IN THE SUPREME COURT OF FLORIDA

KIRK A. WOODSON,

Petitioner,

Case No. 87,057

vs.

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

Respondents.
_____/

**ON CERTIFIED QUESTION FROM
THE SECOND DISTRICT COURT OF APPEAL**

BRIEF OF AMICUS CURIAE

Florida Home Builders Association

ROBERT M. RHODES, ESQUIRE
Florida Bar No. 183580
Steel Hector & Davis
215 South Monroe St., Suite 601
Tallahassee, FL 32301

TERRY S. BIENSTOCK, P.A.
Florida Bar No. 259160
JAIME A. BIANCHI, ESQUIRE
Florida Bar No. 908533
Bienstock & Clark
First Union Financial Center
200 S. Biscayne Boulevard, Suite 3160
Miami, FL 33131-2367

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTORY AUTHORITY

STATEMENT OF THE CASE

The Florida Home Builders Association (the "Association") adopts the Statement of the Case set forth in the Answer Brief of the Respondents, MacLean Realty, Inc. ("MacLean Realty") and Wilma Martin.

The Second District Court of Appeal in Woodson v. Martin[1] certified the following question to this Court:

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

STATEMENT OF THE FACTS

The Association adopts the Statement of the Facts set forth in the Answer Brief of the Respondents, MacLean Realty and Wilma Martin. But certain pertinent facts bear repeating.

First, the Respondents, MacLean Realty and Wilma Martin, were not parties to the purchase contract between the Petitioner, the buyer, and the sellers of the home.

Second, the Respondents represented the sellers in the home sale and were not in privity with the Petitioner.

Third, the purchase contract contained provisions expressly warranting the condition of the home. In the first provision, paragraph N, the sellers warranted that there were no visible signs of water damage. In paragraph W, the second provision pertaining to the condition of the home, the sellers warranted that they did not know

---

[1] 663 So. 2d 1327 (Fla. 2d DCA 1995).

of any facts which would materially affect the value of the home which were not readily observable by the Petitioner, or which had not been disclosed. The purchase contract also contained a merger clause, paragraph Z, which provided that:

> no past or present agreements or representations shall be binding upon the [b]uyer or the [s]eller[s] unless included in this Contract. No modification to the Contract shall be valid or binding upon the parties unless in writing and executed by the party or parties intended to be bound by it.

Fourth, the Petitioner was not a hapless purchaser. He retained his own experts to help him buy the home, and these individuals guided him throughout the transaction. He was first represented by his own broker in the selection of the home and in negotiating its purchase. He then had his own counsel at the closing, so presumably the legal implication of the purchase contract was fully explained to him by his lawyer.

Fifth, the Petitioner does not claim that he suffered personal injury or damage to property, only that a misrepresentation was made in the course of a business transaction.

SUMMARY OF ARGUMENT

In affirming the District Court, this Court would make it clear that offending conduct contemplated and addressed by a contract will not give rise to a tort action. Since 1987, Florida has espoused the Economic Loss Rule which provides that a party who suffers economic damages arising from another's failure to perform his contractual obligations is limited to contractual remedies, and may not seek tort relief.

To escape the application of this rule, the Petitioner casts his claim as

"fraudulent inducement," even though the misrepresentations, which allegedly induced him to buy the home, were found in the purchase contract. The breach of a contractual warranty gives rise to a claim for breach of contract against the seller, and not one against the seller's agent for the distinguishable and independent tort of fraudulent inducement. As such, the Petitioner here is limited to his contractual remedies and should not be allowed to avoid the application of the Economic Loss Rule by claiming fraudulent inducement.

In reply, the Petitioner argues that, if the District Court's opinion were upheld, unscrupulous brokers would be given a green light or a "safe harbor" to commit fraud on unsuspecting real estate purchasers. This position ignores the other legal remedies available to aggrieved parties. First, the seller would be responsible to any misled buyer for any false representations made by the broker while performing his duties. Second, the broker would be liable to any seller for any unauthorized false statement regarding the property. Third, the broker could lose his license for any violation of Chapter 475, Florida Statutes, which regulates the real estate brokerage business. And lastly, any injured buyer could have a private right of action against the broker for any violation of Chapter 475.

Next, the Petitioner argues that the District Court's opinion conflicts with this Court's ruling in Johnson v. Davis.[2] This contention is also incorrect. The purchase contract contained the disclosure mandated by Johnson. If that disclosure provision were breached, the Economic Loss Rule would bar Petitioner's claim for economic

---

[2] 480 So. 2d 625 (Fla. 1985).

damages sounding in tort. Otherwise, this Court's ruling that tort remedies are not available when solely economic damages are suffered, in Casa Clara Condominium Ass'n v. Charley Toppino & Sons,[3] would be eviscerated.

ARGUMENT

A. The Economic Loss Rule Will Bar Claims For Fraudulent Inducement If The Alleged Misrepresentations Are Found In The Contract.

Florida has long recognized that a party may not seek a tort remedy for economic damages arising from the other party's failure to perform his contractual obligations.[4] This doctrine -- the Economic Loss Rule -- is grounded in the theory that, when a claimant seeks economic damages, contract law rather than tort law is best able to deal with any failed economic expectations.[5] The Economic Loss Rule acknowledges that the purposes behind contract and tort law are totally different. This is because the "basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault ... or to one who is better able to bear the loss and prevent its occurrence."[6] Meanwhile, as this Court stated in Casa Clara, "[c]ontractual duties, on the other hand, come from society's interest in the performance of promises."[7] The nature of the injury will dictate whether tort or

---

[3] 620 So. 2d 1244 (Fla. 1993).

[4] Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987).

[5] Casa Clara, 620 So. 2d at 1246-47.

[6] Id. at 1246.

[7] Id. at 1247.

contract law will apply. If only economic harm is suffered, "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 contractual remedies.'"[8] This Court concluded, in Casa Clara, that "contract principles [are] more appropriate than tort principles for [the] recovering [of] economic loss[es] without an accompanying physical injury or property damage."[9] Thus, if a contract limits liability through bargaining, risk acceptance, and compensation, unless there is some conduct resulting in personal injury or other property damage, there can be no independent tort flowing from a contractual breach which would justify a tort remedy solely for economic losses.[10] Courts will not "intrude into the parties' allocation of risk by imposing [] tort dut[ies]" on a party engaging in the offending conduct.[11] Instead, the complaining party is limited to his contract remedies, which he freely negotiated and accepted as part of the transaction. Thus, in cases such as the instant one where the injured party freely entered into a contract which included a discussion of the very matter disputed post contract, it should be presumed that such party submitted its potential disputes over that matter to the realm of contract law.

In this case, the Petitioner is requesting that this Court disregard the economic nature of his damages and conclude that, because he casts his breach of contract

---

[8] Id. (citation omitted).

[9] Id. (citation omitted).

[10] See id.

[11] Florida Power & Light Co., 510 So. 2d at 902.

claim as "fraudulent inducement," the Economic Loss Rule does not apply, even though the offending statements -- that are the subject of the alleged misrepresentation -- were found in the purchase contract. But, a party's failure to perform his obligations under a contract gives rise to a breach of contract claim and not one for tort.[12] Florida has long rejected claims for tort remedies, such as punitive damages, arising from a party's failure to perform his contractual obligations,[13] even when the claim is cast as "fraudulent inducement."[14] Moreover, this Court held in Lewis v. Guthartz[15] that, unless the offending conduct gives rise to a distinguishable and independent tort, punitive damages, and other tort remedies, are not recoverable for a breach of contract, even if the non-performing party "flagrantly, unjustifiably and oppressively breaches the contract."[16] In Lewis,

---

[12] Leisure Founders, Inc. v. CUC Int'l, 833 F. Supp. 1562, 1572 (S.D. Fla. 1993).

[13] Serina v. Albertson's, Inc., 744 F. Supp. 1113, 1115-16 (M.D. Fla. 1990); Government Personnel Services v. Government Personnel Mut. Life Ins. Co., 759 F. Supp. 792, 793 (M.D. Fla. 1991), aff'd, 986 F.2d 506 (11th Cir.), and aff'd, 986 F.2d 507 (11th Cir. 1993).

[14] J. Batten Corp. v. Oakridge Investments 85, Ltd., 546 So. 2d 68, 69 (Fla. 5th DCA 1989)(rejecting the claimant's contention that it could be fraudulently induced into completing its contractual obligations based on the other party's representations that it would pay the outstanding amounts); John Brown Automation, Inc. v. Nobles, 537 So. 2d 614, 617 (Fla. 2d DCA 1988), review denied, 547 So. 2d 1210 (Fla. 1989); Saunders Leasing System v. Gulf Cent. Distribution Ctr., 513 So. 2d 1303, 1306 (Fla. 2d DCA 1987), review denied, 520 So. 2d 584 (Fla. 1988); contra, Century Properties v. Machtinger, 448 So. 2d 570, 572 (Fla. 2d DCA 1984)("[A] promise may be a basis for fraud where there is evidence the promisor had a specific intent not to perform at the time the promise was made.").

[15] 428 So. 2d 222 (Fla. 1982).

[16] Id. at 223.

the offending landlord had not only breached the rental agreements with the tenants, but had violated applicable federal housing regulations and had been convicted for knowingly making a false representation to a federal agency.[17] This Court held that the claim for punitive damages was not proper for two reasons.[18] First, it did not want to "introduce uncertainty and confusion into business transactions," and second, this Court concluded that "compensatory damages as substituted performance are an adequate remedy for an aggrieved party to a breached contract."[19] In other words, this Court established the sound principle that, when a claimant seeks economic damages, he is generally limited to his contractual remedies, which will adequately compensate him for the other party's non-performance of his contractual obligations.

Following this Court's lead, other Florida courts have similarly refused to award punitive damages for breaches of contracts. For instance, in Lake Placid Holding Co. v. Paparone,[20] the Second District Court of Appeal reversed a grant of punitive damages awarded to a claimant-broker arising from the defendant-seller's refusal to pay a real estate commission.[21] In concluding that punitive damages were not available for the breach of the commission agreement, the Lake Placid Holding Co. court reasoned, like this Court in Lewis, that "even a 'flagrant breach of contract' will

---

[17] Id.

[18] Id.

[19] Id.

[20] 508 So. 2d 372 (Fla. 2d DCA), review denied, 515 So. 2d 230 (Fla. 1987).

[21] Id. at 376.

not support punitive damages."[22] Clearly, Florida has adopted the principle that the intent of the breaching party rarely, if ever, plays a role in contract claims.[23] Instead, for a tort claim to arise from a breach of contract, the offending acts must establish a distinguishable and independent tort.[24]

In this case, the alleged offending conduct is not a distinguishable and independent tort. Rather, the Petitioner is plainly seeking nothing more than a tort remedy for what is, at most, an intentional breach of contract by the sellers. Here, the subject of the pre-contractual misrepresentations, the condition of the home, is found on the face of the agreement. The parties negotiated these items, and incorporated the costs and risks associated with making the representations, into the purchase price. This case is therefore markedly different from the situation where one of the parties prevented the other from freely negotiating the risks associated with agreement. The Economic Loss Rule should bar claims for fraudulent inducement were there is an objective indication, such as a written provision, that the parties actively negotiated a pre-contractual representation and the cost, and risk, of making that representation were incorporated into the parties' agreement.

---

[22] Id.

[23] See, e.g., American Int'l Land Corp. v. Hanna, 323 So. 2d 567, 569 (Fla. 1975) ("[A] breach of contract cannot be converted into a tort merely by allegations of malice.").

[24] Lake Placid Holding Co., 508 So. 2d at 378; Lewis, 428 So. 2d at 223.

Moreover, in real estate transactions, parties actively negotiate representations regarding the condition of the property at issue.[25] This case is no different. The purchase contract contains warranties directly bearing on the subject matter of the alleged pre-contractual misrepresentations. Specifically, the Petitioner complains that, when Respondent Martin showed the Petitioner the house, she orally represented that it was a "brand new, first rate brick construction,"[26] and that it did not contain any leaks.[27] The Petitioner claims that these representations are actionable fraud because the house allegedly contained water damage,[28] structural damage,[29] and defective masonry.[30] He further maintains that Respondent Martin's alleged oral misrepresentations induced him to enter into the home purchase.[31] Petitioner brings his claim predicated on these oral representations despite the fact that the purchase contract itself contained two written representations directly bearing on the home's condition. The first, Paragraph N, provided that there were no visible signs of leaks or water damage. The second, Paragraph W, warranted that "there [were] no facts

---

[25] Roberts v. Rivera, 458 So. 2d 786, 788 (Fla. 5th DCA 1984)(rejecting a claim for fraudulent inducement against the seller regarding the soil condition of the property where the parties expressly excluded such representations from the sales contract).

[26] Petitioner's Initial Brief at 2.

[27] Id. at 4.

[28] Id. at 7-8.

[29] Id. at 8.

[30] Id. at 8-9.

[31] Id. at 9.

known to [s]eller[s] materially affecting the value of the [home] which [were] not readily observable by [Petitioner] or which ha[d] not been disclosed to [Petitioner]." The Petitioner claims that the sellers and the Respondents knew that the representations regarding the house's condition were false, because water damage had been repaired several times by the sellers.[32] Moreover, the Petitioner claims that the father of one of the sellers, at the closing, requested that the sellers disclose the problems with the home, but his request was ignored.[33] Presumably, if the Petitioner's version of the facts bears out, his claim against the sellers for breach of the purchase contract, which is still currently pending before the trial court below, will successfully bring him the relief that he is seeking: the rescission of the home purchase.[34] The simple fact that the Petitioner's breach of contract claim survived a motion for summary judgment underscores the nature of the issue here. When all is said and done, the Petitioner's claim against the Respondents is for nothing more than breach of representations found in the purchase contract, which is certainly a claim for breach of contract against the sellers, but not one for fraudulent inducement against the Respondents.

---

[32] Id. at 7.

[33] Id.

[34] See, e.g., Niesz v. Gehris, 418 So. 2d 445, 448 (Fla. 5th DCA 1982)(indicating that where the seller fails to perform a material and substantial provision of the contract, the buyer can disaffirm the contract and sue to rescind it), petition for review denied, 427 So. 2d 736 (Fla. 1983). In Count IV of the Amended Complaint, Petitioner is, in fact, seeking rescission of the home purchase.

The Petitioner attempts to escape this obvious conclusion by maintaining that his claim against the Respondents, as the sellers' agents, is clearly different from any possible claim that he may have against the sellers for breach of contract.[35] Distilled to its essence, Petitioner claims that, without his fraudulent inducement claim against the Respondents, he has no other claim against them.[36] This Court, however, already addressed this very same argument last year in Airport Rent-A-Car v. Prevost Car.[37] In that case, a disappointed buyer sought to bring a claim for economic losses against a manufacturer of defective buses.[38] The buyer had purchased the buses from a third party, and did not have a contract with the manufacturer. In rejecting the buyer's "no alternative theory of recovery" argument, this Court stated that there was "no reason to burden society as a whole with the losses of one who has failed to bargain for adequate contractual remedies."[39] The rule should be no different here.

Moreover, it is questionable if Petitioner could bring any action against the Respondents for oral representations regarding sale of the home. After all, the Statute of Frauds provides that "[n]o action shall be brought ... upon any contract for the sale of lands ... unless the agreement or promise upon which such action [is based] ...

---

[35] Petitioner's Initial Brief at 29-35.

[36] See id. at 29-31.

[37] 660 So. 2d 628, 631 (Fla. 1995).

[38] Id. at 629.

[39] Id. at 630.

shall be in writing and signed by the party to be charged[.]"[40] The Petitioner's allegations regarding the alleged misrepresentations of the condition of the home fall within the Statute of Frauds because these allegations all relate to his purchase of real estate. Oral representations regarding the conveyance of real estate, even if they are the basis of a claim for a fraudulent inducement, do not circumvent the Statute of Frauds.[41]

In addition to being barred by the Statute of Frauds, the alleged oral representations should not be charged against the Respondents because the purchase contract itself contained a merger clause, paragraph Z, which advised all parties that all representations regarding the home had to be in writing. The Petitioner was aware of the effect of that paragraph because, after all, he was represented by his own broker and counsel throughout the transaction.

The Petitioner also argues that, if this Court were to affirm the District Court's opinion, it would effectively eliminate the tort of fraudulent inducement. But that argument ignores the reality that conduct not contemplated nor addressed by the contract (i.e., extra-contractual representations or behavior) could still give rise to

---

[40] § 725.01, Fla. Stat. (1988).

[41] Canell v. Arcola Housing Corp., 65 So. 2d 849, 851 (Fla. 1953); Ashland Oil v. Pickard, 269 So. 2d 714, 721 (Fla. 3d DCA 1972), cert. denied, 285 So. 2d 18 (Fla. 1973); Khawly v. Reboul, 488 So. 2d 856, 857 n.1 (Fla. 3d DCA 1986); Dewachter v. Scott, 657 So. 2d 962, 963 (Fla. 4th DCA 1995); but see Bird Lakes Dev. Corp. v. Meruelo, 626 So. 2d 234, 237 (Fla. 3d DCA 1993)(finding that a developer's oral promise to build infrastructure is not barred by the statute of frauds because the promise did not convey a property interest), review denied, 637 So. 2d 233 (Fla. 1994).

claims for fraudulent inducement. One such instance is where the parties are unable to freely negotiate the contract because of the actions of one of the parties. Fraudulent inducement would remain a viable claim, unaffected by the Economic Loss Rule. For example, in McCoy v. Love,[42] this Court held that a deed given by an illiterate person would be voidable if the grantor were intentionally misinformed by the grantee as to the nature of the conveyance.[43] Clearly, in such a circumstance where the contract, or deed in that case, did not memorialize the transaction, the Economic Loss Rule will not bar the defrauded party from rescinding the transaction based on misrepresentations made by the other party.

Accordingly, in affirming the District Court, this Court would make it clear that offending conduct contemplated and expressly addressed by a contract will not give rise to a tort action. Otherwise, a flood of claimants will be able to circumvent the application of the Economic Loss Rule by merely restating their claims for negligent performance of contract as ones for fraudulent inducement. For instance, in John Brown Automation, Inc. v. Nobles,[44] the claimant-buyer sought economic damages for the seller's "negligent misrepresentation" regarding the availability of certain

---

[42] 382 So. 2d 647 (Fla. 1979).

[43] Id. at 649. Another example of extra-contractual behavior that could result in a fraudulent inducement claim would be where one contracting party, through bribery or duress, caused an agent of another contracting party to sign a contract on its principal's behalf which either was unauthorized or failed to memorialize the desired transaction.

[44] 537 So. 2d 614 (Fla. 2d DCA 1988), review denied, 547 So. 2d 1210 (Fla. 1989).

parts.[45] He later changed the name of his claim to "fraud in the inducement" as a means of avoiding reversal.[46]

The problem of allowing fraud claims for failed economic expectations is also brought into sharp relief in L. Luria & Son, Inc. v. Honeywell, Inc.[47] In L. Luria & Son, the claimant-buyer brought an action against the seller of a malfunctioning alarm system claiming, in part, breach of contract and fraud.[48] The claimant sought damages arising from the seller's breach of a collateral oral contract.[49] The breach of contract claim was dismissed because the trial court enforced the exculpatory provision found in a second written contract, but the court held that the fraud claim for the malfunctioning alarm system was actionable and not barred by the contract's language.[50] The claimant's fraud and breach of contract claim arose from identical facts, a non-functioning alarm system, and the damages were identical as well: economic losses related to the subject matter of the transaction. Yet, while the L. Luria & Son court barred the breach of contract claim because the parties had negotiated a limitation of loss, the claimant, by alleging fraud, was able to circumvent

---

[45] Id. at 617.

[46] Id.

[47] 460 So. 2d 521 (Fla. 4th DCA 1984).

[48] Id.

[49] Id. at 522.

[50] Id. at 523.

that contractual provision.[51] The Economic Loss Rule is designed to prevent this type of avoidance of negotiated allocations of risks and liabilities that are contained within contractual provisions. Therefore, in affirming the District Court's opinion, this Court would not sanction the cause-of-action "shell game" of the claimants in John Brown Automation and L. Luria & Son. Clearly, claims for economic damages associated with the performance of contracts are, and should remain, breach of contract claims.

Accordingly, because the Petitioner's claim, although titled as a distinguishable independent tort, is nothing more than a claim for breach of contract, the Economic Loss Rule bars his claim.

B. Affirming The District Court's Opinion Below Will Not Give Free Rein To Rogue Brokers To Defraud Unsuspecting Real Estate Buyers.

The Petitioner maintains that, if the District Court's opinion were upheld, unscrupulous brokers would be given a green light or a "safe harbor" to commit fraud on unsuspecting real estate purchasers.[52] In adopting that position, the Petitioner ignores the basic factual premise in this case: the alleged pre-contractual misrepresentations are found on the face of the purchase contract. In other words, the Petitioner here freely entered into a contractual relationship which expressly allocated the disputed risks between himself and the sellers, and at no time did

---

[51] Id.

[52] Petitioner's Initial Brief at 25-35.

Petitioner seek to make the Respondents parties to the contract and thereby expose them to the liabilities undertaken by Respondents' principals, the sellers.

Nevertheless, the Petitioner maintains that the Respondents would escape liability if the representations regarding the status of the home were incorrect.[53] This contention misses the point of the agent-principal relationship that exists between a broker and a seller. The seller is the party who contracted with the buyer. If the representations in a purchase agreement were incorrect, the seller is the one who is responsible for the buyer's failed expectations, not the seller's broker, who merely served as a conduit for the information reflected in the purchase contract and did not join in the seller's risk exposure. This makes sense because, while the broker may be more knowledgeable about the overall marketplace, the seller is the one who best knows the attributes and condition of his property. Accordingly, the broker must invariably rely on the representations made to him by the seller regarding the property. Otherwise, the broker would have to independently investigate every property that he lists for sale. That obligation is found nowhere in Florida law. Nor should it be because it would impose additional transaction costs on the sale of real estate, and discourage buyers from undertaking reasonable investigations on their own behalf. Such a requirement would also be unnecessary, because the seller, as the principal, is responsible for the broker's representations to third parties.[54] The general rule in

---

[53] Id. at 25-26.

[54] Held v. Trafford Realty Co., 414 So. 2d 631, 633 (Fla. 5th DCA 1982); Martha A. Gottfried, Inc. v. Amster, 511 So. 2d 595, 598 (Fla. 4th DCA 1987)(quoting the Restatement (Second) of Agency § 329 for the proposition that "[a] person who

Florida is that "statements made by an agent within the scope and course of his employment may be attributable to the principal, even though the agent may not be specifically directed to make that statement."[55] In sum, buyers, who were misinformed regarding the condition of the property, would have recourse for any misstatements made by the broker against the party who would ultimately benefit from the misinformation, the sellers.

Nor would the broker escape liability for any unauthorized false statement regarding the property. The broker is liable to the seller for any losses which the seller suffers due to the broker's failure to perform as instructed by the seller.[56] Thus, the broker too would have to make an injured seller whole for any false or misleading representations made regarding a property.

---

purports to make a contract, conveyance or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized."); Fraioli v. Bobby Byrd Real Estate, 630 So. 2d 1131, 1132 (Fla. 2d DCA 1993)(finding that a broker is responsible for the representations of its agent, and "[w]hen an agent acts for his principal, and the principal accepts the fruits of the agent's efforts, the principal must be deemed to have adopted the methods employed, and he may not, even though innocent, receive the benefits and at the same time disclaim the responsibility for the means by which they were acquired." (citations omitted)).

[55] Held, 414 So. 2d at 633.

[56] Oxford Lake Line v. First Nat'l Bank of Pensacola, 40 Fla. 349, 24 So. 480, 483 (Fla. 1898); Certain Lands Upon Which Taxes Are Delinquent v. City of Corondo Beach, 128 Fla. 884, 175 So. 774, 776 (Fla. 1937).

Further, the broker would risk losing his license for any such behavior which runs afoul of the laws governing his conduct.[57] Chapter 475 of the Florida Statutes empowers the Florida Real Estate Commission to regulate the business of real estate brokers and salespersons.[58] If the broker violates any part of Chapter 475, or any regulation promulgated by the Commission, he can be censured, have his license revoked, or be subjected to criminal sanctions.[59] On a related note, such a disgruntled buyer also has a private right of action against the broker for violations of Chapter 475.[60] Here, however, the Petitioner never brought an action against Respondents under any of these provisions. Therefore, the Petitioner's contention that without a claim for fraudulent inducement the Court would be creating a "safe harbor" for fraudulent brokers, is chimerical at best.

C. **The District Court's Opinion Does Not Conflict With *Johnson v. Davis.***

Next, the Petitioner in this case attempts to cast the District Court's opinion as conflicting with this Court's ruling in Johnson v. Davis.[61] In Johnson, this Court charged the sellers of residential real estate, new and used, with the duty of disclosing to the buyer "facts materially affecting the value of the property which are

---

[57] § 475.25, Fla. Stat. (Supp. 1996).

[58] § 475.42.

[59] See id.

[60] Moyant v. Beattie, 561 So. 2d 1319, 1320 (Fla. 4th DCA 1990).

[61] 480 So. 2d 625 (Fla. 1985).

not readily observable and are not known to the buyer[.]"[62] According to Petitioner, the District Court "ignored this Court's precedent in Johnson[] as it applied to real estate agents and effectively made realtors immune to tort actions based on their independent fraud."[63] As with the Petitioner's earlier contentions, this one too misses the mark, and in two important respects.

First, the purchase contract, in paragraph W, contains an express warranty for the type of disclosure mandated by this Court in Johnson. If the seller failed to comply with that warranty, the Petitioner's claim for breach of contract against the seller remained intact. But, the Petitioner maintains that he has an "independent fraud claim" against the Respondents. Yet, if the Court were to accept the Petitioner's contention that a viable fraudulent inducement claim may be brought against the Respondents for representations found in the purchase contract, it would establish the proposition that conduct which would otherwise be a breach of contract against a principal becomes a tort when brought against his agent. This would eviscerate this Court's holding in Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.,[64] that the character of the loss determines the appropriate remedy.[65] Moreover, as recently as last year, in Airport Rent-A-Car v. Prevost,[66] this Court reaffirmed its

---

[62] Id. at 629.

[63] Petitioner's Initial Brief at 25.

[64] 620 So. 2d 1244 (Fla. 1993).

[65] Id. at 1247; see discussion supra text accompanying notes 5-10.

[66] 660 So. 2d 628 (Fla. 1995).

analysis in Casa Clara that the key inquiry in determining if the Economic Loss Rule applies is whether or not "there exists physical injury or other property damage; if not, then remedies in tort generally do not lie."[67] In this case, it is undisputed that the Petitioner is claiming that he suffered purely economic losses (and not physical injury or damage to other property). Clearly, the Petitioner, in light of this Court's holdings in Casa Clara and Airport Rent-A-Car, cannot have tort remedies for his economic losses. Further, a finding that tort remedies are available for economic damages would contravene long-standing Florida law, such as the privity doctrine, which precludes recovery of economic damages outside of a contractual setting.[68]

Second, it is unclear if the Johnson disclosure obligation applies to brokers. Petitioner relies on two cases to support that proposition: Revitz v. Terrell[69] and Rayner v. Wise Realty Co. of Tallahassee.[70] In Revitz, the Third District Court of Appeal cited Rayner for authority in finding that the Johnson disclosure obligation applied to brokers.[71] Although Rayner was decided on whether an "as is" clause will waive a seller's obligation to disclose material adverse facts regarding a property, in dicta it mentioned that the Johnson disclosure might apply to brokers.[72] There is

---

[67] Id. at 631-32.

[68] Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987).

[69] 572 So. 2d 996 (Fla. 3d DCA 1990).

[70] 504 So. 2d 1361 (Fla. 1st DCA 1987).

[71] 572 So. 2d at 998 n.5.

[72] 504 So. 2d at 1364.

another case dealing with this issue, although not cited by Petitioner. The Fifth District, in Torbron v. Campen,[73] also held that the Johnson disclosure obligation applied to brokers.[74] As with Revitz and Rayner, Torbron might be doubtful authority because that court's decision was not based on a broker's failure to give a Johnson disclosure to a prospective buyer. Rather, in Torbron, the seller of commercial property brought an action against his broker for failure to disclose certain zoning regulations which would impede the sale.[75] In addition to being factually distinguishable from this case, the general consensus among the Districts is that the Johnson disclosure does not apply to commercial real estate transactions.[76]

In sum, as the purchase contract in question here incorporated the Johnson disclosure, the District Court's opinion did not conflict with this Court's ruling in Johnson because the Petitioner's claim for material misrepresentations of the house's condition against the sellers remains intact.

---

[73] 579 So. 2d 165 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991).

[74] Id. at 169.

[75] Id. at 170.

[76] See Futura Realty v. Lone Star Bldg. Centers (Eastern), 578 So. 2d 363, 364 (Fla. 3d DCA), review denied, 591 So. 2d 181 (Fla. 1991); Wasser v. Sasoni, 652 So. 2d 411, 412 (Fla. 3d DCA 1995); Green Acres, Inc. v. First Union Nat'l Bank of Florida, 637 So. 2d 363, 364 (Fla. 4th DCA 1994); Mostoufi v. Presto Food Stores, 618 So. 2d 1372, 1377 (Fla. 2d DCA), review denied, 626 So. 2d 207 (Fla. 1993); Haskell Co. v. Lane Co., 612 So. 2d 669, 674 (Fla. 1st DCA), review dismissed, 620 So. 2d 762 (Fla. 1993); but see Henson v. James M. Baker Co., 555 So. 2d 901, 907 (Fla. 1st DCA), review denied, 564 So. 2d 487 (Fla. 1990).

CONCLUSION

For the aforementioned reasons and arguments, the Association respectfully requests that this Court affirm the District Court's opinion in Woodson v. Martin, below.

Respectfully submitted, this 8th day of May, 1996.

STEEL HECTOR & DAVIS
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
Telephone: 904-222-2300
Facsimile: 904-222-8410

and

BIENSTOCK & CLARK
200 S. Biscayne Boulevard
Suite 3160
Miami, Florida 33131-2367
Telephone: 305-373-1100
Facsimile: 305-358-1226

By: TERRY S. BIENSTOCK, P.A.
Fla. Bar No. 259160
JAIME A. BIANCHI
Fla. Bar No. 908533

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Brief Of Amicus Curiae The Florida Home Builders Association** was mailed this 8th day of May, 1996 to the individuals listed below:

Terry S. Bienstock, P.A.

Lisa Berlow-Lehner, Esq.
SZYMONIAK & RIDGE, P.A.
2101 Corporate Blvd., Ste. 415
Boca Raton, FL 33431
Attorneys for Amicus Curiae the Alliance of American Insurers Liberty Mutual Insurance Company

G. WILLIAM BISSET
501 N.E. 1st Avenue
Miami, FL 33132

Louis F. Hubener, Esq.
Charlie McCoy, Esq.
OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050

Jodi L. Corrigan, Esq.
Robert L. Rocke, Esq.
ANNIS, MITCHELL, COCKEY, et al
P.O. Box 3433
Tampa, FL 33601-3433
Attorneys for the Respondents Wilma Martin and MacLean Realty, Inc.

Paul P. Jackson
PAUL P. JACKSON REALTY
14047 Briar Dale Lane
Tampa, FL 33618

JEFFREY N. KRAMER, ESQ.
The Walnut Building
24 West Third Street,
Suite 312
Mansfield, OH 44902
Attorney for the Petitioner
Kirk A. Woodson

Harold D. Oehler, Esq.
MacFARLENE AUSLEY FERGUSON & McMULLEN
Post Office Box 1531
Tampa, FL 33601
Attorneys for the Petitioner
Kirk A. Woodson

Marsha G. Rydberg, Esq.
RYDBERG, GOLDSTEIN & BOLVES
500 East Kennedy Boulevard
Suite 200
Tampa, FL 33602

ROY D. WASSON, ESQ.
Court House Tower, Suite 402
44 W. Flagler Street
Miami, FL 33130
Attorney for Amicus Curiae Academy of Florida Trial Attorney

ARVIDA\96-8441\22207