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IN THE SUPREME COURT OF FLORIDA

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KIRK A. WOODSON,

Petitioner,

v. CASE NO. 87,057

WILMA MARTIN, et al.,

Respondents.
_____/

**BRIEF BY THE ATTORNEY GENERAL
AS AMICUS CURIAE
ON BEHALF OF PETITIONER**

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PRELIMINARY STATEMENT

Although this case and Casa Clara involve contracts for the purchase of homes, the logic of permitting actions for fraud in the inducement goes beyond such facts. Following its argument on behalf of Woodson, the State adds a brief point illustrating the combined effect of the economic loss rule and the State's waiver of sovereign immunity when it enters a contract.

STATEMENT OF THE CASE AND FACTS

Amicus curiae [the "State"] was permitted to file a brief by this Court's order of January 24, 1996. The State accepts the Petitioner's statement of the case and facts. Otherwise, the facts necessary for resolution of the issue addressed in this brief are found in the opinion below, Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995) (*en banc*). For clarity, the State will summarize the essential facts.

Woodson alleged that Appellees made misrepresentations regarding a private residence. Relying on these misrepresentations, he bought the house. Numerous, serious defects were discovered later. He sued the sellers, the real estate agency and the individual real estate agent.

As amended, Woodson's complaint included four counts. The first alleged "fraud in the inducement" to contract for the

purchase of the home. Id. at 1327-8. The trial court granted summary judgment in favor of all defendants as to the fraud count.

Following this Court's decision in Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So.2d 1244 (Fla. 1993) and intervening decisions by the Eleventh Circuit, a majority of the Second District affirmed. See 663 So.2d at 1328-9 (*en banc*). The majority grounded its decision on the fact that the "only damages suffered by the Appellant were damages to the house." Id. at 1329. For this reason, the majority found Woodson's situation was "squarely within the economic loss rule" (id.) announced by this Court in Casa Clara. The majority, with the concurrence of the dissenting judges, certified this question:

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

Id. at 1327.

SUMMARY OF ARGUMENT

Nothing in this Court's jurisprudence compels the conclusion reached below, that the economic loss rule precludes actions for fraud in the inducement to enter a contract. When two parties knowingly and intelligently enter a contract, they have the opportunity to limit their remedies and damages. Such limits are part of the bargained-for package; and, presumably, affect the price of the item or service purchased.

Thus, the principles which confine a party to contract remedies are premised on the existence of a *legitimate* contractual relationship. When a contract is induced through fraud, there is not a knowing and intelligent agreement. To the contrary, the agreement is induced because one party misrepresented or concealed material facts. There is no true meeting of the minds.

Absent a meeting of the minds, there is no contract or bargained-for limits on remedies and damages. To confine a purchaser to such remedies and damages imposes a contract where none existed. It gives the fraudulent party the immediate benefit of the contract; that is, the right to performance by the other party. It also confers the later benefit of limiting the defrauded party to contract remedies and damages. Such an expansive and unfair application of the economic loss rule was never intended by

Casa Clara, and is not necessary to prevent tort remedies from "swallowing up" contract law.

From the State's perspective, there is an additional, strong public policy concern. If a party fraudulently induces the State to enter a contract, sovereign immunity is waived. The public fisc is opened. Nevertheless, the State would be confined to contract remedies for purely economic losses.

The certified question must be answered in the negative. The opinion below must be reversed to the extent it precludes Woodson's fraudulent inducement count.

ARGUMENT

ISSUE

WHETHER THE ECONOMIC LOSS RULE ASSUMES A VALID CONTRACTUAL RELATIONSHIP, AND DOES NOT PRECLUDE CLAIMS THAT A CONTRACT WAS FRAUDULENTLY INDUCED

A. Private Contracting Parties

Six of fourteen judges below dissented, in two opinions. That the Second District divided so closely[1] is troublesome.

More troublesome is the fact that the opinions below[2] do not address the critical issue: whether the economic loss rule--in order to operate at all--assumes a valid contractual relationship. The majority, discussing Casa Clara, *infra*, observed that a homebuyer's "failure to receive the benefit of the bargain is a

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[1]This division is reflected in recent opinions by other district courts of appeal. The Fourth District has already certified conflict with the majority opinion below. IGI Development v. CV Reit, Inc., 21 Fla. L.W. D 79 (Fla. 4th DCA Jan. 3, 1996) (economic loss rule does not bar the "independent tort" of fraud in the inducement), agreeing with HTP, Ltd v. Lineas Aereas Costarricenses, 661 So.2d 1221 (Fla. 3d DCA 1995) at 1222: "Fraud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered." [internal citation omitted].

[2]As did the majority opinion, Judge Lazzara's dissent (663 So.2d at 1332-4) focused on Casa Clara. It noted the factual and legal narrowness of that decision, which involved purchase of homes by private persons. Fairly read, Casa Clara addressed negligence claims, not fraud. Moreover, the Casa Clara court expressly noted other remedies available to homebuyers. The State adopts Judge Lazzara's dissent.

Judge Altenbernd's dissent (663 So.2d at 1330-1) casts doubt on applying Casa Clara to preclude a claim for fraud in the inducement. The State adopts this part of Judge Altenbernd's dissent.

core concern of contract, not tort law." 663 So.2d at 1329. The State respectfully suggests that the majority overlooked another core concern of contract law; whether a valid contractual relationship ever existed. If not, it is wrong to limit the parties to contract remedies and damages based on a non-existent contract.

When one party deliberately conceals or misrepresents material facts, the other party's assent to the contract is not based on a factual meeting of the minds. Consequently, such fraudulently induced contract is voidable, and can be rescinded if it would not have been entered but for the fraud. Columbus Motel Corp. v. Hotel Management Corp., 116 Fla. 464, 156 So. 893, 897 (1934); Saunders Leasing System, Inc. v. Gulf Central Distribution Center, Inc., 513 So. 2d 1303 (Fla. 2d DCA 1987), rev. den., 520 So.2d 584 (Fla. 1988). This allows the injured party to rescind the contract or to accept its benefits and remedies; presumably, when the fraud is not serious or contract remedies appear sufficient.

Woodson was unwilling to accept his contract with the sellers, as he sought recision in Count IV. 663 So. 2d at 1328. For purposes of this appeal, it must be assumed that he would not have entered the contract but for a "number of misrepresentations." Id. at 1327. If he obtains rescission, there will be no contractual

relationship. Nevertheless, the economic loss rule would be applied to preclude tort recovery for fraud, thereby confining Woodson to contract remedies and damages under a rescinded contract.

The result is very unfair. Even if the sellers are made to return Woodson's money; he may not, under contract law, obtain damages that tort law would deem quite foreseeable. The sellers--who have enjoyed use of whatever payments Woodson has made--will get their house back.

Return to Judge Altenbernd's observation in dissent: "Normally, fraud in the inducement occurs prior to the contract." 663 So. 2d at 1327. If true here, the misrepresentations by Appellees would have been made before the parties entered the very contractual relationship triggering the economic loss rule. When the rule is applied, it effectively extends contract remedies back to a time before a contract existed. Enjoying the benefit of their fraud, the Appellees have also insulated themselves from tort liability for pre-contract conduct.

From the injured party's perspective, application of the rule injects a non-bargained-for term into a later contract. Contracts for the sale of a private residence, often standard forms used by local realtors, are very unlikely to put a buyer on notice that

tort claims based on pre-contract misrepresentations are waived as a matter of law.

A peculiar situation emerges. In Saunders, supra, the Second DCA declared that an "express exclusion of implied warranties and other representations that predate the contract is enforceable." 513 So. 2d at 1306 [e.s.] However, if such an exclusion is part of a contract induced by fraud, the exclusion would not apply. "A party may not contractually limit liability in a contract induced by fraud." Banks v. Public Storage Mgt., 585 So. 2d 476, 477 (Fla. 3d DCA 1991).

Suppose Woodson had entered a contract containing an exclusion clause, presumably in return for a lower purchase price. If the contract was fraudulently induced, the clause would not operate to protect Appellees from liability for pre-contract misrepresentations. Nevertheless, Appellees--including the real estate agent who allegedly made the misrepresentations--have escaped liability for fraud through operation of the economic. See 663 So. 2d at 1328 (noting that contract claims remained against the sellers, but not mentioning Appellees). In short, the economic loss rule has relieved the actively misrepresenting party (real estate agent) of liability for fraud, while leaving the more

passive party (seller) liable only under the narrower relief afforded by contract law.

More than simple irony attaches to this result. In Zichlin v. Dill, 25 S.2d 4, (Fla. 1946) (en banc) this Court declared, that under statutes prescribing conduct by licensed real estate brokers, "the old rule of caveat emptor is cast aside"; and persons may assume a broker "possesses the requisites of an honest, ethical man." Id. at 5. See *Op. Atty. Gen.* 96-20 (March 1, 1996) (concluding that clause in sales agreement between buyer and seller, purporting to relieve broker of liability for "negligence or otherwise" arising from "Broker's representations regarding the property's condition" is unlawful and void." Within the Second District, the economic loss rule applies to overrule Zichlin and negate the statutory duty placed on licensed brokers.

B. The State's Perspective

The State waives sovereign immunity when it enters a contract. As this Court said in Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla. 1984):

> where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.

Notably, this Court's willingness to preclude the sovereign immunity defense - with its historic concern for the public fisc - was not grounded on an express statutory waiver. See id. at 5 ("There is no analogous waiver in contract.") Instead, this Court declared it could not "in good conscience" leave the injured party to the remedy of a claims bill before the legislature. Id.

Here, the Court should act with the same "good conscience" displayed in Pan-Am Tobacco. When the State is fraudulently induced to enter a contract, the public fisc is opened to damage claims through the wrongdoing (i.e., the misrepresentations) of the other party.

Suppose, for example, the State contracts for the provision of goods or services--perhaps at a higher price--because the provider deliberately represents that it is a minority-owned business. Upon discovering such representation was false, the State withholds an interim payment for otherwise satisfactory goods or services. The provider stops delivering goods or services and sues for payment. The State counter-claims for the higher price it paid; and for monetary damages, sounding in tort, due to the disruption of public business while it locates a new provider.

In this situation, the State deliberately accepted a higher price in order to support a minority-owned business. Nevertheless,

the economic loss rule, as applied in the opinion below, would preclude recovery on tort claims based for fraud in the inducement. On the other hand, sovereign immunity would be waived as to the provider's action for payment under the contract.

Assume facts more similar to this case. The State contracts for the building of a home for an employee, a park ranger, who must live in a remote location on state-owned land. The builder is chosen based on the representation, later learned to be fraudulent, that the home can be built on time despite its remote location. Moreover, the builder does not build the home as specified, and uses substandard materials. The State sues not only for the lesser value of the home; but for lost admissions revenue when the park cannot be opened on time, and the higher cost of the ranger's temporary accommodations elsewhere while repairs are made.

To the extent the State's damage claims sound in tort, the decision below would bar them; despite the fact that the contract was fraudulently induced. Since sovereign immunity was waived through entrance of the contract, the builder can still sue for the final payment on the house. The State, in order to revive the defense of sovereign immunity and protect the public fisc, would be forced to seek rescission; a difficult and disfavored remedy. It would have to forego the less severe remedy of damages in tort, and

forego preserving the acceptable aspects of the contractual relationship.

In tandem, the Pan-Am Tobacco decision would open the public fisc, while the decision below would preclude the State's recovery despite fraud in the inducement. The hypothetical builder not only obtains the benefit of the bargain and the waiver of sovereign immunity, but is insulated from liability despite wrongdoing which predates the contract. The defense of sovereign immunity is void and meaningless. See id., 471 So.2d at 5 (declaring that the state must be bound by its contracts, or the "legislative authorization for such act[s] is void and meaningless"). This result cannot be reached in good conscience.

CONCLUSION

The certified question must be answered in the negative. The decision below must be reversed, to the extent it affirms summary judgment against Woodson's fraud in the inducement count.

Respectfully submitted,

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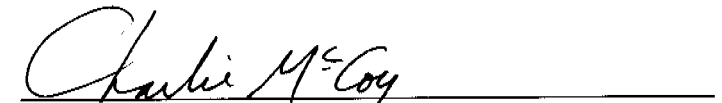

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