IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,057

KIRK A. WOODSON,

Petitioner,

vs.

WILMA MARTIN and MacLEAN REALTY, INC.,

Respondents.

ON CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Respondents, Wilma Martin and MacLean Realty, Inc., respectfully file this Answer Brief on the merits. For the Court's convenience, citations to the Petitioner's Appendix to the Initial Brief will be designated (PA-__). Citations to the Respondents' Appendix will be (RA-__). All of the documents included in the Respondents' Appendix were part of the record below. Citations to the Second Amended Complaint will be identified by a paragraph (¶) or page number, the complete Second Amended Complaint is part of the Respondents' Appendix. The Petitioner, Kirk A. Woodson, will be referred to as "Dr. Woodson." Respondent Wilma Martin will be referred to as "Martin" and Respondent MacLean Realty, Inc. will be referred to as "MacLean Realty."

STATEMENT OF THE CASE

This appeal arose from the trial court's grant of summary judgment in favor of Martin and MacLean Realty. Among other claims against other parties, Dr. Woodson sued MacLean Realty and Martin for fraud in the inducement and breach of implied warranty of habitability.[1] (RA-1-70). Dr. Woodson alleged that MacLean Realty and Martin fraudulently induced Dr. Woodson to enter into a contract for the purchase of a home. (RA-1-70, ¶¶ 16-63). MacLean Realty and Martin, who are brokers, are not parties to the purchase contract. Dr. Woodson also alleged that MacLean Realty and Martin breached the implied warranty of habitability because of defects allegedly existing in the home. (RA-1-70, ¶¶ 64-70). At the time of the Motion for Summary Judgment hearing, Dr. Woodson also had pending claims against the sellers for breach of contract, breach of the implied warranty of habitability and rescission. (RA-1-70, ¶¶ 83-85).

The trial court granted the sellers' and MacLean Realty and Martin's Motions for Summary Judgment on the fraud claims based on the economic loss doctrine. The trial court concluded that the implied warranty claim failed because MacLean Realty and Martin were brokers and not builder/vendors. Dr. Woodson appealed the trial court's ruling only with respect to Martin and MacLean Realty. Dr. Woodson's claims against the sellers for breach of contract, breach of the implied warranty of habitability and rescission remain pending in the trial court. The Second District Court of Appeal affirmed trial court's ruling *en banc*.

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[1] The Second Amended Complaint contained four counts. Count I alleged fraud in the inducement against MacLean Realty, Martin and the sellers of the home (the "Sheas"). Count II alleged breach of the implied warranty of habitability against MacLean Realty, Martin and the sellers. Count III alleged a breach of contract against the sellers and Count IV alleged rescission. (RA-1-70).

However, the Second District Court of Appeal certified the following as a question of great public importance:

> 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 FACTS

Dr. Woodson devotes more than a quarter of his Initial Brief to an argumentative "Statement of Facts" which has little or no bearing on the legal issues before this Court. Again, Dr. Woodson includes as an Appendix to his Initial Brief a self-serving Affidavit which has no bearing on the legal issues that were resolved by the trial court and affirmed by the Second District Court of Appeal.[2]

Dr. Woodson, and the amici who have filed briefs in his support, overlook undisputed facts which are critical to the issues before this Court. Although many of the facts recited in Dr. Woodson's extensive Statement of the Case and Facts were disputed, for the purposes of the summary judgment below, MacLean Realty and Martin accepted as true the facts as alleged in Dr. Woodson's Second Amended Complaint and Affidavit. The undisputed facts material to this Court's determination of the legal issues before it are summarized here:

Dr. Woodson first viewed the house in July 1989, with his real estate broker father, Marcus Woodson, and Martin. (RA-19-20). The Sheas were residing in the house during his initial visit, as they were during each subsequent visit, as evidenced by clothing in the closets, items stored in the house, and the dog fenced in the back yard. (RA-82-83). Conspicuously absent from Dr. Woodson's Statement of the Facts, is that his wife "didn't like the house." (RA-96).

On July 17, 1989, Dr. Woodson signed a Contract for Purchase and Sale of the house (the "Contract") which governs all of Dr. Woodson's claims. (RA-71-73). The Contract contained a warranty provision relating specifically to the conduct which Dr. Woodson alleges constituted

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[2] Each time Dr. Woodson tells the story, it changes, as evidenced by a comparison of the allegations of the Complaint, the Amended Complaint, the Second Amended Complaint (RA-1-70), his deposition testimony (RA-74-95), and the Affidavit (PA-1-19).

fraud: "Seller warrants that there are no facts known to Seller materially affecting the value of the Real Property which are not readily observable by Buyer or which have not been disclosed to Buyer." (RA-72, ¶ W). The conduct allegedly constituting fraud by MacLean Realty and Martin arises solely from uncorroborated claims that the sellers and their broker were aware of facts materially affecting the value of the property which were not disclosed to Dr. Woodson. (RA-1-70).

The form of contract executed in this case was approved by the Florida Bar and the Florida Association of Realtors after this Court's decision in Johnson v. Davis, 480 So. 2d 625 (Fla. 1985). (RA-71-73). The Contract expressly provided contractual remedies for the nondisclosure of defects materially affecting the value of the property -- the issue in this case and in Johnson v. Davis. Moreover, the Contract permitted Dr. Woodson to conduct a home inspection, and provided that if Dr. Woodson failed to do so, he would be deemed to have waived the sellers' warranties as to defects not reported. (RA-73, ¶ N). It is undisputed that Dr. Woodson failed to conduct any inspection (PA-15).

There were no personal injuries or property damage arising from the facts underlying Dr. Woodson's claims. (RA-1-70). Despite Dr. Woodson's claim that the house was represented as "new," it is undisputed that the house was built in 1987 (RA-70), and that Dr. Woodson knew that the house was not "brand new." Indeed, by Dr. Woodson's own allegations, he relied on a "fact sheet" which directly stated that the house was built in 1987. (PA-20). Dr. Woodson also alleges that he relied on a Multiple Listing Service ("MLS") sheet which represented the house as "brand new, first rate brick construction, beautiful moldings throughout." (IB-2). However, Dr. Woodson obtained that MLS listing from his own real estate broker, Paul Jackson -- not Martin

or MacLean Realty. (PA-4). Moreover, it was undisputed that Dr. Woodson was aware that the Sheas were living in the house from the very first time he viewed it. (RA-80-83, 93).

Dr. Woodson was at all material times represented by his own real estate broker (Paul Jackson), as well as Marcus Woodson, his father, a licensed real estate broker. (PA-1, RA-19). Dr. Woodson also was represented by counsel at the closing of the transaction, and prior to closing had discussed with his attorney his contractual right to inspect the property. (RA-84-85, 87-88). Dr. Woodson is a highly educated physician and was, at all times, on equal footing with the other parties involved in the transaction. (RA-4-6).

In summary, the only "pre-contractual" allegations of Dr. Woodson's Second Amended Complaint, or of his Affidavit, which relate to fraud concern (a) whether the property was "new" or, (b) the "quality of construction" of the house. (RA-1-70). Despite Dr. Woodson's detailed recitation of the defects allegedly existing in the house, he made no allegations of specific representations relating to those defects; nor did he allege that Martin or MacLean Realty were aware of the alleged defects. (RA-90). Dr. Woodson offered no evidence that any of Martin's representations regarding the quality of construction were false, or were known by her to be false. There was no evidence that Martin had any knowledge of any defects in the house. Dr. Woodson could not identify any specific defects of which Martin had knowledge when he testified in his deposition. (RA-90). Moreover, Dr. Woodson testified that he "lived there for almost two years before I found out about all of the problems with the house." (RA-92).

The trial court granted its summary judgment only after complete and deliberate consideration. The sale of the house closed on October 11, 1989. The lawsuit was filed in May, 1990, and the trial court entered summary judgment against Dr. Woodson on November 23, 1993.

In his Second Amended Complaint, Dr. Woodson alleges the same underlying facts in support of the fraud in the inducement count as the breach of contract count. Moreover, contrary to what he claims in his Initial Brief, the Second Amended Complaint sought the same compensatory damages for the breach of contract as for the fraud count:[3]

Count I Damages for Fraud	Count III Damages for Breach of Contract
Costs or estimated costs of expected repair;	Damages in an amount necessary to repair the property;
Lodging expense during repairs;	The costs of lodging while repairs are being made;
Recovery of monies paid for inspections;	Cost of inspections
The costs paid for past services for repair of certain aspects of the property as detailed in Exhibit "D";	Reimbursement for costs already expended in repairs and services to correct deficiencies with the property as evidenced by Exhibit "D";
Recovery of that portion of the costs paid for down payment and for subsequent mortgage payments paid on the property that corresponds to the diminished value of the property from the time of purchase through the expected future date that repairs can be completed;	To compensate Plaintiff for any permanent reduction in the reasonable value of the property occasioned by the extensive repairs that will be needed because of the need to disclose to prospective purchasers and the uncertainty that all progressive and continuing damage will have been addressed by those repairs or can be addressed by those repairs;
Prejudgment interest as appropriate;	
Attorneys' fees and costs of this action;	Attorneys' fees and costs of this action;
Punitive damages.	

[3] The damages claimed which are listed in the table are quoted directly from the Second Amended Complaint. (RA-41, 48).

Finally, Dr. Woodson has a claim for rescission, as well as a contractual claim for money damages against the sellers of the house, both of which remain pending.

SUMMARY OF THE ARGUMENT

In this case there is a contractual provision which deals precisely with the conduct which Dr. Woodson alleges constituted fraud. The issue before this Court is not whether the economic loss rule abolished the 700-year-old tort of fraud and the Court need not make such a monumental decision. In fact, if the Court chose to decide that issue, this case would not support such a far-reaching decision. The issue before the trial court and the Second District Court of Appeal was more accurately framed as whether a claim for fraud under the facts as alleged in the Second Amended Complaint could exist independently of the alleged breach of contract. The trial court properly found that it could not. The Second District correctly affirmed that decision.

This Court has emphasized time and again that it is the character of the loss which determines the remedies. For recovery in tort there must be something beyond mere disappointed economic expectations. Where solely economic losses are sustained, contract law is more appropriate than tort law to address those losses.

This Court has never distinguished intentional torts and negligence in applying or discussing the economic loss rule. Other courts have recognized that in accordance with general principles of contract law, if a claimant can allege a tort claim independently of a contract claim both claims will stand. To constitute an "independent tort," the tort claim must allege either damages separate and distinct from a contract claim, or the facts giving rise to each claim must be separate and distinct. In this case, the facts giving rise to each claim and the damages allegedly sustained are the same. There is no separate and independent tort claim; therefore, the economic loss rule precludes Dr. Woodson's claim for fraudulent inducement.

Applying the economic loss rule to this case neither abrogates this Court's ruling in Johnson v. Davis nor does it abolish the tort of fraud in the inducement. In this case, the alleged conduct constituting fraud was specifically addressed in the written contract which Dr. Woodson executed. This is not a case like Johnson v. Davis where the house purchaser had no contractual remedy for non-disclosure of defects materially affecting the value of the property. Furthermore, Florida law provides that a victim of fraud in the inducement has two remedies -- he can affirm the contract and seek money damages for breach of contract, or he can disavow the contract and seek the equitable remedy of rescission. In this case, Dr. Woodson has a contractual claim for money damages against the sellers for non-disclosure of material defects. Dr. Woodson also has a claim for rescission.

In this case, there is simply no reason why the economic loss rule should not bar Dr. Woodson's fraud claim against Martin and MacLean Realty. The trial court correctly applied the economic loss rule and the Second District properly affirmed that decision *en banc*. This Court should affirm the Second District's holding.

ARGUMENT

THE ECONOMIC LOSS RULE PREVENTS A BUYER OF RESIDENTIAL PROPERTY FROM RECOVERING DAMAGES FOR FRAUDULENT INDUCEMENT AGAINST THE REAL ESTATE BROKER REPRESENTING THE SELLERS WHEN THE BUYER CANNOT ALLEGE AN INDEPENDENT TORT BECAUSE HE CANNOT ALLEGE FACTS SUPPORTING THE CLAIM, OR DAMAGES SEPARATE FROM THOSE SOUGHT IN CONTRACT.[4]

I. THE ECONOMIC LOSS RULE APPLIES TO FRAUD CLAIMS.

A. The Character of the Loss Determines the Remedies.

Any analysis of the economic loss rule, and its application to this case, must begin with this Court's decision in Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993). There, this Court pronounced:

> If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law. Id. at 1247 (emphasis added).

That is precisely the issue in this case, and this Court's inquiry need go no further. Dr. Woodson purchased a house that did not meet his expectations and caused economic disappointment. Simply stated, he claims that he did not receive the benefit of his bargain. Thus, his claim is controlled and should be addressed, by contract law, not tort law.

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[4] This Court is not bound by the question certified by the Second District Court of Appeal and may consider the entire record in determining whether to approve or disapprove of the Second District's decision. See Scherer & Sons, Inc. v. Int'l Ladies' Garment Workers' Union, Local 415, 142 So. 2d 290 (Fla. 1962); Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976) (Court's review of the case extends to the entire decision of the Second District Court of Appeal, rather than the certified question) (citing Rupp v. Jackson, 238 So. 2d 86 (Fla. 1970)). This Court need not answer the certified question or may restate the question. See Cleveland v. City of Miami, 263 So. 2d 573 (Fla. 1972) (although certified questions operate to confer jurisdiction on the Court, the Court need not answer them).

For recovery in tort, "there must be a showing of harm above and beyond disappointed expectations." Id. at 1246.[5] It is the character of the loss which determines the appropriate remedies. Id. at 1247. The Casa Clara Court defined economic losses as "disappointed economic expectations," which include "diminution in the value of the product because it is inferior in quality . . ." Id. at 1246. Economic losses also include "damages for inadequate value and costs of repair." Id. at 1246. Significantly, the Casa Clara court refused to create an exception for homebuyers. Id. at 1247-48. Casa Clara clearly governs the damages sought in this case because Dr. Woodson alleges solely economic losses. Specifically, Dr. Woodson seeks:

- The costs or estimated costs of expected repairs;
- Lodging expense during repairs;
- Monies paid for inspections;
- Costs paid for past services for repair of certain aspects of the property as detailed in (the paragraph which set forth the alleged defects in the home);
- Recovery of that portion of the costs paid for down payment and for subsequent mortgage payments paid on the property that corresponds to the diminished value of the property from the time of purchase through the expected future date that repairs can be completed;
- Prejudgment interest as appropriate;
- Attorneys' fees and costs; and
- Punitive damages. (RA-41).

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[5] Long before Casa Clara, this Court had held that Florida law did not permit a contracting party to recover solely economic losses in tort: "[C]ontract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage." Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987) (purchaser of goods); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987) (purchaser of services).

Dr. Woodson's allegations of diminution in value and repair costs are solely economic losses. There is no claim of personal injury or damage to other property. Therefore, Dr. Woodson's fraud claim fits squarely within this Court's analysis of economic losses which are governed by contract and not tort law.

Dr. Woodson asserts that Casa Clara should not govern this case because Casa Clara involved a negligence claim rather than an intentional tort. This argument completely ignores the rationale of Casa Clara that it is the character of the loss which determines the appropriate remedies -- hence, the rule is called the "economic loss rule."

B. There is No Reason to Distinguish Intentional Torts and Negligence In Applying the Economic Loss Rule.

This Court never has distinguished between intentional torts and negligence in discussing or applying the economic loss rule. This Court's stated rationales for the rule are twofold: (a) to uphold the boundary between contract and tort law;[6] and (b) to encourage parties to negotiate risks through warranty provisions and price.[7] Moreover, contrary to Dr. Woodson's claim that the economic loss rule bars only negligence, many courts have held that intentional torts are also barred. See Belford Trucking Co., Inc. v. Zagar, 243 So. 2d 646 (tort action for conversion); J. Batten Corp. v. Oakridge Investments 85, Ltd., 546 So. 2d 68 (Fla. 5th DCA 1989)(fraud claim); Gov't Personnel Services, Inc. v. Gov't Personnel Mut. Life Ins. Co., 759 F. Supp. 792, 794 (M.D. Fla. 1991) ("there is simply no basis presented or found for disparate treatment of fraud and negligence within the 'economic loss rule'") aff'd. 986 F.2d 506 (11th Cir. 1993); Hoseline, Inc.

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[6] Casa Clara at 1246.

[7] Florida Power & Light at 901.

v. U.S.A. Diversified Products, Inc., 40 F.3d 1198 (11th Cir. 1994) (economic loss rule bars claims for fraud and civil theft); Rosen v. Marlin, 486 So. 2d 623 (Fla. 3d DCA 1986) (economic loss rule bars recovery for civil theft where loss arises from breach of contract); Crane v. Sun Bank/Gulf Coast, Inc., 9 F.L.W. Fed. D701, 703 (M.D. Fla. April 11, 1996) (fraudulent inducement, tortious interference, and fraudulent conspiracy barred by economic loss rule); Richard Swaebe, Inc. v. Sears World Trade, Inc., 639 So. 2d 1120 (Fla. 3d DCA 1994) (fraud claim); John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1988) rev. denied 547 So. 2d 1210 (Fla. 1989); Morton L. Ginsberg and MLG Properties, Inc. v. Lennar Florida Holdings, Inc., 645 So. 2d 490 (Fla. 3d DCA 1994).

Despite Dr. Woodson's reliance on Williams Elec. Co. v. Honeywell, Inc., 772 F. Supp. 1225, 1238 (N.D. Fla. 1991) rev'd. on other grounds, 854 F.2d 389 (11th Cir. 1988), even the Northern District of Florida which concluded that the economic loss rule might not bar a claim of fraud in the inducement as opposed to a claim of fraud in the performance of a contract, noted that the fraud action would be barred where "either the conduct of the defendant is 'inextricable from the events constituting the breach of contract,' or tort damages are not separate from the contract damages." Id. at 1238. Here, there is no question that the exception set forth in Williams is applicable. The allegations of the Second Amended Complaint clearly establish that the alleged fraud in the inducement in this case is inextricable from the events constituting the alleged breach of contract.

Count I for fraud in the inducement alleges representations made by Martin, the Sheas and Dr. Woodson's broker, Paul Jackson. All of the alleged representations relate to the condition of the house. Paragraph 63 of the Second Amended Complaint specifically identifies the alleged

defects in the house. A cursory review of the breach of contract allegations establishes that they relate solely to the defects alleged in the fraud count. Specifically, in the breach of contract count, Dr. Woodson alleged that "by the terms of clause W the SHEAS [sellers] warranted that there were no facts known to them materially affecting the value of the Real Property which were not readily observable by or which had not been disclosed to Woodson, as buyer." (¶ 76). Dr. Woodson further alleges that the "SHEAS breached this clause of the contract by their failure to disclose substantial material and exceedingly costly to repair defects in the Property to WOODSON which were known to them, but were unknown and undiscoverable to WOODSON at the time including . . . " (¶ 77). The same failure to disclose alleged defects is also the heart of the claim for fraud in the inducement. The present case is clearly an instance in which contractual terms and conditions specifically govern the factual basis of the alleged fraud. There is no independent tort relating to defects allegedly existing within the house.

C. <u>There Was No Independent Tort In This Case</u>.

Where a plaintiff can state a cause of action for fraud <u>independent</u> of an action for breach of contract, the plaintiff's count for fraud still stands despite the economic loss rule. The question is not, as Dr. Woodson argues, whether the economic loss doctrine bars only negligent and not intentional torts, but rather whether a plaintiff has alleged a separate and distinct tort which stands independent of his contract action. That is, the tort must occur outside of the rights and duties created by contract. Dr. Woodson has not, and cannot, allege an independent tort.

A tort can be "independent" based on two factors: (a) separate damages resulting from the fraud as opposed to the breach of contract; and (b) separate facts constituting each cause of action.

1. There Are No Separate Damages.

This Court recently reaffirmed that "without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses. Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628, 277 (Fla. 1995).[8] In fact, this Court concluded years ago that "without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987). In this case, there was no conduct resulting in personal injury or property damage. Even by Dr. Woodson's own allegations he has sustained solely economic losses. (Second Amended Complaint at 41).

Additionally, where the damages alleged in tort are not separate and distinct from those arising in contract, the tort cannot be independent. John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1988, rev. denied, 547 So. 2d 1210 (Fla. 1989). Essentially, Dr. Woodson attempts to convince this Court that fraudulent inducement is always a separate and independent tort, despite the fact that the factual allegations which are the cornerstone of his contract claim are the same facts supporting his fraud claim, and despite the fact that the damages he allegedly sustained are identical. Where a party sustains no damages in tort which are separate and distinct from his contractual damages, there is no tort claim. Florida Temps v. Shannon Properties, Inc, 645 So. 2d 102 (Fla. 2d DCA 1995).

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[8] In Airport, this Court flatly rejected the "no alternative theory of recovery" exception to the economic loss rule. Dr. Woodson is in a far superior position than the plaintiff in Airport: he has a contractual remedy -- the warranty in ¶ W -- relating to the specific subject matter of the alleged fraud.

In fact, the only difference between the damages Dr. Woodson seeks in contract and in tort are punitive damages. Yet, Dr. Woodson overlooks that punitive damages alone do not render the damages separate and distinct. See Gov't. Personnel, supra. Moreover, only by pleading a separate and independent tort could Dr. Woodson support his claim for punitive damages. Lewis v. Guthartz, 428 So. 2d 222, 225 (Fla. 1982) (pleading and proving an independent tort are required in a breach of contract action in order for punitive damages to be recovered); see Rolls v. Bliss & Nyitray, Inc., 408 So. 2d 229, 237 (Fla. 3d DCA 1981) ("...since plaintiffs failed to prove that they sustained compensatory damages based on a theory of fraud which were any way separate or distinguishable from their compensatory damages based on the contract, we conclude that plaintiffs have failed to meet the strict pleading and proof requirements necessary to recover compensatory and punitive damages based on fraud..."). As already discussed, Dr. Woodson has not plead a separate and independent tort.

Although Dr. Woodson attempts to convince this Court that there would never be an instance where fraud in the inducement results in anything other than economic damages, that is simply not the case. For example:

1). A fraudulently induces B to enter into a contract to purchase a car on the basis that it is designed for racing. While racing the car, it explodes and causes personal injury to B. B would have a claim for fraud in the inducement (personal injuries) in addition to breach of contract (car did not meet B's contractual expectations).

2). A affirmatively represents to B that a certain boat never has been involved in any accidents. B purchases the boat relying on that representation. While B is using the boat, it sinks because a previous accident had caused hull damage. B is physically injured. B would have a claim for fraud (personal injuries) and breach of contract (value of the boat if the representation had been included in the contract).

3). B purchases reinforcing steel bars from A, which A has represented are designed to be the strongest rebar made. B constructs a wall using the rebar. A windstorm knocks down the wall because the rebar is not as strong as most rebar. B's car, parked near the wall is damaged

by the falling wall. B has a claim for fraud (property damage to the car) and a claim for breach of contract (cost of the rebar).

Additionally, fraud in the inducement would continue to provide a basis for rescinding a contract, or a defense to a breach of contract action. See page 23 below.

2. The Facts Giving Rise to Each Claim Are The Same.

Many federal district courts in Florida have utilized a well-reasoned factual analysis to determine whether a tort is independent of a breach of contract. If the factual basis of the dispute is contractual, then tort claims -- including fraud -- are barred. Where "the facts surrounding the tort claim are interwoven with the facts surrounding the breach of contract claim," the economic loss rule bars the fraud claim. Serina v. Albertsons, Inc., 744 F. Supp. 1113 (M.D. Fla. 1990). The Serina court explained that:

> [O]ne may be able to bring an action for punitive damages in a breach of contract case when the facts surrounding the breach of contract and the separate and distinct tort are interlaced, but may be precluded from bringing a *separate tort action* under the same scenario by the "economic loss rule." Id. at 1118.

The Middle District followed the Serina rationale in Gov't. Personnel Services, Inc. v. Gov't. Personnel Mutual Life Ins. Co., 759 F. Supp. 792 (M.D. Fla. 1991). In Gov't. Personnel, the court concluded that the economic loss rule applied equally to fraud and negligence actions, even where the plaintiffs were seeking punitive damages.

In this case, not only do the damages alleged in the fraud claim mirror those alleged in the contract claim, the factual basis underlying the fraud claim and the contract claim are inescapably intertwined. The factual basis of the fraud claim relates to Martin's alleged failure to disclose defects existing within the house and her affirmative representations regarding the quality of construction. Martin was allegedly guilty of fraud for representing the house as "new," and built with the "highest quality construction." (¶ 17(a) and (b)). Likewise, the contract claim

specifically alleges that the sellers breached the contract by concealing and misrepresenting defects. Moreover, Dr. Woodson contends that the sellers breached the contract by "their failure to disclose substantial material and exceedingly costly to repair defects in the Property to WOODSON which were known to them and were unknown and undiscoverable WOODSON . . . " (¶ 77). It is simply impossible to extract the facts, or the damages, of the fraud claim from those alleged in the contract claim. Essentially, all of the factual allegations relate to alleged defects which were not disclosed, and all of Dr. Woodson's alleged damages relate to the cost of repairing the defects that were not disclosed.

That Dr. Woodson's fraud claim would mirror his contract claim is not surprising since the contract at issue contained a specific warranty provision which addressed facts materially affecting the value of the property, known to the sellers and not disclosed to the buyer. Indeed, Dr. Woodson bases his contract claim on a breach of that provision. "Florida law bars all claims for fraud where the plaintiff has a remedy in contract for the breach." Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769, 776-77 (11th Cir. 1991); see Leisure Founders, Inc. v. CVC Int'l., Inc., 833 F. Supp. 1562 (S.D. Fla. 1993).

To determine whether the economic loss rule bars a tort claim, the federal courts also analyze whether the alleged tort was "independent" of the contract.[9] In fact, several courts have found that fraud in the inducement may be barred by the economic loss rule. See Leisure Founders, Inc. v. CVC Int'l., Inc., 833 F. Supp. 1562, 1572 (S.D. Fla. 1993) ("[t]rue fraudulent inducement attends conduct prior to striking the express or implied contract and alleges that one party tricked

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[9] Although Dr. Woodson argues that federal courts have consistently held that the economic loss rule does not bar claims for fraud in the inducement (IB-17), that argument is not supported by an analysis of the federal cases.

the other into contracting. . . . where the complaint alleges fraudulent inducement, but the facts comprising the fraudulent inducement claim are closely interwoven with those constituting the breach of contract, the economic loss rule bars the pleading of a separate tort claim.")

Fraud in the inducement arises when one party is tricked into contracting, based on precontractual conduct. Williams Elec. Co. v. Honeywell, Inc., 772 F. Supp. 1225, 1238 (N.D. Fla. 1991); see also, K/F Dev. Inv. Corp. v. Williamson Crane & Dozer Corp., 367 So. 2d 1078 (Fla. 3d DCA 1979) (alleged warranty delivered at closing and not at time of contract for purchase and sale could not have induced the buyer to enter into transaction), cert. denied, 378 So. 2d 350 (Fla. 19798). Thus, by definition, the fraud has to occur before the contract is signed. Here, Dr. Woodson's fraud claim is based on conduct which he alleges occurred both before and after contracting. The affirmative allegations of the Second Amended Complaint reflect that only Martin's alleged representation as to the house being "new" and of "the highest quality construction" took place prior to the time Dr. Woodson entered into the Contract. (¶ 17). Other representations allegedly took place after Dr. Woodson entered into the Contract. (¶¶ 18-27). Because Dr. Woodson's fraud claim arises from conduct occurring before and after contracting and because there is a specific contractual warranty governing the conduct which allegedly constituted fraud, there is no clearer case of a claim for fraudulent inducement which is not independent of a contract claim.

II. APPLYING THE ECONOMIC LOSS RULE TO BAR A FRAUD CLAIM IN THIS CASE, OR IN OTHER CASES WHERE THE CONDUCT CONSTITUTING FRAUD IS THE SUBJECT OF A SPECIFIC CONTRACTUAL PROVISION WOULD NOT ABROGATE THIS COURT'S PRECEDENT IN JOHNSON V. DAVIS.

The District Court's opinion did not ignore the precedent established by this Court in Johnson v. Davis, 480 So. 2d 625 (Fla. 1985). The Second District simply recognized that the Contract

at issue here contained a "Johnson v. Davis clause" by providing the warranty in ¶ W. Dr. Woodson is attempting to employ a fraud theory perhaps because he negotiated what he now thinks is an inadequate contractual right with the sellers. Woodson v. Martin, 663 So. 2d 1327, 1331 (Fla. 2d DCA 1995) (Judge Altenbernd dissenting).

Here, the contractual warranty provision -- designed to protect buyers from the very fraud Dr. Woodson advances in his lawsuit, affords the buyer a contractual remedy for conduct which might be difficult to establish constitutes fraud.

III. APPLYING THE ECONOMIC LOSS RULE IN THIS CASE DOES NOT ABOLISH FRAUD IN THE INDUCEMENT.

Application of the economic loss rule to Dr. Woodson's money claim for money damages for fraudulent inducement, does not leave him without a remedy for fraud. It simply denies a financial recovery for the same economic losses which he can recover in contract. Here, Dr. Woodson wants to have his cake and eat it too. He wants a contract claim for money damages and he wants a fraud claim for money damages. Moreover, count IV of the Second Amended Complaint alleges a cause of action for rescission. According to established Florida law, there are two remedies available for fraud in the inducement. The defrauded party can either affirm the contract and seek contract damages for breach of the contract or disaffirm the contract and seek rescission of the contract and restoration to a pre-inducement position. Burton v. Linotype Co., 556 So. 2d 1126 (Fla. 3d DCA 1989) rev. denied 564 So. 2d 1086 (Fla. 1990); Hauser v. Van Zile, 269 So. 2d 396, 399 (Fla. 4th DCA 1972) ("[w]here a presumably complete remedy is thus available against the vendor and the plaintiffs' own complaint shows that they pursued the remedy, it is inconsistent to allow the plaintiffs to proceed against the agents for damages, without

some allegation that the remedy pursued against the vendor by rescission was inadequate to fully compensate the plaintiffs").

In this case, Dr. Woodson also seeks to disavow and nullify the purchase contract based on allegations of fraud. (Second Amended Complaint Count IV). Fraud in the inducement remains a viable basis for seeking rescission of a contract. Thus, even if this Court concluded that the economic loss rule barred Dr. Woodson's claim for fraud, Dr. Woodson would not be without a remedy.

Moreover, fraud in the inducement does not cease to exist as a tort. As already discussed, where the resulting damage is personal injury or damage to other property, the independent tort continues to exist. Additionally, fraud in the inducement remains a viable defense against liability on a contract. Poneleit v. Reksmad, 346 So. 2d 615, 616 (Fla. 2d DCA 1977) (a party can successfully defend against liability on a claim by showing that he was fraudulently induced to enter into the contract or transaction upon which such liability is asserted). Applying the economic loss rule to fraud in the inducement, simply requires parties to abide by their contracts and encourages negotiation of contract remedies which are more easily proven and enforced. It provides certainty in contracts. There is no case more compelling than this one to compel a party to abide by his contract.

If this Court was to accept Dr. Woodson's argument, all a party dissatisfied with a contract would have to do is allege that he was tricked into contracting and the contract would cease to dictate the rights and remedies of the contracting parties.

IV. LONG ESTABLISHED PRINCIPLES OF CONTRACT LAW PRECLUDE THE FRAUD CLAIM IN THIS CASE.

"[R]epresentations, negotiations and conversations which proceed or are contemporaneous with the making of a contract are presumed to have merged in the written agreement." Azar v. Richardson Greenshields, Sec., Inc., 528 So. 2d 1266, 1269 (Fla. 2d DCA 1988). In Azar, the plaintiff alleged that he had entered into an agreement to purchase stock through a brokerage firm as a result of fraud and misrepresentations. He alleged further that he had relied on the broker's representations at the time he purchased the stock. Azar and the brokerage firm executed a Customer Trading Agreement which did not address the representation relating to margin calls. Therefore, because the representations regarding margin calls were not referenced in the Trading Agreement, Azar was not permitted to claim damages as a result of the broker's breach of the agreement to manage the account "in a timely and professional manner." Dr. Woodson's allegations are equally inconsistent with the express contractual language contained in ¶ W.

Moreover, "ordinarily, representations and negotiations which proceed and accompany the making of contracts are presumed to have merged into the final written contract." State Farm Ins. Co. v. Nu Prime Roll-A-Way of Miami, Inc., 557 So. 2d 107, 109 (Fla. 3d DCA 1990). In that regard, the Second District Court of Appeal has held that a buyer cannot recover for fraudulent misrepresentation when the alleged representations are not part of the contract. Saunders Leasing Systems, Inc. v. Gulf Central Distribution Center, Inc., 513 So. 2d 1303 (Fla. 2d DCA 1987) rev. denied, 520 So. 2d 584 (Fla. 1988). After purchasing trucks which allegedly did not conform to the seller's representations, the buyer sued for fraudulent representations and breach of contract. The court rejected the contract claim because the written contract contained a merger clause and the contract did not reflect any of the alleged representations. If the representations were material,

the court found that they should have been included in the contract. Likewise, the alleged representations were not actionable in fraud.

The Saunders' rationale was also applied in Englezios v. Batmasian, 593 So. 2d 1077 (Fla. 4th DCA 1992). In Englezios, the District Court concluded that "[a] party may not recover in fraud for an alleged oral misrepresentation which is adequately dealt with in a later written contract." Moreover, it does not matter whether the misrepresentations were made before or after executing the contract. In Englezios, the tenant alleged that the landlord fraudulently misrepresented that the premises could be used as a restaurant. The lease obligated the tenant to determine the suitability of the premises for a restaurant and if it was not, he could void the lease. Because the essence of the representation was addressed in the lease, the tenant could not recover in fraud.

In this case, the Contract specifically provided in ¶ N that the buyer was entitled to an inspection of the property and that if the buyer failed to inspect the premises and report defects ten days prior to closing, "[b]uyer shall be deemed to have waived Seller's warranties as to defects not reported." (¶ N). Just as in Englezios, the essence of the representations allegedly constituting fraud were specifically addressed in the Contract; therefore, Dr. Woodson may not recover in fraud. Dr. Woodson had an affirmative duty to avail himself of his contractual right to inspect the premises rather than failing to inspect and complaining later that he was deceived by the seller's and the broker's misrepresentation.

V. OTHER STATES SHOW A SPLIT OF AUTHORITY WITH RESPECT TO WHETHER THE ECONOMIC LOSS RULE BARS CLAIMS FOR FRAUD.

Although Dr. Woodson claims that other states consistently hold that the economic loss rule does not bar a claim for fraud in the inducement, it is more accurate to state that there is a split of authority on the issue. In fact, New Jersey courts have been inclined to distinguish fraud

extraneous/outside of the contract and fraud "interwoven" with the breach of contract. Public Service Enterprise Group, Inc. v. Philadelphia Electric Co., 772 F. Supp. 184 (D.N.J. 1989). In this case, the alleged fraud is not extraneous to the contractual dispute, but rather another link in the chain of Dr. Woodson's contract claim. The fraud claim is supported by factual allegations identical to those supporting the breach of contract claim. The specific allegations of fraud are alleged to have occurred both before and after contracting.

Moreover, Huron Tool & Engineering Co. v. Precision Consulting Services, Inc., 532 N.W.2d 541 (Mich. App. 1995), does not support Dr. Woodson's claim that fraudulent inducement always constitutes a tort independent of a breach of contract claim. In Huron, the plaintiff purchased a computer software system. Due to defects in the software, he sued the seller for breach of contract and warranty, fraud and misrepresentation. On summary judgment, the court concluded that fraud in the inducement may be an exception to the economic loss rule; however, the court found that the plaintiff had failed to plead such an independent tort. The Court reasoned that damages reflected by a concern about the quality expected by a buyer and promised by a seller are the essence of a warranty action. The court stated that "where the only misrepresentation by the dishonest party concerns the quality or character of the goods sold, the other party is still free to negotiate warranty and other terms to account for possible defects in the goods." Id. at 545. The court ultimately held that the plaintiff could pursue a claim for fraud in the inducement extraneous to the alleged breach of contract. However, the court further found that the representations alleged as fraud related only to the quality and characteristics of the software which were indistinguishable from the terms of the contract which were allegedly breached. Because the allegations of fraud were not extraneous to the alleged breach of contract, the plaintiff was restricted to its contractual remedies.

Huron wholly supports MacLean Realty and Martins' position in this case. In this case, the only alleged misrepresentations concern the quality and character of the house. Dr. Woodson was free to negotiate for warranty provisions and bargain over price. In fact, the contract contained a warranty provision. In addition, Dr. Woodson had a right to conduct an inspection which he failed to conduct. This is not a case where the allegations of fraud were extraneous to the alleged breach of contract. Dr. Woodson, like the plaintiff in Huron, should be restricted to his contractual remedies.

Contrary to Dr. Woodson's statement in his Initial Brief, the Michigan Supreme Court's opinion in Neibarger v. Universal Cooperatives, Inc., 486 N.W.2d 612 (Mich. 1992), did not mirror this court's opinion in Casa Clara. Neibarger did not involve negligence and strict liability claims. Rather, Neibarger involved claims for breach of express warranty, breach of implied warranty and negligence with respect to a cow milking machine which did not operate as anticipated. When the cows became sick and died, the dairy farmer sued the seller of the milking machine. The Michigan Supreme Court's decision in Neibarger is completely inapplicable to this case.

Similarly, Roehm v. Charter Mobile Home Moving Co., 907 F. Supp. 1110 (W.D. Mich. 1993) is equally inapposite. Roehm did not hold that fraud in the inducement was an exception to the economic loss rule under Michigan law. Likewise, in Theuerkaus v. United Vaccines Div. of Harlan Sprague Dawley, Inc., 821 F. Supp. 1238 (W.D. Mich. 1993), the court specifically stated that it need not address whether fraud in the inducement would be barred by the economic loss rule because the question had not been presented. Notably, the court added that the plaintiff could not shield his claims from the application of the economic loss rule by merely seeking

compensation for emotional distress and punitive damages. Such an escape, would swallow the rule.

Dr. Woodson also cites the unpublished decision of the Sixth Circuit in Electromatic Products, Inc. v. Prime Computers, Inc., 884 F.2d 579, 1989 WL 99044 (6th Cir. 1989).[10] Dr. Woodson completely misstates the court's holding. The court in Prime Computers affirmed the lower court's holding that a negligence count was barred under the economic loss rule, and simply noted that the lower court had denied summary judgment with respect to the fraud and misrepresentation counts. There is no discussion as to the reasoning behind the summary judgment claim with respect to the fraud count. Interestingly, in relation to the alleged fraudulent misrepresentations, the court noted that whether the misrepresenting party had actually made certain statements and whether they were more than mere "puffing," was very important to the determination with respect to fraud and justifiable reliance.

VI. DR. WOODSON CANNOT RAISE ANY ARGUMENTS RELATING TO BREACH OF A STATUTORY DUTY BECAUSE HE FAILED TO RAISE THOSE ISSUES BEFORE THE TRIAL COURT, OR THE SECOND DISTRICT COURT OF APPEAL.

Dr. Woodson's arguments with respect to statutory duties were neither raised before the trial court, nor before the Second District Court of Appeal; therefore, it is inappropriate to raise them before this Court. Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992). See also, Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981).

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[10] Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit. Therefore, the precedential value of this case in Michigan, let alone anywhere else, is highly suspect.

VII. THE REPRESENTATIONS ON WHICH DR. WOODSON ALLEGEDLY RELIED PRIOR TO ENTERING INTO THE CONTRACT ARE NOT REPRESENTATIONS ACTIONABLE IN FRAUD.

Dr. Woodson's alleges that only two representations took place prior to the time he entered into the Contract. Accordingly, only those representations could be considered as claims of fraud in the inducement. It is abundantly clear that these representations do not constitute fraud in the inducement.

A. **The House was New**.

A house is "new" to its first occupant. Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA 1972) aff'd 264 So. 2d 418 (Fla. 1972). At the time Dr. Woodson first viewed the house he knew that the sellers were residing in the there. (RA-93). Dr. Woodson could not expect to be the first occupant of the house.

Kirk Woodson Deposition (RA-80-83).

> Q: Were the Sheas [Sellers] actually living in the house at that time?
> A: The house had furnishings in it. (RA-80).
> A: There was junk in one of the closets, that we really couldn't see in the closets. I shouldn't say junk. I should say articles of clothing and items stored underneath the stairs and so forth. (RA-82).
> A: Behind the garage, there was a large amount of debris. And the dog was fenced in the back part of the back yard, so you really couldn't see behind the garage and places like that. (RA-83).

This case is distinguishable from S.H. Investment and Development Corp. v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986) rev. den. 504 So. 2d 767 (Fla. 1987), where a condominium seller represented a fire damaged unit as "new." In that case, the purchasers were unaware that the unit had previously been occupied and had suffered from fire damage. In this case, the documents on which Dr. Woodson relies to establish that the house was falsely represented as "new," also specifically stated "year built: 1987." (RA-57, 70). Moreover, each and every time that he viewed

the house, the sellers were residing in the house and evidence of their presence, from cluttered closets and furniture, to their physical presence at the house was everywhere. (RA-80-83). Similarly, the appraisal of the house that Dr. Woodson reviewed indicated that the house was less that one year at the time of the appraisal (January, 1988) as the effective age was "new." (RA-58-66). Even Dr. Woodson does not allege that the house was represented as "unoccupied" or "never occupied" like in Kincaid.

Florida law would also preclude Dr. Woodson's ability to recover in fraud on the basis of the "new" representation because the falsity of that representation was obvious to him. Fry v. J.E. Jones Const. Co., 567 So. 2d 901 (Fla. 5th DCA 1990). Unlike, in Fry where the plaintiffs could not ascertain whether the misrepresentation was false, and therefore they could recover for fraud, Dr. Woodson knew that the house was not new. At a minimum with the sellers residing in the house, and the year built printed on the documents provided to him, the falsity of the representation was obvious.

B. **The House was of the Finest and Highest Quality Construction**.

There was no evidence that any of Martin's representations regarding the quality of construction were false or known to be false by her. There was no evidence that Martin had any knowledge of any defects in the house. Dr. Woodson himself could not identify any specific defects of which Martin had knowledge. He testified that "I don't know exactly what she knew." (RA-90). Moreover, Dr. Woodson "lived there for almost two years before [he] found out about all of the problems with the house." (RA-92). Martin's general representation that based on her knowledge the house was of the finest and highest quality construction is not actionable.

Any representation as to the "quality" of the house must be considered opinion and expressions of opinion are not actionable fraud. Atlantic Nat'l Bank of Fla. v. Vest, 480 So. 2d 1328 (Fla. 2d DCA 1985) rev. den. 491 So. 2d 281 (Fla. 1986). An "opinion" was defined by the Restatement (Second) of Contracts § 168: "[a]n assertion is one of opinion if it . . . or expresses only a judgment as to quality, value, authenticity, or similar matters." The Restatement elaborates by example that a "seller's general statement of quality is usually one of opinion." Restatement 2d Contracts § 168 comment c. Any of Martin's general statements about the quality of construction were mere assertions of opinion, consequently, they are not actionable fraud.

Martin's statements regarding the quality of construction are in the nature of a salesman's "puffing" therefore her statements cannot be deemed actionable in fraud. Upledger v. Vilanor, Inc., 369 So. 2d 427, 430 (Fla. 2d DCA 1979) cert. den. 378 So. 2d 350 (Fla. 1979) (complaining party is not entitled to rely on misrepresentations in the nature of "puffing."); See also, Eastern Cement v. Halliburton Co., 600 So. 2d 469, 471 (Fla. 1992) ("[t]rade talk or puffing relates to matters of opinion . . ."); Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092 (11th Cir. 1983) (financial projections conceded to be "puffing" statement by dealer and not an actionable representation).

The Florida Supreme Court has recognized that sellers of property make certain assertions which are mere opinions and are not to be relied upon by buyers.

> Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by seller to obtain a high price and are always understood as affording to buyer no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land . . . are, after all, only expressions of opinion, or estimates founded on judgment, about which honest men might well differ materially. Williams v. McFadden, 23 Fla. 143, 1 So. 618 (Fla. 1887).

Although Dr. Woodson paints himself as a hapless consumer, effectively manipulated by conniving sellers and their broker, such was not the case. Dr. Woodson was at all material times represented by his own real estate broker (Paul Jackson), as well as Marcus Woodson, his father, a licensed real estate broker. (PA-1, R-79). Moreover, Dr. Woodson had a contractual right to inspect the house, (RA-71-72), and prior to closing, he had discussed with his attorney his contractual right to inspect the property. (RA-84-85, 87-88). Dr. Woodson is a highly educated physician and was, at all times, on equal footing with the other parties involved in the transaction. (RA-74-76). Dr. Woodson is attempting to make Martin and MacLean Realty guarantors of a house that did not live up to his economic expectations.

CONCLUSION

Based on the foregoing, this Court should affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail this 9th day of May 1996, to Jeffrey N. Kramer, Esquire, 24 West Third Street, Suite 312, Mansfield, OH 44902, and Frederick J.V. Pearson, Esquire, Watson & Pearson, 600 -49th Street North, Suite C, St. Petersburg, Florida 33710.

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