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IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,057

KIRK A. WOODSON,

Petitioner,

vs.

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

Respondents.

FILED
SID J. WHITE
MAY 15 1996
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

BRIEF BY MASONITE CORPORATION AS AMICUS CURIAE

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Ford Motor Co. Bronco II Products Liability Litigation,
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GAF Corp. v. Zack,
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Seely v. White Motor Co.,
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Serina v. Albertson's, Inc.,
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Tampa Drug Co. v. Wait,
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TGI Development, Inc. v. CV Reit, Inc.,
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Other

Barrett, Construction Claims: Recovery of Economic Loss in Tort For Construction Defects: A Critical Analysis, 40 S.C. L. Rev. 891 (1989) 20, 21, 23, 36

Bennett, Theresa M., Lies And Broken Promises: Fraud And The Economic Loss Rule After Woodson v. Martin, 70 Fla.B.J. 46 (May 1996) 11

Economic Loss and Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966) 14, 36

Jones, Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort 44 U. Miami L. Rev. 731, 733-44 (1990) 16, 18,

Manufacturers' Liability to Remote Purchasers For "Economic Loss" Damages -- Tort or Contract? 114 U. Pa. L. Rev. 539, 541 (1966) 14

Schwiep, Paul J., The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts, 69 Fla.B.J. 34 (Nov. 1995) 1

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INTRODUCTION

Over the course of the last decade, this Honorable Court has issued three landmark decisions establishing the legal framework within which a product seller's liability to third parties for purely economic losses is determined. This trilogy of decisions, Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987) ("FPL"), Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 620 So.2d 1244 (Fla. 1993) ("Casa Clara"), and Airport Rent-A-Car v. Prevost Car, Inc., 660 So.2d 628 (Fla. 1995) (Prevost"), hold in no uncertain terms that, with respect to a product seller's liability to third parties, "[c]ontract principles [are] more appropriate than tort principles for resolving economic loss without any accompanying physical injury or property damage." FPL, 510 So.2d at 902; Casa Clara, 620 So.2d at 1247; Prevost, 660 So.2d at 630. Contrary to the complaints expressed by a few,[1] these decisions will prove to be a victory for and beneficial to the overwhelming majority of the citizens in this great State as it moves into the next century, including both those entities engaged in the business of manufacturing and supplying products and to those individuals who are members of the consuming public. These decisions brought stability to this important area of civil law,[2] an area which was in a state of disarray and

[1]See, e.g., Schwiep, Paul J., The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts, 69 Fla.B.J. 34 (Nov. 1995); Bennett, Theresa M., Lies And Broken Promises: Fraud And The Economic Loss Rule After Woodson v. Martin, 70 Fla.B.J. 46 (May 1996).

[2]If there exists any doubt as to the importance and far-reaching impact of this Court's decisions in this area of the law, then one only needs to look at the number and variety of amicus curiae briefs submitted to the Court in the Casa Clara case and in the instant case.

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confusion generated by a multitude of seemingly conflicting appellate court decisions and opinions.

In each of these three decisions, this Court issued succinct, unambiguous and well-reasoned opinions reaffirming Florida's adherence to the rule that a cause of action in tort against a remote manufacturer or supplier of an allegedly defective product is not available to one whose use of the product has caused no personal injury or physical damage to "other property" - the so-called "Economic Loss Rule". Beginning with the issuance of the decision in FPL and continuing up to today, however, the Plaintiffs' Bar has repeatedly devised creative ways to attempt to avoid the strictures of the Rule, urging the Court to first recognize and then adopt various exceptions to its application. In each instance, this Court appropriately concluded that the commercial considerations, as well as the other public policies which underlie the economic loss rule itself clearly counseled against eroding or limiting the rule through the creation of exceptions in cases of perceived isolated hardship.

For example, this Court has concluded that no exception to the economic loss rule should be created to protect residential homeowners, a class of citizens historically accorded preferential treatment in Florida. See, Casa Clara, 620 So.2d at 1246-47. The Court has further concluded that the economic loss rule applies notwithstanding that the claimant may otherwise have no viable cause of action against the remote product supplier unless allowed to recover in tort (i.e., the "no alternative remedy" exception). See, Casa Clara, 620 So.2d at 1248; Prevost, 660 So.2d at 631. The Court has also concluded that the economic loss rule applies even though the defect

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in the product posed an imminent or potential risk of causing personal injury, Casa Clara, 620 So.2d at 1247, or actually destroyed itself as a result of a sudden calamitous event (i.e., the "sudden calamity" exception), Prevost, 660 So.2d at 631. Lastly, this Court has concluded that the economic loss rule applies to situations involving the product seller's purported commission of an unintentional tort claimed to be "separate and independent" of any breach of contract or warranty (i.e., the "separate and independent tort" exception). See, Prevost, 660 So.2d at 632.[3]

Against this backdrop, there are presently pending before the Court at least six separate decisions of the various district courts reaching conflicting results in cases broadly calling into question the applicability vel non of the economic loss rule to lawsuits wherein recovery of purely "economic damages" is being sought on the basis of allegations that the defendant committed a common law fraud or some other so-called "intentional" tort. The decision rendered in the instant case, Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995), held that the buyer of residential property was prevented by the economic loss rule from recovering damages of a solely economic nature from the seller's real estate agent, who was alleged to have been guilty of making fraudulent misrepresentations regarding the condition of the property in

[3] In this regard, the plaintiff in Prevost argued to the Eleventh Circuit that, under AFM Corporation v. Southern Bell Tel. & Telgr. Co., 515 So.2d 180 (Fla. 1987) a cause of action could be pursued in tort to recover economic damages if the defendant committed an "independent tort" which was "separate and apart from any contractual action." Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 18 F.3d 1555, 1559 (11th Cir. 1994). Plaintiff argued that it should be permitted to proceed with its suit because it alleged the existence of such an "independent tort" based upon the defendant manufacturer's claimed breach of an asserted post-sale duty to warn.

order to induce the buyer to enter into a purchase contract. The majority and dissenting opinions in the Woodson case represent the most thorough and careful analyses of this Court's prior economic loss rule precedent, and the various policy considerations relied upon by this Court in reaching its conclusions in this important area of the law. In contrast, the decisions from the Third, Fourth, and First Districts treat the economic loss rule issue being raised in a very superficial fashion, and then broadly and unconditionally state that "the economic loss rule does not bar a common law fraud in the inducement claim seeking to recover only economic losses." See, HTP, Ltd. v. Lineas Aereas Costarricenses, 661 So.2d 1221, 1222 (Fla. 3d DCA 1995); TGI Development, Inc. v. CV Reit, Inc., 665 So.2d 366 (Fla. 4th DCA 1995); Jarmco, Inc. v. Polygard, Inc., 668 So.2d 300, 301 (Fla. 4th DCA 1996); Monco Enterprises, Inc. v. Ziebart Corp., 21 Fla.L.Wkly. D755 (Fla. 1st DCA 1996). The sole reason expressed for the conclusion reached by these other district courts is their apparent belief that "fraud in the inducement" constitutes a "separate and independent tort" as a matter of law.

It will be demonstrated below that the Fifth District's Woodson decision represents the correct analysis and application of long-established Florida law. It will also be demonstrated that the First, Fourth, and Third Districts' unconditional statement that "fraud in the inducement" constitutes a "separate and independent tort", as a matter of law, and therefore is not subject to the economic loss rule is unwarranted, erroneous, and simply irreconcilable with prior pronouncements of this Court. Although they will deny it, the truth is that the plaintiffs in these purported "fraud in the inducement" group of economic loss rule cases are not just asking this

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Court to "break new ground"; they are asking this Court to break this new ground in such a way as to "create a sinkhole", which will gradually increase in size until it ultimately swallows up the entire economic loss rule itself.

For this Court to grant the Petitioner's request would require it to overrule, or at least distinguish into oblivion, several of its prior decisions, and would result in far-reaching economic consequences to those businesses involved in manufacturing and supplying products. These consequences would ultimately be detrimentally visited upon Florida consumers through unnecessary increases in the price of products. Broad application of the economic loss rule in the products liability arena is supported by the clear weight of decisional authority, and by sound commercial and public policy considerations. Any attempt to restrict the rule's scope through the creation of ad hoc exceptions to ameliorate the occasional harsh result should be met with the highest level of scrutiny and should be subjected to a careful consideration and balancing of the interests of all parties concerned, foremost of which is the potential undermining of the comprehensive approach to the sale of goods reflected in Florida's Uniform Commercial Code.

FACTS REGARDING MASONITE'S INTEREST IN THE OUTCOME OF THIS CASE

Masonite is a foreign corporation primarily engaged in the business of developing, manufacturing, and distributing a wide variety of products utilized in the construction industry. Many of those products have been and continue to be used extensively throughout this country, including the State of Florida. Masonite's products reach their final destination as a result of a series of successive commercial sales transactions. Masonite first sells its products in bulk to

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wholesale distributors. These distributors in turn enter into independently negotiated wholesale sales contracts with local retailers. These local retailers then enter into their own sales contracts to supply the materials to residential and commercial developers, to general contractors, and to sub-contractors. At each successive level of the distribution system, the parties involved contractually allocate their respective risks and responsibilities and determine the sales price based thereon.

Over the last five years, Masonite has been sued as a product manufacturer by homeowners, contractors and developers based upon causes of action running the entire gamut of tort and contract law. The earliest suits generally proceeded on the basis of causes of action sounding in negligence and strict products liability, with breach of express and/or implied warranty claims thrown in for good measure. It was for this reason that Masonite sought, and was granted permission to file an amicus brief in the Casa Clara case. As a result of the decision rendered in Casa Clara, claimants shifted gears and sought to pursue Masonite on the basis of the two theories discussed by the United States Court of Appeals, Eleventh Circuit, in Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 18 F.3d 1555 (11th Cir. 1995). As a result, Masonite again sought and was granted permission to file an amicus brief in this Court in Prevost. The manner in which this Court answered the questions certified in Prevost was important to Masonite, since claimants were successfully arguing that notwithstanding the decision in Casa Clara, they could still pursue a cause of action against Masonite sounding in negligence simply by alleging that they had "no alternative theory of recovery," such as breach

of express warranty.[4] These claimants were also successfully arguing that they could pursue Masonite, irrespective of the economic loss rule, based upon a theory that Masonite committed a "separate and independent tort" - it breached some post-sale duty to warn or recall. This Court's decision in response to the three certified questions in Prevost again reaffirmed the holding in Casa Clara, as well as the economic and public policy rationale espoused in that decision.

Undaunted by either Casa Clara or Prevost, claimants continue to seek to pursue Masonite on the basis of causes of action sounding in tort. Currently in vogue are causes of action alleging negligent misrepresentation, intentional or fraudulent misrepresentation, and/or fraud in the inducement. Multiple questions regarding the scope and applicability of the economic loss rule to these types of tort claims are squarely posed by the instant original proceeding. Masonite submits that before a decision is handed down by this Court, each of these various "representational" or "informational" tort theories must be fully explored, and their interrelationship with the economic and public policy rationales supporting the economic loss rule must be fully considered.

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[4] Ironically, in most situations the ultimate consumer/homeowner does, in fact, have a remedy against Masonite predicated upon the obligations assumed by Masonite under the express limited warranty which runs with its siding products. However, most homeowners do not wish to pursue the potential sales/warranty remedy available to them under the Uniform Commercial Code [§672.313, Fla. Stat.], apparently because such remedy would be subject to limitations or exclusions. Thus, the homeowners (and other intermediate parties in the distributive chain) have found another way "to manipulate the application of the economic loss rule" by deciding to allege only tort causes of action in their complaint and disavow their alternative contractual remedy.

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It is absolutely essential that Florida trial and appellate courts be provided with easily applied, sound legal principles to follow in cases involving the sale of allegedly defective products which have caused only economic loss. Until reconciled, the divergent views expressed in the multiple opinions and authorities cited in the decision brought up for review can do nothing but generate additional confusion in an area of law which we, at least, felt was fully and finally clarified by the Casa Clara and Prevost decisions. We feel that this Court should again reaffirm that a product manufacturer or supplier may not be sued in tort for the recovery of purely economic losses. Instead, recovery of economic losses from manufacturers and suppliers such as Masonite should be restricted to the various remedies provided for in Florida's Uniform Commercial Code. This is the only rule which makes economic and public policy sense.

SUMMARY OF ARGUMENT

This Court should respond to the certified question from the Second District in Woodson in such a fashion as to leave no doubt as to the viability and broad scope of the economic loss doctrine in Florida jurisprudence. Those such as the Petitioner in Woodson and the Respondents in the other pending "fraud in the inducement" cases, who all criticize the rule, must be challenged to identify the specific problems they intend to correct through their proposed dilution of the rule by the creation of "exceptions", and they should be challenged to explain why existing law is inadequate, without resort to generalizations or stylized abstraction. We do not feel that those who complain are up to such a challenge. When all is said and done, harshness of result in some isolated instances where individuals feel their economic or financial

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expectations fell short of the mark is the price which must be paid for a stable and prosperous commercial system.

The economic loss rule is supported by sound commercial and public policy considerations. For this Court to grant the Petitioner's request that a broad and unconditional exception for purported "fraud in the inducement" causes of action should be carved out of the economic loss rule would require a clear departure from heretofore well-settled principles of tort law, would require this Court to overrule or distinguish into oblivion numerous prior decisions of its own and of the district courts of appeal, and would result in far-reaching economic consequences to those businesses involved in manufacturing and supplying products. These consequences would, in turn, ultimately be detrimentally visited upon Florida consumers through unnecessary increases in the price of products.

In the Woodson case, the plaintiffs sued because they were not pleased with the quality of the home they had purchased and they believed they had been fraudulently mislead by false statements made by the seller's agent regarding the home's qualities and value. It is obvious that regardless of the nature of the defendant's conduct, the purchaser's frustrated economic expectations provide the sole basis for their damage claim. The condition of the home (its quality) and the extent of the plaintiffs' economic losses remained the same, unaffected by the nature of the defendant's conduct. Thus, it would seem to make no logical sense to permit the nature of the defendant's conduct to control the nature and scope of the remedy which is available to redress the purchaser's frustrated economic expectations.

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Likewise, in the products liability arena, the condition of the product (its quality and suitability) remains the same, regardless of the nature of the representations made by the defendant regarding that product. If the purchaser believes he/she did not receive a product of the quality and suitability represented, then the remedy lies in breach of contract and warranty, not in tort for fraud in the inducement. The various separate causes of action which presently exist under decisional and statutory law in Florida are more than sufficient to protect the interests of all parties concerned with and involved in the manufacture, distribution, retail sale, purchase, and use of products, from the ultimate product purchaser/user to the remote product supplier and manufacturer.

As aptly noted by this Court in Casa Clara, "[w]hen only economic harm is involved, the question becomes whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies." Beginning in the early 1980s and continuing up through the 1995 decision in Prevost, a line of product liability cases have been decided in Florida which properly concluded that no cause of action in tort was available to seek recovery of purely economic losses in the absence of physical harm to persons or other property. The correct conclusions were reached in those cases because the courts began their analysis with the fundamental concept of whether tort or contract based duties are more appropriate for resolving disputes involving solely economic damages. Of the many "fraud in the inducement" cases presently pending before this Court, only one involves the sale of a product - Jarmco, Inc. v. Polygard, Inc., 668 So.2d 300 (Fla. 4th DCA 1996).

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Unfortunately, that decision reached the wrong conclusion: it permits a product purchaser to pursue a tort action to recover purely economic damages, instead of relegating the purchaser to its contract and UCC warranty remedies.

The respondent in the Jarmco case can thus be viewed as advocating the interests of a group composed of all those below the defendant in the distributive chain, which may include wholesale distributors and retailers, as well as initial and secondary purchasers and users. Under the current state of Florida law, all of these parties are provided with adequate common law contract and UCC warranty causes of action upon which to seek redress for any economic losses they may suffer.

All of the parties in the chain of distribution have the opportunity to bargain for and obtain some form of warranty or guaranty to protect against the possibility that the products they are purchasing will not fulfill their expectations or live up to representations made concerning the character, quality or performance of the product. As a practical matter therefore, application of the economic loss doctrine to "fraud in the inducement claims" is an obstacle only to two classes of injured parties: (1) those who fail to bargain for any contract or UCC right to be compensated for economic losses; and (2) those whose contract rights are worthless because the seller or the person with whom they dealt in a contractual setting is insolvent. Because no rule of law can protect the second class while ignoring the first, the real issue is whether this Court should provide for a recovery in tort by those who fail to secure for themselves what they consider to be an adequate remedy in contract/warranty and those who fail to make sure that all

of the oral representations made to them concerning product quality or fitness ultimately find their way into the written warranty provided with the product. This Court should not provide for such a new remedy.

The First, Third, and Fourth districts concluded that a cause of action labelled "fraud in the inducement" is not subject to Florida's economic loss rule because it constitutes an "independent tort". Those courts' conclusion in this regard appears to be unconcerned with whether the underlying facts and economic damages being sought are interwoven with and identical to those supporting the plaintiff's concurrent breach of contract or warranty claim. Such a broad, unconditional rule of law constitutes a departure from this Court's prior precedent. With respect to the issue of what constitutes an "independent tort", this Court stated most recently in Prevost that "AFM Corp. reaffirms that there can be no independent tort action for purely economic loss without an accompanying physical injury or other property damage." This statement of the law is entirely consistent with prior Florida cases holding that fraud or other intentional tort claims could not be pursued when the facts constituting the tort and the damages claimed to have flowed from the tort are identical to and interwoven with the facts and damages giving rise to the claimant's breach of contract claim. Thus, most, if not all, fraud in the inducement claims should be barred in the products liability arena. Specifically, if the defendant made false representations to the plaintiff concerning the characteristics, qualities or performance of the product being offered for sale, then those representations would give rise to enforceable express warranties under the UCC, with the scope and extent of the defendant's

liability for any resulting economic damages being governed by the parties' contract and the UCC. Since the purchaser therefore has available contract/warranty remedies, the economic loss rule unquestionably applies to bar any so-called "separate or independent" tort claim based on fraud. The policies underpinning this Court's rulings in FPL, AFM, Casa Clara, and Prevost compel this result.

ARGUMENT

THE EXISTENCE AND SCOPE OF THE LIABILITY OF A MANUFACTURER OF A PRODUCT WHICH IS NOT INHERENTLY OR UNREASONABLY DANGEROUS AND WHICH HAS CAUSED NO PHYSICAL INJURY TO PERSONS OR TO "OTHER PROPERTY" SHOULD BE GOVERNED BY THE LAW OF CONTRACTS AND THE UNIFORM COMMERCIAL CODE, NOT BY TORT PRINCIPLES

I.
PREFACE

Stare decisis, as well as substantial economic and public policy considerations, counsel heavily against this Court's acceptance of the Petitioner's request to break new ground by ruling in its favor in the instant case. If tort law is to be expanded to grant any additional special protection to individuals such as Petitioner who have only themselves to blame for the predicament in which they find themselves, then such a step should appropriately be taken by the Florida Legislature after it has been given the opportunity to determine whether any significant problem actually exists, and, if so, to then thoroughly analyze the various available solutions and the ramifications of each.

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II.
THE ECONOMIC LOSS RULE IN THE PRODUCTS LIABILITY ARENA

(A)

By Definition, This is a Case Involving Purely Economic Losses

In the context of products liability litigation, the term "economic loss" has generally been defined as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits, as well as the diminution in the value of the product because it is inferior in quality and does not work for the normal purposes for which it was manufactured and sold. This general definition encompasses the ultimate aim of product warranty law -- to protect expectations of product suitability and quality. Casa Clara, 620 So.2d at 1246; Moorman Mfg. Co. v. National Tank Co., 91 Ill.2d 69, 61 Ill. Dec. 746, 435 N.E.2d 443, 449 (1982); See generally, Note: Economic Loss and Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966); Comment, Manufacturers' Liability to Remote Purchasers For "Economic Loss" Damages -- Tort or Contract? 114 U. Pa. L. Rev. 539, 541 (1966).

Similarly, in the Woodson case, the plaintiffs sued because they were not pleased with the quality of the home they had purchased and they believed they had been fraudulently mislead by false statements made by the seller's agent regarding the home's qualities and value. It is obvious that regardless of the nature of the defendant's conduct, the purchaser's frustrated economic expectations provide the sole basis for their damage claim. The condition of the home (its quality) and the extent of economic losses remained the same, unaffected by the nature of the defendant's conduct. Thus, it would seem to make no logical sense to permit the nature of

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the defendant's conduct to control the nature and scope of the remedy which is available to redress the purchaser's frustrated economic expectations:

> We believe that the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories. 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. Woodson, 663 So.2d at 1329.

Likewise, in the products liability arena, the condition of the product (its quality and suitability) and the economic damages it might cause remain the same, regardless of the nature of the representations made by the defendant regarding that product. If the purchaser believes he/she did not receive a product of the quality and suitability represented, then the remedy lies in breach of contract and warranty, not in tort for fraud in the inducement. See, e.g., Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc., 444 So.2d 1068 (Fla. 3d DCA 1984) (recognizing cause of action for breach of express warranty based upon pre-purchase representations made to purchaser by manufacturer's sales representatives).

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(B)

The Problem of Economic Losses:
Tort vs. Contract/Warranty Law
Under the Uniform Commercial Code

(1)

Contract/Warranty Law Under the Uniform Commercial Code

Contract law involves a series of legal principles and rules that the courts have developed through the years to allow innocent parties to a contract which has been breached to recover the benefit of that party's bargain. At the heart of these rules lies the principle of protecting the economic expectation of the parties to the contract. Generally speaking, under principles of contract law, a party injured by a breach of contract is entitled to recover an amount of damages that will put that party in the same economic position it would have been in had the contract been performed. Many of the protections and limitations existing in contract law have been incorporated into the law of sales, which is governed in most states by the particular version of the Uniform Commercial Code adopted by their respective legislatures.

The Florida Legislature adopted and enacted its own version of the Uniform Commercial Code ("UCC") in 1965. Laws 1965, c. 65-254, effective January 1, 1967 (codified in Chapter 672, Florida Statutes). Article 2 of the UCC (Ch. 672) governs transactions "in goods", and generally displaces the prior common law precedent governing sales. The UCC defines in a uniform manner the rights and duties of parties to transactions relating to the sale of goods, including what remedies are available to a party in the event of a breach. See generally, Jones,

Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort, 44 U. Miami L. Rev. 731, 733-44 (1990). With respect to economic losses, the Code provides that an aggrieved buyer may recover consequential damages resulting from the failure of the product to meet the buyer's needs if the seller had reason to know of those needs. §672.2-715(2), Fla. Stat. (1991 Supp.). The buyer may recover consequential damages from the seller as long as the seller has reason to know of the buyer's general or particular requirements at the time of contracting; the seller need not consciously assume the risk of the buyer's consequential economic losses in order to be held liable therefor. Under the UCC, courts have generally permitted the recovery of most consequential economic damages, so long as such damages were sufficiently foreseeable. In most instances, the provisions of the Code are subject to change by agreement of the parties. The parties are allowed to shift those allocations of risks and responsibilities otherwise provided for or specified in the UCC, so long as any such change is not "unconscionable" and does not cause the contract to "fail in its essential purpose." Thus, the primary goal of the law of sales, as expressed in the UCC, is to protect parties' economic expectation interests as expressed in the agreements they have reached, with only minimal interference from the courts.

(2)

Tort Law

In contrast, tort law is designed to secure the protection of all citizens from the danger of physical harm to their persons or to their property. Tort standards are imposed by law (the

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courts) without reference to any private agreement. They obligate each citizen to exercise reasonable care to avoid foreseeable physical harm to others. As such, tort law is fundamentally concerned with enforcing standards of conduct so as to protect people from physical harm.

Within this context, economic interests -- particularly those relating to the quality and value of a product which causes no personal injury -- are not interests that tort law has traditionally protected. This view represents the weight of authority in this country, and its validity is continually being reaffirmed. The benefit to be gained by protecting individuals by shifting the burden of economic loss onto product manufacturers and suppliers through imposition of tort liability is insufficient to justify the substantial economic impact which such cost-shifting would have on society as a whole. See, Jones, Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort, 44 U. Miami L. Rev. 731, 763-79, 797 (1990).[5] Manufacturers' prices would rise as they sought to insure against the possibility that some of their products would not meet the needs of some of their purchasers or live up to the quality or performance representations of their sales representatives and to insure against the possibility that some of their products might be placed into the stream of commerce with design or manufacturing defects which, although causing no personal injury or damage to "other

[5]In reaching its conclusions in Casa Clara, this Court agreed with this commentator's statement that:

> ...Tort law is being used "by litigants and courts to undermine allocations of risks agreed to by the parties and to substitute judicial solutions for contractual arrangements that are almost certainly superior in terms of both fairness and efficiency." Casa Clara, 620 So.2d at 1247 n. 7.

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property", nevertheless cause enormous economic or commercial losses to be suffered by parties occupying positions lower on the chain of distribution.

The responsibility placed upon the courts to cogently express those legal principles which are necessary to keep the law of contracts and the law of torts operating within their respective spheres was accepted without hesitation by this Court in Casa Clara:

> ... Thus, the "basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is better able to bear the loss and prevent its occurrence." The purpose of a duty in tort is to protect society's interest in being free from harm, and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. When only economic harm is involved, the **question becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies."**
>
> We are urged to make an exception to the economic loss doctrine for homeowners. .... There are protection for home buyers, however, ... [T]hese protection must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses. Therefore, we again "hold contract principles more appropriate than tort principles for recovering economic loss without an accompanying physical injury or property damage." If we held otherwise, "contract law would drown in a sea of tort."

Casa Clara, 620 So.2d at 1246-47 (citations omitted).

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III.

THE ECONOMIC LOSS DOCTRINE: THE RULE THAT KEEPS THE LAW OF CONTRACTS/WARRANTY AND THE LAW OF TORT OPERATING WITHIN THEIR PROPER SPHERES.

It has been observed that the modern economic loss doctrine developed in response to three separate jurisprudential concerns: (1) the theoretical difficulties of using conduct-oriented tort standards to protect economic expectancy interests created by contract; (2) the practical difficulty involved in fashioning a rule of law that permits recovery for economic loss in tort without subjecting the defendant to potentially limitless liability; and (3) the unavoidable conflict encountered when the courts attempt to expand a manufacturer's tort-based duty, while at the same time maintaining the manufacturer's statutory rights under the UCC. See, Barrett, Construction Claims: Recovery of Economic Loss in Tort For Construction Defects: A Critical Analysis, 40 S.C. L. Rev. 891 (1989) [hereinafter "Barrett"]. Although the use of a tort-based theory to recover economic loss implicates each of these concerns, courts have been inconsistent in addressing or even recognizing them. Id., at 897-914.

(A)

Origin and Development of the Economic Loss Rule

In Florida, a tort-based duty to avoid physical harm to remote third parties was first imposed upon manufacturers in the case of Mathews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956). Mathews, like MacPherson, was a case involving personal injury only -- an amputated finger caused by a dangerously designed aluminum rocking chair. The duty recognized, the breach of

which would give rise to a cause of action based upon negligence, was narrow and restricted to cases involving bodily harm:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel lawfully or to be in the vicinity of its probable use, for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

88 So.2d at 300, quoting the Restatement of Torts §398. Florida's imposition of a tort-based duty to warn on a remote product manufacturer was similarly limited to situations involving personal injuries. See, Tampa Drug Co. v. Wait, 103 So.2d 603, 607 (Fla. 1958) (the duty to warn "is an obligation arising out of a duty to take reasonable precautions to avoid reasonably foreseeable injuries to those who might use the product").

Unfortunately, as courts throughout this Country, including several in Florida, began to dismantle the privity defense, those same courts began to unknowingly equate the scope of liability in tort with the foreseeability of harm, without any regard whatsoever for the nature of the harm which was involved in the case before it. See, Barrett at 905 - 11. As a result, one began to see a group of cases being decided which would permit recovery of economic loss in both product, service and construction defect cases solely on the basis of the rationale that such economic loss was "foreseeable" to the manufacturer, service provider, contractor, or other construction professional. Typical of these cases is Drexel Properties, Inc. v. Bay Colony, etc., 406 So.2d 515 (Fla. 4th DCA 1981), disapproved in Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 620 So.2d 1244, 1248 (Fla. 1993); and Audlane Lumber &

Builders Supply, Inc. v. D. E. Britt Associates, 168 So.2d 333 (Fla. 2d DCA 1964). Close analysis of those decisions discloses that the primary legal impediment to the claimant's pursuit of a negligence action which the courts chose to focus upon was the defense of lack of privity. Once the appellate courts disposed of that privity defense, they then erroneously felt that they were left with nothing but the simple rule that where it is foreseeable that the plaintiff will suffer the harm sued on, the product manufacturer or service supplier has a legal duty to use reasonable care to avoid causing that harm. Drexel, 406 So.2d at 519; Audlane, 168 So.2d at 335.

While such a statement unquestionably reflected a correct and well-established rule of negligence law in product or service cases involving physical injuries, such a rule of law had not theretofore been employed in product or service cases which involved only economic harm. Most opinions that have relied on MacPherson to expand tort liability in cases involving mere economic loss show absolutely no awareness of the historic and proper distinction which the common law drew between physical harm and economic loss when determining whether a duty and therefore a cause of action in tort existed. Thus, the courts that allowed foreseeability alone to govern recovery for economic loss in tort appeared totally unaware that they were expanding liability far beyond the scope of liability that Judge Cardozo envisioned in MacPherson or the

Florida Supreme Court envisioned in Mathews v. Lawnlite.[6] In rendering its decision in Casa Clara, this Court unquestionably recognized the mischief which resulted from utilization of this flawed line of reasoning, and therefore expressly disapproved of such decisions as Drexel Properties. See, Casa Clara, 620 So.2d at 1248.

(B)

Application of the Economic Loss Rule On Florida Products Liability Cases

Beginning in the early 1980s and continuing up through the 1995 decision in Prevost, a line of product liability cases have been decided in Florida which properly concluded that no cause of action in tort was available to seek recovery of purely economic losses in the absence of physical harm to persons or other property. The correct conclusions were reached in those cases because the courts began their analysis with the fundamental concept of whether tort or contract based duties are more appropriate for resolving disputes involving solely economic

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[6] As Barrett points out in his Law Review article:

> Properly understood, neither the demise of the privity defense in MacPherson nor the rejection of other similar defenses effected an expansion of tort liability. Rather, MacPherson simply restored the application of traditional tort standards to manufacturers and contractors for liability for physical harm to remote parties. It placed manufacturers in the position they arguably should have occupied all along -- subject to a legal duty of exercising reasonable care to avoid injuring others. The abolition of the privity defense created no new theory of recovery, but merely eliminated a defense to liability under traditional tort principles. (Barrett, at 905).

damages. Of the many "fraud in the inducement" cases presently pending before this Court, only one involves the sale of a product - Jarmco, Inc. v. Polygard, Inc., 668 So.2d 300 (Fla. 4th DCA 1996). Unfortunately, that decision reached the wrong conclusion: it permits a product purchaser to pursue a tort action to recover purely economic damages, instead of relegating the purchaser to its contract and UCC warranty remedies.

In Monsanto Agricultural Products Co. v. Edenfield, 426 So.2d 574 (Fla. 1st DCA 1983), the court was presented with the question of whether a herbicide manufacturer could be held liable in tort to a farmer suffering purely economic losses allegedly resulting from defects in the herbicide. In concluding that a tort claim for such damages was not available, the First District focused upon the concept of duty:

> Tort law imposes upon manufacturers a duty to exercise reasonable care so that the products they place in the market place will not harm persons or property. However, tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers. Such a duty does, of course, exist where the manufacturer assumes the duty as part of his bargain with the purchaser, or where implied by law, but the duty arises under the law of contracts, and not under tort law. [426 So.2d at 576]. (citations omitted).

Several years later the Third District was presented with a similar situation where a party attempted to sue a remote manufacturer of defective roofing materials. The plaintiff in that case, GAF Corp. v. Zack, 445 So.2d 350 (Fla. 3d DCA 1984), was a roofing contractor who, in connection with two building projects on which it had secured roofing contracts, had purchased certain roofing materials from a local distributor. The roofing materials were manufactured and

marketed by the defendant GAF Corporation. The materials were subsequently utilized during the plaintiff's construction of roofs on two Howard Johnson motor lodges. The roofing materials proved to be extremely defective in numerous respects, thereby causing the entire roofing systems constructed by the plaintiff to be defective.

The roofing contractor brought a products liability action against GAF asserting causes of action based upon negligence and breach of implied warranty. The case ultimately went to trial, resulting in a jury verdict awarding both compensatory and punitive damages. The defendant manufacturer appealed, claiming that the trial court erred in denying its motion for directed verdict. The Third District agreed, stating that:

> Under no tort or contract theory known to our law, then, does the plaintiff Zack have a cause of action for negligence or breach of implied warranty against the defendant GAF for the economic losses it sustained in this case. Plaintiff Zack's sole remedy, if any, for these economic losses would be an action for breach of implied warranty of merchantability under the Uniform Commercial Code [§672.314, Fla. Stat. (1981)] or a related breach of contract action against the party, East Coast Supply Corp. which sold the defective roofing materials to the plaintiff Zack -- actions which were not brought below. [445 So.2d at 352].

In Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, 444 So.2d 1068 (Fla. 3d DCA 1984), it was similarly held that a cause of action based on strict products liability under the Restatement (Second) of Torts §402A "should be reserved for those cases where there are personal injuries or damage to other property." Three years later the Third District decided Affiliates For Evaluation and Therapy, Inc. v. Viasyn Corp., 500 So.2d 688 (Fla. 3d DCA 1987). In that case, a consumer brought an action against a computer manufacturer for breach

of implied warranty and for negligence. In affirming the trial court's dismissal of the action, the Third District held that the negligence count could not stand because the only damages sought in the case were "contract-type damages, namely, economic losses to plaintiff's business because the subject computer did not perform as it should have." Id. at 693. The Third District also affirmed dismissal of the breach of implied warranty claim on the basis that the plaintiff had failed to allege the essential element of privity of contract between itself and the defendant.

The plaintiff in Viasyn claimed that the earlier decision of the Third District in GAF Corp. v. Zack "was not good law." The Third District, however, had no difficulty in reaffirming the continuing validity of that prior decision, stating:

> Plainly, the result reached in GAF Corp. is in full accord with the overwhelming weight of authority on this subject throughout the country. Dean Prosser summarizes this established law as follows:
>
>> "There can be no doubt that the seller's liability for negligence covers any kind of physical harm, ... But where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule, . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery." (footnotes omitted).

500 So.2d at 691, quoting W. Prosser, Law of Torts §101, at 665 (4th Ed. 1971).

The clear thrust of Florida law in this area was further clarified with the issuance of this Court's decision and opinion in Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987). The case arrived before this Court as a result of the certification of

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several questions from the Eleventh Circuit Court of Appeals in Florida Power & Light Co. v. Westinghouse Electric Corp., 785 F.2d 952 (11th Cir. 1986). The certified questions revolved around what approach Florida takes to the economic loss rule in cases involving allegedly defective products. In its order certifying several legal questions to this Court, the Eleventh Circuit stated that it had "reviewed the Florida authority . . . and [was] persuaded that there [was] no clear and controlling precedent in the Florida courts."[7] [785 F.2d at 952].

The dispute in the FPL case arose as a result of the purchase by a power company of allegedly defective nuclear steam generators from the manufacture/seller, Westinghouse. Because of alleged defects in the design and manufacture of those steam generators, leaks subsequently developed, thus prompting FPL to bring suit against Westinghouse for breach of express warranty and for negligence, seeking damages for the cost of repair, revision and inspection of the steam generators. The federal trial judge ultimately granted Westinghouse's motion for partial summary judgment on the negligence count on the grounds that Florida law precluded the recovery of economic loss without any claim of personal injury or damage to other property.

[7] Among the decisions which the Eleventh Circuit cited as causing its confusion were A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973), Drexel Properties, Inc. v. Bay Colony, Etc., 406 So.2d 515 (Fla. 4th DCA 1981), Monsanto Agricultural Products Co. v. Edenfield, 426 So.2d 574 (Fla. 1st DCA 1983), GAF Corp. v. Zack, 445 So.2d 350 (Fla. 3d DCA 1984), and Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, 444 So.2d 1068 (Fla. 3d DCA 1984).

Before this Court, the appellant, FPL, argued that a negligence claim based on traditional concepts of duty, causation, and foreseeability was the appropriate vehicle to resolve the dispute between the parties and that tort law imposed a duty on Westinghouse to avoid harming FPL. In response, Westinghouse asserted that the trial court's view of the case was supported by the majority of decisions throughout the country which had considered the question of whether recovery in tort for purely economic damages is available when there is no personal injury or damage to other property. The plaintiff in FPL thus relied upon the analysis employed in such cases as A. R. Moyer, Drexel Properties, and Audlane Lumber, while the defendant relied upon the three products liability cases of GAF, Cedars, and Monsanto. This Court ultimately sided with the defendant Westinghouse, approved of and ruled consistent with the three prior Florida products liability cases, and held that "contract principles are more appropriate than tort principles for resolving economic loss claims." Id. at 901.

In discussing the reasoning behind the majority view it was adopting, this Court in FPL quoted from the opinion of Justice Trainor in Seely v. White Motor Co., 63 Cal.2d 9, 45 Cal. Rep. 17, 403 P.2d 145 (1965):

> 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. He 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 liable for the level of performance of his products in the consumer's business **unless he agrees** that the product was defined to meet the consumer's demands.

FPL, 501 So.2d at 900-1, quoting from Seely, 403 P.2d at 151 (citations omitted).

In reaching its decision in FPL, this Court also found persuasive the just-issued decision of the United States Supreme Court in East River Steam Ship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). In that case, a shipbuilder contracted with the defendant to design, manufacture and supervise the installation of turbines that would be the main propulsion units for four oil-transporting supertankers which were being constructed for a third party. After the supertankers were completed, one of them was chartered by plaintiff. When the ships were subsequently put into service, the turbines on all four ships malfunctioned due to design and manufacturing defects in the first-stage steam reversing ring. The defective rings disintegrated and caused substantial damage to the turbine propulsion units as a whole.

Suit was ultimately filed by the plaintiff/ship charterer against the manufacturer of the defective ring component parts which damaged the turbine propulsion units. The causes of action were based upon tort theories and sought recovery for the cost of repairing the ship and for income lost while the ship was out of service. Summary judgment was entered in favor of the manufacturer, which precipitated appeals that ultimately worked their way to the United States Supreme Court.

The Supreme Court canvassed the various approaches which the courts throughout this country had taken to the issue presented. Under the "minority" approach, a manufacturer of a defective product could be held liable in tort for mere economic loss. Under the "intermediate" approach, a manufacturer of a defective product could be held liable in tort for a mere economic

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loss based upon the value of the product itself or the cost of removing, repairing or replacing the product if the product loss occurred during a sudden calamitous event or if the product was shown to present an imminent, although unrealized, risk of causing bodily harm.

In a unanimous decision, the East River court ultimately rejected both the "minority" and "intermediate" approaches in favor of the "majority" approach, and squarely held that a product manufacturer "owed no duty under a products-liability theory based on negligence to avoid causing purely economic loss." In declining to follow either the "minority" or "intermediate" positions, Justice Blackmun stated:

> We find the intermediate and minority land based positions unsatisfactory. The intermediate positions which essentially turn on the degree of risk are too indeterminent to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, **the resulting loss** due to repair costs, decreased value, and lost profits **is essentially the failure of the purchaser to receive the benefit of its bargain** -- traditionally the core concern of contract law.
>
> We also decline to adopt the minority land based view ... Such cases raise legitimate questions about the theories behind restricting products liability, but we believe that the countervailing arguments are more powerful. The minority view fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages. [East River, 476 U.S. at 870-71. (citations omitted)].

In aligning itself with East River and the majority approach, this Court noted in FPL that the "policy adopted by the majority of courts encourages parties to negotiate economic risk through warranty provisions and price." This Court also felt that the minority view's imposition of a duty of care to prevent mere economic harm resulted in a situation where "a manufacturer faced with this kind of liability exposure must raise prices on every contract to cover the enhanced risk." FPL, 510 So.2d at 901. This Court pointed out that "the economic loss rule approved in this opinion is not a new principle of law in Florida," and it specifically discussed and approved of the decisions reached in Monsanto, GAF, and Cedars of Lebanon.

This Court aptly realized that by siding with the East River/majority view, it would be furthering the public interest:

> We agree and find no reason to intrude into the party's allocation of risk by imposing a tort duty and corresponding cost burden on the public. We hold contract principles more appropriate than tort principles for resolving economic loss without any accompanying physical injury or property damage. The lack of a tort remedy does not mean that the purchaser is unable to protect himself from loss. We note that the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view. Further, the purchaser, particularly in a large commercial transaction like the instant case, can protect his interest by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making. [FPL, 510 So.2d at 902].

The First District subsequently applied the economic loss rule in its decision in American Universal Insurance Group v. General Motors Corp., 578 So.2d 451 (Fla. 1st DCA 1991). That

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case involved review of a final order dismissing a suit against General Motors Corp. brought by a subrogated insurer seeking damages under theories of negligence and strict products liability for economic losses sustained by an insured when the engine on his commercial fishing vessel was destroyed by a fire alleged to have originated with a defective oil pump manufactured by General Motors. In affirming the trial court's dismissal of the complaint, the First District relied upon this Court's decision in FPL, as well as upon decisions from various other states which had applied the majority rule espoused in East River.

In American Universal the First District held that since General Motors' replacement oil pump was an integral, component part of the entire engine, the destruction of that engine when the pump malfunctioned did not constitute the type of "damage to other property" which would support a negligence or strict products liability claim for economic losses. The court properly perceived the claim as being one for breach of warranty resulting in economic losses only, thus relegating the purchaser to his UCC remedies against the direct seller of the allegedly defective product, an entity which the plaintiff had chosen not to sue.

The continuing vitality of the economic loss doctrine in Florida was most recently soundly reaffirmed in this Court's 1993 decision in Casa Clara and its 1995 decision in Prevost. In sum, a review of the Florida products liability decisions which have dealt with the economic loss rule discloses a unanimity of result (except Jarmco) -- no recovery has been permitted in tort for the recovery of economic losses alone. These decisions are all grounded in the rule that a manufacturer simply does not owe a duty to remote third parties to protect their economic

interests, "unless the manufacturer has agreed to." When the manufacturer has "agreed to", whether by pre-purchase representations of fact or by contract, then each party is relegated to the contractual and warranty remedies available under Florida law.

In the face of this unwavering line of decisions, Petitioner still suggests that its claim falls outside the economic loss rule as applied in Florida, and also argues that if it does not, then the law should be changed by this Court so as to permit it to pursue the Respondent in tort. This Court should reject the Petitioner's attempt to muddy the waters in this extremely important area of law, particularly when the creation of any of the ad hoc exceptions proposed by Petitioner would simply invite an uncontrolled inertia for the creation of additional ad hoc exceptions in future cases. On behalf of product manufacturers and sellers, we submit that this result would only serve to undermine and thwart the laudatory purposes of the Uniform Commercial Code, which are to simplify, clarify, modernize and make uniform the law governing commercial transactions.

IV.

WHERE THE ALLEGED FRAUDULENT CONDUCT OR FALSE REPRESENTATIONS CONCERN THE CHARACTER, QUALITY OR PERFORMANCE OF THE GOODS SOLD, THEN THE ECONOMIC LOSS RULE APPLIES, AND THE PURCHASER'S REMEDY LIES IN BREACH OF CONTRACT OR WARRANTY.

(A)
Existing Common Law and UCC Warranty Law Provide Adequate Protection to Product Purchasers

As should be clear by now, the foundation for any across-the-board decision in favor of

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the various "purchasers" in the presently pending group of economic loss rule cases would require this Court to recede from its decisions in FPL, AFM, Casa Clara, and Prevost, all of which specifically held that "contract principles [are] more appropriate than tort principles for recovering economic loss without accompanying physical injury or property damage." Prevost, 660 So.2d at 630. With respect to "goods" or products subject to the UCC (the question presented only in the Jarmco case), such an across-the-board ruling would explicitly recognize and impose on product suppliers a potentially limitless liability founded in tort principles to protect the economic interests of third party product users or purchasers.[8] Any such decision in this regard is obviously an exercise in judicial policy-making and should be made, if at all, only after weighing all competing interests and public policy and only after considering the practical impact upon litigation. Ultimately, the decision must serve the best interests of society as a whole, and most appropriately should be a decision made by the legislature.

In the products liability arena, the first interests to consider are those of the party who claims to have suffered economic damages due to some deficiency in the character, quality

[8]From a purely analytical standpoint, the various types of "purchasers" involved in the group of "fraud in the inducement" cases before the Court should arguably be treated in the same fashion, since they all have various existing legal protections from economic losses which are based on statute or contract and warranty. See, Casa Clara, 620 So.2d at 1247, discussing the various protections afforded homebuyers by existing statutes and the common law.

Nevertheless, Judge Altenbernd stated in his dissent in Woodson that:

> .... There is an argument that the products liability [economic loss] rule should bar a broad range of tort theories, including fraud. If so, I am inclined to believe that it should apply to a narrowly defined concept of product and only in claims against manufacturers and retailers where warranty theories can provide an adequate remedy. [663 So.2d at 1331].

or performance of the manufacturer or seller's goods -- the third party product user or purchaser. The respondent in the Jarmco case can thus be viewed as advocating the interests of a group composed of all those below the defendant in the distributive chain, which may include wholesale distributors and retailers, as well as initial and secondary purchasers and users. Under the current state of Florida law, all of these parties are provided with adequate common law contract and UCC warranty causes of action upon which to seek redress for any economic losses they may suffer.

All of the parties in the chain of distribution have the opportunity to bargain for and obtain some form of warranty or guaranty to protect against the possibility that the products they are purchasing will not fulfill their expectations or live up to representations made concerning the character, quality or performance of the product. As a practical matter therefore, application of the economic loss doctrine to "fraud in the inducement claims" is an obstacle only to two classes of injured parties: (1) those who fail to bargain for any contract or UCC right to be compensated for economic losses; and (2) those whose contract rights are worthless because the seller or the person with whom they dealt in a contractual setting is insolvent. Because no rule of law can protect the second class while ignoring the first, the real issue is whether this Court should provide for a recovery in tort by those who fail to secure for themselves what they consider to be an adequate remedy in contract/warranty and those who fail to make sure that all of the oral representations made to them concerning product quality or fitness ultimately find their way into the written warranty provided with the product. This Court should not provide

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for such a new remedy. See generally, Barrett, 40 S.C. L. Rev. at 932-42; Note: Economic Loss and Products Liability Jurisprudence, 66 Colum. L. Rev. 917 (1966).

(B)

Florida's Long-Standing "Separate and Independent Tort" Rule

The First, Third, and Fourth districts concluded that a cause of action labelled "fraud in the inducement" is not subject to Florida's economic loss rule because it constitutes an "independent tort". Those courts' conclusion in this regard appears to be unconcerned with whether the underlying facts and economic damages being sought are interwoven with and identical to those supporting the plaintiff's concurrent breach of contract or warranty claim. Such a broad, unconditional rule of law constitutes a departure from this Court's prior precedent.

In AFM this Court concluded that "without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." 515 So.2d at 181-82. The rationale for this rule is that:

> ...[T]ort law and contract law must be held apart in order to foster the reliability of commercial transactions. Where parties have limited liability and allocated risk by agreement, tort remedies should not be allowed to supersede the parties' prior understanding of the consequences of deficient performance. Contractual duties are imposed by agreement between the parties; the scope of those duties, and of liability for their breach, are limited by the agreement. Tort duties are imposed by society, are not limited by the understanding of the parties, and their breach may result in far more extensive remedies.

Leisure Founders, Inc. v. CUC International, Inc., 833 F.Supp. 1562, 1572 (S.D. Fla. 1993) (applying Fla. law).

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With respect to the issue of what constitutes an "independent tort", this Court stated most recently in Prevost that "AFM Corp. reaffirms that there can be no independent tort action for purely economic loss without an accompanying physical injury or other property damage." Prevost, 660 So.2d at 632. This statement of the law is entirely consistent with prior cases from the district courts which hold that fraud or other intentional tort claims could not be pursued when the facts constituting the tort and the damages claimed to have flowed from the tort are identical to and interwoven with the facts and damages giving rise to the claimant's breach of contract claim. See, J. Batten Corp. v. Oakridge Investments 85, Ltd., 546 So.2d 68 (Fla. 5th DCA 1989); John Brown Automation, Inc. v. Nobles, 537 So.2d 618 (Fla. 2d DCA 1988). As explained in Serina v. Albertson's, Inc., 744 F. Supp. 1113 (M.D. Fla. 1990):

> The torts of negligence and fraud are distinct torts with distinct elements. However, there is simply no basis presented or found for disparate treatment of fraud and negligence within "the economic loss rule." Furthermore, the Court finds the holding in Public Service Enterprise Group to be persuasive when the District Court of New Jersey refused to make an exception for fraud in the "economic loss rule" when the facts surrounding the tort claim are interwoven with the facts surrounding the breach of contract claim. Id. at 1118.

See also, Hoseline, Inc. v. U.S.A. Diversified Products, Inc., 40 F.3d 1198 (11th Cir. 1994) (applying Florida's economic loss rule to preclude purchaser from circumventing limited contract remedies by pleading a cause of action in fraud); Keys Jeep Eagle, Inc. v. Chrysler Corp., 897 F.Supp. 1437 (S.D. Fla. 1995) (applying Florida's economic loss rule to preclude a jeep dealer from circumventing contract remedy by pleading a cause of action in fraud); In Re Ford Motor

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Co. Bronco II Products Liability Litigation, 1995 U.S. Dist. LEXIS 12398, *49-51 (E.D. La. 1995) (applying Florida's economic loss rule to preclude purchasers of Bronco's from circumventing limited contract remedies available for vehicle defects, which had caused no personal injuries, by pleading a cause of action in fraud).

The recent opinion of the Michigan appellate court in Huron Tool and Engineering Co. v. Wulffenstein, 209 Mich. App. 365, 532 N.W.2d 541 (Mich. App. 1995), contains the most comprehensive and well-reasoned discussion of the viability of fraud in the inducement claims in the context of the economic loss rule and the UCC. In most respects, Michigan's economic loss rule is consistent with Florida law, although it is more liberal in one key respect - unlike Casa Clara and Prevost, Michigan does not apply the economic loss rule in situations involving a lack of privity between the plaintiff and the defendant. Nevertheless, since we believe the approach taken by the Michigan appellate court in Huron is analytically sound, we beg the Court's indulgence in quoting the pertinent portions of the opinion which we believe demonstrates the fundamental deficiency in the superficial approach taken by the First, Third, and Fourth Districts in deciding the issue posed:

> .... Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely -- which normally would constitute grounds for invoking the economic loss doctrine -- but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. In contrast, where the only **misrepresentation** by the dishonest party concerns the **quality or character of the goods sold**, the other party is still free to negotiate warranty and other terms to account for possible defects in the goods.

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* * *

> Plaintiff asserts that the UCC explicitly preserves its right to maintain a common-law fraud action independent of its contractual claims. .... Plaintiff's position, however, only begs the question before us now. The provision cited by plaintiff merely keeps intact those areas of the common law not superceded by specific provisions of the UCC. The body of common law sought to be preserved in this provision is the same body of law in which the economic doctrine arose. .... Thus, the issue remains whether, even assuming that the law of fraud remains unchanged, plaintiff may pursue a fraud claim under the economic loss doctrine in light of its contractual remedies. We hold that plaintiff may only pursue a claim for fraud in the inducement **extraneous** to the alleged breach of contract. ....

* * *

> Having determined the proper analytical framework for evaluating plaintiff's fraud claim, we now turn to the facts of this case. .... The **fraudulent representations** alleged by plaintiff **concern the quality and characteristics of the software system sold** by the defendants. These representations are indistinguishable from the terms of the contract and warranty that plaintiff alleges were breached. Plaintiff fails to allege any **wrongdoing** by the defendants **independent** of defendants' **breach** of contract and **warranty**. Because plaintiff's allegations of fraud are not extraneous to the contractual dispute, plaintiff is restricted to its contractual remedies under the UCC. The circuit court's dismissal of plaintiff's fraud claim was proper. Id. at 373-75.

Applying this analytical framework to the cases before this Court it becomes readily apparent that most, if not all, fraud in the inducement claims would be barred in the products liability arena. Specifically, if the defendant made false representations to the plaintiff concerning the characteristics, qualities or performance of the product being offered for sale, then those representations would give rise to enforceable express warranties under the UCC, with the scope and extent of the defendant's liability for any resulting economic damages being

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governed by the parties' contract and the UCC. Since the purchaser therefore has available contract/warranty remedies, the economic loss rule unquestionably applies to bar any so-called "separate or independent" tort claim based on fraud. The policies underpinning this Court's rulings in FPL, AFM, Casa Clara, and Prevost compel this result.

CONCLUSION

Based on the reasoning and citations of authority set forth above, the Masonite Corporation respectfully submits that the decision of the Second District in the Woodson case must be approved, and the conflicting decisions of the First, Third and Fourth districts in the other "fraud in the inducement" cases presently pending before this Court must be quashed.

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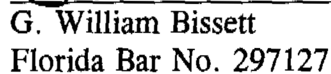
By: 
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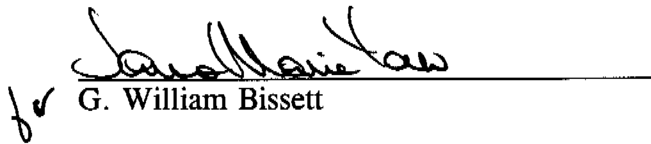
CASE NO. 87,057

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the individuals identified on the attached Service List, this 14th day of May, 1996.



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