ORIGINAL

SUPREME COURT OF FLORIDA

CV REIT, INC., a Delaware corporation f/k/a CENVILL INVESTORS, INC., and H. IRWIN LEVY,

Petitioners,

vs.

TGI DEVELOPMENT, INC.,

Respondent.
_____/

CASE NO. 87,282
District Court of Appeal
4th District - No. 94-2749

PETITIONERS' BRIEF ON THE MERITS BY CV REIT, INC. f/k/a CENVILL INVESTORS, INC. AND H. IRWIN LEVY

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioners, CV Reit, Inc., a Delaware corporation f/k/a Cenvill Investors, Inc., and H. Irwin Levy, certifies that the following persons and entities have or may have an interest in the outcome of this case.

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3. CV Reit, Inc. f/k/a Cenvill Investors, Inc.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER

THE CASE AND FACTS

Preliminary Statement

This is a brief by Petitioners, CV Reit, Inc. and H. Irwin Levy. The Petitioner, CV Reit, Inc., was formally known as Cenvill Investors, Inc. and will be so referred to herein.[1] Petitioners seek review and reversal of the decision of the Fourth District Court of Appeal of January 3, 1996, reported at TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996). Jurisdiction is based on the Fourth District's certified conflict with the Second District's opinion in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995). Woodson was an *en banc* opinion by the Second District Court of Appeal in which the majority opinion held that the Florida Economic Loss Rule applied to bar a claim for fraud in the inducement to enter into a contract to buy a private residence. The two dissenters in Woodson urged that the Economic Loss Rule did not apply to bar such a claim. In the present case, the Fourth District Court of Appeal agreed with the dissenting opinions from Woodson and specifically disagreed and certified conflict with the majority decision in Woodson. See TGI Development, Inc. v. CV Reit, Inc., 665 So.2d at 366.

There are presently six certified cases from the District Courts of Appeal presenting variations of certified questions on the overall issue of whether the Florida Economic Loss Rule bars

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[1]Cenvill Investors, Inc. was a real estate investment trust and the name of this trust company was changed to CV Reit, Inc. during the litigation. The letters "CV" are a contraction of the word "Cenvill" and "Reit" is a common term referring to a real estate investment trust.

fraud in the inducement claims. Each case is based on its own individual facts. Some are commercial cases while others are consumer law matters. Of course, each case involves a contract plus an assertion of some brand of fraud before or during the performance of the contract. Only the CV Reit case involves the creation of an ongoing business relationship lasting for years between two sophisticated business corporations functioning on an equal bargaining basis. The six cases are:[2]

1. Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995);
2. Raymond James & Associates, Inc. v. PK Ventures, Inc., 666 So. 2d 174 (Fla. 2d DCA 1995);
3. Linn-Well Development Corporation v. Preston & Farely, Inc., 666 So. 2d 558 (Fla. 2d DCA 1996);
4. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995);
5. Jarmco, Inc. v. Polygard, Inc., ___ So. 2d ___, 21 FLW D478 (Fla. 4th DCA 1996); and
6. TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996).

The Third District Court of Appeal's decision in HTP, Ltd. v. Lineas, held that the Economic Loss Rule does not apply to bar a contracting party from recovering economic damages from another contracting party for the tort of fraud in the inducement concerning a settlement agreement in litigation. This decision occupies the lead position in the set of cases and has been scheduled for oral argument on May 29, 1996.

In all of these cases, the overall umbrella issue is whether the Economic Loss Rule bars claims for fraud in the inducement. This is a substantial over-simplification of the varying legal

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[2]Hereafter these cases will be referred to by use of a short style.

issues behind each of these cases which are very different in their background and facts.

One thing is absolutely clear. Since this Court's decision in Casa Clara Condominium Assn., Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993), in June of 1993, the Economic Loss Rule and its application to the overall issue of fraud in the inducement has become an extremely active area of litigation. In the years since Casa Clara, many civil cases involving contracts with the additional allegation of a count for fraud in the inducement have progressed through the trial courts, on to the district courts of appeal, through that decisional process and now on to this Court. The six cases above have arrived here almost simultaneously. Obviously, the bench and bar are in real need of clarification and guidance from this Court. As noted in Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352 (Fla. 2d DCA 1992), rev. den., 626 So. 2d 207 (Fla. 1993), the rule is much easier to state than it is to apply. The decisions of Florida trial judges and the district courts have been anything but consistent. See Woodson, Lazzara dissenting.

The instant case was decided by the Fourth District Court of Appeal based on the Woodson and HTP opinions from the Second and Third Districts, respectively, which were both unwritten when the briefs and arguments occurred in CV Reit. The Fourth District reversed the trial court's position that the Economic Loss Rule bars fraud int he inducement claims by rejecting the majority position in Woodson and accepting instead the two dissenting

opinions. Because Petitioners believe the instant case is entirely different from the Woodson case, a statement of the proceedings and facts is necessary to appropriate consideration of this case.

Proceedings and Facts

TGI v. CV Reit involves a longstanding contractual relationship between sophisticated businessmen on behalf of their corporations. The facts are taken from the second amended complaint which is in the record at R.256-303. This complaint is quoted verbatim at pages 9-13 of this brief. It will be generally designated by ¶ numbers. All contracts were solely between the corporations. The trial attorneys on both sides were experienced and respected commercial litigators with excellent firms. This is not a consumer case and it does not involve the purchase of a private residence. The plaintiff below, TGI Development, Inc., was a developer building condominiums in the Boca Grove Plantation Development. Boca Grove was an exclusive country club residential community with numerous amenities including a golf course, a tennis club, pool areas, and other luxuries. (R.¶ 6,7).Plaintiff, TGI Development, Inc., already owned real estate in the Boca Grove Development and it had purchased an option so that it could buy additional real estate to continue its on-going development and sale of completed units within this upscale community.[3] (R.¶ 7,8).

TGI Development was already building and selling units and

[3]These initial transactions: the acquisition of property and the acquisition of the option to purchase additional property were not alleged to have been a part of any fraudulent conduct by anyone.

decided to go forward with additional land purchases and additional construction. (R.¶ 7-13). Mr. Frank Zappala was the chief officer of TGI Development who actually resided in the Boca Grove Development and was well-aware of everything that was going on there.

The defendant below, Cenvill Investors, Inc., was a real estate investment trust and a major investor in the Boca Grove Plantation Development. Although denied in its answer and counter-claim, for the purposes of the summary judgment below, Cenvill accepted as true the facts alleged in the plaintiff's second amended complaint. (R.¶ 1-32). Of course, Petitioners also do so now for purposes of review by this Court. As a real estate trust, Cenvill Investors actually had no involvement in the development, but the complaint alleges a totally different set of facts. The complaint asserts that Cenvill Investors was a development company which was a major investor in and was actively involved in the planning and construction of Boca Grove. (R.¶ 12). Cenvill Investors was alleged to have initially invested $7 million in the venture and to have invested some $22 million before the financial failure of the project and the take over by a receiver. (R.¶ 12-20).

Mr. H. Irwin Levy was alleged to be the main officer and director of Cenvill and at all times to have been functioning on behalf of and in the scope of his employment and agency for the Cenvill Company. (R.¶ 4). All contractual arrangements as attached to the complaint were between the two corporations: TGI

Development, Inc. and Cenvill Investors, Inc. (R.356-303). There was no contract involving Mr. Levy personally, and there were no assertions that Mr. Levy personally profited from any of his corporate conduct on behalf of his company Cenvill.[4] There were no assertions that Levy gained personally from the supposed "common law fraud" alleged in the complaint. The complaint was amended at least three times. (R.1-94,194,256). The plaintiff attempted to have the case set for jury trial over and over again. (R.355,409,436).

The trial court then entered a summary judgment in favor of CV Reit solely on Count I (fraud). (R.3872). At this point, plaintiff decided to abandon with prejudice all of the other still pending counts. The other counts, including the contract count and CV Reit's counter-claim, were thus determined in favor of CV Reit on the merits. (R.3897-3909,3910-3913). These determinations were not conditional; they were on the merits. TGI appealed solely the fraud ruling and the Fourth District Court of Appeal reversed and also gratuitously granted the plaintiff the right to amend what the Court found to be a very "inartfully pleaded" assertion of fraud in the inducement. There was no motion for leave to amend in the trial court or the Fourth District. The appellant's brief merely argued that the TGI complaint was poorly drafted and the District Court chose to construe this as a motion to amend which was then granted totally without notice that it was being considered.

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[4]Any assertions of such profits were contained in counts which the plaintiff initially asserted and then abandoned. (R.1-10,356-364,384,795,796).

As stated, Cenvill had accepted all of the facts in the second amended complaint and there was never any question about factual issues barring summary judgment.[5] The summary judgment proceeding was certainly not a rush to judgment. The case was filed in early 1989 and had been pending for well over four years when the motion and supplemental motion for summary judgment were filed. (R.930,1144). The summary judgment was entered in January of 1994. (R.3872). The complaint initially alleged numerous counts including common law fraud, statutory lender liability, breach of contract, rescission of the contract, and breach of fiduciary duty. (R.1-94). The plaintiff eventually abandoned all counts except for Count I common law fraud and Count III breach of contract. The defendants moved to dismiss the complaint and the trial court held that the contract count stated a valid cause of action against the defendants. (R.322-323). The Court set various trial dates, none of which were ever reached.

Plaintiff was represented by an experienced and competent trial firm which specifically pled Count I as "common law fraud" and not as "fraud in the inducement." Exactly the same facts were alleged in support of the fraud count and the breach of contract count. The acts were alleged to have occurred over several years and were specifically recited to have been both the breach of

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[5]The Second Amended Complaint from R.256-303 is quoted verbatim in this brief. It is the source of almost every factual statement. See p. 8-14 herein. Although the parties dealt solely with this existing complaint on appeal, the District Court gave plaintiff a clear and overwhelming message that the complaint should be amended a fourth time. We have no idea whether the trial judge would have granted such a motion, had one been made.

contract(s) and as common law fraud. Exactly the same compensatory damages were sought for the breach of contract as were sought for the common law fraud.

As indicated, almost all of the facts were taken directly from the plaintiff's second amended complaint. The only additional facts in the entire summary judgment argument were merely for clarification and concerned damages. Mr. Zappala, TGI's executive officer lived in Boca Grove and testified that the facts in both counts (fraud and contract) were the same. (T.11). In answers to interrogatories, the plaintiff admitted that the damages claimed under the fraud count and the damages claimed under the contract count were exactly the same. (T.11-20).

Cenvill was a substantial investor starting at $7 million and going up to $22 million in Boca Grove Plantation. (R.¶ 12). here was no question as to its substantial financial backing and as alleged, Mr. Levy was at all times acting as an agent for Cenvill. Indeed, it was alleged that Cenvill and Boca Grove Plantation were joint venturers and that Cenvill had basically taken over the development and invested up to $22 million in Boca Grove Plantation since 1983. (R.¶ 13-15). Despite this, plaintiff would eventually voluntarily dismiss all claims against Boca Grove Plantation and proceed solely against Cenvill and Levy. (R.796). Plaintiff would also abandon most of its claims for compensatory damage claims and filed a Notice of Abandonment of all of its claims for lost profits against Cenvill and Levy. In addition, plaintiff abandoned all of its claims for any damages growing out of a $4.5 million bank loan

which it had obtained to purchase the additional property in Boca Grove pursuant to its option. (R.795, T.53). Plaintiff also abandoned all of its claims for damages growing out of Cenvill's $800,000 loan to TGI by stipulating to a judgment.

It is frankly very difficult to figure out just what compensatory damages were still being sought by the end of the case. The last act by TGI Development was to forgo the opportunity of proceeding to trial on its breach of contract claim and the counter-claim where all of the same facts would have been tried before a jury. Instead, plaintiff consented to a judgment against itself on the merits on both the breach of contract count and the counter-claim. Judgment for $1.1 million was entered against TGI on the $800,000 loan counter-claim. (R.3912).

We have no alternative other than to simply repeat verbatim the allegations of the complaint which, as stated, were accepted as true for purposes of the summary judgment. We disagree that these are the true facts. Thus, begging the Court's indulgence, the complaint alleged as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. TGI, formerly known as Tridel Development, Inc., is a Florida corporation with its principal place of business in Palm Beach County, Florida.

2. CENVILL is a foreign corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of Florida with its principal place of business in Palm Beach County, Florida.

3. LEVY is an individual residing in Palm Beach County, Florida, who at all times material hereto was and is an officer and director of CENVILL.

4. All acts and omissions of LEVY complained of herein were within the course and scope of his agency relationship with CENVILL, were carried out by LEVY with the intent of furthering the interests of CENVILL, were either authorized in advance or subsequently ratified by CENVILL and were otherwise conducted under such circumstances as to render CENVILL either directly or vicariously liable for the acts and omissions of LEVY.

5. BOCA GROVE, LTD. (hereinafter BOCA GROVE) is a Florida limited partnership of which LaBonte Diversified Development, Inc. (hereinafter LDD) is the sole general partner. BOCA GROVE was the developer of a project known as Boca Grove Plantation.

6. Boca Grove Plantation (hereinafter Plantation) is a real estate development project conceived as an exclusive, luxury residential golf and country club community including both single family and multi-family residential units.

7. Beginning in approximately 1982, CENVILL acquired a substantial financial interest in Plantation in the amount of approximately $7,000,000.00, as a joint venture investor in Plantation with BOCA GROVE, LTD. and/or as mortgage creditor of BOCA GROVE secured by an interest in Plantation. The joint venture between CENVILL and BOCA GROVE arose out of an oral agreement between them to engage in the development of Boca Grove Plantation as an exclusive luxury residential golf and country club community. Both joint ventures contributed financing, management direction, property, labor, experience, skill, time, or a combination thereof with the objective of generating a profit to be shared between them without any actual partnership or corporate designation.

8. As an inducement to BOCA GROVE to establish the aforedescribed business relationship with CENVILL, LEVY represented that CENVILL, as a knowledgeable and sophisticated developer, would take such action as necessary in the interest of BOCA GROVE to assure the financial success of Plantation.

9. Shortly after the initiation of the relationship between CENVILL and BOCA GROVE, BOCA GROVE recognized that market conditions were such that the cash flow demands of the transaction between CENVILL and BOCA GROVE as structured in the written agreements between them would ensure the failure of Plantation. Those facts were communicated to LEVY and CENVILL by BOCA GROVE on various occasions and in various forms from time to time beginning during 1983.

10. During 1983 and on numerous occasion thereafter, LEVY and CENVILL continued to promise BOCA GROVE that CENVILL would fulfill its earlier promises to assure the financial success of Plantation.

11. Contrary to the express representations of LEVY and CENVILL, CENVILL (acting through LEVY and others) had formulated a scheme to acquire complete control of Plantation at minimal cost to CENVILL and at the expense of BOCA GROVE and other Plantation investors.

12. In furtherance of this scheme, CENVILL acquired the first mortgage on Plantation in October 1983, thereby increasing its investment from 7 to 22 million dollars.

13. Responding to the continuing and increasingly serious financial problems of Plantation and in furtherance of the ultimate objectives of its scheme, CENVILL modified its written agreements with BOCA GROVE in 1985 and again in 1986. The modification expanded CENVILL's control over Plantation and perpetuated Plantation's financial distress.

14. Prior to 1987, CENVILL acquired the right to approve each and every one of BOCA GROVE's expenditures and thereafter managed BOCA GROVE's cash receipts and disbursements, payroll, operations and personnel including the hiring and firing of senior management. CENVILL thereby had direct control over all marketing and development efforts relating to Plantation and first-hand knowledge of the financial condition of the project.

15. During approximately June 1985, Plaintiff, TGI became interested in a real estate purchase within Plantation. While contemplating the purchase, TGI was contacted by LEVY who communicated to TGI that he, LEVY, was the operating principal of CENVILL, which in turn was a major investor in Plantation. LEVY further communicated to TGI through words and actions that he, on behalf of CENVILL, controlled the marketing and development decisions of BOCA GROVE as they related to Plantation.

16. In reliance upon CENVILL and LEVY's commitment to and involvement in Plantation, TGI entered into a Purchase and Sale Agreement with BOCA GROVE on February 28, 1986, which contract included an option granted to TGI for additional real estate purchases. Said agreement is attached as Exhibit A.

17. The transaction between TGI and BOCA Grove required TGI to enter into an Exclusive Agency Brokerage and Marketing Program Agreement (attached as Exhibit B).

Said Agreement was subsequently amended on August 7, 1987 (Exhibit C) and January 18, 1988 (Exhibit D).

18. Prior to March 1987, BOCA GROVE approached TGI with a request that TGI accelerate the purchase of the optioned Plantation property.

19. The health of the project generally and the economic well-being of BOCA GROVE were considered by TGI to be essential to the success of any development plans of TGI within Plantation and were, therefore, primary considerations in TGI's decision as to whether to exercise its option to purchase.

20. Accordingly, TGI met with IRWIN LEVY on several occasions during the period from March through July 1987, for the express purpose of investigating the financial health of Plantation and BOCA GROVE.

21. LEVY unequivocally stated to TGI that CENVILL had a major investment in Plantation and a strong personal commitment to the principals in BOCA GROVE such that CENVILL would never foreclose its mortgage interest in the project, but would instead utilize its own assets to assure the continued viability of BOCA GROVE.

22. LEVY further stated that a substantial portion of the proceeds of the sale from BOCA GROVE to TGI would be set aside to assure continuation of a quality marketing program for Plantation.

23. LEVY further stated that the financial obligations between BOCA GROVE and CENVILL had been met in a timely fashion and were in good standing to date.

24. The aforedescribed statements were made by LEVY for the purpose of inducing TGI's reliance and with knowledge that TGI would and did, in fact, rely upon the statements in deciding to purchase the additional optioned Plantation land.

25. The statements when made were false and were known by LEVY to be false in the following material respects:

a. At the same time LEVY was assuring TGI that CENVILL would never foreclose on BOCA GROVE, LEVY knew that CENVILL was contemplating foreclosure proceedings.

b. CENVILL had no intent to protect the viability of BOCA GROVE, but intended instead to take over Plantation from BOCA GROVE, at the cheapest possible

price and without regard to the impact of such takeover of BOCA GROVE on any other developer involved in Plantation.

c. CENVILL never had an intent to set aside any proceeds of the sale from BOCA GROVE to TGI for marketing and, in fact, never did make any effort to have any funds set aside. Instead, said funds were intended to be used and were used to reduce BOCA GROVE's indebtedness to CENVILL.

d. BOCA GROVE was repeatedly delinquent in meeting its financial obligations to CENVILL and was subject to foreclosure at the very time that CENVILL was assuring TGI of BOCA GROVE's good standing.

26. The false and fraudulent statements of LEVY were made with the malicious intent to deceive TGI and they did, in fact, deceive TGI.

27. As a further inducement for TGI to enter into a purchase of additional Plantation land, CENVILL volunteered to loan $800,000.00 to TGI to finance the construction of improvements to the land, requiring TGI to secure repayment of the loan with a mortgage on the land from TGI to CENVILL.

28. In reliance upon the false and fraudulent statements of CENVILL acting through LEVY, TGI entered into a Purchase and Sale Agreement with BOCA GROVE on July 31, 1987 (Exhibit E) and borrowed $800,000.00 from CENVILL. But for the false and fraudulent statements, TGI would not have engaged in either transaction.

29. The purchase was closed on August 7, 1987, with TGI paying $4,000,000.00 to BOCA GROVE which in turn transferred all or substantially all of said funds to the use or benefit of CENVILL. No money was set aside for marketing.

30. By February 1988, in accordance with the CENVILL scheme to take control of Plantation, all marketing efforts with respect to the project ceased.

31. Subsequently, CENVILL discontinued its financial support of Plantation causing the clubhouse facility to be closed to members and further causing a discontinuance of golf course maintenance and services. Eventually, the project was placed under the control of a receiver.

32. As a direct and proximate consequence of the aforedescribed acts and omissions of LEVY and CENVILL,

> TGI lost the value of its investment in Plantation, the sums spent in the development of its Plantation holdings, and all profits which would otherwise have been derived from the development of its Plantation holdings, which sums are in the amount substantially in excess of Five Million Dollars. [The lost profits claim and various other claims were then formally abandoned].

Following these allegations, five causes of action were alleged against the defendants in separate counts. However, Counts (II) statutory lender liability, (IV) rescission of contract and (V) breach of fiduciary duty, were voluntarily dismissed after voluminous discovery. (R.384,796). Only the following two counts on fraud and breach of contract remained:

COUNT I -- COMMON LAW FRAUD

> The Allegations Common To All Counts are incorporated as if each were fully set out herein and Plaintiff further alleges:
>
> 33. The aforedescribed action of the Defendants constitute the commission of a fraud upon the Plaintiff which fraud proximately caused injury to the Plaintiff.
>
> WHEREFORE, Plaintiff demands judgment against the Defendants, CENVILL and LEVY, for compensatory damages in an amount in excess of Five Million Dollars ($5,000,000.00) plus interest, punitive damages, costs and such further relief as this Court deems just and proper. Plaintiff further demands trial by jury.

COUNT III -- BREACH OF CONTRACT

> The Allegations Common To All Counts are incorporated as if each were fully set out herein and Plaintiff further alleges:
>
> 46. This is an action for damages in excess of Five Thousand ($5,000.00) Dollars.
>
> 47. The loan agreement between Plaintiff and Cenvill referenced in Paragraph 27 and 28, by implied covenant, requires the exercise of good faith and fair dealing on the part of all parties concerned. Plaintiff is not currently in possession of a copy of the agreement but

believes the Defendant, Cenvill, to have it.

48. The duty of good faith and fair dealing requires that such party cooperate in such a manner so as not to prevent the other party from enjoying the benefit of their bargain and further requires that one party not preclude or interfere with performance by the other.

49. Defendant, CENVILL, has breached the implied covenants of good faith and fair dealing by engaging in the fraudulent and unreasonable activities more particularly alleged throughout this Complaint including particularly those activities described in Paragraph 29, 30 and 31; that is, failing to set aside money for marketing; terminating all marketing efforts; terminating financial support of Plantation; causing or permitting the clubhouse facility to be closed to members; discontinuing golf course maintenance and services; and causing or permitting the project to be placed in the hands of a receiver.

50. As a direct and proximate result of CENVILL'S breach, Plaintiff has been damaged.

WHEREFORE, Plaintiff demands judgment against Defendant CENVILL, for damages in excess of Five Thousand ($5,000.00) Dollars, plus interest, costs and such further relief as this Court deems just and proper. Plaintiff further demands trial by jury.

TGI did not allege that it was fraudulently induced to buy the option agreement on which it began negotiations in June of 1985 and entered into a purchase and sale agreement on February 28, 1986. This contract included the option for TGI to purchase additional real estate. TGI made a $4.5 million loan from a bank to buy the additional property. When TGI decided to exercise its option on the additional real estate, it alleged that part of the reason for the additional purchase was because Cenvill offered to loan TGI $800,000 to be used for construction and improvements on the new property. (R.¶ 27). It is uncontested that Cenvill did loan TGI the $800,000 and that unpaid $800,000 loan was the subject of

Cenvill's counter-claim against TGI. Eventually, TGI agreed to a judgment against itself in the total amount of $1.1 million representing the full $800,000 loan, which it had received, but not repaid in any way. Obviously, TGI sustained no damage as a result of the $800,000 loan it received from Cenvill. If there was ever any doubt about it, any such assertion of fraud surrounding the $800,000 loan was laid to rest when the judgment was entered in favor of Cenvill on this unpaid loan for the full amount plus interest ($1.1 million). TGI did initially assert usurious interest, but that claim was also abandoned by its voluntary dismissal of Count II. (R.384).

As to fraud, TGI contended that Cenvill misrepresented its real intentions regarding its future financial support for the Boca Grove project, and that eventually the entire project was a financial failure. (R.¶ 31,32). The complaint alleges that Levy stated that he had a personal commitment to the individual principals in Boca Grove so he would never foreclose a mortgage against them and that he (Cenvill) would "utilize its own assets to assure" success of the venture. (R.¶ 21). TGI alleges it relied on these personal commitments. The complaint also asserts that for five months in 1987 it was "investigating the financial health of Plantation and Boca Grove." (R.¶ 20).

TGI asserts it lost substantial monies due to Cenvill's failure to prop up the development with further financial support. TGI further alleged that Cenvill failed to set aside certain funds for marketing the development and that it eventually terminated its

financial support, discontinued maintenance of the golf course facility and permitted the appointment of a receiver to take over the property. (R.¶ 31,49). The complaint never actually alleges that a foreclosure action was filed or completed. All of these events were described in the complaint as a continuing course of "fraudulent conduct". Obviously, most of the alleged fraudulent events occurred long after the initial deal was made and during the longstanding contractual relationship between the parties. The oral statement regarding a "personal commitment" are in ¶ 21 and are stated to have occurred in the five month period in 1987. At another point, the complaint specifically alleges Cenvill was "engaging in fraudulent . . . activities . . . more particularly those activities described in paragraph 29, 30 and 31;" after which a series of 1988 events are listed. The last "fraudulent" act listed was the appointment of a receiver in 1988.

Post Summary Judgment Stipulations

Obviously, plaintiff had every right to appeal the circuit court's summary judgment ruling after proceeding to trial on the breach of contract count and the counter-claim on the $800,000 loan. As previously indicated, the exact facts were specifically alleged in the second amended complaint as the facts supporting the breach of contract count and the trial court had already denied a motion to dismiss the breach of contract count thereby holding that a cause of action had been stated. In addition, the plaintiff had also reasserted all of the same fraud facts as an affirmative defense to the $800,000 loan counter-claim. (R.350-351). TGI

asserted that because of the defendant's alleged fraud, TGI could not be forced to repay the $800,000 loan.

Plaintiff chose to walk away from its opportunity to have all of these issues tried before a jury and fully determined. Instead, plaintiff stipulated to a dismissal with prejudice on its breach of contract claim and further stipulated to an adverse judgment on the merits on the $800,000 counter-claim. Judgment for $1.1 million was entered in favor of Cenvill and against TGI Development, Inc. The parties signed an agreement on April 5, 1994. (R.3900). In paragraph four of that agreement, plaintiff specifically agreed that it would not seek to bolster its appeal on the fraud count in any way based on its own dismissal of the breach of contract count. The agreement further provided:

> Plaintiff agrees that in no way will they argue in the appeal that the fact that they have no available remedy for breach of contract makes their fraud claim viable.

Thus, the absence of a contract remedy is not to be considered in any way. Indeed, plaintiff had the clear opportunity to proceed to trail on its contract count which had been held to state a valid cause of action.

SUMMARY OF THE ARGUMENT

This is one of six cases certified on the general issue of whether the Economic Loss Rule bars claims that a contracting party was fraudulently induced into entering into a contract which that party also contends has been breached by the party guilty of fraud. There is no question but that the Economic Loss Rule bars tort claims in a contractual setting under this Court's previous decisions. The Second District Court of Appeal in Woodson and the Fourth District Court of Appeal in CV Reit have adopted an exception to the general rule, holding that the Economic Loss Rule does not bar fraud in the inducement claims. In fact, these courts have simply wiped out this aspect of the rule in its entirety and certified the general issue on to this Court.

We respectfully suggest that on the overall question, a one-sentence rule without definition is not enough to deal with the tremendously diverse problems presented under the guise of contractual litigation involving fraud in the inducement. Because of the Casa Clara decision, every breach of contract case now seemingly involves a claim for fraud in the inducement. It matters not the degree of inducement, it is only necessary for the plaintiff to put this label at the top of Count I. Such a pleading will have the effect of neutralizing the Economic Loss Rule plus entitle the plaintiff to punitive damages. While this Court's Casa Clara decision was designed to limit tort litigation, it has actually had the practical effect of greatly increasing it.

Despite the array of six new cases, CV Reit suggests that the

existing law on independent torts and intertwined factual situations adequately covers the CV Reit case and should have resulted in an affirmance of the trial court's summary judgment in favor of CV Reit.

When the setting is purely commercial and the facts of the breach of contract and the facts of the fraudulent conduct are exactly the same, and where the damages are exactly the same under either theory, then the law of contract controls and the Economic Loss Rule bars an action for fraud in the inducement.

Recognition of this suggested rule is all that is necessary to dispose of the instant case. Indeed, this is already the law as established in numerous cases in Florida and throughout the country.

There is also substantial caselaw holding that the Economic Loss Rule does not bar a fraud in the inducement claim when the fraud is truly a totally independent and separate tort resulting in damages separate and apart from the contract damages. The CV Reit situation is simply not such a situation because here exactly the same facts are alleged as the fraud and the breach of contract and exactly the same damages are sought under both theories. Under such circumstances and in a commercial setting, the walls between tort and contract should be strengthened rather than weakened. The Economic Loss Rule bars this case.

In addition, here the plaintiff stipulated to an adverse judgment on the breach of contract claim and further stipulated to an adverse judgment on a counterclaim. The plaintiff could have

proceeded on to a trial where every single fact alleged to be fraud would have been determined by a jury. The plaintiff was asserting exactly the same alleged fraud as its defense to the counterclaim on the $800,000 loan. However, there is now a judgment against the plaintiff on the counterclaim based on these same alleged fraud facts. The plaintiff chose not to litigate the alleged fraud even though it had a breach of contract count which had been held to state a cause of action.

The Fourth District Court of Appeal should not have merely taken a sideline position by adopting the dissent from Woodson. Woodson is a totally different factual case between the purchaser of real estate and an independent agent who made fraudulent representations. Woodson is not even an appeal between the buyer and the seller and the Woodson dissent made it clear that the Economic Loss Rule would have applied to a claim between buyer and seller who were the two contracting parties. Thus, even under the dissent, CV Reit would have been entitled to an affirmance. The Fourth District should have given this case an actual analysis rather than merely adopting a position from Woodson. Such an analysis would have resulted in an affirmance. In the alternative, if the rule of law is to be changed, then the case should be remanded to the District Court for review under the newly announced standards on a case specific review.

In addition, the Fourth District wrongly granted plaintiff leave to amend based on an argument in the appellant's brief. There was never a motion to amend and CV Reit never had notice that

allowing an amendment was even under consideration.

ISSUES ON REVIEW

I. THIS COURT SHOULD HOLD THAT IN A PURELY COMMERCIAL CONTRACT SETTING, THE ECONOMIC LOSS RULE BARS A CLAIM FOR ALLEGED COMMON LAW FRAUD WHEN THE FACTS OF THE FRAUD ALSO FORM THE BASIS FOR A VALID CAUSE OF ACTION FOR BREACH OF CONTRACT AND WHERE PRECISELY THE SAME CLAIMED COMPENSATORY DAMAGES ARE AVAILABLE THROUGH THE CONTRACT CLAIM.

II. THIS COURT SHOULD HOLD THAT THE DISTRICT COURT ERRED IN GRANTING LEAVE TO AMEND THE FRAUD COUNT WHERE THERE HAD BEEN ABSOLUTELY NO REQUEST TO AMEND IN THE TRIAL COURT AND THE ARGUMENT RESULTING IN THE RIGHT TO AMEND WAS RAISED FOR THE FIRST TIME ON APPEAL. DOBER V. WORRELL, 401 SO. 2D 1322 (FLA. 1981) REQUIRES A REVERSAL.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT IN A PURELY COMMERCIAL CONTRACT SETTING, THE ECONOMIC LOSS RULE BARS A CLAIM FOR ALLEGED COMMON LAW FRAUD WHEN THE FACTS OF THE FRAUD ALSO FORM THE BASIS FOR A VALID CAUSE OF ACTION FOR BREACH OF CONTRACT AND WHERE PRECISELY THE SAME CLAIMED COMPENSATORY DAMAGES ARE AVAILABLE THROUGH THE CONTRACT CLAIM.

The Fourth District Court of Appeal chose not to analyze this particular case, nor to analyze any of the cases cited in the majority opinion in Woodson. The Second District Court of Appeal majority cited two recent 11th Circuit Court of Appeal cases; Hoseline, Inc. v. USA Diversified Products, Inc., 40 F.3d 1198 (11th Cir. 1994), and Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734 (11th Cir. 1995). The Fourth District, without explanation, simply rejected the Woodson majority and adopted the two dissents. The Fourth District brief opinion also seems to have rejected the Woodson majority's concluding sentence that: "The nature of the damages suffered determines whether the Economic Loss Rule bars recovery based on tort theories." This was a conclusion which should have been given more consideration.

No matter what result was reached in Woodson, the very different facts of that case make even the dissents inapplicable and non-controlling to the CV Reit situation. Even if this Court were to adopt the general view that the Economic Loss Rule does not bar a fraud in the inducement claim, such a holding would not require that the Fourth District be affirmed herein. The six pending certified cases, plus the two 11th Circuit cases cited by the Woodson majority show the diversity of the factual situations

which should not be simply swept along with the same broad brush approach. The point is easily demonstrated in the following chart.

1. Casa Clara - Defect in cement in building.
2. Hoseline - Defect in wire harness.
3. Pulte Home Corp. - Defect in plywood.
4. Jarmco - Defective resin in boat.
5. Woodson - Sale of a home.
6. Raymond James - Sale of a lime rock mine.
7. Linn-Well - Sale of commercial property.
8. HTP - Litigation settlement.
9. CV Reit - Failure of extended multi-contract commercial relationship.

A one sentence rule of law as stated by the Fourth District opinion should not control each and every one of these factual situations. Merely stating that the Economic Loss Rule does or does not bar all fraud in the inducement claims is neither a correct or an adequate answer.

Petitioners start with the proposition that once this Court has assumed jurisdiction over a case, it has the appropriate power to deal with all issues in the case and dispose of the entire controversy. We therefore suggest that this Court should at least reframe the Woodson certified question as it should apply herein.

Same Facts - Same Damages

There is one relatively simple rule which we suggest this Court could state which would be helpful and certainly warranted in the overall clarification of this troublesome area of the law.

> When the setting is purely commercial and the facts of the breach of contract and the facts of the fraudulent conduct are exactly the same, and where the damages are exactly the same under either theory, then the law of contract controls and the Economic Loss Rule bars an action for fraud in the inducement.

These are the precise facts of this CV Reit case.

Of course, when these are the circumstances, there is no true independent tort and no separate and distinct pre-contract fraud because the fraud facts and the contract breach facts are intertwined. Further, if there are no distinct and different compensatory damages, there is absolutely no actionable fraud. Under these circumstances, there is simply no reason not to limit a plaintiff to a contractual remedy. These are the duties and the remedies that the parties agreed on. The walls between tort and contract should be firmly maintained under these circumstances. There is absolutely no reason not to do so except for punitive damages and we suspect that is truly what is driving the plaintiff's entire position in this case. The plaintiff waived numerous issues herein. These included its own affirmative breach of contract claim, all claims for future lost profits, all claims for damages growing out of the $4.5 million loan which it obtained to buy the additional property under the option and all claims for damages growing out of the $800,000 loan which it received from CV Reit. Plaintiff conceded defeat on all of these issues apparently just so it could appeal its fraud claim without a jury verdict on what the true facts might have been.

It is almost impossible to know what actual damages TGI is seeking and to this day plaintiff has never stated in either of its briefs before the Fourth District Court of Appeal, what actual damages are claimed. In the Appellees' Brief below defendants demanded that the plaintiff disclose what damages were being sought in its Reply Brief. That invitation went unanswered and we again

suggest that the plaintiff advise this Court just what damages, other than punitive damages, it has in mind.

Same Facts and Damages Under the Existing Economic Loss Rule

The relatively simple rule suggested on the previous page is already established in numerous cases. Again, when the setting is commercial and the facts of the alleged fraud are the same as the facts of the alleged breach of contract, and where the compensatory damages are exactly the same then even a claim labeled as fraud in the inducement must fail. After all, the label is totally unimportant. Where there is a commercial, contractual, ongoing relationship, the parties should be held to contract law, and merely labeling the claim "fraud in the inducement" does not abrogate all contract principles.

This case is a model of the intertwined fact situation because the same facts were claimed as fraud and breach of contract along with exactly the same damages. Further, an analysis of these facts shows they are indeed intertwined and intertangled. This was plaintiff's third attempt at a complaint. Discovery had gone on for over four and one-half years. Plaintiff had set the case for trial on several different occasions. There was no motion or even an oral request to amend the complaint. A previous motion for summary judgment had been argued and plaintiff was thoroughly on notice of the Economic Loss Rule arguments as based on same facts and same damages.

After the trial court granted summary judgment on the fraud count, the contract count was still pending along with the counter-

claim on the $800,000 loan. Precisely the same fraud assertions would have been tried before a jury but for the fact that plaintiff stipulated to a dismissal with prejudice and to a judgment against itself on all of these remaining claims. Plaintiff thus walked away from the chance to have all of these same issues determined. The plaintiff even abandoned all claims for future loss profits, all claims for damages growing out of the bank loans by which plaintiff bought the optioned property, and any defense based on fraud to the $800,000 loan transaction which resulted in a $1.1 million judgment against plaintiff. The obvious reason is plaintiff's desire to proceed on a punitive damage claim. This Court should not approve this kind of commercial litigation conduct. This is precisely the sort of litigation which the Economic Loss Rule was conceived and designed to prevent.

Florida's Economic Loss Rule

Casa Clara Condominium Assoc., Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993); Florida Power & Light Company v. Westinghouse Electric Corporation, 510 So. 2d 899 (Fla. 1987); and AFM Corporation v. Southern Bell Telephone & Telegraph Co., 515 So. 2d 180 (Fla. 1987) are of course the leading cases. In 1993 this Court overruled six district court cases and established the Economic Loss Rule in Florida's Jurisprudence. Only in Casa Clara was this subject settled and since then the District Courts of Appeal had applied the principles of the rule in holding that tort remedies are only available in personal injury or property damage cases and that there can be no independent tort flowing from a

contractual breach justifying a tort claim such as fraud solely for economic losses. The latest case employing the Economic Loss Rule as of the filing of the briefs in the Fourth District was City of Tampa v. Thornton v. Tomasetti, 646 So. 2d 279 (Fla. 2d DCA 1994). The City of Tampa case provides an appropriate general definition of the principle. The court stated:

> Because the City seeks to recover purely economic losses, it can arguably state no grounds for relief in tort. See AFM Corp. v. Southern Bell Tel. & Electric Corp., 510 So. 2d 899, 902 (Fla. 1987) (principles of contract, not tort, govern claims for economic loss where there is no accompanying personal injury or damage to the property outside of the contract; Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc., 609 So.2d 1349, 1355 (Fla. 2d DCA 1992) ("Because the law of negligence does not recognize a protected interest in purely economic loss, no cause of action exists under such circumstances"), rev. denied, 626 So.2d 207 (Fla. 1993). The City, urging the rationale of section 552, Restatement (Second) of Torts, has contended, however, that its tort claims are excepted from the economic loss doctrine. (FN4) We disagree based upon the following analysis.

In AFM Corporation this Court discussed its own Florida Power & Light Co. decision noting that the Economic Loss Rule was the majority view throughout the United States. The opinion stated as follows:

> We conclude 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.

The Casa Clara Condominium case is, of course, the landmark Economic Loss Rule decision because it overrules some six District Court of Appeal cases and strictly limits one Florida Supreme Court decision (Moyer) to its facts. The district courts were reversed for having incorrectly refused to apply the rule "to what should

have been contract actions." In reaffirming prior decisions, this Supreme Court again concluded:

> Therefore, we again "hold contract principles more appropriate than tort principles for recovering economic loss without an accompanying physical injury or property damage." *Florida Power & Light*, 510 So.2d at 902. If we held otherwise, "contract law would drown in a sea of tort."

Contract principles thus govern over tort principles and fraud is a classic tort theory. If only economic loss is sought then a case must be brought in contract rather than tort and this is the existing law of this state. There are many situations involving third parties where there is no actual contract between the plaintiff and this particular defendant. The Woodson real estate agent had no direct contract with the buyer, but the seller did. See generally, May 1994, Florida Bar Journal: The Supreme Court of Florida Ends the Confusion Surrounding the Economic Loss Doctrine Len Wagner and Richard Solvent. In the instant case, there is no question about the direct contract relationship nor about the available contract remedy. Plaintiff would have already had a trial on that remedy but for plaintiff's own stipulation to a determination against itself on all contract issues.

The complaint (¶ 49) even alleged the specific acts which TGI considered to be the breaches of the contract and the "fraudulent" acts. Those acts were precisely the same. The plaintiff also alleged precisely the same damages arising from both the fraud count and the breach of contract count. The same facts, plus the same damages, equals a classic application of the Florida economic loss doctrine. The trial court would have been in substantial

error had the loss rule not been applied.

Plaintiff had also taken voluntary dismissals of its counts for statutory liability under Ch. 68, Ch. 772 and Ch. 817. Thus, no issue is presented as to the loss rule barring a statutory cause of action as was asserted against the broker in Woodson. TGI also dismissed its count for contract rescission, but it certainly had not dismissed its breach of contract count. This occurred only after the final summary judgment on the fraud count.

Intertwined and Inextricable Facts Case Law

The Economic Loss Rule bars even fraudulent inducement claims when the facts constituting the breach of contract are closely interwoven with those constituting the alleged fraud. A case directly on point is Leisure Founders, Inc. v. CUC Intern, Inc., 833 F.Supp. 1562 (S.D. Fla. 1993), where the court stated as follows at page 1572:

> True fraudulent inducement attends conduct prior to striking the express or implied contract and alleges that one party tricked the other into contracting. . . . "It is based on pre-contractual conduct which is, under the law, a recognized tort." *Id.* Where the complaint alleges fraudulent inducement, but the facts comprising the fraudulent inducement claim are closely interwoven with the those constituting the breach of contract, the economic loss rule bars the pleading of a separate tort claim. *See Serina v. Albertson's, Inc.* 744 F.Supp. 1113, 1118 (M.D. Fla. 1990); *John Brown Automation, Inc. v. Nobles*, 537 So.2d 614, 617-618 (Fla. 2d DCA 1988) (striking punitive damages for fraud where the misrepresentation was "inextricable from the events constituting a breach of contract"); *J. Batten Corp. v. Oakridge Investments 85 Ltd.*, 546 So.2d 68, 69 (Fla. 5th DCA 1989) (dismissing fraud claim in breach of contract case). No Florida case that we can find has expressly held that true fraudulent inducement does not come within the ambit of the economic loss rule.

The Leisure Founders opinion was argued to but not addressed by the

Fourth District.

The John Brown opinion relied on in Leisure Founders, is also from the Second District Court of Appeal and is clear Florida authority directly on point. Obviously, the Woodson court did not see the facts in Woodson as intertwined or inextricable because John Brown was not mentioned in any way. The John Brown opinion holds that where the facts of the supposed fraud are "inextricable" from the breach of contract then the plaintiff is limited to a contract remedy rather than a tort remedy under the theory of fraud. The Second District's own prior language is extremely appropriate and we thus quote it at length:

> [1] Punitive damages for breach of contract are barred by Florida law. A legion of cases supports this proposition. E.g., AFM Corp. v. Southern Bell Telephone and Telegraph Co., 515 So.2d 180 (Fla. 1987); Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987); Southern Bell Telephone & Telegraph Co. v. Hanft, 436 So.2d 40 (Fla. 1983); Lewis v. Guthartz, 428 So.2d 222 (Fla. 1982); Futch v. Head, 511 So.2d 314 (Fla. 1st DCA), pet. for review den., 518 So.2d 1275 (Fla. 1987); Rolls v. Bliss & Nyitray, Inc., 408 So.2d 229 (Fla. 3d DCA 1981). As these cases recognize, however, a separate and independent tort, if pleaded and proved, will support a claim for punitive damages.
>
> * * *
>
> A constant untangled thread running through all the cases involving punitive damages in the context of a contractual breach is that the tort for which such damages are recoverable must be separate and independent from the breach of contract. For example, in Rolls v. Bliss & Nyitray, Inc., the Third District expressed the following:
>
> > Therefore, 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, and that those damages must therefore be reversed.

408 So.2d at 237 (emphasis added).

> Similarly, the claim for punitive damages was rejected in Lewis v. Guthartz for the failure "to allege or prove a tort committed by Guthartz which was distinguishable from or independent of his breach of contract." 428 So.2d at 224. Furthermore, the damages sustained by that tort must be of a particular kind, as our supreme court emphasized in its recent comments in AFM Corp.: "We conclude that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." 515 So.2d at 181-82.

The TGI company has conceded that it has no damages for fraud that are different from its damages for breach of contract. The long-existing law of this state, as further reenforced by Casa Clara, absolutely bars this fraud claim. Here, contract law controls.

Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991); Serina v. Albertson's, Inc., 744 F.Supp. 1113 (M.D. Fla. 1990) and J. Allen, Inc. v. Humana of Florida, Inc., 571 So. 2d 565 (Fla. 2d DCA 1990) were also cited to the trial court as examples of the application of the Economic Loss Rule in this situation. Of course, these authorities were also argued to the Fourth District, but again that court chose to rely solely on the new cases of HTP, Ltd. and the Woodson dissents.

In Serina, the court analyzed the issue of whether an exception to the Economic Loss Rule should be made for the intentional tort of fraud. The federal judge noted that the

Economic Loss Rule had not been clearly decided in Florida in September of 1990. The judge concluded that fraud should not receive different of "disparate treatment" by excluding it from the Economic Loss Rule. This was a case where the plaintiff had not even filed a claim for breach of contract but the court found that the fraud claim facts were "interwoven with the facts surrounding a hypothetical breach of contract claim" and granted the defendant's motion for summary judgment on the fraud issue.

Contrary Case Law

Respondent CV Reit certainly agrees that there are many cases throughout the country on the issue of the Economic Loss Rule and fraud in the inducement and that many of those cases contain a simple statement that the Economic Loss Rule does not bar fraud in the inducement. HTP, Ltd. v. Lineas Aereas, by the Third District in 1995 is just such a case. The opinion contains one sentence stating that the loss rule does not bar a fraud in the inducement claim and cites to Burton v. Linotype Co., 566 So. 2d 1126 (Fla. 3d DCA 1990). Again, this one sentence approach without a definition of fraud in the inducement and without reference to the facts is a less than adequate analysis. HTP, Ltd. involved a settlement agreement among lawyers in litigation over fraud. Surely, such a settlement (contract) should not be governed by the same rule that governs the sale of a house or an article of personal property. The Burton opinion does not even mention the Economic Loss Rule by name, and of course, it predates Casa Clara. Further, in Burton the Third District made it clear that there could be no recovery

for fraud damages as "independent torts" unless the plaintiff was able to prove "differentiated damages".

Quite clearly, in the present case the plaintiff will not be able to prove differentiated damages because the damages have been conceded to be exactly the same. In short, the fact that many courts have said the Economic Loss Rule does not bar fraud in the inducement claims is an insufficient statement of the rule in cases such as this where the facts of the contract claim and the facts of the fraud claim are the same and there the damages are the same. There must be a definition of fraud in the inducement and the existing definition of that label already excludes intertwined fact situation. The Fourth District erred in not recognizing this point of law which was not addressed in Woodson.

It is not as though Casa Clara has been retreated from. In Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995), this Court was presented with three certified questions from the 11th Circuit Court of Appeal. The opinion by Justice Shaw rejected the plaintiff's argument that an exception should be created to the Economic Loss Rule where plaintiff had no alternative theory of recovery. Airport Rent-A-Car makes it clear that this Court had chosen not to create exceptions for negligent torts or intentional torts -- the Economic Loss Rule still precludes such claims. The majority opinion in Woodson is faithful to both Casa Clara and Airport Rent-A-Car and the dissent is at odds with those decisions.

Basic Policy For The Economic Loss Rule In Commercial Cases Not Involving A Product Or The Sale Of Property

As previously pointed out, many of the present crop of loss rule cases deal with the sale of products which were misrepresented before they were bought. In several circumstances, the misrepresentation occurred by someone other than the actual seller. Such facts have nothing to do with the circumstances in the CV Reit case. This case involves a purely commercial series of transactions between two sophisticated business corporations. The course of conduct occurred over a number of years and the plaintiff's assertion is nothing more than that a CV Reit officer said he would stand behind and financially prop up the Boca Grove development which both TGI and CV Reit had invested in. Numerous documents were signed and numerous express oral agreements were reached in the years these companies were in business together. The complaint specifically alleges that CV Reit is guilty of fraud because it stopped maintenance of the golf course club house facility and eventually allowed a receiver to be appointed to run the property. It is patently obvious that this conduct (which is specifically alleged to be part of the fraudulent conduct) occurred long after any representations were ever made that CV Reit would "stand behind" the overall development.

This case is nothing more than a plaintiff asserting that the contract was eventually breached and that therefore the breaching party never really meant to perform in the beginning. The plaintiff then reasons -- and therefore I must have been

fraudulently induced in the beginning. Commercial contracts between sophisticated business companies cannot be so lightly swept aside and that is precisely what the Economic Loss Rule has as one of its main goals.

It is not necessary for CV Reit to discuss all of the cases and all of the law on what should occur in consumer cases or on what rules apply in cases dealing with the sale of a piece of property or a product. This is simply not one of such cases.

The general policy behind the Economic Loss Rule is to encourage commercial contracting parties, in their pre-execution negotiations, to take full advantage of the socially desirable process of allocating the risks of non-performance and loss between and among themselves. Palau International Traders, Inc. v. Narcam Aircraft, Inc., 653 So. 2d 412, 416 (Fla. 3d DCA 1995).

The basic policy of this Court announced in Casa Clara and reinforced in Airport Rent-A-Car, Inc. is that the wall between contract and tort should be maintained and that at least in the commercial setting, the parties are required to protect themselves by drawing appropriate contract provisions rather than to simply sit back and sue for tort after the party realizes that he or she should have been more attentive to the contract before it was ever signed.

It is axiomatic that commercial contracts almost always impose duties on parties which are different than the generalized societal standard of negligence by the common man. If all contracts are to be judged and enforced by negligence standards, then the

distinction between these two branches of law will certainly be abolished.

Indeed, a generalized exception from the Economic Loss Rule for all brands of fraud in the inducement will mean that every breach of contract case will include a count for fraud in the inducement. It is very easy to put this label at the beginning of every complaint and that is precisely what will occur. In the present case, the label was not even used in the complaint which was based instead on "common law fraud". This complaint never asserted a true cause of action for fraud occurring before a contract which was asserted to have been breached thereafter. Indeed, almost all of the alleged breaches (fraud) were post-contractual. The law on intertwined facts is nothing more than the logical application of the general doctrine of independent torts. The law has been and remains that a truly independent tort is actionable whether or not the tortfeasor happens to have a contractual relationship with the victim of the tortious conduct. A true independent tort would have absolutely nothing to do with the contract between the same parties. The doctrine foreclosing fraud in the inducement claims when they are based on the same facts which constitutes a breach of contract is nothing more than the application of the doctrine that the tort must be totally independent in order to be actionable outside the protections and duties afforded under the contract. We are confident that this Court does not wish to retreat from Casa Clara's clear statement that contract principles govern over tort principles.

In addition to the required independent nature of a fraudulent act, the supposed fraudulent conduct must be substantially more than mere "puffing" by a seller. Statements by Irwin Levy that he was personally committed to the individuals running the Boca Grove development, that he would stand behind the development and that he would prop it up financially are simply not actionable fraud as a matter of law. Such statements are at most "puffing" under Upledger v. Vilanor, Inc., 369 So. 2d 427 (Fla. 2d DCA 1979) cert. den., 378 So. 2d 350 (Fla. 1979) holding that a complaining party may not rely on representations in the nature of "puffing". See also, Eastern Cement v. Halliburton Co., 600 So. 2d 469 (Fla. 1992), where at p. 471 this Court stated: "Trade talk or puffing relates to matters of opinion . . . ." Mere opinions as to what will occur in the future are not actionable fraud and certainly do not constitute an independent tort outside the restrictions of the Economic Loss Rule." See Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092 (11th Cir. 1983) where financial projections by a dealer were held non-actionable puffing. Further, this Court's 1887 decision in Williams v. McFadden, 1 So. 618 (Fla. 1887) is an old, but still applicable authority which holds precisely in accordance with the present day law on the loss rule.

It should also be noted that in the present case the complaint itself alleges that the principal of TGI met with the principal of CV Reit in a series of meetings over several months to assure himself of the financial situation of the overall project. (R.__). After these extensive contractual dealings between sophisticated

businessmen, TGI now abandons its contract claim and sues solely in tort.

Woodson v. Martin

The Fourth District adopted the dissents and rejected the majority opinions from Woodson. Thus, we first deal with the dissents and respectfully suggest that CV Reit was entitled to an affirmance even under the positions asserted in the dissents.

Judge Altenbernd took the historical approach and concluded that Florida actually had three distinct but overlapping economic loss rules. He classified these as (1) the products liability rule, (2) the contract rule, and (3) the negligence rule. We invite this Court to look closely at Judge Altenbernd's description of the contract rule because it is entirely consistent with all of the "independent tort" argument previously stated herein. Judge Altenbernd even agrees that: "This rule [the contract Economic Loss Rule] might govern Dr. Woodson's claim against the sellers . . . " Woodson involved a buyer's suit against both the sellers and a real estate salesperson (Wilma Martin) who was the primary person making the alleged fraudulent representations. There was no direct contract between Woodson and Wilma Martin and the Woodson appeal was directed at the rulings concerning the salesperson. Here, CV Reit stands in the equivalent position of the sellers in Woodson. Thus, even the dissent adopted by the Fourth District, would apply the "contract Economic Loss Rule" to bar the claim against the actual contracting parties; the buyer and sellers. The same rule would have applied in favor of CV Reit. At the very least, under

Judge Altenbernd's approach the trial court would be allowed to control abuses by plaintiffs in seeking to impose tort liability for the mere breach of a contract between the parties. The Fourth District simply leaped without looking -- Judge Altenbernd's dissent should have resulted in an affirmance herein.

Judge Lazzara's dissent takes the homeowner's approach relying entirely on the position that Johnson v. Davis, 480 So. 2d 625 (Fla. 1985), was not overruled by Casa Clara. Obviously, CV Reit is not a home purchase case and Judge Lazzara's dissent has no application whatsoever.

We respectfully suggest that the majority opinion in Woodson is the better reason approach. The majority initially cites Casa Clara and then discusses this Court's 1995 decision on certified questions in Airport Rent-A-Car, Inc. v. Provost Car, Inc. Then the majority analyzes the two recent federal 11th Circuit decisions in Hoseline, Inc. v. USA Diversified Products, Inc., 40 F.3d 1198 (11th Cir. 1994) and Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734 (11th Cir. 1995). These cases support the majority view that if any overall general rule is to be adopted, it should be the rule that the Economic Loss Rule does bar fraud in the inducement claims. This is a fair rule, and taking a page from Judge Altenbernd's dissent, this general rule should apply and trial courts should be authorized to soften the rule and apply exceptions in cases of obvious and aggravated abuse of the normally adequate protections of the contract process. This Court should affirm the majority position from Woodson in a commercial setting.

The Economic Loss Rule On A Case-By-Case Basis

There are, of course, alternatives and this Court may wish to reject the yes/no approach and conclude instead that the Economic Loss Rule may apply or not apply depending upon the facts on a case-by-case basis. Trial courts might appropriately be directed to consider these issues in individual cases based upon an established set of factors.

An example of this approach may be taken from the State of Michigan. In Neibarger v. Universal Cooperatives, Inc., 486 N.W.2d 612 (Mich. 1992), the Michigan Supreme Court wrote a decision very similar to this Court's Casa Clara decision. Neibarger involved negligence and strict liability claims and the court held in broad terms that the Michigan Economic Loss Rule barred "tort claims" and that the rule was necessary to avoid a situation where "contract law would drown in a sea of tort."

In a subsequent case in the intermediate appellate court, Huron Tool and Engineering Co. v. Precision Consulting Services, Inc., 532 N.W.2d 541 (Mich. App. 1994), the District Court ruled that the Supreme Court's decision did not extend beyond the facts of that case and that even though fraud was indeed a tort, it would not be barred by the Economic Loss Rule. The court engaged in a case specific analysis and stated beginning at page 544:

> ". . . the danger of allowing contract law to 'drown in a sea of tort' exists only where fraud and breach of contract are factually indistinguishable." (citation omitted). However, a claim of fraud in the inducement by definition, redresses misrepresentations that induce the buyer to enter into a contract, but that do not in themselves constitute contract or warranty terms subsequently breached by the seller."

The Huron court thus adopted a case-by-case analysis to determine whether fraudulent inducement was distinct from a breach of contract. In the event that this Court chooses to adopt a similar approach then the trial courts should, of course, be given the initial task. We suggest establishing factors including, but not limited to the following:

1. Whether a direct contract exists between the plaintiff and defendant, that is, whether direct privity applies;
2. Adequacy or inadequacy of a contract remedy;
3. The type of relationship between the parties: commercial or consumer relationships;
4. Whether the facts of the contract/fraud dispute are intertwined and whether the damages are distinct or the same;
5. Whether the matter involves the sale of goods, products or real estate;
6. Equality of bargaining positions;
7. Whether the alleged fraud is also a specific statutory violation; and
8. Whether the contract itself negates reliance on a later fraud in the inducement theory.

In the instant case, it is uncontested that there was a contract and an adequate contract remedy. TGI cannot suggest to this Court that its contract remedy was non-existent or inadequate in any way. The TGI complaint was held to state a cause of action for breach of contract and that count was ready to proceed to trial when the plaintiff itself dismissed the count and stipulated to an adverse determination on the contract count and the loan counter-claim. Plaintiff has also stipulated that the dismissal of the contract count cannot be used to bolster plaintiff's appellate position in any way. Every single fact concerning the alleged common law fraud was specifically plead as an affirmative defense to the $800,000 loan counter-claim and plaintiff also stipulated to

an adverse $1.1 million judgment against itself on this claim. If this case were to be returned to the trial court under the Fourth District's opinion, the jury would be asked to determine the truth or falsity of the fraud facts while CV Reit already has an unconditional judgment which implicitly holds that the "same facts" did not constitute fraud by CV Reit. The effect of the post-judgment stipulations and judgment, takes this CV Reit case out of the general law. In short, even on a case-by-case basis CV Reit is entitled to an affirmance.

II. THIS COURT SHOULD HOLD THAT THE DISTRICT COURT ERRED IN GRANTING LEAVE TO AMEND THE FRAUD COUNT WHERE THERE HAD BEEN ABSOLUTELY NO REQUEST TO AMEND IN THE TRIAL COURT AND THE ARGUMENT RESULTING IN THE RIGHT TO AMEND WAS RAISED FOR THE FIRST TIME ON APPEAL. DOBER V. WORRELL, 401 SO. 2D 1322 (FLA. 1981) REQUIRES A REVERSAL.

The Fourth District commented that the plaintiff's complaint was inartfully drawn, but sufficient to allege fraud in the inducement. In a footnote, the Fourth District directed that TGI be allowed to amend the sole remaining count of the complaint on fraudulent inducement on remand before the trial court. Of course, CV Reit contends that the complaint, as previously quoted verbatim herein, was not sufficient to state an action for fraudulent inducement because the complaint itself fully demonstrates that the fraud and contract facts are obviously at least intertwined. However, under no circumstance should the plaintiff now beheld be entitled to amend this complaint.

Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981) holds that after summary judgment a party may not raise for the first time on appeal

a request to amend. In the instant case, there was absolutely no motion to amend or even an oral request to amend before the trial court. The case had been pending for four and one half years before the summary judgment. The plaintiff had amended the complaint numerous times. The plaintiff had set and reset the case for trial numerous times. Extensive discovery had occurred and every conceivable fact had been the subject of documentary production. Successive motions for summary judgment had been filed and the plaintiff was fully aware of the defendant's position regarding application of the Economic Loss Rule to the fraud count. This was not a rush to judgment and plaintiff's competent trial lawyers were not caught off guard by the Economic Loss Rule. Written memorandum of law were exchanged by the lawyers before the hearing on the motion for summary judgment and there were certainly no surprises.

Then, for the first time on appeal, appellate counsel changed horses and began arguing that the complaint was poorly worded, inartfully drawn and this was the reason the summary judgment was granted. See Appellant's Brief, p. 11, 18, 19. The Fourth District considered this argument as a request to amend the complaint and granted it in footnote 2. At least, we assume that the Fourth District considered this argument in the brief as a request for an amendment. Otherwise, the grant of leave to amend was totally of the Court's own making and it was, of course, totally without notice. In no event did CV Reit have the vaguest idea that the court was even considering granting leave to amend. Indeed, it is

necessary for this point to be considered now because otherwise this Court is in the position of dealing with a complaint which does not actually state the facts and is not the complaint which both plaintiff and defendant are bound by. This grant of a right to amend based solely on an appellate argument that the appellant had relied upon a poorly drafted complaint was obvious error. As stated in Dober:

> It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleading to assert matters not previously raised renders a mockery of the 'finality' concept in our system of justice.

In short, the plaintiff is bound by the complaint which was filed and amended several times after notice of the defendant's positions regarding the Economic Loss Rule. The plaintiff never asked the trial court to amend and the obtuse argument that the complaint was poorly drafted could not be honored by the District Court by granting leave to amend. At the very least, an amendment had to be sought in the trial court with notice to the defendants. The trial court would then have exercised discretion in granting or denying an amendment based on whether the privilege of amending had been abused. In addition, the defendants would have been able to see the newly proposed amendment. Now, the trial court will be forced to allow an amendment no matter what it says. None of these concepts were even mentioned to the Fourth District because no one knew the issue was being considered. This error also requires reversal.

CONCLUSION

The summary judgment by the circuit court should be affirmed and the opinion of the Fourth District Court of Appeal reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to **Searcy Denney Scarola Barnhart & Shipley, P.A.**, 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409, **Joel D. Eaton**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130, and **John Gundlach**, Fleming, Hale, Shaw & Gundlach, 11760 U.S. Highway One, Suite 300, Golden Bear Plaza, North Palm Beach, Florida 44408, dated this 25th day of March, 1996.

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