

0d7

IN THE SUPREME COURT OF THE STATE OF FLORIDA

KIRK A. WOODSON,
Petitioner,

v.

WILMA MARTIN, et al.,
Respondents.

FILED

SID J. WHITE

✓ MAR 19 1996

CASE NO. 87,057

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF
RETIRED PERSONS AND CONSUMER FEDERATION OF
AMERICA IN SUPPORT OF PETITIONER

Question Certified from the Court of Appeal of Florida,
Second District, Case No. 94-00002

Barbara Burch, Esq.
Florida Bar No. 0978670
218 East Commercial Blvd.
Lauderdale by the Sea, FL 33308
Attorney for Amici Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
STATEMENT OF THE FACTS	6
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE ECONOMIC LOSS RULE SHOULD NOT BE APPLIED TO THE INTENTIONAL TORT OF FRAUD	8
A. The Economic Loss Rule Was Established To Protect Interests Created By Contract and to Restrict Negligence and Strict Liability Claims	8
B. The Economic Loss Rule Should Permit Claims for the Independent Tort of Fraud in the Inducement	12
II. PRESERVING A TORT CAUSE OF ACTION FOR INTENTIONAL FRAUD WILL PROVIDE IMPORTANT PROTECTIONS FOR CONSUMERS AND THE MARKETPLACE	16
A. The Deterrent and Compensatory Benefits of Tort Remedies Should Be Available to Victims of Intentional Fraud	16
B. Older Consumers Need Broad Remedies Against the Costly Problem of Fraud	22

**C. High Costs and Inadequate Information Increase
Consumers' Vulnerability to Harm in Real Estate
Transactions 26**

CONCLUSION 28

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

PAGE

CASES

<u>Adobe Bldg. Ctrs., Inc. v. Reynolds</u> , 403 So. 2d 1033 (Fla. 4th DCA 1981), <u>review dismissed</u> , 411 So. 2d 380 (Fla. 1981)	7
<u>AFM v. Southern Bell Tel. & Tel. Co.</u> , 515 So. 2d 180 (Fla. 1987)	9,13
<u>A.R. Moyer v. Graham</u> , 285 So. 2d 397 (Fla. 1973)	7
<u>Burton v. Linotype Co.</u> , 556 So. 2d 1129 (Fla. 3d DCA 1989)	13, 14
<u>Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.</u> , 620 So. 2d 1244 (Fla. 1993)	6, 7, 16, 18
<u>Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.</u> , 406 So. 2d 515 (Fla. 4th DCA 1981), <u>review denied</u> , 417 So. 2d 328 (Fla. 1982)	7
<u>East River S.S. Corp. v. Transamerica Delavel, Inc.</u> , 476 U.S. 858 (1985)	9, 10, 11
<u>Florida Power & Elec. Co. v. Westinghouse Elec. Corp.</u> , 510 So. 2d 899 (Fla. 1987)	8, 9, 10, 11
<u>Kee v. National Reserve Life Ins. Co.</u> , 918 F.2d 1538 (11th Cir. 1990)	14
<u>Latite Roofing Co. v. Urbanek</u> , 528 So. 2d 1381 (Fla. 4th DCA 1988)	7
<u>Leisure Founders, Inc. v. CUC Int'l, Inc.</u> , 833 F. Supp. 1562 (S.D. Fla. 1993)	10, 14

<u>Lewis v. Guthartz</u> , 428 So. 2d 222 (Fla. 1982)	13
<u>Moorman v. National Tank Co.</u> , 435 N.E.2d 433 (Ill. 1982).	15
<u>Navajo Circle, Inc. v. Development Concepts Corp.</u> , 373 So. 2d 689 (Fla. 2d DCA 1979)	7
<u>Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.</u> , 653 So. 2d 412 (Fla. 3d DCA 1995)	8
<u>Parliament Towers Condominium v. Parliament House Realty, Inc.</u> , 377 So. 2d (Fla. 4th DCA 1979)	7
<u>Pulte Home Corp. v. Osrose Wood Preserving, Inc.</u> , 60 F.3d 734 (11th Cir. 1995)	11, 14, 20
<u>Seely v. White Motor Co.</u> , 403 P.2d 145 (Cal. 1965)	11
<u>Simmons v. Owens</u> , 363 So. 2d 142 (Fla. 1st DCA 1978)	7
<u>Soules v. General Motors Corp.</u> , 402 N.E.2d 599 (Ill. 1980)	15
<u>Spring Motors Distrib., Inc. v. Ford Motor Co.</u> , 489 A.2d 660 (N.J. 1985)	19
<u>State Farm Mut. Ins. Co. v. Novotny</u> , 657 So. 2d 1210 (Fla. 5th DCA 1995)	20
<u>Waldinger v. Ashbrook-Simons-Hartley Inc.</u> , 564 F. Supp. 970 (C.D. Ill. 1983), <u>aff'd in part, remanded on other grounds sub nom</u> <u>Waldinger Corp. v. CRS Group Eng'rs, Inc.</u> , 775 F.2d 781 (7th Cir. 1985)	15
<u>Williams Elec. Co. Inc., v. Honeywell, Inc.</u> , 772 F. Supp. 1225 (N.D. Fla. 1991)	10

STATUTES

Fla. Stat. Ann. § 501.2077 (West 1988 and Supp. 1996) 25

OTHER AUTHORITIES

American Association of Retired Persons, A Report on the 1993 Survey of Older Consumer Behavior (1994) 1, 2, 23

American Association of Retired Persons, Buying a Home: What Buyers and Sellers Need to Know About Real Estate Agents (1992) . 5

American Association of Retired Persons, Senior Consumer Alert Buying a Home: What You Should Know (Summer 1994). 5

American Association of Retired Persons, Toward a Just & Caring Society The AARP Public Policy Agenda 1995 (1995) 3

22 Am. Jur. 2d Damages (1988) 17, 21

37 C.J.S. Fraud (1943). 19, 20

Consumer Federation of America and the American Association of Retired Persons, Real Estate Agencies: A Report (Nov. 1994) 5

Consumer Federation of America, Residential Real Estate Agents and Home Sales: An Evaluation (Oct. 1991)4, 27

Consumer Fraud and the Elderly: Easy Prey? Hearing Before the Senate Special Comm. on Aging, 102d Cong., 2d Sess. 3 (1993)22, 23

Federal Bureau of Investigation, U. S. Dep't of Justice Operation Disconnect Press Briefing Material (1993) 24

W. Page Keeton et al., Prosser and Keeton on the Law of Torts (5th ed. 1984)16, 17, 18, 19

Los Angeles Regional Office Staff Report, Federal Trade Commission
Staff Reports The Residential Real Estate Brokerage Industry
(Dec. 1983) 26, 27, 28

Ralph Nader, Keynote Address: Symposium: The Future of Tort
Litigation in California, 29 Santa Clara L. Rev. 504 (Summer
1989) 18

William Prosser, Law of Torts (4th ed. 1971) 9

U. S. Department of Commerce, City and County Data Book 1994
(12th ed. 1994) 24

STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a not-for-profit membership organization of approximately thirty three million people aged fifty and older. More than two million members live in Florida, comprising almost one-half of Florida's population of persons aged fifty and older. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older people; (b) promote independence, dignity and purpose for older people; (c) advance the role and place of older people in society; (d) sponsor research on the physical, psychological, social, economic and other aspects of aging; and (e) represent older people's interests on legal and public policy issues.

As the largest membership organization in the United States serving older people, AARP is greatly concerned about the rampant deception and fraud perpetrated against older people in a broad range of consumer transactions. AARP members and their families and friends are among those Americans victimized by such practices at an estimated annual cost of \$100 billion. American Association of Retired Persons , A Report on the 1993 Survey of Older Consumer Behavior 1

(1994), [hereinafter AARP Older Consumer Behavior], citing figures of the United States Office of Consumer Affairs. Consequently, AARP advocates for consumers' interest, by, among other activities, filing amicus curiae briefs in federal and state courts and publishing numerous consumer education materials.

A recent AARP-sponsored survey of older consumer behavior found that consumers aged 65 and older are particularly vulnerable to fraud and deception because they are "less familiar with basic consumer issues and less suspecting of the existence of deceptive sales practices." Id. at 48. Older consumers suffer greater harm due to the economic consequences of fraud because they have limited opportunities to recoup their losses through future earnings. The economic damage to older consumers also may be increased by their failure to seek redress. AARP's survey reveals that twenty percent of older consumers never have taken any of ten specific consumer complaint actions following a bad buying experience, compared with only eight percent of younger consumers. Id. at 4, 5. Through its long history as a consumer advocate AARP has observed the need for

enhanced protection of consumer rights and vigilant enforcement of laws designed for this purpose.

AARP believes the marketplace should provide consumers with the opportunity to make informed choices based upon complete and accurate information about the goods and services being purchased. The Association supports effective consumer protection at all levels of government to safeguard older consumers against fraud, deception and other unfair practices. AARP supports the availability and use of the full range of enforcement actions, including individual lawsuits, and the availability of appropriate and adequate redress for consumers who are wronged in marketplace transactions. Toward a Just & Caring Society The AARP Public Policy Agenda 1995 at 345. Moreover, AARP opposes changes in legal doctrines and standards that would limit access to the courts, as well as limitations on punitive damages, recognizing that in the product liability area, for example, the threat of such damages serves as an "important economic incentive" for manufacturers to produce safe goods and to remedy discovered defects. Id. at 399.

The Consumer Federation of America (CFA) is a non-profit association of approximately 240 consumer groups, founded in 1968 to advance the consumer interest through advocacy and education. Its combined membership of over 50 million persons includes most national consumer organizations and dozens of state and local consumer education and advocacy groups. Since 1990 one of CFA's high priorities has been to ensure that home buyers and sellers receive good value, and are treated fairly by real estate brokers and agents.

CFA has published studies of brokerage services, disclosures to consumers, and the performance of state real estate regulators. CFA has proposed reforms in residential real estate transactions, including more comprehensive disclosures, greater negotiability of commissions, and increased buyer access to information. These reforms would increase competition and protect consumers in residential real estate transactions and could save consumers at least \$10 billion annually. Consumer Federation of America, Residential Real Estate Agents and Home Sales: An Evaluation 1 (Oct. 1991).

Amici are concerned about the many problems consumers face in real estate matters and have been actively involved in efforts to improve needed disclosures and other protections. In 1994, AARP issued a report based on a survey conducted jointly with CFA examining real estate licensing and regulatory agencies in the fifty states. The report concluded that persistent underfunding of the agencies, and industry domination of agency operations, resulted in inadequate consumer education and the absence of neutral complaint resolution mechanisms. Consumer Federation of America and American Association of Retired Persons, Real Estate Agencies: A Report (Nov. 1994). AARP also has produced publications jointly with the National Association of Attorneys General's Elderly and Consumer Law Subcommittee and CFA discussing important issues for home buyers, particularly those related to disclosures about agency relationships. See, e.g., Senior Consumer Alert Buying a Home: What You Should Know, (Summer 1994); Buying a Home: What Buyers and Sellers Need to Know About Real Estate Agents (1992).

Amici respectfully submit this brief urging the Court to preserve consumers' ability to obtain tort remedies for acts of intentional fraud. Amici believe such remedies are crucial, because of the compensatory value they provide to consumers, and the deterrent power they exert on the marketplace. These functions are particularly important in the residential real estate market because high costs and inadequate information increase consumers' vulnerability to harm.

STATEMENT OF THE FACTS

Amici adopt the Petitioner's statement of the facts.

SUMMARY OF ARGUMENT

In Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., this Court, when asked whether a homeowner can recover in negligence for purely economic losses, "again 'h[e]ld contract principles more appropriate than tort principles for recovering economic loss'" where there was no personal injury or property damage. 620 So. 2d 1244, 1247 (Fla. 1993). This Court disapproved, in whole or in part, of six court of appeals' decisions, because they conflicted with

that ruling, and strictly limited another to its facts.¹ *Id.* at 1248, n. 9. In all but one of those cases, the lower courts had allowed plaintiffs to proceed on negligence theories to recover economic losses; in one, the plaintiff had proceeded on a strict liability theory. None of the affected cases involved a plaintiff alleging an intentional tort, such as fraud in the inducement. Casa Clara, which only decided the appropriateness of a negligence action to recover economic losses, should not be applied broadly to limit plaintiffs' ability to recover economic losses for intentional torts, including fraud in the inducement.

The economic loss rule was intended to restrict negligence and strict liability claims for economic loss where there has not been personal injury or damage to property other than the property which is the subject of the contract. The rule was not meant, and should not be applied, to bar persons harmed by torts independent of contractual

¹ Adobe Bldg Ctrs., Inc. v. Reynolds, 403 So. 2d 1033 (Fla. 4th DCA 1981), review dismissed 411 So. 2d 380 (Fla. 1981); Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So. 2d 515 (Fla. 4th DCA 1981); Latite Roofing Co. v. Urbanek, 528 So. 2d 1381 (Fla. 4th DCA 1988); Parliament Towers Condominium v. Parliament House Realty, Inc., 377 So. 2d 976 (Fla. 4th DCA 1979); Navajo Circle, Inc. v. Development Concepts Corp., 373 So. 2d 689 (Fla. 2d DCA 1979); Simmons v. Owens, 363 So. 2d 142 (Fla. 1st DCA 1978); A.R. Moyer v. Graham, 285 So. 2d 397 (Fla. 1973).

breaches from recovering for the resulting economic loss. Such a bar would be contrary to the economic loss rule's rationale and to decisions of this and other courts. Moreover, barring consumers from bringing an independent claim for fraud in the inducement would prevent recovery of costly losses due to intentional acts, and remove the deterrent effect that such a cause of action provides.

ARGUMENT

I. THE ECONOMIC LOSS RULE SHOULD NOT BE APPLIED TO THE INTENTIONAL TORT OF FRAUD

A. The Economic Loss Rule Was Established To Protect Interests Created By Contract and to Restrict Negligence and Strict Liability Claims

The economic loss doctrine arose out of the privity doctrine, which barred recovery of economic losses outside of contractual relationships. Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987). The doctrine holds that a seller's liability for negligence applies to personal injury and damage to property, but that economic losses are not "entitled to protection against mere negligence." Palau Int'l Traders, Inc., v. Narcam Aircraft.

Inc., 653 So. 2d 412, 418 (Fla. 3d DCA 1995) (quoting William Prosser, Law of Torts § 101, at 665 (4th ed. 1971)). An economic loss is the loss of an expectancy interest created by a contract, often described as the benefit of the bargain. It arises when a product is of inferior quality, or does not work for its intended purpose. The loss may occur gradually or abruptly, and may include a diminution in value of an item due to its defective nature, the cost of repairing the defect, the cost of replacement, and the resulting loss of use or lost profits. East River S. S. Corp. v. Transamerica Delavel, Inc., 476 U.S. 858, 870 (1985). If a product causes physical harm to an individual or property other than the product itself, the resulting loss is not “economic loss” and tort recovery for damages is permitted. Id. at 866-67.

This Court held, in Florida Power, that contract principles “are more appropriate than tort principles for resolving economic losses resulting from the purchase of a product where there are no personal injury or property damage claims.” In AFM v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987), this Court stated that its

application of the economic loss doctrine in Florida Power was consistent with the U. S. Supreme Court's decision addressing the doctrine in East River, and was the majority view in the country.

The application of the rule reveals judicial concern about the appropriate role of tort remedies, the reliability of commercial transactions, personal responsibility, and the proper limits of exposure to liability. There is a perceived need to separate tort and contract law because of the danger that "tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions." Williams Elec. Co., Inc., v. Honeywell, Inc., 772 F. Supp. 1225, 1237 (N.D. Fla. 1991). Some courts express the belief that parties' bargains should be honored and enforced, and that "[o]nce the contract has been made, the parties should be governed by it." Id. Other courts stress that tort remedies not "be allowed to supersede the parties' prior understanding of the consequences of deficient performance." Leisure Founders, Inc. v. CUC Int'l, Inc., 833 F. Supp. 1562, 1572 (S.D. Fla. 1993). Courts hope that the rule will encourage parties to carefully consider the terms of their bargain,

because they know that additional tort remedies will not be available. The Eleventh Circuit had harsh words for one plaintiff it believed had not bargained effectively: "Having failed to avail itself of the opportunity to mitigate the risks of potential disappointment at the time of contract negotiations, [plaintiff] cannot now resort to the courts to save it from a bargain improvidently made." Pulte Home Corp. v. Osмосе Wood Preserving, Inc., 60 F.3d 734, 742 (11th Cir. 1995).

Moreover, the rule safeguards the parties' expectations about the extent of liability. Although manufacturers and sellers have a duty to market products that do not create unreasonable dangers for persons and property, they cannot be held liable for the risk that their products will not meet customers' economic expectations, unless they have expressly agreed to accept that risk. Florida Power, *supra*, at 900-901 (quoting Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965)). Judicial reluctance to use tort theories to allow recovery of economic losses is based on concern with "maintain[ing] a realistic limitation on damages." East River S.S., *supra*, at 871.

Fair application of the economic loss rule occurs only when the parties forming a contract have the ability and opportunity to bargain, to receive accurate information, and to verify the other party's representations. The rule dictates that the party who fails to make use of these opportunities is held to bargained-for contract remedies for strict liability and negligence claims. If, during contract negotiations, however, one party intentionally misrepresents the facts, the other party cannot anticipate the potential harm, and thus cannot bargain for adequate protections from harm. This Court thus should distinguish between these two very different circumstances and find that the rule does not apply to the party harmed by an intentional tort.

B. The Economic Loss Rule Should Permit Claims for the Independent Tort of Fraud in the Inducement

The economic loss doctrine prohibits negligence or strict liability claims for economic loss, unless there has been personal injury or damage to property other than that subject to the contract. To obtain damages, a plaintiff must establish behavior that amounts to a tort independent of a contractual breach. Florida courts have recognized

fraud in the inducement as an independent tort for which a plaintiff may bring a claim.

In AFM this Court held that a tort action could not be brought to recover lost profits absent personal injury or property damage. The Court discussed breach of contract actions, recalling its decision in Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982), that a breach of contract alone, even if flagrant, unjustifiable and oppressive, will not lead to the recovery of punitive damages. 515 So. 2d at 181. The court added that punitive damages are available when a plaintiff can prove that the defendant committed a tort "distinguishable from or independent of [the] breach of contract." Id.

In Burton v. Linotype Co., 556 So. 2d 1129 (Fla. 3d DCA 1989), the court acknowledged that "[f]raud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered," and reversed a summary judgment granted for a defendant on a fraud claim. The court added that "only after a full explanation of the facts and circumstances can the occurrence of fraud

be determined” and, therefore, summary disposition of a fraud claim is “ordinarily inappropriate.” Id. at 1131.

The Eleventh Circuit agreed that tort actions are permitted in some situations, despite the existence of a contract. “[T]he mere existence of a contract claim does not automatically vitiate all causes of action in tort. Tort claims can be appropriate under Florida law where there is some wrongful conduct which amounts to an independent tort in addition to the conduct resulting in the contractual breach.” Kee v. National Reserve Life Ins. Co., 918 F.2d 1538 (11th Cir. 1990). The Eleventh Circuit recently reiterated this principle in Pulte Home Corp., stating that the Florida economic loss doctrine “does not preclude a claim for damages occasioned by an independent tort, including fraud in the inducement of a contract.” 60 F.3d at 742.

A Florida federal district court has ruled in accord with this understanding. In Leisure Founders the court refused to grant summary judgment on a fraudulent inducement claim, finding that the claim referred to conduct distinct from a breach of contract and, therefore, was outside the economic loss rule’s ban. The court noted

that the elements necessary to prove the claim are different from a contract breach, and that “[t]rue fraudulent inducement attends conduct prior to striking the express or implied contract and alleges that one party tricked the other into contracting.” 833 F. Supp. at 1572.

Other courts have recognized an exception to the economic loss rule for independent torts. In Moorman v. National Tank Co., the Illinois Supreme Court noted its previous decision that economic loss is recoverable where one intentionally makes false representations. 435 N.E.2d 443, 452 (Ill. 1982) (citing Soules v. General Motors Corp., 402 N.E.2d 599 (Ill. 1980)). The court reiterated its determination that plaintiffs may not recover for solely economic loss under tort theories of strict liability and negligence. The following year a federal district court applied Illinois law to find that a plaintiff could recover damages in tort, including strictly economic loss, for intentional interference with its contract. Waldinger v. Ashbrook-Simon-Hartley, Inc., 564 F. Supp. 970 (C.D. Ill. 1983), aff’d in part, remanded on other grounds sub nom

Waldinger Corp. v. CRS Group Eng'rs, Inc. 775 F.2d 781 (7th Cir. 1985).

A plaintiff's ability to proceed on a tort claim for harm from an independent tort is repeatedly supported by the above cases. This Court should not extend Casa Clara, supra, which addressed the propriety of a negligence claim, to upset these decisions.

II. PRESERVING A TORT CAUSE OF ACTION FOR INTENTIONAL FRAUD WILL PROVIDE IMPORTANT PROTECTIONS FOR CONSUMERS AND THE MARKETPLACE

A. The Deterrent and Compensatory Benefits of Tort Remedies Should Be Available to Victims of Intentional Fraud

Contract law is designed to enforce the expectancy interests private parties create by agreement, and the parties' performance is judged by standards upon which the parties themselves agree. Tort law, on the other hand, enforces standards of conduct created by law. A party commits a tort when it breaches a duty "fixed and imposed upon the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 1, at 4 (5th ed. 1984)

[hereinafter Prosser and Keeton]. Tort duties are imposed because of the relation between the parties, and they may be owed to all persons generally, or to classes of persons. Id. § 1, at 5.

Tort law is “concerned with the allocation of losses arising out of human activities,” id. § 1, at 6, and provides redress for people who have suffered interference with their person, property or intangible interests. Tort law is applied to determine rights, punish wrongdoers, deter wrongful activity, and to vindicate parties and deter retaliation and unlawful self-help. 22 Am. Jur. 2d Damages § 130 (1988). Tort remedies are meant to provide compensation and restitution to individuals for the injuries they have sustained to their protected interests because of another’s conduct.

Tort law also provides value to society as a whole. Consumer advocate Ralph Nader has suggested that in addition to serving compensatory and deterrent functions, the tort system leads to greater disclosure and increases public knowledge, as information gathered during litigation enables the public to take precautions. Mr. Nader also suggests that the value of tort law includes a little recognized function

of ethical evaluation. He concludes there is no more consistent and productive “reservoir for authoritative advancement of proper ethical relationships between corporations and consumers” than appellate decisions in tort law. Ralph Nader, Keynote Address: Symposium: The Future of Tort Litigation in California, 29 Santa Clara L. Rev. 504, 504-506 (Summer 1989).

Many factors affect whether tort liability will be assigned to particular conduct. The primary factors include a recognized need to compensate for loss, the doctrine of precedent, and the moral aspects of a defendant’s conduct. Prosser and Keeton, supra, § 4, at 20-21. The idea that liability requires socially unreasonable conduct is central to determining when compensation is due. Id. § 1, at 6. The interests of society in general may be involved in disputes between private litigants, id. § 3, at 15, and the law is concerned with the general social consequences that will follow from an individual’s action, evaluating whether acts are unreasonable or socially harmful from a community perspective. Id. § 1, at 7. As this Court noted in Casa Clara, “[t]he purpose of a duty in tort is to protect society’s interest in

being free from harm.” 620 So. 2d at 1246 (quoting Spring Motors Distrib., Inc. v. Ford Motor Co., 489 A.2d 660 (N.J. 1985)).

A community’s opinion about moral right and wrong and a defendant’s acts and motives can influence the courts. Ultimately, the “selfish aggressor who deliberately disregards and overrides the interests of neighbors, may expect to find that the courts of society, no less than the opinion of society itself, condemn the conduct.” Prosser and Keeton, supra, § 4, at 21. The law of torts has come to reflect current ideas of morality, and has tended to keep pace with changing ideas about morality. Id. In most tort cases, assignment of liability now “rests upon some moral delinquency on the part of the individual.” Id. § 4, at 23.

It is vital to apply tort law to acts of intentional fraud, which harshly undermine consumers’ ability to rely on the statements of others. “Fraud . . . embraces all the multifarious means which human ingenuity can devise and are resorted to . . . to gain an advantage over another by false suggestions or by suppression of the truth.” 37 C.J.S. Fraud § 1 (1943). It “taints and vitiates everything it touches”

and, no matter what form it takes, "the law furnishes a remedy therefor when it is exposed." Id. § 5. Intentional fraud is committed with deception and treachery with the purpose of inducing a person to part with property or to surrender a legal right. Id. § 2.b. The commission of fraud requires misrepresentation, id. § 6, and "inducing a person to take an action he has no obligation to take, nor intent to take without the representation." State Farm Mut. Ins. Co. v. Novotny, 657 So. 2d 1210 (Fla. 5th DCA 1995). To prevail on a claim of fraud in the inducement a plaintiff must establish (1) the misrepresentation of a material fact, (2) that the representor knew, or should have known, that the statement was false, (3) an intent that the representation will induce another to act in reliance on it, and (4) a resulting injury to the party acting in justifiable reliance on the representation. Pulte Home Corp., 60 F.3d at 742.

Tort remedies should be available to victims of intentional fraud, to assist both present and potential victims in the marketplace at large. Just as the threat of a tort action for intentionally fraudulent conduct may restrain potential bad actors from engaging in deceptive conduct,

loss of the remedy may free dishonest persons to exercise deception. Exemplary or punitive damages generally are recoverable in tort cases, including actions based on fraud, where there is "some additional element of asocial behavior" which goes beyond the facts of a "simple case in tort." 22 Am. Jur. 2d Damages, supra, at § 747. They are awarded in most jurisdictions to punish a defendant and deter him and others from repeating the misconduct. Id. § 733.

Permitting plaintiffs to bring tort actions for intentional fraud also is consistent with the economic loss rule's goal of increasing the reliability of commercial transactions. The likelihood that a transaction will proceed as the parties intended requires the exchange of complete and accurate information when the transaction is being contemplated. The parties must have all relevant facts before they can thoroughly assess their priorities and bargain to secure the terms that satisfy their needs. Parties are more likely to produce the necessary accurate information when they realize that liability can attach to their intentional fraud.

A decision that a plaintiff defrauded by a party with whom it formed a contract cannot seek tort remedies, but is restricted to the remedies provided by a contract he was induced to accept, defeats tort law's purposes of deterrence, compensation and vindication. Limiting a defrauded party's remedies to those he agreed to will serve to reward connivance in the formation of contracts. Moreover, a loss of tort remedies for intentional fraud would be especially grievous for parties, such as the Woodsons, harmed by an individual with whom they have no contractual relationship, and against whom they have no alternative source of redress.

B. Older Consumers Need Broad Remedies Against the Costly Problem of Fraud

The costs of consumer fraud are high, and older persons bear a disproportionate burden of those costs. A recent estimate by the United States Office of Consumer Affairs placed annual losses from fraud at \$100 billion. Although older people make up only ten percent of the population, they comprise thirty percent of consumer fraud victims. Consumer Fraud and the Elderly: Easy Prey?: Hearing Before the Senate Special Comm. on Aging, 102d Cong., 2d Sess. 3 (1993)

(prepared statement of Senator Harry Reid). The Arkansas Attorney General remarked at that hearing that older consumers are more accessible to "con-artists" by telephone, mail, and in person, because retirement, health problems and restricted mobility keep many older consumers at home. Id. at 64 (statement of Hon. Winston Bryant, Attorney General, State of Arkansas). AARP's 1993 survey of older consumer behavior revealed that older consumers are especially vulnerable to fraud and deception because they are less familiar with basic consumer issues and less suspicious of the prevalence of deceptive sales practices. AARP Older Consumer Behavior, supra, at 48. The survey contained an index of consumer vulnerability, based on consumer awareness of sources of information, understanding of four marketplace transactions, openness to appeals from telemarketing companies, and wariness of misleading sales practices. The index classified one third of persons over age 75 and one quarter of persons aged 65-74 as having high vulnerability. Id. at 46.

The Federal Bureau of Investigation's report of a recent investigation of criminal telemarketing fraud related how unscrupulous

businesspeople identify and then capitalize on the behaviors and financial concerns of older consumers. A convicted "boiler room" operator stated:

We found the elderly intent on enlarging their nest egg, their limited income, and often interested in generating money for their grandchildren The elderly are vulnerable because their memory is poor Their most notable weakness is that once they recognize the deceit, they are often too embarrassed to relay the events to their offspring, friends, counsel, and law enforcement.

Federal Bureau of Investigation, U.S. Dep't of Justice, Operation Disconnect Press Briefing Material (1993) (quoting testimony before the House Comm. on Government Operations, Subcomm. on Commerce, Consumer And Monetary Affairs (Nov. 1991)).

The potential harm to older persons from fraud is of special concern in Florida, with almost 4 million residents aged 55 or older in 1990, constituting twenty eight percent of the total state population. U.S. Dep't of Commerce, County and City Data Book 1994 75 (12th ed. 1994). The Florida legislature's preamble to the provision establishing enhanced penalties for violations of the state Deceptive and Unfair Trade Practices Act involving older persons recognized the

dangerous effects of such acts for this segment of the population. The legislature stated that older persons are among the thousands who each year are "victimized by high-pressure sales, door-to-door schemes, and various con games which often result in their entering into a contract for services or merchandise for which they are unable to pay," and are "substantially more vulnerable than other members of the public and often end up emotionally distraught and financially devastated as a result of the consumer transaction fraud." Fla. Stat. Ann. § 501.2077 (Historical and Statutory Notes) (West 1988 and Supp. 1996).

Amici recognize the high incidence of fraud against older persons and support a full range of effective consumer protections, and thus urge this Court to secure consumers' ability to seek tort damages for acts of intentional fraud. Such remedies are especially important to older consumers whose marketplace behaviors increase the potential risk of harm in a consumer transaction.

C. High Costs and Inadequate Information Increase Consumers' Vulnerability to Harm in Real Estate Transactions

A real estate purchase generally is the largest financial transaction a consumer makes in a lifetime. Both primary parties to the transaction usually are consumers, who are assisted by and depend upon a broker or brokers. This dependence and the consumers' limited understanding of the transaction and the brokers' roles place them at a disadvantage in conducting the transaction, and increase their need for corrective tort remedies should they fall victim to intentional fraud.

According to a Federal Trade Commission Staff Report, consumers beginning a real estate transaction are interested primarily in selling or buying a home. They also hope to "rationally select a broker," but the "subjective 'quality' of the broker, like that of other infrequently used professionals, is generally beyond the ability of the consumer to judge directly." Los Angeles Regional Office Staff Report, The Residential Real Estate Brokerage Industry 41 (Dec. 1983).

Consumers become dependent upon brokers because they "so infrequently undertake this complex transaction that their level of

knowledge and understanding about the possibilities, costs, risks and advantages of particular transactions is generally much lower than that of the brokers.” Id. at 173. This may explain why consumers consider the broker’s “honesty and integrity” to be his or her most important characteristic. Id. at 41.

The real estate broker’s role represents a significant gap in consumer knowledge. In 1991 CFA released Residential Real Estate Agents and Home Sales: An Evaluation (Oct. 31, 1991), a study incorporating a nationwide survey of more than 500 agents in 27 major metropolitan areas. The report, the first one by a consumer group, defined serious problems facing buyers and sellers and identified reforms that would increase competition, and protect buyers and sellers. The reforms included requiring agents to tell buyers which party they legally represent in the sale. A test conducted by CFA in 1990 had revealed that only thirty percent of consumers knew that real estate agents usually legally represent the seller only. Id. at 8. A buyer who does not realize the broker’s true role may be unknowingly disadvantaged if he or she reveals information to the broker. The

broker may have a legal obligation to share this information with the seller, thus reducing the buyer's ability to bargain. The FTC staff found that seventy-three percent of buyers told the agent with whom they worked the highest price they would pay for the property. FTC Staff Report, supra, at 186. Eighty three percent of surveyed buyers believed the price information they gave the broker would remain confidential. Id.

Consumers making the significant financial commitment of a real estate purchase have limited understanding of the actors and elements of the transaction, thus increasing their susceptibility to fraud. It is particularly important, therefore, that these consumers have recourse to tort damages for acts of intentional fraud.

CONCLUSION

The economic loss rule, designed to bar tort remedies in contract actions for strict liability and negligence, should not be applied to

consumers harmed by intentional fraud. Intentional fraud is meant to allow one party to unfairly gain advantage over another. Older consumers, and others engaged in costly real estate transactions, have significant vulnerabilities. The danger to consumers created by these vulnerabilities could be reduced through tort law's compensatory and deterrent purposes to reduce the incidence of intentional fraud in the marketplace.

This Court's ruling will prove highly important to all Florida consumers who rely on the statements of others when making buying decisions. The social interest in having a dispute resolved fairly is based upon concern for the parties directly involved and for potential disputants. "There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future." Prosser and Keeton, supra, § 3, at 16.

Amici therefore respectfully request that this Court answer the question certified to it to find that the economic loss rule does not

prevent a buyer of residential real property from recovering damages
for fraud in the inducement.

Respectfully submitted,

Barbara Burch (BS)

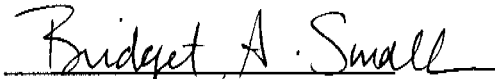
Barbara Burch
Florida Bar No. 0978670
Attorney for Amici
218 East Commercial Boulevard
Suite 210
Lauderdale by the Sea, Florida 33308

Steven S. Zaleznick
Deborah M. Zuckerman
Bridget A. Small
American Association of Retired Persons
601 E Street NW. Room B4-230
Washington, DC 20049
(202) 434-6055

March 18, 1996

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amici American Association of Retired Persons and Consumer Federation of America in support of Petitioner have been furnished to the each of the following by regular U.S. Mail on this 18th day of March, 1996:



Bridget A. Small, Esq.
American Association of
Retired Persons
601 E. Street NW
Washington, DC 20049
(202) 434-6055

Paul P. Jackson
Paul P. Jackson Realty
14047 Briar Dale Lane
Tampa, FL 33618

Robert L. Rocke, Esq.
Annis, Mitchell, et al
One Tampa City Center
Suite 2100
201 N. Franklin Street
Tampa, FL 33602

Marsha G. Rydberg, Esq.
Rydberg, Goldstein & Bolves
500 E. Kennedy Blvd.
Suite 200
Tampa, FL 33602

Lisa Berlow-Lehner
Szymoniak & Ridge, P.A.
2101 Corporate Blvd.
Suite 415
Boca Corporate Center
Boca Raton, FL 33431

Office of the Attorney General
Attn: Chas. McCoy, Esq.
The Capitol Bldg.
Suite PL-01
Tallahassee, FL 32399-1050

Roy D. Wasson, Esq.
Courthouse Tower
Suite 402
44 West Flagler Street
Miami, FL 33130

Harold D. Oehler, Esq.
Macfarlane, Ausley, et al
P.O. Box 1531
Tampa, FL 33601

Jeffrey N. Kramer, Esq.
24 West Third Street
Suite 312
Mansfield, OH 44902

Mr. G. William Bissett, Esq.
Hardy, Bissett and Lipton
P.O. Box 9700
Miami, FL 33131

Ms. Jodi Corrigan, Esq.
P.O. Box 9700
Tampa, FL 33601