

IN THE SUPREME COURT OF FLORIDA

LINN-WELL DEVELOPMENT CORP., :
et al.,

Petitioners,

Case No. 87,385

v.

PRESTON & FARLEY, INC.,
et al.,

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

Respondents. :

FILED

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

REPLY BRIEF OF PETITIONERS

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ARGUMENT

A. THE PURPOSE OF THE ECONOMIC LOSS RULE IS NOT ADVANCED BY PRECLUDING CLAIMS AGAINST A LICENSED REAL ESTATE BROKER FOR FRAUD IN THE INDUCEMENT OF A REAL ESTATE TRANSACTION AND BREACH OF STATUTORY DUTIES.¹

1. Woodson misapplies the products liability economic loss rule to a non-products liability case involving fraud in the inducement.

Preston & Farley relies on Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), for the proposition that the economic loss rule bars Southgate's claims against Preston & Farley. Woodson holds that "the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories." Id. at 1329. Woodson, a seven to six majority decision, misapplies this court's ruling in Casa Clara Condominium Ass'n., Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993), a case enunciating the products liability economic loss rule.²

Although not expressly stated in Casa Clara, implicit in its holding was a finding that the building material suppliers owed no duty in tort to the homeowners, and that because purchases of products are contractual transactions, unless there is attendant physical injury or property damage, economic losses beyond the contract are not recoverable in tort. See Casa Clara, supra, at

¹ Because Preston & Farley did not address Southgate's argument in its initial brief that Southgate's claims involve constitutionally protected property rights, this reply brief does not address that issue. See, Initial Brief of Petitioners, p. 12, 22. References to Answer Brief of Respondent Preston & Farley will be designated as (A.B. at ___).

²See, e.g., Woodson, supra, at 1331 (Altenbernd, J. dissenting) (Judge Altenbernd described the rule controlling Casa Clara as the "products liability economic loss rule.")

1247. **The** court in Casa Clara specifically noted that society's interest in being free from harm finds protection in duties imposed in tort. Id. at 1246.

Contrary to the Woodson majority's decision, Casa Clara does not purport to overrule this Court's precedents in not applying the economic loss rule to tort claims for fraud in the inducement. See, e.g., AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987); Airport Rent-A-Car v. Prevost Car, Inc., 660 So. 2d 628, 632 (Fla. 1995); Johnson v. Davis, 480 So. 2d 625 (Fla. 1985). As succinctly put by Judge Griffin in his concurrence in, Lee v. Paxson, 641 So. 2d 145 (Fla. 5th DCA 1994), the "argument that the economic loss rule bars the fraudulent inducement claim is specious."

By its **own** terms the economic loss rule only deals with economic losses; accordingly, looking at the nature of the damages suffered does not address the issue of whether the economic loss rule should be applied. To determine applicability of the economic loss rule, one must look to the underlying claim of the duty owed. As Judges Altenbernd and Lazzara noted in their dissents in Woodson, the supreme court declined to make an exception for homeowners to the economic loss rule because they had adequate protection stemming from the duty of sellers to disclose defects. Casa Clara, supra, 620 So. 2d at 1247; Woodson, supra, 663 So. 2d at 1330, 1333 (Altenbernd, J., Lazzara, J., dissenting). **The** purpose of the economic loss rule is to "prevent modern negligence theories from consuming traditional contract law." Woodson, supra,

at 1330. Judge Altenbernd explained that the element of duty in these modern negligence theories is what supports the standards of care designed to protect the interests involved, and as a result, a **required** element of these negligence theories has long been personal injury or property damage. Id. at 1330-1331. In contrast, tort theories such as fraud in the inducement involve duties in tort designed to protect "**society's** need for truthful statements in important human relationships, primarily commercial or business **relationships**," where breach of such duties normally result in "purely economic loss." Id. at 1330; see also, Casa Clara, supra, 620 So.2d at 1246 ("The purpose of a duty in tort is to protect society's interest in being free from harm"). Florida's legislature recognizes society's need for truthful statements between licensed real estate brokers and buyers and sellers of property. Southgate's claim against Preston & Farley for fraud in the inducement demonstrates this need.

The heart of the analysis arises from a recognition of a duty owed which society seeks to protect by allowing a cause of action for breach of such duty, even where solely economic losses result. Woodson, supra, 663 So. 2d at 1327, (Altenbernd, J. dissenting) (by implication); see also, Midway Airlines, Inc. v. Northwest Airlines, Inc., 1993 W.L. 65673, p. 20 (Bankr. N.D. Ill. 1993). Consideration of the nature of the duty owed and whether such duty encompasses the prevention of precisely the type of harm that occurs is the determining factor in whether the economic loss rule has any application. See, e.g., 2314 Lincoln Park West Condominium

Association v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 351 (Ill. 1990) ("The principle common to those decisions [regarding the economic loss rule] is that the defendant owes a duty in tort to prevent precisely the type of harm, economic or not, that occurred. Thus, the economic loss rule attempts to define the contours of duty." (comment added)), Here, Preston & Parley owed a duty in tort to prevent precisely the type of economic harm that occurred.

Except for the economic loss rule decisions of the Second District Court of Appeal which are presently being reviewed by this Court, other Florida district courts of appeal and federal courts have unanimously held that the economic loss rule does not bar claims for fraud in the inducement. See, Monco Enterprises, Inc. v. Ziebart Corp., 21 Fla. L. Weekly D755 (Fla. 1st DCA, March 25, 1996); Acadia Partners, L.P. v. Tompkins, 21 Fla. L. Weekly D795 (Fla, 5th DCA, March 22, 1996) (by implication, citing Ashland Oil, Inc. v. Pickard, 269 So. 2d 714 (Fla. 3d DCA 1972) (" . . . [O]ne who has been fraudulently induced into a contract may elect to stand by that contract and sue for damages for the fraud."); Jarmco, Inc. v. Polvgard, Inc., 668 So. 2d 300 (Fla. 4th DCA 1996); TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996); HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995); Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 742 (11th Cir. 1995); Williams Electric Co. v. Honeywell, Inc., 772 F.Supp. 1225, 1238 (N.D. Fla. 1991); Brass v. NRC Corp., 826 F.Supp. 1427, 1428 (S.D. Fla. 1993);

Kingston Square Tenants Ass'n v. Tuskegee Gardens Ltd., 792 F.Supp. 1566, 1576 (S.D. Fla. 1992).

These cases find that independent torts not flowing from contractual breach **are** not barred by the economic loss rule because such claims are predicated on a **duty breached** resulting in economic damages for which the law has long provided recovery in tort. As stated by Judge Altenbernd in his dissent in Woodson, "[N]othing in Casa Clara causes me to conclude that the supreme court actually intended to abolish a seven hundred-year-old intentional tort in the context of limiting a negligence theory." Woodson v. Martin, 663 So. 2d 1327, 1330 (Fla. 2d DCA 1995) (Altenbernd, J., dissenting). In the instant case, Preston & Farley's representations and omissions in fraudulently inducing Southgate to purchase the property clearly constitutes an independent tort separate and apart from the breach of contract to which Preston & Farley was not even a party.

To limit Southgate's damages for fraud in the inducement to those recoverable under the very contract that Southgate was fraudulently induced by Preston & Farley to enter achieves an inequitable result not contemplated by the economic loss rule. As stated in Williams Electric Company, Inc. v. Honeywell, Inc., 772 F.Supp. 1225, 1238 (N.D. Fla. 1991):

Fraud in the inducement, however, addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct which is, under the law, a recognized tort.

See, also, Woodson, supra, 663 So. 2d at 1331 (Altenbernd, J. dissenting) ("**F**raud in the inducement occurs prior to the contract and the standard of truthful representation placed upon the defendant is not derived from the contract.").

2. The economic loss rule does not bar claims for breach of statutory **duties by a licensed real estate broker.**

Preston & Farley asserts that statutory regulation of brokers provides no basis for the circumvention of the economic loss rule. (A.B. at 20). Southgate does not attempt to circumvent the economic loss rule; rather Preston & Farley attempts to circumvent liability for breach of its common law and statutory duty by hiding behind the economic loss rule. Florida's Legislature has found it **necessary** to protect society's interest in being free from harm from fraudulent conduct by its licensure and discipline of **professionals**, including licensed real estate brokers. See, § 475.25 Fla. Stat.; Op. Att'y Gen. Fla. 96-20 (March 7, 1996). Consequently, Preston & Farley owed a common law and statutory affirmative duty to deal truthfully with Southgate, which cannot be diminished **by** the economic loss rule. Fraioli v. Bobby Byrd Real Estate, Inc., 630 So. 2d 1131, 1133 (Fla. 2d DCA 1993) (defendant broker had a duty to deal with plaintiff in a fair and honest fashion); see, also, Runde v. Visus Realty, Inc., 617 N.E.2d 572, 575, 576 (Ind. 2d DCA 1993); Schafir v. Harrisan, 879 P.2d 1384, 1390 (Utah App. 1994) (by implication, economic loss rule is inapplicable to claims against a real estate agent for breach of

the statutory duty to "meet standards of honesty, integrity, truthfulness, reputation, and **competency.**")

3. **Application of the economic loss rule to non-privy professionals.**

Preston & Farley attempts to rationalize Woodson's application of the economic loss rule to non-privy professionals with the holding in Casa Clara by arguing that "**persons** not in privy with the professional cannot rely upon the professional's relationship with another to justify an action for economic loss." (A.B. at 13-14). However, the Second District has previously held that parties **can** recover purely economic damages in tort in non-privy circumstances such as professional malpractice. See, e.g., City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279, 282 (Fla. 2d DCA 1994). Even so, the exceptions to the economic loss rule noted by the Second District would squarely apply to the instant case. As City of Tampa holds, liability for economic losses arising from professional negligence can be extended to "distinct third parties whose reliance upon the documents or information furnished by the professional constituted the 'end and aim of the **[transaction]**'." Id. at 282. In the instant case, Southgate, a distinct third party to the relationship between Preston & Farley and the sellers, relied upon a licensed professional, Preston & Farley, to supply it with documents and information in its purchase of the property, which constituted the "**end** and aim of the underlying transaction."

Further, the non-privity argument overlooks the fact that Preston & Farley's relationship with the sellers does not undermine its fiduciary duty owed to Southgate, the buyer. As noted in, Bush v. Palermo Realty, Inc., 443 So. 2d 104, 105-6 (Fla. 4th DCA 1983):

Nor are the broker's primary fiduciary duties to the seller undermined by the broker's obligation to the prospective buyer. . . . When a real estate broker acts as an inter-mediary between a seller and a prospective buyer, he is under a duty to deal fairly and honestly with the prospective buyer. Funk v. Tifft, 515 F.2d 23, 25 (9th Cir. 1975). . . . So serious is a breach of this duty that if the broker purchases the land from the seller for himself without advising the prospective buyer of his actions, he becomes a constructive trustee for the benefit of the buyer. . . .

See, also, Fraioli v. Bobby Byrd Real Estate, Inc., 630 So. 2d 1131, 1133 (Fla. 2d DCA 1993) (defendant broker had a duty to deal with plaintiff in a fair and honest fashion). Although Preston & Farley relies on Judge Lazzara's dissent in Woodson to explain application of the economic loss rule to non-privity professionals, (A.B. at 13), Judge Lazzara specifically found that the economic loss rule should not apply to claims for fraud against a licensed real estate broker:

It is clear to me, therefore, that the appellees, as real estate agents representing the sellers, had a duty under Johnson to disclose to the appellant any facts known to them which materially affected the value of this home, if such facts were not readily observable by or known to the appellant. If the facts advanced by the appellant are true, then the appellees have clearly violated the

duty imposed by Johnson and should be held accountable for their fraudulent misrepresentations and nondisclosures which induced the appellant to purchase the home.

Woodson, supra, 663 So. 2d at 1332 (Lazzara, J., dissenting).

Preston & Farley argues the exceptions cited in City of Tampa are inapplicable, suggesting that professional malpractice claims require privity of contract and that the economic nature of the damages sought is subject to contract principles (citing to Weiner v. Moreno, 271 So. 2d 217 (Fla. 3d DCA 1973); A.B. at 11). Professional malpractice is an action sounding in tort. Weiner, supra, at 219; Woodson, supra, 663 So. 2d at 1334, fn. 2. Indeed, professional malpractice is a classic example of a claim where solely economic losses are recovered in tort, and yet no court has gone so far as to preclude professional malpractice claims based on the economic loss rule. Further, such claims do not require privity of contract. See, City of Tampa, supra, 646 So. 2d at 281, and cases cited therein.

Preston & Farley attempts to avoid liability by suggesting that Southgate could have bargained for additional contractual protection (A.B. at 15-16); however, Preston & Farley was not a party to Southgate's contract with the sellers and presumably would have refused to be made a party. Even assuming Preston & Parley would have voluntarily entered into a contract with Southgate, Preston & Farley could not legally contractually exculpate itself from liability for breach of its common law and statutory duty to

deal honestly, fairly and in good faith with Southgate. See, e.g., Op. Att'y Gen. Fla. 96-20 (March 7, 1996).

Preston & Farley admits that Torbron v. Campen, 579 So. 2d 165, 169 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991), extended Johnson v. Davis to allow an exception to the economic loss rule to include non-privity professionals in residential real estate sales. See, also, Woodson, supra, 663 So. 2d at 1332 (Lazzara, J., dissenting) Preston & Farley's argument that the exception should not apply in the commercial real estate transaction because it would undermine the fiduciary relationship between the broker and the seller (A.B. at 16) ignores a critical fact: Preston & Farley had a fiduciary relationship with Southgate and Southgate was entitled to rely on Preston & Farley because of Preston & Farley's privileged status as a licensed real estate broker with attendant common law and statutory duties to deal honestly, fairly and in good faith. See, e.g., Op. Att'y Gen. Fla. 96-20 (March 7, 1996); § 475.25, Fla. Stat. Preston & Parley will not dispute that it occupies a privileged status in the state of Florida as a licensed real estate broker that can legally charge a commission in connection with its occupation. This fiduciary relationship applies to commercial real estate transactions. Fraioli v. Bobby Byrd Real Estate, Inc., 630 So. 2d 1131 (Fla. 2d DCA 1993).

Preston & Farley argues that the doctrine of caveat emptor also lends support to its argument that this Court should not extend an exception to the economic loss rule as delineated in

Johnson v. Davis, supra, to commercial real estate transactions. (A.B. at 15). However, to the extent Preston & Farley attempts to rely on the doctrine of caveat emptor, no such reliance may be had. One who owes a fiduciary duty cannot rely on the doctrine of caveat emptor to escape liability for breach of that fiduciary duty. Capital Bank v. MVB, Inc., 644 So. 2d 515, 520 (Fla. 3d DCA 1994) (A "fiduciary must disclose fairly and honestly to the clients all facts which might be presumed to influence him in regard to his actions.") .

4. Southgate's contract with the sellers is irrelevant.

Preston & Farley argues that Southgate should not be permitted to recover against the broker, after having failed to recover against the sellers. (A.B. at 19, 20). The sellers had negotiated a contract with Southgate that contained **an** express disclaimer in favor of the sellers, not Preston & Farley. The sellers could thus escape liability. But the law does not allow a licensed real estate broker to escape or contract away liability for its misrepresentations. See, Op. Att'y Gen. Fla. 96-20 (March 7, 1996). Indeed, Preston & Farley would have this Court apply the economic loss rule in such a fashion so that Preston & Farley can take advantage of the sellers' express contractual disclaimer to avoid liability for breach of its independent duties in tort and statute.

Preston & Farley's assertion that Southgate is merely suing out of frustrated economic expectations regarding the purchase of

the property (A.B. at 22), is disingenuous. Southgate's claims against Preston & Farley are based on disappointed economic expectations created by Preston & Farley's own fraudulent conduct.

5. Public policy.

Applying the economic loss rule to intentional torts as suggested in Woodson would abolish claims for tortious interference, unfair competition, RICO violations, Unfair Trade Practices Act violations, and a host of traditional actions for breach of duties in tort where solely economic damages are sought. See, e.g., GNB, Inc. v. United Danco Batteries, Inc., 627 So. 2d 492, 499, n. 9 (Fla. 2d DCA 1993) (Altenbernd, J., dissenting) (questioning whether the economic loss rule now bars claims for tortious interference with business relationships). Casa Clara cannot be interpreted in such fashion.

Preston & Parley asserts that the economic loss rule is the life preserver which prevents contract law from drowning in a sea of tort. (A.B. at 9) To the contrary, abolishing claims for fraud in the inducement and breach of statutory duties of honesty and fair dealing leaves innocent victims of fraud in a sea of sharks without a life preserver.

B. NO OTHER GROUNDS EXIST FOR AFFIRMING TBE 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. The decision of the Second District in this case essentially constituted the granting of a summary judgment in favor of Preston & Farley, although the Second District did not pass upon any issue of fact in dispute. In reviewing the grant of a summary judgment, all issues of material fact must be resolved in favor of Southgate, the non-moving party. See, generally, Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). Preston & Farley's statement of the case and facts ignores this foregoing standard of review. (A.B. at 1-5). Preston & Farley has presented the facts in the light most favorable to it on the erroneous assumption that a prior per curiam affirmance without opinion by the Second District Court of Appeal in a related case in favor of the sellers acts as a prima **facie** finding that the Second District agrees with the facts as set forth by Preston & Farley. (A.B. at 2); Linn-Well Development Corp. v. Crown Beverage Packasins, Inc., 632 So. 2d 1036 (Fla. 2d DCA 1993). Southgate respectfully disagrees. A per curiam affirmance without opinion has no precedential value, Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310, 312 (Fla. 1983) and should be properly excluded from a brief or oral argument. Id.

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 which are part of the record below.

CONCLUSION

The economic loss rule does not apply to Southgate's claims against Preston & Farley for fraud in the inducement and negligent misrepresentation in the inducement of a contract because such claims involve independent duties designed to protect society's interest in the truth, and interest in being free from **harm** resulting from the breach of such duties. The economic loss rule does not bar Southgate's claims against Preston & Farley for breach of its duty as a licensed real estate broker to deal honestly, fairly, and good faith because any contract that purports to remove a licensed broker's liability for misrepresentation or fraud is contrary to public policy and void. 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.


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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 **Box** 1259, St., Petersburg, Florida 33731-1259, on this 3 day of May, 1995.

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