ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LINN-WELL DEVELOPMENT CORP., et al

Petitioners,

v.

PRESTON & FARLEY, INC.

Respondent.

_____/

Case No: **87,385**

District Court of Appeal
2nd District - No. **94-03170**
94-03168

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT PRESTON & FARLEY, INC.

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STATEMENT OF THE CASE

Defendant/respondent Preston & Farley, Inc., adopts the Statement of the Case set forth in Plaintiff/petitioner Southgate's Initial Brief, with the following additions.

The certified question herein was presented to this Court by the Second District Court of Appeal in two separate appeals which had been consolidated. In one appeal, referred to herein as "the First Case," the trial court had denied Southgate's motion to correct a "clerical error" naming Preston & Farley in a summary final judgment which had already been affirmed by the appellate court in a prior appeal, (Supplement to Record at S. 66-67) In the second appeal, referred to herein as "the Second Case," the trial court had granted a separate summary judgment in favor of Preston & Farley in a different case involving the same allegations. (R. 387-88)

The Second District Court of Appeal noted the "convoluted procedural events preceding the presence of this matter before us," (A. 7 at 1)* and further noted the res judicata and collateral estoppel arguments raised by Preston & Farley as a result of a previous summary judgment naming Preston & Farley and affirmed on a previous appeal. (A. 7 at 2) The Court specifically refrained from ruling on those other matters because the economic loss rule

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* Record citations to Petitioner's Appendix to Initial Brief shall cite the tab number of the document, followed by the page number therein.

in itself determined the outcome of the appeals, citing Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995). Thus, the Second District panel did not address the other issues involved in this appeal, but rather limited its certified question to a narrow issue involving the application of the economic loss rule to buyers of commercial property suing a non-privity broker for fraud in the inducement.

STATEMENT OF THE FACTS

Plaintiff/petitioner Southgate's "Statement of the Facts" in its Initial Brief treats the underlying facts in the light most favorable to its case, on the assumption that the granting of a summary judgment in favor of defendant/respondent Preston & Farley allows such a one-sided interpretation. While this is certainly true under normal circumstances, this case presents a unique posture in which a prior summary judgment naming Preston & Parley has already been affirmed by the Second District in Linn-Well Development Corp. v. Crown Beverage Packaging, Inc., *632* So.2d 1036 (Fla. 2d DCA 1993). Based upon this separate case (in which respondent was never served), it equally could be argued that Preston & Farley is entitled to favorable interpretation of the underlying facts, which would allow it to argue that the undisputed facts demonstrate no evidence of breach of contract, fraud in the inducement, negligent misrepresentation or breach of a duty of honesty and fair dealing.

Petitioners' "Statement of the Facts" is taken from the complaint. The count therein alleging fraud in the inducement (the subject of the certified question herein) incorporates five paragraphs of factual allegations concerning alleged misrepresentations and omissions. (R. 12) These incorporated paragraphs allege that Preston & Farley and the sellers opined about the value of the commercial property to petitioners, the

potential buyers. (R. 5-6) They further allege that Preston & Farley and the sellers failed to disclose certain reports indicating that a portion of the lands for sale (10%) might be subject to environmental regulation depending upon further site investigations and assessments of the land's character. (R. 6-7; R.23) As to Preston & Farley, the proposed actionable fraud in the inducement was an alleged omission of material facts.

In the First Case, however, the trial court and appellate court found that no misrepresentations had been made to petitioners (R. 246), that there was no duty to disclose (R. 239-240), that appropriate disclosures had been made to petitioners (R. 243), that petitioners were attempting to sue on non-actionable expressions of opinion (R. 246), that there was no reliance by petitioners (R. 249-2531, and that petitioners' own actions were inconsistent with the allegations. (R. 254) This is quite a different summary of the applicable facts.

These "duelling statements" depend for their resolution on the determination of the res judicata and collateral estoppel issues passed upon by the Second District panel. Accordingly, Preston & Farley disputes the "Statement of the Facts" submitted by Southgate, and requests that this Court rely solely on the following facts common to both potential "Statements of Fact":

1. Plaintiff Southgate was a commercial purchaser of real property intended for development; (R. 9)

2. Defendant Preston & Farley was a real estate broker retained by the seller of the commercial property, and had no contract or relationship with the plaintiff buyer; (R. 2)

3. The seller and purchaser negotiated a detailed contract for the purchase of the commercial property, which contract expressly provided that no representations were made regarding the physical condition of the property, and that the commercial property was being sold "where is, as is;" (R. 76) and

4. Plaintiff Southgate is suing defendant Preston & Farley for fraud in the inducement, based upon its disappointed economic expectations regarding the physical condition of commercial property purchased, and for which no contractual representations were negotiated with the seller.

It is those facts upon which the certified question should be based, and not the facts submitted by petitioner Southgate which are based upon assumptions left unaddressed by the District Court in its certification.

SUMMARY OF ARGUMENT

In Casa Clara Condominium Ass'n v. Charley Toppino and Sons, 620 So. 2d I244 (Fla. 1993), this Court held that application of the economic loss rule depends upon the nature of the harm sought to be addressed. Where plaintiffs seek to redress personal harm, tort law provides the remedy. Where, however, plaintiffs seek damages based upon their disappointed economic expectations arising out of contractual relationships, they must rely on contract law.

A narrow exception to the economic loss rule has been allowed with regard to tort suits against professionals by parties other than the professional's clients. This exception applies only to plaintiffs who are part of a limited group of persons "whose reliance upon documents or information furnished by the professional" constitute the "end and aim" of the underlying transaction. City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279 (Fla. 2d DCA 1994). This Court has expressed its determination to halt the expansion of this tort liability of professionals to non-clients. Casa Clara at 1248, n.9.

Petitioner Southgate fails to come within this narrow exception to the economic loss rule. It negotiated a detailed contract to purchase commercial property, which contract expressly disavowed any representations regarding the character of the real property. Although its economic expectations apparently failed to be met, it cannot be allowed to turn those disappointments into a

tort action against the seller's broker Preston & Farley, alleging non-disclosure of material fact regarding the commercial transaction. No case has gone so far in extending professional liability to non-clients, and the economic loss rule properly prohibits such an attempt to circumvent freely negotiated contracts,

Intentionality provides a poor distinguishing factor in application of the economic loss rule in the instant matter. The rule relies upon the nature of the damages sought not the intention of the parties. Such a distinction would arguably prohibit professional malpractice suits unless intent were alleged. Petitioners herein seek to avoid the consequences of their contract by alleging the intentional tort of fraud in the inducement through material non-disclosures. "Intentional" breaches of contract make no more sense than "negligent" breaches.

Petitioner's argument regarding statutory regulation of brokers goes beyond either the decision of the Second District Court of Appeal herein or the certified question before this Court. The legislative regulation of the brokerage professional does not, however, lend independent support for a suit by a purchaser of commercial property against the seller's broker, where the "as is" transaction results in economic disappointment. The cases addressing liability of professional brokers to non-clients have involved limited facts of no application to the instant matter.

Finally, petitioner's argument that no other support exists for the summary judgment granted to respondent also goes beyond

either the appellate decision herein or the certified question. The record supports, however, summary judgment for Preston & Farley on several separate grounds, including res iudicata and collateral estoppel.

ARGUMENT

A. THE ECONOMIC LOSS RULE PREVENTS A BUYER OF COMMERCIAL PROPERTY FROM RECOVERING PURELY ECONOMIC LOSS IN TORT, INTENTIONAL OR NOT, AGAINST THE REAL ESTATE BROKER REPRESENTING THE SELLER OF SUCH NON-RESIDENTIAL PROPERTY

1. Tort Liability of Professionals Should not be Expanded to Include Non-privity Plaintiffs in Commercial Real Estate Transactions.

The economic loss rule enjoys a varied reputation. Is it the life preserver which prevents contract law from "drowning in a sea of tort," Casa Clara Condominium Ass'n v. Charley Toppino and Sons, 620 So.2d 1244 (Fla. 1993), or is it "The Monster that Ate Commercial Torts?"[1] There are no doubt conflicting interpretations of this Court's pronouncements on the outlines of the economic loss rule. This could be expected, since the rule straddles the great dividing line of civil law separating contracts and torts. This brief will concentrate, however, on the narrow issue presented by the certified question, which can be answered without addressing all aspects of the economic loss rule.

The controversy surrounding the economic loss rule has arisen partly as a result of several factual dichotomies that exist in the various cases that have addressed the issue. These dichotomies are:

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[1] Paul Schwiep The Economic Loss Rule Outbreak, FLA. BAR JOURNAL, Nov. 1995, pp. 34-43.

1. the nature of the tort (intentional vs. negligence) ;
2. the nature of the transaction (consumer vs. commercial);
3. the relationship of the parties (privity vs. non-privity);
4. the damages sought (property damage vs. economic loss); and
5. the type of liability (products liability, professional liability, business torts).

The cases that have addressed the economic loss rule have contained a permutation of these dichotomies, and as a result attempts to state a general rule have foundered on differing facts.

In Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987), this Court drew a distinct line between the two fundamental causes of action: a) contract actions which seek to enforce the economic expectancies of parties; and b) tort actions which seek to impose duties not founded on contract. Relying upon Seely v. White Motor Co., 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965), and East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), this Court held that contract principles were more appropriate to resolve purely economic loss as opposed to personal injury and property loss.

Although Florida Power & Light involved two parties in privity with each other, this Court later applied the economic loss rule in

a non-privity context. In **Casa** Clara Condominium Ass'n v. Charlev Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993), this Court stated:

> "The purpose of a duty in tort is to protect society's interest in being free from harm. ... Contractual duties, on the other hand, come from society's interest in the performance of promises." Id. at 1246-1247

Thus in analyzing the application of the rule the Court placed primary emphasis on the nature of the harm sought to be addressed - disappointed economic expectations versus personal harm - rather than privity of contract.

The instant matter involves application of the economic loss rule to actions in tort against professionals. Where privity exists between the professional and the person harmed, i.e., the client, there is little difficulty in determining that the professional contractual relationship created gives rise to causes of action for economic harm caused by breach of the professional's duty to the client. E.g., Weiner v. Moreno, 271 So. 2d 217 (Fla. 3d DCA 1973).

The greater problem is created when attempts are made to expand the class of persons who may sue the professional for economic harm. In a few limited instances, this Court has allowed non-privity plaintiffs to bring tort actions against certain professionals. See First Florida Bank v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990)(accountants); Angel, Cohn & Rosovin v. Oberon Investment, 512 So.2d 192 (Fla. 1987) (attorneys); First American Title Ins. Co., Inc. v. First Title Service Co., 457 So.2d 467

(Fla. 1984) (abstractors); A. R. Mover, Inc. v. Graham, 285 So.2d 397 (Fla. 1973) (architects). In City of Tampa v. Thornton-Tomasetti, P.C., 646 So.2d 279 (Fla. 2d DCA 1994), the Second District Court of Appeal examined these exceptions to privity and noted that these few cases involved not every foreseeable injured party, as traditional tort law would suggest, but rather only:

> "distinct third parties whose reliance upon documents or information furnished by the professional constituted the 'end and aim of the [underlying] transaction.' Id. at 282.

Without expressly stating so, this analysis tracks closely the exception to the economic loss rule set forth in Section 552, Restatement (Second) of Torts (1976). This section allows actions in tort against professionals by non-privity plaintiffs for information negligently supplied to them, as long as these plaintiffs are part of a "limited group of persons for whose benefit and guidance" the professional knowingly provided such information. In Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc., 653 So.2d 412 (Fla. 3d DCA 1995), that court noted that this expansion of professional liability to non-privity plaintiffs was "a narrow exception to the economic loss rule." Id. at 417.

The case of Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995), and the instant matter address the application of these varied principles to suits by non-privity plaintiffs against real estate brokers for alleged intentional torts. In Woodson, the en banc majority reviewed the Casa Clara decision and the more recent decision of this Court in Airport Rent-A-Car, Inc. v. Prevost Car,

Inc., 660 So.2d 628 (Fla. 1995). In describing the Airport Rent-A-Car case, the Woodson court stated:

> The court strongly reaffirmed its holding in Casa Clara, emphasizing that in Casa Clara the court recognized that the law of contracts protects one's economic losses, whereas the law of torts protects society's interest in being free from harm, The court cited language from a previous case 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.' Id. at 1329.

In dissent, Judge Altenbernd argued that the economic loss rule should not apply to intentional torts. Id. at 1330. Judge Lazzara noted in his separate dissent that Casa Clara had not expressly overruled another case allowing assertion of intentional torts against sellers of residential property, Johnson v. Davis, 480 So.2d 625 (Fla. 1985). Id. at 1332-1333. Judge Lazzara emphasized the protection to residential purchasers provided by the Johnson decision, and pointed out that this Court had made the same distinction in Casa Clara (in footnote 6 at p.1247). Id. at 1333. Judge Lazzara further noted that the duties of disclosure regarding residential property have been extended to the seller's professional broker. Tobron v. Campen, 579 So.2d 165, 169 (Fla. 5th DCA 1991), rev. den., 589 So. 2d 289 (Fla. 1991).

Judge Lazzara's dissent points the way to a reconciliation of the cases addressing the application of the economic loss rule to non-privity professionals, the situation presented in the instant action. The starting point of any such analysis must be the general proposition that persons not in privity with a professional

cannot rely upon the professional's relationship with another to justify an action for economic loss - i.e., for "disappointed economic expectations." Casa Clara at 1246.

To this general rule certain narrow exceptions have been allowed. As noted above, this Court has allowed a limited class of non-privity plaintiffs to sue professionals where reliance on documents or information provided by the professional is the "end and aim" of the subject transaction. Citv of Tamwa, suwra at 282. The Tobron case, suwra, suggests that Florida courts should expand the protected class of non-privity plaintiffs to purchasers of residential property. This Court has expressed, however, a determination to limit the expansion of professional liability to non-privity plaintiffs. Although A. R. Mover, suwra, had allowed expansion of professional liability to non-privity architects who "supervise" contractors, in Casa Clara this Court limited that prior decision "strictly to its facts." Casa Clara at 1248, n.9.

Likewise, this Court should not permit free expansion of professional non-privity tort liability to include real estate brokers, particularly in the context of commercial transactions. The Casa Clara decision described homeowners as "an appealing, sympathetic class," and noted the protections extended to them by Johnson v. Davis. Casa Clara at 1247. The certified question herein asks for guidance with regard to commercial transactions. Given the Court's reluctance to allow continued expansion in this area of the law, a clear line can and should be drawn between residential and commercial transactions.

In the instant case, the transaction in question involved a large tract of commercial real property. The parties to the transaction negotiated an extensive and detailed contract for its purchase and sale. That contract, freely negotiated by the two corporate entities, expressly disavowed any representations by the sellers regarding the quality of the property. (R. 76) Southgate's suit herein clearly seeks damages for its "disappointed economic expectations" regarding the property and the price paid for it, rather than for any personal injury or property damage. (R. 1-14)

The doctrine of caveat emptor is still applicable to commercial real estate transactions. "The doctrine of caveat emptor protects a seller of commercial real property from any liability to the purchaser of that property for any condition of that property that preexists the sale." Mostoufi v. Presto Food Stores, Inc., 618 So.2d 1372, 1377 (Fla. 2d DCA 1993), rev. den., 626 So. 2d 207 (Fla. 1993). In that case, the Second District noted that this Court had modified that doctrine only as to sales of residential real property in Johnson v. Davis, supra. Id.

Of course, caveat emptor does not protect against active misrepresentations. It is applicable, however, to nondisclosure of material facts, unaccompanied by words or acts sufficient to constitute active fraud. Haskell Co. v. Lane Co., Ltd., 612 So. 2d 669 (Fla. 1st DCA 1993); Ramel v. Chasebrook Construction Co., 135 so. 2d 876, 882 (Fla. 2d DCA 1961). In the instant matter, other than expressing opinions about value prior to the contract

negotiations, Preston & Farley was only alleged to have failed to disclose certain material facts regarding the physical condition, (R. 6-7) and to have been the seller's broker in a sale that expressly disavowed any representations concerning that physical condition,

Thus, although the District Court decision in Tobron expanded upon Johnson v. Davis by allowing this exception to the economic loss rule to include non-privity professionals in a residential sale, this Court should not extend the exception even further by including non-privity professionals in a commercial context. This Court has relied on the economic loss rule to provide a necessary limitation on the increasing scope of tort law. Parties who enter into contracts, in which they have been free to negotiate whatever protections they deem important, should not be allowed to circumvent that process after the fact by turning their disappointed economic expectations into a tort action, especially against professionals who owe their primary fiduciary obligation to their clients. Were such an expansion of professional duties allowed, no real estate broker could ever represent a seller of commercial property desiring to sell "as is," since the broker's fiduciary duty to his client would clash inexorably with any duty owed to the stranger to their relationship. As the Palau court stated:

> "the buyer, particularly in a large commercial transaction as in this case, could have protected his interests by negotiation and contractual bargaining or insurance with the seller. Palau at 416 (emphasis added).

2. Application of the Economic Loss Rule Should not Depend upon a Distinction Between Intentional Torts and Negligence.

This analysis should not turn on a distinction between intentional and unintentional torts, as suggested by the minority opinions in Woodson and by petitioners herein. That distinction does not do justice to the underlying rationale of the economic loss rule, which is the nature of the damages sought. When the crux of the lawsuit is a commercial transaction whose outcome does not satisfy the plaintiff's expectations, parties should not be allowed to circumvent contract law by couching their allegations in what amounts to "tortious" breaches of the contract, be they intentional or unintentional,

An immediate analytical problem is presented when "intentional versus unintentional" is used as the distinguishing factor in applying the economic loss rule. If this were true, then professional malpractice would arguably disappear as a valid tort where only economic damages result. For example, accounting or attorney malpractice give rise exclusively to economic loss as opposed to personal injury or property damages. If intentionality were the defining point, non-medical professionals could only be sued if they were accused of intentional torts instead of mere negligence. Such a result is illogical.

The courts which have examined the economic loss rule in Florida after Casa Clara have differed on its application to intentional torts. Some have held unequivocally that the rule only

governs actions founded in negligence. E.g., HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995). Others have applied the economic loss rule to intentional torts. E.g., Palau, supra; Hoseline, Inc. v. U.S.A. Diversified Products. Inc., 40 F. 3d 1198 (11th Cir. 1995). A third approach has been to determine whether the alleged intentional tort is "independent" of a breach of contract. E.g., Swaebe v. Sears World Trade, Inc., 639 So. 2d 1120 (Fla. 3d DCA 1994).

In the instant matter, plaintiffs/petitioners alleged that defendant/respondent committed the tort of "fraud in the inducement." The certified question from the Second District panel specifically addresses this alleged tort. Fraud in the inducement was first recognized as a separate cause of action by the Supreme Court in Losan v. Losan, 22 Fla. 561 (1886). In that case, the Court held that a party could be liable for inducing another party to execute a mortgage with him based upon fraudulent misrepresentations.

Only a very few cases have addressed this tort in any detail in the ensuing 110 years. In Hirschman v. Hodges, O'Hara & Russell co., 59 Fla. 517, 51 So. 550 (1910), and in Columbus Hotel Corp. v. Hotel Manasement Co., 116 Fla. 464, 156 So. 893 (1934), this Court again recognized the tort in the context of a cause of action between parties to a contract. The fraudulent inducement cases cited by petitioner Southgate in its Initial Brief (pp. 13-14), with one exception, all deal with parties in privity, as can be expected with such a cause of action. The one exception, Wallis v.

South Florida Savings Bank, 574 So. 2d 1108 (Fla. 2d DCA 1990), contains a discussion of privity in Judge Altenbernd's concurring opinion. He noted that some cases had allowed actions in fraud to extend to non-privity parties, citing First Florida Bank, supra, and Johnson v. Davis, supra. No mention is made of the economic loss rule, but, significantly, Judge Altenbernd does refuse to extend Johnson v. Davis beyond its facts. Id. at 1110.

Respondent does not suggest that the economic loss rule has "abolished" the "seven hundred-year-old" intentional tort of fraud. (See dissenting opinion of Judge Altenbernd in Woodson, supra) . Where parties have engaged in direct transactions with each other, and thus are in privity, and the suit involves harm to one party, rather than disappointed economic expectations, the economic loss rule does not overpower the tort. The injured party seeks to be made whole rather than receive the benefit of the bargain.

In the instant matter, however, Southgate attempted to circumvent its negotiated contract by alleging intentional torts against the seller and broker. The economic loss rule serves its function well in barring such an attempt, regardless of the nature of the tort. In the previous appeal involving the First Case (against both the sellers and the broker), plaintiffs herein failed to convince either the trial court or the appellate court that it had a viable cause of action against the seller in light of the contract it negotiated. This included attempts to use fraud and fraud in the inducement as means to avoid the clear terms of their "as is" commercial real estate contract. It would be patently

illogical to allow plaintiffs to succeed against the broker where it failed against the broker's only client (the seller), and thus further blur the distinction between contract and tort.

B. STATUTORY REGULATION OF BROKERS PROVIDES NO INDEPENDENT JUSTIFICATION FOR CIRCTJMVENTION OF THE ECONOMIC LOSS RULE

Petitioners argue in their initial brief that, because the legislature has seen fit to regulate real estate brokers within the Department of Professional Regulation, non-privity plaintiffs are afforded an additional opportunity to circumvent the economic loss rule and avoid the consequences of their commercial negotiations. Chapter 455 creates the Department of Professional Regulation, and section 455,227 provides grounds for disciplinary actions against licensed professionals. Chapter 475 brings real estate brokers and salesmen within the purview of Florida's regulatory scheme.

The question certified to this Court by the Second District panel did not include this separate issue. The scope of review herein is extended to the entire opinion and judgment of the appellate court, and not just the question certified. Lawson v. State, 231 So.2d 205 (Fla. 1970). In the instant matter, however, the Second District panel did not address the other issues in this case, including the issue regarding statutory duties of brokers, but rather affirmed the summary judgment within the "limited setting" of the "application of the economic loss rule to an action for fraud in the inducement alleged against a real estate broker."

(A. 7 at 2) Furthermore, upon being asked by petitioners to clarify its ruling and address the statutory arguments, the Second District declined to do so. (A. 8) Petitioners having raised the issue herein, however, respondent Preston & Farley will respond.

In Zichlin v. Dill, 25 So.2d 4 (Fla. 1946), the Supreme Court found a broker liable to a purchaser of real property where the broker, knowing what the buyer was willing to pay, bought the property himself, misrepresented his status in the transaction, and sold the property for a profit to himself. The Court noted that the broker's profession is regulated by law and must act in an ethical manner to all, including the purchaser.

Other cases, relying on this language, have found a similar duty under egregious circumstances. In Fraioli v. Bobby Byrd Real Estate, Inc., 630 So.2d 1131 (Fla. 2d DCA 1993), a plaintiff was allowed to sue the employer of a real estate salesman with whom plaintiff had formed a business association involving a lease of property to a third party. The salesman acted in a dual capacity as agent for the third party and as a recipient of the deal with plaintiff, and made misrepresentations in connection with the transaction. The court found liable the broker who employed the salesman, holding that where an agent (the salesman) acts for a principal (the broker employer) and the principal accepts the fruits of the agent's efforts, the principal is deemed to have adopted the methods employed by the agent. Id. at 1132. The court additionally noted the duty of the broker to deal with the public in an honest fashion.

Petitioners also cite a recent Attorney General's Opinion in support of its proposition. Op. Att'y Gen. Fla., 96-20 (March 7, 1996). That opinion, however, is inapposite to the issue at hand, and merely opines that any provision in a real estate contract purporting to absolve the broker from fraud is contrary to public policy. Respondent is not relying herein on any such provision in the sales contract (indeed, there is no such provision), but rather on the simple proposition that this sale was specifically negotiated by petitioners and the seller on an "as is" basis with no representations. As noted above, any broader ruling that would require a broker to make full disclosures in a sale of commercial property "where is, as is" would essentially preclude such broker from representing either the seller or the buyer.

These cases and opinions provide inadequate foundation for any suggested general rule that, in commercial transactions involving sale of real property "as is," the purchaser can later sue the seller's broker when the land fails to meet the seller's expectations. This is in essence what petitioners urge herein. None of the cases cited by petitioners on this subject addressed the economic loss rule. It is a relatively simple matter to pull language out of cases and paste them onto the fact pattern of one's choice. The factual contexts of Zichlin and Fraioli are a far cry from the facts adjudged by the trial court herein. It bears repetition to point out that in a previous incarnation of this same set of allegations, involving the precise same set of facts, the Second District affirmed a summary judgment in favor of the sellers

herein, finding no basis to support allegations of fraud or any other tort against the sellers. The instant case presents no egregious facts compelling a further extension of tort law.

C. THE MANY ADDITIONAL GROUNDS SUPPORTING THE STJMMARY JUDGMENT IN THIS MATTER HAVE BEEN ADEQUATELY ADDRESSED BY THE PARTIES IN THE PROCEEDINGS BELOW

As discussed above, the certified question before this Court involves the narrow issue regarding the application of the economic loss rule to actions for fraud in the inducement brought by non-privity plaintiffs against brokers. In their initial brief, petitioners ask this Court to go well beyond the certified question and reverse the summary judgment on all grounds previously asserted. Although the Court has the power to address all issues it so wishes, such an effort would entail reviewing the entire record and considering the many other issues which respondent believes lend independent support for the summary judgment in its favor.

These issues include the res judicata and collateral estoppel defenses which the trial court found sufficient to support summary judgment. Said defenses were based upon the unusual circumstance that respondent Preston & Farley had previously been named in a summary judgment which had been affirmed on a previous appeal. Summary judgment for Preston & Farley was further justified by the failure of petitioners to support their contention that a "clerical error" had occurred in the prior judgment. Finally, since the

allegations against respondents were precisely the same as those previously made against the sellers of the property, summary judgment was likewise justified for the same reasons.

All of these grounds further support the granting of a summary judgment for respondent Preston & Farley, in addition to an affirmative response to the question certified by the appellate court herein.

CONCLUSION

The economic loss rule serves to limit the expansion of tort law into contractual relationships. In the instant matter, the rule serves its purpose well by prohibiting petitioner, a disappointed purchaser of commercial property, from turning its failure to negotiate better terms into a tort claim against a broker representing only the seller in the transaction. This Court should continue to limit the further expansion of tort law into such commercial transactions. The judgment of the Second District Court of Appeal should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served upon:

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