IN THE SUPREME COURT OF FLORIDA

LINN-WELL DEVELOPMENT CORP., et al.,

Petitioners,

v.

PRESTON & FARLEY, INC., et al.,

Respondents.

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

INITIAL BRIEF OF PETITIONERS

"Richard Benjamin Wilkes
'Florida Bar No. 265163
Anthony T. Leon
Florida Bar No. 974552
GARDNER, WILKES, SHAHEEN & CANDELORA
501 E. Kennedy Boulevard
Suite 1250
Post Office Box 1810
Tampa, Florida 33601
(813) 221-8000
(813) 229-1597 (FAX)
Attorneys for Petitioners

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PRELIMINARY STATEMENT

Petitioners, Linn-Well Development Corp., as general partner of Southgate Eureka Associates Limited Partnership, Stuart Lichter and Barry Lang were the plaintiffs/appellants below and will be referred to collectively in this brief as "Southgate." The appellee, Preston & Farley, Inc., will be referred to as "Preston & Parley."

References to the transcript of the proceedings are designated (T. ____). References to portions of the record other than the transcript are designated (R. ____). Various materials referenced in this brief are reproduced in the Appendix and cited as (A. [tab no.]).

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

This case arises from an affirmance with a certified question by the Second District Court of Appeal of, inter alia, a final order entering summary judgment on Southgate's claims against Preston & Farley in Appeal No. 94-03170 (A. 2, A. 3). There were other issues raised on appeal that do not relate to the certified question. These other matters were fully briefed in the Second District Court of Appeal and the statement of the case and facts as relates to these other issues is contained in those briefs, which are included in the appendix as A. 4, A. 5 and A. 6.

Southgate sued Preston & Parley for claims of fraud in the inducement, misrepresentation, and breach of the duty of honesty, candor, good faith, and fair dealing (R. 1-14; A. 1-1-14).[1] On July 1, 1994, Preston & Farley filed an amended motion to dismiss and motion for summary judgment (R. 137) asserting the affirmative defenses of res judicata, collateral estoppel, and the economic loss rule (R. 138). On August 12, 1994, the trial judge entered an order granting Preston & Farley's motion for summary judgment, without specifically stating any basis therefor (R. 385-86; A. 2). On August 12, 1994, the trial court entered a final summary judgment on Southgate's claims in favor of Preston & Farley (R. 387-88; A. 3).

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[1] Other claims were asserted against other defendants; these are not in issue.

The Second District Court of Appeal heard argument on September 26, 1995. Subsequent to that oral argument, and on November 17, 1995, the Second District Court of Appeal decided Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), with the majority holding that the economic loss rule barred claims based on fraud in the inducement, and certifying a question to this Court. Thereafter, on December 20, 1995, the Second District Court of Appeal affirmed the trial court's order granting summary judgment in favor of Preston & Farley, within a limited setting, in light of Woodson. Linn-Well Development Cam. v. Preston & Farley, Inc., 666 So. 2d 558 (Fla. 2d DCA 1996). (A. 7). In so doing, the Second District Court of Appeal again certified to this Court the substance of the question certified in Woodson:

> IS A BWER OF COMMERCIAL PROPERTY PREVENTED BY THE "ECONOMIC LOSS RULE" FROM RECOVERING DAMAGES FOR FRAUD IN THE INDUCEMENT AGAINST THE REAL ESTATE AGENT AND ITS INDIVIDUAL AGENT REPRESENTING THE SELLERS?

Southgate then filed a motion for rehearing or in the alternative, motion for clarification, on January 4, 1996, suggesting that the Second District Court of Appeal overlooked additional causes of action asserted by Southgate that would not be barred by the economic loss rule, including negligent misrepresentation and breach of the duty of honesty, candor, good faith and fair dealing. Alternatively, Southgate suggested that new case law merited reconsideration of the Second District Court of Appeal's holding based on the economic loss rule. The Second District Court

of Appeal denied without comment Southgate's motion for rehearing on January 22, 1996. (A. 8). Southgate subsequently filed a notice to invoke the discretionary jurisdiction of this Court.

11. STATEMENT OF THE FACTS

This case comes before this Court upon the affirmance by the Second District Court of Appeal of the granting of a summary judgment in favor of Preston & Farley, within a limited setting, based on the economic loss rule. (A. 7). The Second District Court did not pass upon any issue of fact in dispute. (A. 7). Because summary judgment was granted against Southgate, the applicable standard of review requires that all issues of material fact be resolved in favor of Southgate, the non-moving party. See generally, Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). Southgate sets forth this Statement of Facts in conformance with that standard of review.

This lawsuit related to Southgate's purchase of approximately forty-two acres of real property located in Tampa, Hillsborough County, Florida ("Tampa Property") (R. 7, 9). At least twenty acres was advertised by Preston & Farley, a licensed real estate broker (R. 13), as "desirable undeveloped land available for future development;" a large building was also on the property (R. 5, 68). Southgate agreed to and did purchase the property in reliance on various representations made by Preston & Farley (R. 8). Subsequent to the purchase, Southgate learned of considerable difficulties impeding the development relating to the presence of wetlands on the unimproved portion of the property, rendering that portion undevelopable (R. 9).

Preston & Farley acted as the exclusive selling agent of the Tampa Property for the prior owner of the property, Crown, pursuant

to an exclusive listing agreement (R. 2). Prior to the sale of the property and in contemplation of the sale, Crown engaged Florida Land Design & Engineering, Inc. ("FLD&E"), a Tampa Engineering Firm, to conduct a preliminary site investigation (R. 3).

On August 28, 1986, after a physical inspection of the Tampa Property, FLD&E concluded that a majority of the site contained enough wetland vegetation to be considered jurisdictional by the regulatory agencies (R. 3). On September 9, 1986, FLD&E concluded that potentially anywhere from two-thirds to the entire undeveloped portion of the Tampa Property could be claimed by the environmental regulatory agencies (R. 3). On October 27, 1986, FLD&E rendered its report to Crown (R. 16-18). That report noted an erratic flow pattern and a poorly defined channel, both of which precluded a determination regarding the required preservation area for the undeveloped property based on the presence of wetlands (R. 16-18). The report also noted that at least two governmental entities would have to approve any development plans because of the presence of wetlands and related drainage issues (R. 16-18). The report noted that the jurisdictional wetland boundaries for developmental purposes could not be reasonably estimated and that between 2/3 and 100% of the undeveloped property may be claimed by regulatory bodies (R. 16-18).

Crown then acted on its own and, without obtaining regulatory approval, cleared the vegetation and requested that FLD&E conduct a second site investigation (R. 20-24). On or about December 2, 1986, FLD&E rendered a second report to Crown (R. 20-24). While

the report estimated that the jurisdictional wetlands comprised probably four to five acres of the site, it further noted that final delineation of the jurisdictional boundaries of the wetlands would need to be determined through field inspections by the Florida Department of Environmental Regulation, The Hillsborough County Environmental Protection Commission, The Southwest Florida Water Management District and/or the Army Corps of Engineers (R. 20-24). The report further made clear that the property could not be subdivided because the wetlands would exceed twenty percent of the land (R. 20-24).

Both the October 26, and December 2, 1994, FLD&E reports were provided to and reviewed by Preston & Farley (R. 3-4). On or about November 20, 1986, Preston & Farley representatives, FLD&E representatives and others held a meeting in Tampa in which it was decided not to "red flag" the Tampa Property from an environmental standpoint until the end use of the vacant lot was known (R. 4). In or around November of 1986, Preston & Farley delivered the final draft of the marketing brochure for the Tampa Property to Crown for its approval (R. 4). The brochure represented that "[t]he facility is situated on 42 acres of which approximately 20 acres remain in its natural state for possible future development."

On or about March 6, 1987, Crown requested a law firm to review and provide an opinion on the October and December FLD&E reports (R. 5). By letter dated March 24, 1987, legal counsel responded by finding that the reports appeared to be thorough in

their analysis of wetlands and drainage issues (R. 5). Preston & Farley received a copy of this letter (R. 5).

In April of 1987, Preston & Farley representatives showed the Tampa Property to Southgate (R. 5). Southgate advised Preston & Farley that they were interested in purchasing the building, but not the approximately 20 acres of vacant land adjoining the building (R. 5). Preston & Farley told Southgate that the building was not for sale separately, but represented that the vacant land was worth $75,000 an acre, that an offer in excess of $1 million had been received for it, and that Southgate could purchase the property, subdivide the vacant land and sell it without difficulty (R. 5-6). Despite Preston & Farley's knowledge of and access to the October and December of 1986 FLD&E reports, Preston & Farley did not disclose the reports to Southgate (R. 8).

Southgate purchased the property on March 1, 1988 (R. 7, 68); they did so in reliance on Preston & Farley's representations that the property would be subdivided and that the development potential of the property was not impaired by the presence of the represented "four to five acres" of wetlands (R. 7-8). In August of 1988, Southgate retained the services of FLD&E to provide a site investigation in connection with Southgate's plan to subdivide and develop the unimproved portion of the Tampa Property. On August 26, 1988, FLD&E provided a report to Southgate which referenced and enclosed a copy of the October 1986 report prepared for Crown. As a result of Southgate's subsequent investigations, it has been

determined that the unimproved parcel is almost 100% jurisdictional wetlands and essentially without value (R. 8).

SUMMARY OF ARGUMENT

Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), and Linn-Well Development Corp. v. Preston & Farley, Inc., 666 So. 2d 558 (Fla. 2d DCA 1996), wrongly hold that where a party sustains solely economic losses, the party can have no remedy in tort because of the economic loss rule. The economic loss rule was designed to prevent contracting parties from choosing more favorable tort remedies over existing contract remedies. The economic loss rule however, does not and should not apply to tort claims that are separate and independent of any breach of contract. These independent tort claims include the claims asserted by Southgate against Preston & Farley: breach of statutorily imposed duties and fraud in the inducement of a contract. There are two reasons why the economic loss rule is inapplicable to such claims.

First, the economic loss rule should not apply to independent intentional tort claims, which existed at common-law. These claims, such as tortious interference with contract and fraudulent inducement of a contract, are constitutionally protected property rights; these claims do not represent efforts to circumvent or avoid bargained-for contractual limitations with new theories of duty in tort. To the contrary, they are long-established remedies for intentional wrongs, for which no contractual remedy exists. Judicial abolition of these claims is inconsistent with the intent and purpose of the economic loss rule and our system of justice.

Second, Preston & Farley, a licensed real estate broker, owed to Southgate a statutory and common law independent duty of honesty, candor, good faith and fair dealing. Contracts purporting to remove a licensed broker's statutory liability for misrepresentation or fraud are contrary to public policy and void; the economic loss rule does not abrogate claims for breach of statutory duties.

ARGUMENT

A. TEE ECONOMIC LOSS RULE IS INAPPLICABLE TO INTENTIONAL TORT CLAIMS SUCH AS FRAUD IN THE INDUCEMENT OF A CONTRACT.

The Woodson and Linn-Well decisions improperly apply the economic loss rule to eliminate long-established intentional tort claims. The economic loss rule was designed to prevent contracting parties from choosing more favorable tort remedies over their contract remedies. Casa Clara Condominium Ass'n., Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) (claims by home-owner against the builder's suppliers barred by economic loss rule). Although initially instituted in cases between contracting parties, the economic loss rule has been applied to negligence claims for solely economic losses against non-contracting parties, where those parties had assumed no special duty to the claimant. See, e.g., id.

However, the majority opinion in, Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), and the Linn-Well decision under review extend the economic loss rule to intentional torts, and in so doing, eliminate necessary causes of action against wrongdoers for such long-established business torts as fraud in the inducement, misrepresentation, and tortious interference with contractual and business relationships. As noted in Judge Altenberndt's dissent in Woodson, "[I]f the majority's reasoning is correct, both fraud and

negligent misrepresentation have been essentially abolished in Florida." Woodson, 663 So. 2d at 1331.

The Woodson majority relied on Casa Clara in holding that the economic loss rule applies to claims for fraud in the inducement. The Woodson majority stated, "if the damages sought are economic losses only, the party seeking recovery for these damages must proceed on contract theories of liability." Woodson then specifically holds that the economic loss rule bars recovery of economic damages based on any tort theory. Id. at 1329.

Woodson's reliance on Casa Clara is misplaced. As noted in Judge Altenbernd's dissent, the Woodson majority misconstrues Casa Clara's references to tort remedies as encompassing intentional torts as well as negligence. See also, Sandarac Ass'n., Inc. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352, n. 3 (Fla. 2d DCA 1992), rev. denied, 626 So. 2d 207 (Fla. 1993) ("[t]he interests protected by negligence are not identical to those protected by other torts.")

These intentional torts are common-law causes of action; as such they are constitutionally protected property rights. See, e.g., Kluser v. White, 281 So. 2d 1, 4 (Fla. 1973); and Fl. Const. art. I, § 21. ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.") In some cases, such as the instant case, these causes of action are specifically based on statutory duties established by the Florida Legislature for the protection of the public. See Op. Att'y Gen. Fla. 96-20 (March 7, 1996).

Further, as noted in Judge Lazzara's separate dissent, the Woodson majority effectively, but improperly, construed Casa Clara to overrule this Court's decision in, Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985) (homebuyer may sue seller for fraudulent misrepresentation). The duty of disclosure enunciated in Johnson applies to real estate brokers. See e.g., Torbron v. Campen, 579 So. 2d 165 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991).

The Woodson dissenting opinions accord with other Florida appellate court rulings. In, TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996), the Fourth District Court of Appeal held that fraud in the inducement, "is the kind of independent tort that is not barred by the economic loss rule." In so holding, it certified conflict with Woodson, supra, and noted agreement with the dissenting opinions of Judges Altenbernd and Lazzara. See also, Jarmco, Inc. v. Polysard, Inc., 21 Fla. L. Weekly D478, 1996 WL 71251 (Fla. 4th DCA, February 21, 1996) ("[t]he economic loss rule (ELR) does not bar a common law fraud in the inducement claim seeking to recover only economic losses."); and, HTP, Ltd., v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995), rev. granted, 1996 Fla. LEXIS 336 (Fla. Feb. 19, 1996).

Allowing a claim for fraud in the inducement as an alternative or in addition to contractual remedies does not run afoul of the economic loss rule's purpose of preventing tort remedies from engulfing contractual remedies thereby undermining "the reliability

of commercial transactions." Williams Electric Co., Inc. v. Honevwell, Inc., 772 F.Supp. 1225, 1237 (N.D. Pla. 1991). Rather, claims for fraud in the inducement involve conduct independent of that which may have resulted in contractual breach, which claims the economic loss rule was not intended to bar. Id. at 1237, 1238; see also, Wallis v. South Florida Savings Bank, 574 So. 2d 1108, 1110 (Fla. 2d DCA 1990) (recognizing fraud in the inducement claims independent of contract claims, without discussion of economic loss rule); Warren v. Monahan Beaches Jewelry Center, Inc., 548 so. 2d 870, a73 (Fla. 1st DCA 1989) (seller's post-sale concealment that diamond ring was fake constituted subsequent tort of fraud independent of contractual breach); Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734 (11th Cir. 1995).

In the instant case, Preston & Farley breached a legislatively-created, judicially-recognized, affirmative obligation of licensed brokers to disclose known material facts impacting upon the purchase and sale of property. See, Zichlin v. Dill, 25 So. 2d 4 (Fla. 1946); Torbron v. Campen, 579 So. 2d 165 (Fla. 5th DCA), rev. denied, 589 So. 2d 289 (Fla. 1991); Op. Att'y Gen. Fla. 96-20 (March 7, 1996). Considering the rationale for applying the economic loss rule -- barring a tort remedy to one who failed to bargain for adequate contract remedies -- the rule cannot justifiably extend where pre-contractual fraud induced the deal in the first place.

To establish a claim for fraud in the inducement, a plaintiff must demonstrate: (1) a misrepresentation of material fact; (2)

that the defendant knew or should have known that the statement was false; (3) that the defendant intended to induce the other to rely and act upon the misrepresentation; and (4) a resulting injury to the party acting in justifiable reliance on the misrepresentation. Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So. 2d 306, 308 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 165 (Fla. 1991).

Southgate clearly set forth a prima facie case for fraudulent inducement (R. 1-14, A. 1-1-14). Preston & Farley had actual knowledge of the adverse FLD&E reports associated with the property, yet failed or refused to disclose this information to Southgate prior to Southgate's purchase of the property (R. 5-8, 11). Further, Preston & Farley affirmatively misrepresented the true condition of the property by concealing adverse FLD&E reports (R. 11). Southgate would not have entered into the contract had it been aware of the misrepresentations and omissions, and justifiably relied, to its detriment, upon Preston & Farley's misrepresentations and omissions. (R. 11-12). These allegations clearly establish a claim for fraud in the inducement on which Southgate should receive a trial on the merits.

B. SOUTHGATE'S CLAIMS AGAINST PRESTON & FARLEY FOR BREACH OF TEE INDEPENDENT FIDUCIARY DUTY OF HONESTY, CANDOR, GOOD FAITH AND FAIR DEALING ARE NOT BARRED BY TEE ECONOMIC LOSS RULE.

Preston & Farley's independent fiduciary duty as a licensed real estate broker of honesty, candor, good faith and fair dealing arises from statutory duties under Chapters 455 and 475 of the

Florida Statutes, governing licensed professionals and real estate brokers, and the common law. Indeed, Preston & Farley admits that it owed such a duty. See Answer Brief [DCA], page 30-31. (A. 5).

By enacting Chapters 455 and 475, Florida's Legislature has authorized the discipline of certain professionals and occupations for certain conduct that is contrary to the public welfare and policy. Section 455.227(1) (a), Florida Statutes, provides that disciplinary action may be taken against a licensed professional who makes misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession. Chapter 475 authorizes the Florida Real Estate Commission to discipline a broker who misrepresents a property offered for sale and makes such act a misdemeanor. Chapters 455 and 475 make misrepresentation, concealment and fraud by real estate brokers contrary to the public policy of the State of Florida. See e.g., Op. Att'y Gen. Fla. 96-20 (March 7, 1996).

In, Zichlin v. Dill, 25 So. 2d 4 (Fla. 1946), this Court recognized that Florida real estate brokers occupy a status with recognized privileges and responsibilities, enjoying a monopoly to engage in a lucrative business; accordingly, this Court held that real estate brokers and salesmen owe those with whom they deal a duty of honesty, candor and fair dealing, even absent a principal/ agent relationship. Id.; see also, United Homes Inc. v. Moss, 154 So. 2d 351, 354 (Fla. 2d DCA 1963) ("Those dealing with a licensed broker may naturally assume that he possesses the requisites of an

honest, ethical man; and where a real estate broker is acting as agent for the seller, he nevertheless owes a duty to the buyer.")

The fiduciary duty imposed upon Preston & Farley is an affirmative one: a duty to deal with purchasers in a fair and honest fashion. Fraoli v. Bobby Byrd Real Estate, Inc., 630 So. 2d 1131 (Fla. 2d DCA 1993). Such a duty placed Preston and Farley in a fiduciary position with Southgate regarding disclosure. See e.g., Torbron v. Campen, 579 So. 2d 165, 169 (Fla. 5th DCA), rev. denied, 589 So. 2d 289 (Fla. 1991); see also, Givan v. Aldemeyer/Steqman/Kaiser, Inc., 788 S.W. 2d 503 (Ky. App. 1990) (Real estate broker obligated to discover and disclose adverse factors that a reasonably competent and diligent investigation would disclose).

In Fraioli v. Bobby Byrd Real Estate, supra, the Second District Court of Appeal reversed a summary judgment entered against a purchaser of real property on his claim against a real estate broker, pointing out that the defendant broker had a duty to deal with plaintiff in a fair and honest fashion. Id. at 1133. Accord, Ellis v. Flink, 301 So. 2d 493 (Fla. 2d DCA 1974) (affirming partial summary judgment against real estate broker; broker owes duty of honesty, candor and fair dealing to all those it deals with, citing Zichlin v. Dill, 25 So. 2d 4 (Fla. 1946)).

Other jurisdictions are in accord with Florida law recognizing this affirmative duty owed by brokers and holding brokers liable for breach of the same. Where a broker acts as an intermediary between a seller and a purchaser, the broker is under a duty to

deal fairly and honestly with both parties, even in the absence of a principal and agency relationship. See, Hughey v. Rainwater Partners, 661 S.W. 2d 690 (Tenn. App. 1983). As part of this duty, the broker has an affirmative duty to discover and disclose adverse factors that a reasonably competent and diligent investigation would disclose. See, Givan v. Aldemeyer/Stegman/Kaiser, Inc., 788 S.W. 2d 503 (Ky. App. 1990). Preston & Farley had an affirmative duty to disclose the existence of the adverse FLD&E reports to Southgate. Johnson v. Davis, 480 So. 2d 625 (Fla. 1985); Torbron v. Campen, 579 So. 2d 165 (Fla. 5th DCA), rev. denied, 589 So. 2d 289 (Fla. 1991).

Conduct giving rise to causes of action for fraud in the inducement and negligent misrepresentation is conduct violative of Chapters 455 and 475 of the Florida Statutes. On March 7, 1996 the Attorney General for the State of Florida issued an Opinion which specifically discussed the independent duty owed by licensed real estate brokers and held contracts which attempt to relieve brokers of such duties are void as contrary to public policy:

> A licensed real estate broker or salesperson cannot be relieved of a professional duty or shielded from liability for a violation of the professional practices act by language contained in the sales agreement between a seller and a buyer of real estate. Any provision of a contract that purports to remove a real estate broker's or salesperson's liability for misrepresentation or other wrongdoing undermines public confidence in a regulated profession and is contrary to public policy and, therefore, void. Id. at 1.

The Opinion specifically addressed whether a contractual provision can shield real estate brokers or salespersons from liability for wrongdoing.

The Opinion cites to Chapters 455, Florida Statutes, which relates to the general regulation of certain professions and occupations and Chapter 475, Florida Statutes, which relates particularly to the regulation of real estate brokers and salespersons, holding that such regulations are necessary for the protection of the health, safety and welfare of the public. Id. at 2-3. The Opinion states that licensed real estate brokers may be disciplined for misrepresenting or making any fraudulent representations regarding a property offered for sale, and states that Chapters 455 and 475 "clearly make misrepresentation, concealment, and fraud by real estate brokers and salespersons contrary to the public policy of this state." Id. at 3.

The Opinion concludes:

> the provisions of the practices acts regulating the conduct of real estate brokers and salespersons were enacted by the Legislature to protect the public from potential economic loss and to instill public confidence in real estate sales practices. Moreover, the practices acts clearly make misrepresentation, concealment, and fraud contrary to the public policy of this state. In light of the prohibitions contained in Chapters 455 and 475, Florida Statutes, any provision of a contract that seeks to remove liability for such acts undermines public confidence in a regulated profession and is contrary to public policy and, therefore, void. (emphasis added) Id. at 4.

Clearly, Preston & Farley could never legally enter into a contractual relationship whereby it could avoid liability for making fraudulent representations, misrepresentations, or omissions, because such a contract would violate the statutes governing the licensure and regulation of licensed professionals, would undermine the public confidence in a regulated profession, would be contrary to public policy, and would be void. Such a contract would be considered illegal and totally unenforceable. Nizzo v. Amoco Oil Co., 333 So. 2d 491, 493 (Fla. 3d DCA 1976). A fortiori, Preston & Farley cannot rely on Southgate's contract with a third party (Crown), to avoid liability for breach of its statutory duties.

Where, as here, the Legislature has enacted a statute creating an affirmative duty, the economic loss rule is inapplicable. See, Sandarac Ass'n,, Inc. v. W.R. Frizzell Architects, Inc., 609 So.2d 1349, 1353 (Fla. 2d DCA 1992), rev. denied 626 So. 2d 207 (Fla. 1993). (The economic loss rule does not abrogate claims for breach of statutory duties.)

C. THERE ARE NO OTHER BASES FOR SUSTAINING THE GRANTING OF SUMMARY JUDGMENT IN FAVOR OF PRESTON & FARLEY.

For reasons previously set forth herein, Southgate submits that the economic loss rule is not a valid basis for sustaining the granting of summary judgment in favor of Preston & Farley. If this Court concurs, there remains no other basis to sustain the affirmance. The standard of review for the granting of a summary

judgment is: If the record raises even the "slightest doubt that an issue might exist," the summary judgment is improper. Snyder v. Cheezem Development Corp., 373 So. 2d 719 (Fla. 2d DCA 1979). The record below clearly raises genuine issues of material fact precluding the granting of summary judgment in favor of Preston & Farley. Moreover, with respect to the other issues raised on appeal below, the law is clear that Preston & Farley was not entitled to the entry of summary judgment in its favor. These arguments were all included in the briefs filed by Southgate and Preston & Farley before the Second District Court of Appeal, copies of which are attached in the appendix in this cause (A. 4, A. 5, and A. 6).

CONCLUSION

"The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The economic loss rule's laudable purpose was to prevent the unnecessary creation of new tort causes of action to contracting parties. The economic loss rule was not intended to, and indeed cannot constitutionally, eliminate statutorily-created and established common law causes of action for intentional and independent torts. Accordingly, the question certified to this Court by the Second District Court of Appeal should be answered in the negative and this cause should be reversed and remanded for a trial on the merits.

Richard Benjamin Wilkes
Florida Bar No. 265163
Anthony T. Leon
Florida Bar No. 974552
GARDNER, WILKES, SHAHEEN & CANDELORA
501 E. Kennedy Boulevard
Suite 1250
Post Office Box 1810
Tampa, Florida 33601
(813) 221-8000
(813) 229-1597 (FAX)
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U. S. mail to Terry Smiljanich, Esquire, Post Office Box1259, St. Petersburg, Florida 33731-1259, on this 19th day of March, 1995.

Attorney