae before this Court in the case of Casa Clara Condominium Association Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993). Its purpose at that time was to suggest the profound social and economic impact which adoption of plaintiffs' position would have on the members of PLAC. PLAC was concerned because plaintiff was asking the court to realign the traditional role of contract law and tort law in resolving disputes -- a change which would critically impact on manufacturers and sellers of goods in Florida. This Court flatly rejected plaintiffs' position and confirmed that the economic loss rule was firmly imbedded in Florida law.

Two years later, PLAC participated as amicus curiae before this Court in the case of Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995). In Airport, another plaintiff was attempting to pry open the economic loss rule by creating various "exceptions" to the rule. PLAC argued that the Court should refuse plaintiff's attempts to disrupt an area of law which had been sealed tight by the Court in Casa Clara. This Court agreed and refused to create any new exceptions.

Today, sound jurisprudential and public policy considerations once again require that this Court refuse another plaintiff's attempt to disrupt an area of law which has now been firmly settled in Florida.

## STATEMENT OF THE CASE AND FACTS

PLAC adopts the Statement of the Case and Facts as set forth by the Second District Court of Appeal below in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995) and as set forth by Respondents in their Answer Brief before this Court.

## SUMMARY OF THE ARGUMENT

For the past ten years, beginning with its landmark decision in Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987), this Court has consistently upheld the fundamental boundary between tort and contract law by applying the economic loss rule to preclude plaintiffs from recovering in tort where no personal injury or property damage occurred. Just one year ago, in its Airport decision, this Court reaffirmed the significance of the economic loss rule to Florida jurisprudence by refusing to create two proposed exceptions which would have allowed plaintiffs to recover in tort for mere disappointed economic expectations. Airport also applied the Court's 1993 holding in Casa Clara to preclude a plaintiff with no alternative remedy from recovering in tort for solely economic loss. In Florida, therefore, the law is well-settled that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which justifies a tort claim solely for economic losses.

Plaintiffs now invite the Court create a new exception to the economic loss rule for "fraud in the inducement" despite the fact that Plaintiff suffered no personal injury or property damage. However, such an exception would contradict this Court's decisions finding that the character of the loss determines the appropriate remedies. Plaintiff's exception would reconfigure the firmly established boundary between tort and contract law and swallow the

entire economic loss rule. The Second District's decision is also consistent with district courts which have barred intentional tort claims based on the economic loss rule, including fraud, where there are no damages separate and distinct from those claimed in a breach of contract count.

The Second District's opinion is also supported by sound public policy. The economic loss rule has stabilized the law of commercial transactions by providing a predictable arena in which to conduct business without the risk of boundless tort claims. It is important to maintain this stability and to preserve the boundary between claims for disappointed commercial expectations and personal injury or property damage. This is especially true where most plaintiffs will have alternative remedies available other than those they seek in the bountiful land of tort. In contrast, with a hollow economic loss rule, future plaintiffs will undoubtedly allege that every contract was fraudulently induced to avoid the contractual remedies with which they are dissatisfied.

## ARGUMENT

The instant action is one of a series of cases pending before this Court[1] in which a plaintiff seeks recovery for economic losses under a theory of fraud in the inducement. Plaintiff has not suffered personal injury or damage to other property. Rather, the damages sought are purely economic losses relating to Plaintiff's disappointed expectations; Plaintiff merely claims that he did not receive the benefit of his bargain.

The simple issue is whether Plaintiff's claim based on fraud in the inducement is barred by the economic loss rule. Plaintiff, like those before it in Casa Clara and Airport, seeks relief which would dramatically destabilize the well-settled law of Florida. By attempting to define a tort claim in such a manner that it is outside the reach of the economic loss rule, Plaintiff is, in fact, asking this Court to carve out a broad "exception" to the rule which may very well swallow it whole.

An examination of the theoretical underpinning of the doctrine and its development in Florida jurisprudence will demonstrate that:

---

[1]The other cases include:

HTP Ltd. v. Lineas Aereas Costarricenses, S.A.,
Case No. 86,913
TGI Development, Inc. v. C.V. Reit, Inc.,
Case No. 87,282
Linn-Well v. Preston & Farley Inc.,
Case No. 87,385
Polygard Inc. v. Jarmco Inc.,
Case No. 87,638;
Raymond James & Associates, Inc. v. P.K. Ventures, Inc.,
Case No. 87,404.

(1) application of the economic loss doctrine to fraud in the inducement is consistent with the underpinnings of the doctrine, and (2) there are broad policy considerations which favor application of the economic loss rule to bar this intentional tort claim.

## I.

## THE HISTORICAL UNDERPINNING OF THE ECONOMIC LOSS DOCTRINE.

### A. The Difference Between Contract Law and Tort Law.

The law of contract and the law of torts exist for different reasons; they are designed to protect different interests and to provide for different remedies. In its simplest form, the difference between contract law and tort law is the difference between expectancy and duty.

Contract law is designed to enforce the expectancy interests created by agreement between private parties. Its purpose arises from society's interest in the performance of promises. Spring Motors Distributors v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660, 672 (N.J. 1985). The law imposes no standards to judge each party's performance, the only standards are those agreed upon by the parties. As such, contract law seeks to enforce standards of quality as defined by the contract. Barrett, Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C. L. Rev. 891 (1989).

Tort law, on the other hand, is designed to secure the protection of all citizens from the danger of physical harm to

their persons or their property and is only implicated where actual physical injury to persons or other property has occurred. The basic function of tort law is to shift the burden of loss from the injured party to one who is better able to bear it. In contrast to contracts, where the standards are defined by the parties' agreement, tort standards are imposed by law without any reference to private agreement. See Spring Motors. These standards obligate each citizen to exercise reasonable care to avoid foreseeable physical harm to others. The penalties for failure to do so include a broader range of damages, including punitive damages, as well as less restrictions on imposing liability, for example, no requirement of notice.

To recover in tort, "there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of the bargain is not an interest that tort law traditionally protects." Redarowicz v. Ohlendorf, 92 Ill.2d 171, 177, 441 N.E.2d 324, 327 (1982) quoted in Casa Clara, 620 So. 2d at 1246. Instead, as will be described below, the majority of courts have concluded that "contract law . . . provides the more appropriate system for adjudicating disputes arising from frustrated economic expectations." Spring Motors, 489 A.2d at 672-73.

B. **Development of the Economic Loss Rule as the Boundary Between Contract Law and Tort Law.**

In recognition of the distinction between contract law and tort law, the California Supreme Court in Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) refused to apply tort law to a truck purchaser's claim for damages related to his allegedly defective vehicle; i.e., economic loss. Plaintiff in Seely purchased a truck for use in his business and found that it bounced violently. The dealer was unable to correct this problem. Subsequently, as the result of an alleged defect in the brakes, the vehicle overturned, causing damage to the truck, but not to its occupants. Plaintiff sought recovery under theories of warranty and strict liability in tort.

In affirming recovery under the contract theory, but not the tort theory, the court articulated the following distinction:

> The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries.

403 P.2d at 149.

The court further observed that the basic interest sought to be protected by warranty law--the quality of the product--is better served by contract remedies and principles. As explained by the court, the plaintiff properly sought warranty damages related to the failure of the vehicle to perform as expected by this consumer;

i.e., the normal uses for which this Plaintiff intended the vehicle to function. Had the manufacturer also been liable under a tort theory, then the manufacturer would be accountable to other purchasers even though he had not agreed that the product would meet those consumers' demands. Such a broad scope of liability would be inappropriate.

> [The manufacturer] can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demand.

Id. at 151.

Viewed from the other perspective, the consumer:

> should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Id. In sum, the court concluded:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.

Id.

In East River Steamship Corp. v. Transamerican Delaval Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), the United States Supreme Court adopted Seely as the prevailing view. Like Seely, the Supreme Court's decision in East River was grounded in the distinction between tort and contract. On the one hand, tort law concerns itself with protection of individual's safety. When a person is injured, the costs and the loss of time or health "may be an overwhelming misfortune and one which the person is not prepared to meet." East River, 476 U.S. at 871 (quoting Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944)). On the other hand,

> Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." The maintenance of product value and quality is precisely the purpose of express and implied warranties.

Id. at 2303 (footnotes and citations omitted).

Those damages are ones for which the parties may maintain insurance and for which the parties can reach their own agreements regarding limitations of liabilities, disclaimers of liability, and, of course, price. There is then, no reason to presume that the parties require additional protection:

> When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

Id. at 2302. Thus, the increased costs to the public that would be associated with providing protection through tort liability is not justified. Id. Ultimately, the Court concluded that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." 106 S. Ct. at 2302.

The rationale of Seely and East River has become the majority view in the United States. See cases cited in the appendix to D'Angelo, The Economic Loss Doctrine: Saving Contract Warranty Law From Drowning in a Sea of Torts, 26 U. Tol. L. Rev. 591 (1995). Moreover, it is also the position posited in the Tentative Draft No. 2 of the Restatement of the Law of Torts: Products Liability (1995). Id. This view reflects not only the critical distinction between tort and contract, but also the public policy that the benefit of protecting individuals by shifting the burden of economic loss to manufacturers is outweighed by the impact that the rising costs of this shift would cause to the marketplace. See Casa Clara, 620 So. 2d at 1247. See also Barrett at 902.

### C. The Florida Supreme Court has Adopted and Repeatedly Affirmed the Economic Loss Rule.

Consistent with the United States Supreme Court, Florida courts have uniformly adhered to this distinction between tort and contract law. The landmark decision in Florida on the doctrine is Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987).

In Florida Power, the plaintiff purchased two nuclear steam generators which it later determined to be defective. Plaintiff initiated suit under theories of breach of warranty and negligence seeking recovery of the costs of repair, revision, and inspection of the steam generators. Defendant moved for summary judgment on the negligence claim arguing that tort theories were inappropriate in the context of this claim for economic losses. Following Seely and East River, this Court agreed that tort law which is concerned with safety and standards of care is unsuited to cover instances where a product injures only itself:

> We hold contract principles more appropriate than tort principles for resolving economic loss without accompanying physical injury or property damage.

Id. at 902.[2]

Soon after Florida Power, this Court decided AFM Corp. v. Southern Bell Telephone, 515 So. 2d 180 (Fla. 1987). In that case,

---

[2]Florida Power was in accord with earlier district court of appeal decisions on this issue. See Monsanto Agric. Products Co. v. Edenfield, 426 So. 2d 574, 576 (Fla. 1st DCA 1982) (tort law imposes upon manufacturers a duty to exercise reasonable care so that the products they place in the marketplace will not harm persons or property; however, tort law does not impose any duty to manufacture only such products as will meet the economic expectation of purchasers); GAF Corp. v. Zack Co., 445 So. 2d 350, 351 (Fla. 3d DCA 1984), rev. denied, 453 So. 2d 45 (Fla. 1984) (the law of torts affords no cause of action for the plaintiff to recover for its purely economic losses); Cedars of Lebanon Hosp. Corp. v. European X-Ray Distributors of America Inc., 444 So. 2d 1068 (Fla. 3d DCA 1984)(holding that strict liability should be reserved for those cases where there are personal injuries or damage to other property only); Affiliates for Evaluation and Therapy Inc. v. Viasyn Corp., 500 So. 2d 688 (Fla. 3d DCA 1987) (rejecting negligence claim for economic damages).

a business sued Southern Bell for failure to properly list the business' telephone number in the directory. Plaintiff sought economic damages for a negligent breach of the contract under a tort theory. Again, drawing the distinction between contract and tort, this Court concluded that "a breach of contract, alone can not constitute a cause of action in tort." Id. at 181. It is only where there is an independent tort that the breach of contract can constitute a tort. The Court went on to conclude that "without some conduct resulting in personal injury or property damage, there can be no independent tort . . . which would justify a tort claim solely for economic losses." Id. at 181-2.

Thus, after Florida Power and AFM, it is clear that claims in tort for purely economic losses were barred unless plaintiff could demonstrate that there was a separate and independent tort resulting in damages separate and apart from the contract damages.

In 1993, this Court decided Casa Clara. In that case, a homeowner brought a negligence claim against a concrete supplier alleging that a defect in the concrete caused damage to plaintiffs' residences. Focusing precisely on the distinction between tort and contract law, and adopting once again the analysis of Seely, East River, and Florida Power, the Court explained that the economic loss rule represents "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to

others." Id. at 1246 (citing Barrett, 40 S.C. L. Rev. at 894). As the court explained, economic losses are disappointed economic expectations which are protected, if at all, by contract. Tort liability, on the other hand, exists because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Id. at 1246 (citing Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 441 (1944) (Traynor, J. concurring)). When only economic harm is involved, the Court concluded, the consuming public as a whole should not bear the cost of economic losses sustained by those who failed to bargain for adequate contractual remedies.

In reaching its conclusion, this Court specifically declined to carve out an exception for homeowners because of the clear dividing line between contract and tort:

> If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort law.

Id. at 1247.

Plaintiff's assault on the economic loss rule continued in Airport. In that case, this Court answered three certified questions from the Eleventh Circuit which eliminated any doubts about the viability of "exceptions" to the economic loss rule. First, the Court held that the economic loss rule cannot be circumvented by an argument that the plaintiff has no alternative

theory of recovery.[3] 660 So. 2d at 631. As to the second and third questions, the Court rejected the proposed "sudden and calamitous event" exception and the "post manufacture duty to warn" exception. Id. at 632. The Court refused to open the flood gates to a wave of new, virtually boundless tort claims for a consumer's mere disappointed expectations brought under the guise of an exception to the economic loss rule. For the sake of stability in the law and predictability in the market place, this was the correct decision.

The message from all of these decisions is loud and clear. Disappointed economic expectations will be governed by the law of contracts, while injuries to persons or other property will be governed by the law of torts.

## II.

## APPLYING THE ECONOMIC LOSS RULE TO A CLAIM OF FRAUD IN THE INDUCEMENT IS CONSISTENT WITH THE UNDERPINNINGS OF THE DOCTRINE.

Petitioner's primary argument before this Court is that there is no precedent to support expansion of the economic loss rule to a claim of fraud in the inducement. (Petitioner's Brief at 12-25) To the contrary, the instant case falls squarely within the parameters previously set forth by this Court.

---

[3]The court did distinguish A.R. Moyer Inc. v. Graham, 285 So. 2d 397 (Fla. 1973) which it limited to its specific facts.

### A. The Character of the Loss Determines the Appropriate Remedy; Here, it is Undisputed That the Loss is Purely Economic.

As described above, a bright line has been drawn between disappointed economic expectations for which contract remedies are appropriate and the protection of individual safety which is guided by tort law. In the instant case, it is undisputed that Plaintiff seeks recovery for purely economic losses. Economic loss is generally defined as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent lost profits--without any claim of personal injury or damage to other property." Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966) quoted in Casa Clara, 620 So. 2d at 1246. Stated another way, it encompasses "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Comment, Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages--Tort or Contract? 114 U. Pa. L. Rev. 539, 541 (1966) quoted in Casa Clara, 620 So. 2d at 1246. These definitions of economic loss are consistent with the policy of warranty/contract law to protect expectations of suitability and quality.

Starting with Florida Power, it has been clear that the nature of the loss defines the remedy. Therein, this Court held "contract principles more appropriate than tort principles for resolving

economic loss without an accompanying physical injury or property damage." Id. at 902.

Similarly, in Casa Clara, this Court rejected homeowners' contention that the concrete supplier's defective concrete damaged other property, holding that **"[t]he character of the loss determines the appropriate remedies** and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant." Id. The Court reasoned that the homeowners bargained for the entire home, which was a finished product, not for individual components. Accordingly, their claims were for disappointed economic expectations which could not be pursued in tort. Id.

Likewise, in rejecting the plaintiff's argument in Airport that a sudden fire which destroyed two busses created a tort action against the manufacturer, this Court stated that **"[t]he key issue is whether there exists physical injury or other property damage; if not, then remedies in tort generally do not lie."** 660 So. 2d at 631-32. See also AFM (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); City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279 (Fla. 2d DCA 1994) (because the [plaintiff] seeks to recover purely economic losses, it can arguably state no ground for relief in tort).

Based on this precedent, the Second District in this case correctly concluded that "the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories." 663 So. 2d at 1329.

> If the damages sought are economic losses only, the party seeking recovery for those damages must proceed on contract theories of liability. Economic losses are property damage which results in loss of the benefit bargained for. The **only** damages suffered by the appellant were damages to the house. Thus, this situation comes squarely within the economic loss rule as stated by the Florida Supreme Court in Casa Clara and in Airport Rent-A-Car.

Id.

Notwithstanding that the necessary focus is upon the nature of the loss, Petitioner asks this Court to reconfigure the boundary between contract and tort based instead on the nature of the tort. However, this Court has never limited the economic loss rule to particular types of torts. To the contrary, the reasoning applied in Florida Power, AFM, Casa Clara, and Airport upholding the fundamental boundary between tort and contract law applies with the same force and effect to intentional torts. Since the character of the loss does not change simply because one party acted with intent, this Court should not now create an "exception" to the economic loss rule for an intentional tort like fraud in the inducement.

### B. Other Courts have Barred Intentional Tort Claims Based on the Economic Loss Rule Where There are no Damages Separate and Distinct from the Contract Claim.

The Second District in Woodson was not the first court to prohibit a plaintiff from proceeding in tort where the plaintiff seeks recovery of economic losses and the damages sought in the intentional tort claim were identical to those pursued in the breach of contract claim. In those instances, as here, where parties to a commercial transaction seek recovery in tort for economic damages that are the same as the contract damages, the economic loss rule should bar tort recovery. In fact, at least two Florida cases have directly confronted this issue in the context of a fraud claim.

First, in J. Batten Corp. v. Oakridge Investments 85, Ltd. 546 So. 2d 68 (Fla. 5th DCA 1989), a general contractor sued the property owner in a construction project under a mechanic's lien and asserted additional counts for breach of contract and fraud. Plaintiff claimed defendant breached the construction contract and fraudulently induced Plaintiff into performing additional work on the job. The trial court dismissed the fraud count and the Fifth District affirmed based on the economic loss rule. Id. at 69.

Likewise, in Rolls v. Bliss & Nyitray, Inc., 408 So. 2d 229 (Fla. 3d DCA 1981), dismissed, 415 So. 2d 1359 (Fla. 1982), the court reversed a compensatory and punitive damage award predicated on fraud because the damages alleged and proven for breach of contract were identical. In its fraud count, Plaintiff sought to

be put in the position it would have been in had the defendant's not breached the underlying contract. In response, the court stated:

> [S]ince plaintiffs failed to prove that they sustained compensatory damages based on a theory of fraud which were in any way separate or distinguishable from their compensatory damages based on contract, we conclude that plaintiffs have failed to meet the strict pleading and proof requirements necessary to recover compensatory and punitive damages based on fraud, and that these damages must therefore be reversed.

Id at 237. See also Florida Temps, Inc. v. Shannon Properties, Inc., 645 So. 2d 102 (Fla. 2d DCA 1994) (plaintiff not entitled to damages for fraud which duplicate damages already awarded for breach of contract); Richard Swaebe Inc. v. Sears World Trade Inc., 639 So. 2d 1120 (Fla. 3d DCA 1994) (trial court correctly concluded that fraud count was barred by the economic loss rule).

Courts have also found other intentional torts to be barred by the economic loss rule. For example, in Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490 (Fla. 3d DCA 1994), rev. denied, 659 So. 2d 272 (Fla. 1995), the court held that where the claims sued upon are contractual in nature, counts for civil theft, conversion and RICO violations -- all intentional torts -- would not lie. The court stated that "[w]here the damages sought in tort are the same as those for breach of contract, a plaintiff may not circumvent the contractual relationship by bringing an action in tort." Id. at 494. See also Kay v. Katzen, 568 So. 2d 960 (Fla. 3d DCA 1990) (entering summary judgment on the plaintiff's action for

conversion, civil theft and punitive damages because the underlying claim was contractual in nature); John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1988), rev. denied, 547 So. 2d 1210 (Fla. 1989) (both negligent and fraudulent misrepresentations were not actionable in tort because they were inextricable from breach of contract); Futch v. Head, 511 So. 2d 314 (Fla. 1st DCA), rev. denied, 518 So. 2d 1275 (Fla. 1987) (reversing conversion and RICO judgments where oral contract existed and no additional or unique damages were attributable to intentional torts); Rosen v. Marlin, 486 So. 2d 623 (Fla. 3d DCA) rev. denied, 494 So. 2d 1151 (Fla. 1986) (reversing civil theft award where damages sought were the same as those sought for breach of contract).

In sum, Florida law is well established that compensatory damages for fraud are an essential part of the cause of action. Thus, the compensatory damages used as the underlying basis for a contract theory, may not be used to support a separate tort count. Here, the damages sought under the contract theory are the same as those used to support the tort theory. Accordingly, Plaintiff's tort claim is not independent of its contract claim and as such, it is barred.

## III.

## THE SECOND DISTRICT'S DECISION IS SUPPORTED BY SOUND PUBLIC POLICY.

### A. It is Important to Maintain the Stability Which was Created by The Economic Loss Rule.

From the foregoing discussion, it is apparent that the economic loss rule is not an arbitrary doctrine designed to limit certain plaintiffs' ability to recover. Rather, it is the "boundary" between two very different bodies of law: contract law, which protects expectancies; and tort law which imposes duties to protect against personal injury and property damage. Quite clearly, contract law and tort law exist for different reasons and serve different purposes in society.

The economic loss rule has stabilized the law of commercial transactions by providing a predictable arena in which to conduct business without the risk of a multiplicity of law suits and boundless damages. Adoption of fraud in the inducement as an exception to the economic loss rule would only serve to blur the clear distinction which this Court recently created. The inroads such an exception would have on destabilizing the now well-settled law of Florida would be profound.

First, were this Court to create an exception to the economic loss rule for fraud in the inducement, it would serve as a beacon guiding every plaintiff with mere disappointed economic expectations to cross the boundary into the bountiful land of tort. Such an opinion would unquestionably cause every breach of contract

case to turn into a fraud in the inducement case. In fact, that is already happening as evidenced by the fact that there are six cases pending before this Court all involving contract-turned fraud in the inducement.

Moreover, manufacturers, homebuilders, contractors, and the like would ultimately bear the cost of consumer's frustrated expectations. The increased liability to manufacturers and businesses in the short run would necessarily be passed on to the consumer and society at large over time through increased prices. It is doubtful whether the risk of fraud in the inducement would even be insurable, thereby preventing a more efficient spread of the risks through society. As a result, economic growth, especially into areas perceived as high risk already, will be discouraged.

PLAC does not endorse fraud or defend fraudulent conduct; however, it does defend stability and predictability in the law. Maintaining the fundamental boundary between tort and contract law is better for business because it mitigates against excessive and unpredictable verdicts, provides a clear and rational statute of limitations, and encourages efficient and proactive business behavior which protects jobs and economic growth.

### B. Consumers Have Alternative Remedies Which do not Cross the Boundary Between Contract and Tort.

While this Court has held that the absence of another remedy will not preclude application of the economic loss rule, in fact, consumers such as Plaintiff have numerous alternative remedies

available to them which do not violate the economic loss rule. For this reason, public policy considerations weigh heavily against an exception to the economic loss rule which will unquestionably swallow the rule in a flood of "fraud in the inducement" claims which lack any personal injury or damage to other property.

For example, Plaintiff has his breach of contract and breach of warranty causes of action against the seller to recoup his disappointed expectations -- the difference in value between what he thought the house was worth and what he claims it is actually worth. In most commercial transactions, this cause of action will always exist for the plaintiff. In addition, a party to a contract who alleges fraudulent inducement may seek to rescind the contract and to restore the status quo. See, e.g., Florida East Coast Ry. Co. v. Thompson, 93 Fla. 30, 111 So. 525 (1927) (a contract procured through fraud is never binding on an innocent party thereto); Henson v. James M. Barker, Co., 555 So. 2d 901 (Fla. 1st DCA), rev. denied, 564 So. 2d 487 (1990) (recision of fraudulently induced contract may be granted even if restoration to status quo is impossible). Both of these claims are superior in terms of societal fairness and efficiency because they preserve the allocation of risks agreed to by the parties instead of substituting open-ended judicial solutions for disappointed expectations. See Casa Clara, 620 So. 2d at 1247, n.7.

Consumers may also resort to the Florida Deceptive and Unfair Trade Practices Act codified in sections 501.201-.213, Florida

Statutes. This statutory remedy provides full relief for actual damages and attorney fees incurred due to "unfair or deceptive acts or practices" and does not even require a showing of fraud. See, e.g., Urling v. Helms Exterminators, Inc., 468 So. 2d 451 (Fla. 1st DCA 1985). An "unfair" act is one which "offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Id. at 453 (quoting Speigel, Inc. v. Federal Trade Comm., 540 F. 2d 287, 293 (7th Cir. 1976)). "Coupled with homebuyers' power to bargain over price, these predictions must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses." Casa Clara, 620 So. 2d at 1247.

In light of these strong policy considerations, the Second District's decision is the correct result and should be affirmed.

## CONCLUSION

Based on the foregoing, PLAC submits that the decision of the Second District Court of Appeal should be affirmed.

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY
COUNSEL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 22091
(703) 264-5300

Of Counsel

POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
4000 International Place
100 SE Second Street
Miami, Florida 33131
(305) 530-0050

By _____
WENDY F. LUMISH
Florida Bar No. 334332
GARY M. PAPPAS
Florida Bar No. 705853

**CERTIFICATE OF SERVICE**

**WE HEREBY CERTIFY** that a true and correct copy of the foregoing has been mailed this 8th day of May, 1996 to: JODI L. CORRIGAN, ESQUIRE, Counsel for Martin; Annis, Mitchell, Cockey, Edwards & Roehn, P.A., P.O. Box 3433, Tampa, FL 33601-3433; JEFFREY KRAMER, ESQUIRE, Counsel for Woodson, 24 West 3rd Street, Suite 312, Mansfield, Ohio 44902; HAROLD D. OEHLER, ESQ., Counsel for Woodson; Macfarlane, Ausley, Ferguson & McMullen, P.O. Box 1531, Tampa, FL 33601; LISA BERLOW-LEHNER, ESQ., Counsel for The Alliance of American Insurers and Liberty Mutual Insurance Company; Szymoniak & Ridge, P.A., 2101 Corporate Blvd., Suite 415, Boca Corporate Center, Boca Raton, FL 33431; ROY D. WASSON, ESQ.; Counsel for Academy of Florida Trial Lawyers, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, FL 33130; LOUIS F. HUBENER, ESQ. and CHARLIE McCOY, ESQ.; Counsel for The State of Florida, Assistant Attorneys General, Office of the Attorney General, The Capitol - PL01, Tallahassee, FL 32399-1050; MARSHA G. RYDBERG, ESQ.; Counsel for the Sheas, Rydberg, Goldstein & Bolves, 500 E. Kennedy Blvd., Suite 200, Tampa, FL 33602; PAUL P. JACKSON (pro se) Paul P. Jackson Realty, 7211 N. Dale Mabry, Suite 203, Tampa, FL 33614; G. WILLIAM BISSETT, ESQ., Counsel for Masonite Corporation; Hardy, Bissett & Lipton, P.A., P.O. Box 9700, Miami, FL 33101-9700; BARBARA BURCH, ESQ., Counsel for American Association of Retired Persons and the Consumer Federation of America, 218 E. Commercial Blvd., Suite 210, Lauderdale by the Sea,

FL 33308; and STEVEN S. ZALEZNICK, ESQ., DEBORAH M. ZUCKERMAN, ESQ., BRIDGET A. SMALL, ESQ., Counsel for American Association of Retired Persons and the Consumer Federation of America, 601 E Street, NW, Room B4-230, Washington, D.C. 20049.

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY
COUNSEL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 22091
(703) 264-5300

Of Counsel

POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
4000 International Place
100 SE Second Street
Miami, Florida 33131
(305) 530-0050

By _____
WENDY F. LUMISH
Florida Bar No. 334332
GARY M. PAPPAS
Florida Bar No. 705853

1110374.1