IN THE SUPREME COURT OF FLORIDA

PK VENTURES, INC., and ROBERT L. ROSE, THOMAS F. KANE, LOUIS KRUTOY, ROBERT F. GRIMMIG, JOSEPH F. MANNELLO, JOEL A. MARSHALL, THOMAS F. KANE, JR., G. CLIFFORD McCARTHY, and FRANCIS J. CEROSKY,	)	
Petitioners,	)	
v.	)	CASE NO. 87,404
RAYMOND JAMES & ASSOCIATES, INC.,	)	
Respondent.	)	

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

RESPONDENT'S BRIEF ON THE MERITS

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EXPLANATION OF ABBREVIATIONS

The following abbreviations will be used throughout the Respondent's Brief on the Merits.

1. "Investors" will refer to the Petitioners collectively, PK Ventures, Inc., Robert L. Rose, Thomas F. Kane, Louis Krutoy, Robert F. Grimmig, Joseph F. Mannello, Joel A. Marshall, Thomas F. Kane, Jr., G. Clifford McCarthy, and Francis J. Cerosky.

2. "Rose" refers to Petitioner Robert L. Rose.

3. "PK Ventures" refers to Petitioner PK Ventures, Inc.

4. "Raymond James" refers to the Respondent, Raymond James & Associates, Inc.

5. "Zephyr" refers to Zephyr Rock & Lime, Inc., a corporation that owned the subject limerock mine.

6. "Mills" refers to Elli Mills, the majority stockholder, president and chairman of the board of Zephyr who sold his stock in Zephyr to the Petitioners. (T. 543-44).

7. "Carolin" refers to Roger Carolin, Mills' assistant at Zephyr.

8. "Duffy" refers to Andrew J. Duffy, an employee of Raymond James.

9. "Lamb" refers to Henry Lamb, a geologist with Mineral Resource Associates. (R. 4948-49).

10. "Timmons" refers to Bobby J. Timmons, a geologist with Timmons Associates.

11. "Memorandum" refers to the Confidential Memorandum regarding Zephyr dated September, 1986. (R. 8-45 and 4694-4730, A.B.1).

12. "Mills Warranty Letter" refers to Mills' letter dated July 10, 1987, addressed to Rose. (R. 3261-62, A.B.2).

13. "A. ___" refers to the Appendix and the tab letter or number under which the referenced document appears.

14. "R. ___" refers to the page numbers of the Record on Appeal.

15. "T. ___" refers to the pages of the transcript of the trial that are referenced in that manner in the Index to the Record on Appeal.

STATEMENT OF THE CASE

Although somewhat argumentative, the Investors' Statement of the Case in their Initial Brief generally presents an accurate factual history of the instant action. Raymond James deems it appropriate, however, to bring to the attention of this Court one matter relating to the Investors' Statement of the Case.

In 1986, Raymond James was hired by the majority owner of Zephyr Rock & Lime, Inc. ("Zephyr") for the purpose of assisting the shareholders of Zephyr in the sale of the company. Zephyr owned and operated a limerock mine in Pasco County, Florida. In its capacity as an investment banker/business broker, Raymond James prepared a descriptive brochure which is referred to as the "Confidential Memorandum" or the "Memorandum." In their Complaint, the Investors alleged that there were fraudulent and negligent misrepresentations contained in the Raymond James Memorandum. (R. 1-45). A copy of the Complaint and the Memorandum are attached at A.A. and A.B.1, respectively.

In their Initial Brief, the Investors noted:

> Specifically, the Confidential Memorandum prepared by Raymond James assured its readers in unequivocal terms that first-hand investigation, testing, and analysis of core drilling samples had proven that the vast majority of Zephyr's reserves were of aggregate quality. (R-4700). In fact, only a relatively small portion of Zephyr's reserves constituted aggregate quality limestone.

Initial Brief, pp. 1, 2.

Raymond James takes issue with the characterization that its Memorandum "assured its readers in unequivocal terms" that Zephyr's reserves were of a certain quality. On the very first page of the Memorandum was a disclaimer which cautioned:

> Zephyr Rock & Lime, Inc. has made every effort to provide accurate information and believes the information contained herein

> to be accurate, but Zephyr Rock & Lime, Inc. does not otherwise make any representation or warranty regarding the accuracy or completeness of such information and no other party has authority to do so on its behalf. All such information is subject to your written verification. Raymond James & Associates, Inc. has not independently verified any of such information and makes no representation or warranty regarding the accuracy or completeness of such information, and no other party has authority to do so on its behalf. Any reproduction or distribution of this Memorandum, in whole or part, or the divulgence of any of its contents without the prior written consent of Raymond James & Associates, Inc. is prohibited.

(R. 9/A.B.1, p.2).

STATEMENT OF THE FACTS

The Investors' Statement of Facts (Initial Brief, pp. 6-12) is replete with inappropriate argument, distortions of the facts and omissions of material facts. For example, as they did in their Statement of the Case, the Investors again noted that Raymond James made the "bold and unequivocal assertion" that the vast majority of the reserves has proven to have been of aggregate quality. (Initial Brief, p. 10). The Investors further maintained that the disclaimer was nothing but "boilerplate" which was "not directed to any particular representations and did not purport to relieve Raymond James from responsibility for conveying information which it knew or should have know as false." (Initial Brief, pp. 11, 12). In light of the disclaimer which put the readers on notice that Raymond James made no representation or warranty, it is inappropriate for the Investors to characterize any provisions of the Memorandum as being "bold and unequivocal assertions." The disclaimer was directed to all matters contained in the Memorandum, including the provision regarding the quality of the limestone reserves. Except for the names and addresses

of the Raymond James' employees from whom additional information could be obtained, the entire first page of the Memorandum was devoted to the disclaimer. (R.9/A.B.1, p. 2).

As noted in their Statement of the Case (Initial Brief, p. 1) and in their Statement of Facts (Initial Brief, p. 6), the "focal point" of the Investors' case against Raymond James concerned the quality of the reserves at Zephyr. The Investors' theory of liability was that Duffy, when preparing the Raymond James Memorandum, had in his possession the 1984 Zellars-Williams Report. According to the Investors, that report contained information which allegedly conflicted with the sentence in the Raymond James Memorandum which suggested that the vast majority of Zephyr's reserves were proven to be of aggregate quality. (Initial Brief, p. 10). In summary, the Investors claimed that they thought that they were purchasing a mine which produced primarily aggregates, rather than a mine which produced primarily road base. The Investors viewed the 1984 Zellars-Williams Report as one which supported the position that Zephyr should be operated as a road base mine. (Initial Brief, pp. 10, 11). The Investors further maintained that they were not provided with a copy of the 1984 Zellars-Williams Report prior to the closing. (Initial Brief, p. 14).

What the Investors failed to bring to the attention of this Court, however, is that the very document of which they complained--the Raymond James Memorandum--itself put them on notice of the fact that the geological studies which had been performed prior to the closing supported the view that Zephyr should be operated as a road base mine. In pertinent part, the Memorandum reads:

> At the inception of mining operations in 1984, management anticipated that Zephyr Rock & Lime, Inc. would be primarily a producer of limerock road base and that it would produce a small percentage of aggregates as ancillary products. This expectation was based upon the geological data and studies done to date.

> Accordingly, the processing plant was designed with this product mix in mine.
>
> • • •
>
> When initial excavation and processing of material began in 1984, management realized that the quality of the deposit was better than what had been anticipated based upon only the core drillings. Consequently, management decided to restructure the processing plant to produce solely aggregates which command a higher average price in the marketplace. As a result, significant modifications and additions have been made to the processing plant during the past two years in order to increase the capacity for aggregate production and to reach required product quality levels.

R. 34, 35/A.B.1, pp. 26, 27 (emphasis added).

In preparing the Memorandum, Raymond James reviewed a number of materials which were provided to it by the seller, Mills. (T. 233). Included within the voluminous documents provided to Raymond James was a write-up which Carolin, Mills' assistant, had prepared. It was that document which was the source of the language regarding the "vast majority" of the reserves being of aggregate quality. (T. 216). Based on his inspection of the Zephyr operation and his interviews of Mills and Carolin, Duffy believed that Zephyr was primarily an aggregate operation. (T. 244,45). However, Duffy recognized that, because he and others at Raymond James were not geologists, Raymond James could in no way represent or warrant to any prospective buyers the attributes of the mine. It was for that reason that the disclaimer was included in the Memorandum. (T. 372,73).

In their Initial Brief, the Investors also failed to point out their level of sophistication. The individual Investors, other than Rose, were partners in a bond dealer/investment banking firm, Printon, Kane & Company (hereinafter "Printon Kane"). (R. 5184-85). Rose was an employee of Printon Kane. (R. 5094, 5185). In 1986 and 1987, Printon Kane was the largest investment

banking firm in the State of New Jersey. (R. 5185). In September of 1986, Rose and the other Investors formed PK Ventures for the purpose of acquiring companies. (R. 5096). It was Rose's job to locate acquisitions for PK Ventures. (R. 5097). Rose, himself, was and is quite sophisticated, with an undergraduate degree in physics, degrees in business education, and a masters degree in business and applied economics from the University of Pennsylvania. (R. 5092-93). Before becoming associated with Printon Kane, Rose had been employed as a financial analysis for Chemical Bank, had been involved in the bond trading business at Soliman Brothers, Thompson McKinnon, Kidder Peabody and J.J. Lowry & Company. (R. 5092-94). Rose regarded himself as an expert in investigating a business opportunity and conducting the appropriate due diligence prior to a closing. (R. 5186).

It was Rose who initiated the contact with Raymond James by letter dated April 24, 1987. The correspondence reflected that PK Ventures was interested in acquiring companies, and the letter, which appeared on Printon Kane letterhead, noted, *inter alia*:

- We have completed 10 deals since October 1986.
- Our parent company has equity capital in excess of $80 million.
- We are experts in financing and closing deals.

(R. 2645 & 5184).

As noted in their Initial Brief, Rose and the Investors, after the initial contact, became interested in acquiring Zephyr.[1] On July 9, 1987, Rose forwarded to Mills a letter of intent

[1] On page 14 of their Initial Brief, the Investors noted that "Duffy and Carolin gave Rose certain documents, including geological information, but they did not give him the February 1984 Zellars-Williams Report. . ." Duffy's testimony was that it was Carolin, not Duffy, who photocopied the geological studies and drill logs upon which those studies were based. Duffy did not participate in that photocopying and, consequently, he had no personal knowledge to the effect that the Zellars-Williams Report was not included within the stack of documents given to Rose. (T. 369-70).

wherein Rose demanded that Mills warrant, in writing, that the Memorandum "gives a fair and reasonable statement on Zephyr, its competitors and the general market potential of Zephyr." (R. 3253-3260). Mills initially refused to sign the letter of intent requiring the warranty language, but he relented after he updated the Raymond James Memorandum through his letter dated July 10, 1987. The July 10, 1987 letter noted:

> This Memorandum was written prior to September 1986, and, at the time, it gave a fair and reasonable statement on Zephyr, its competitors and the general market potential of Zephyr. Since that time, there have been changes and information coming to light which I would like to bring to your attention to bring the document up-to-date.

R. 3261-62, 5135/A.B.2.

One of the changes which was significant at Zephyr was that, in early 1987, months after the Memorandum had been prepared, Mills changed his method of mining. (T. 549). As a result, he thereafter came to the conclusion that the percentage of fines was higher than what he believed the percentage to be when the Memorandum was prepared. Mills therefore felt compelled, in his July 10, 1987 warranty letter, to put Rose and the other Investors on notice that the estimate of fines was not the 28%, as reported in the Memorandum, but, instead, was closer to 48%. (T. 560, 61). Although the Investors specifically negotiated a warranty regarding the Raymond James Memorandum, as modified, from Mills, the Investors *never* asked or demanded that Raymond James warrant the Memorandum. (R. 5371/T. 371, 72).

Upon receipt of Mills' July 10, 1987 letter, Rose knew that, as of then, he could not trust the information in the Memorandum. (R. 5269). Because of this, Rose proceeded to hire a geologist, Bobby Timmons, to assist Rose in his investigation of Zephyr. (R. 5269). It was his lack of trust in the matters set forth in the Raymond James Memorandum that prompted Rose to

write to Timmons on July 20, 1987 asking, among other things: "Are the reserves really there and of a minable quality?" (R. 3263, A.B.3). According to Rose, this was the most important question which he had of Timmons. (R. 5263).

Rose supplied Timmons with copies of the geological reports which had been provided to Rose by Carolin, including the drill logs for the 1984 Zellars-Williams Report. (R. 5144). Although, as noted above, the Investors claimed that Rose was never given the body of the Zellars-Williams report, it is uncontroverted that he was given the drill logs referenced in that report. (R. 5116, 17). After visiting the mine and reviewing the geological materials, Timmons, by letter dated August 4, 1987, wrote Rose a letter wherein he raised a number of concerns about the geology. He noted, among other things, the following:

> The rock then, whatever it is geologically, becomes highly suspect. The amount of siliceous material present is an enormous red flag, even to one barely acquainted with specifications and their modification by deleterious fractions. . .
>
> Minability - The fine situation contributes to mining difficulty, particularly due to the high water table. . . the result is normally a boulder or excessive fines condition. . .
>
> I would continue to have a concern about the unconfined release of fines into the cypress heads. . .
>
> Overburden removal and storage are evidently significant concerns. . .
>
> Processing costs have to be excessive due to the fine and siliceous fractions. . .
>
> Admittedly, I have a strong negative sense about this operation. . .
>
> Rock quality and quantity are established, but these are insufficiently known (regardless of past studies) for proper mine planning and subsequent product blending. . .

> Contingencies in many aspects would be necessary in any contract negotiations and a bargain price paramount. . .

(R. 2702-04, A.B.4).

The Timmons letter gave Rose "a lot of discomfort." (R. 5145). Notwithstanding the overall negative tone of Timmons' letter, Rose testified that he relied on the positive aspects of Timmons' opinion letter when purchasing the mine. More particularly, Rose testified:

> Well, the letter in substance had concerns, and I was-I understood he had concerns and I understood it was enough for me to go get another geologist, but I still had this statement on Page 3 which says, rock quality and quantity are established and that's what I hung my hat, and I don't pretend to be a geologist understanding all of this. I have to rely on people that have more knowledge than myself.

(R. 5277-78) (emphasis added).

Prior to receipt of Timmons' August 4, 1987 letter, Rose had a telephone conversation with Timmons wherein Timmons expressed concerns regarding the geology at Zephyr, and Timmons told Rose that he needed to investigate Zephyr further. (R. 5281). Rose then hired another geologist, Henry Lamb. In his July 29, 1987 engagement letter to Lamb, with regard to the product mix numbers referenced in the Raymond James Memorandum, Rose noted that he would "only believe the numbers when I see them for real." (R. 5286).[2] Like Timmons, Lamb was given the geological reports which had been provided to Rose. Included within the materials were the drill logs upon which the 1984 Zellars-Williams Report was based. (R. 5002, 06). Inasmuch as Lamb was in possession of the drill logs which were a part of the 1984 Zellars-

[2] The product mix table can be found on page 20 of the Memorandum. (A.B.1). The table reflects the different products that Zephyr was producing and the estimated share of production for each of those products.

Williams Report, coupled with the fact that another geological report, the Burton-Amontree Report, specifically referenced a February 1984 report and quoted that report at length, Lamb was aware that there was this February 1984 report which he did not have. However, Lamb never asked anyone for a copy of the report. (R. 5026-30). It did not concern Lamb that, when he was conducting the due diligence on behalf of the Investors, he did not have a copy of the February 1984 Zellars-Williams Report. (R. 5031-33).

As was Timmons, Lamb was critical of the geological studies which had been done to date on Zephyr. He put "minimal faith" on the existing reports, as those reports were generated on an insufficient number of drill holes and based on poor core recoveries. Among the reports of which Lamb was critical were the drill logs from the Zellars-Williams Report. (R. 5022-24).

Lamb testified that, with regard to the geological reports which were given to Raymond James when Raymond James prepared its Memorandum, the reports were unreliable as there was insufficient data upon which to draw any conclusions with regard to the product mix. Moreover, Lamb further believed that it was possible that the percentage of fines could even have exceeded 50%. (R. 5025-26). Lamb admitted that the estimating of the quality and quantity of reserves is not an exact science. (R. 5066). In fact, Lamb testified that, with respect to the estimate that Mills gave prior to closing suggesting that the percentage of fines was approximately 48% was not an unreasonable estimate. (R. 5072-73). When undertaking his geological investigation of Zephyr, Lamb never contacted Raymond James. The reason for this was because, as investment bankers and stock brokers, the individuals at Raymond James, such as Duffy, "would not be a good source of technical information" in Lamb's opinion. (R. 5010).

Prior to the August 20, 1987 closing, Lamb and Rose had a telephonic conversation wherein Lamb raised "red flags" regarding the geology at Zephyr. (R. 5287). Lamb warned Rose that there were concerns with the quantity and quality of the reserves, and he recommended to Rose that much more geological testing needed to be done prior to closing. (R. 5033-37). Lamb followed up this conversation with his August 20, 1987 letter to Rose. (R. 3267-69/A.B.5). Although Lamb, as reflected in this August 20, 1987 letter, was critical of the existing geological reports and urged Rose and the Investors to undertake further testing, Lamb nevertheless opined:

> Considering a severe case where mining, beneficiation and economic factors reduce the minable, recoverable reserves to 50% of the geological resource (40-45MM tons) and the income potential decreases from higher valued aggregate products to the lower unit value of limerock road base, there remains a reasonable potential for the recovery of the initial investment, coverage of the operating costs and debt service and the realization of a profit for the operator.

(R. 3267-69/A.B.5, p.3) (emphasis added).

Rose testified at trial that he relied on Lamb's opinion to the effect that he could realize a profit at Zephyr. (R. 5310, 5317). In response to the following question, Rose gave the following answer:

> Q. So, you had fallen in love with this investment, and it was proceeding rapidly; and when Mr. Lamb told you that there was a reasonable chance for you to make a profit, you went ahead and closed?
>
> A. Yes, sir.

(R. 5317-18).

Rose also knew that Zephyr was experiencing severe financial difficulties, that Mills was out of cash, and that the lead lender was threatening foreclosure. (R. 5112, 5146). Mills and

Carolin had provided Rose with financial statements which showed that Zephyr had a negative net worth of $1.8 million and that Zephyr as losing over $80,000 per month. (R. 5351-59). Rose also knew that Zephyr was originally conceived as a road base mine, but Mills converted it to an aggregate mine, and that Mills lost roughly $2 million as a result. (R. 5311). In Rose's own words, there was "no question that this was a risky investment." (R. 5316).

The closing on Zephyr took place on the same day that PK Ventures entered into a contract to purchase Zephyr-August 20, 1987. PK Ventures was actually the purchaser, but the contract rights were contemporaneously assigned out to the individual plaintiffs in this action. (R. 5148-52). In their Initial Brief, the Investors failed to note that the Stock Purchase Agreement, to which Raymond James was not a party, contained, *inter alia*, the following warranties by Mills:

> 5.29 Confidential Memorandum. Except as modified by that certain letter dated July 10, 1987 from the Company to Robert L. Rose, the Confidential Memorandum dated September 1986 issued by Raymond James & Associates, Inc. and furnished to the Purchaser fairly presents the competitive position of the Company, its competitors, and the general market potential of the Company and is absent any fraudulent representations.
>
> 5.30 Reserve Studies. Representations in the reserve studies and related documents furnished to the Purchaser by the Shareholder fairly present the quantity and quality of the Company's limestone reserves and are absent any fraudulent representations.

(R. 3546-47).

Thus, notwithstanding the admonitions from Timmons and Lamb, and their recommendations that additional testing be done, Rose and the Investors proceeded to a closing on August 20, 1987. Again, Raymond James was not a party to the purchase and sale contract,

nor was Raymond James asked to execute the contract or make any warranties regarding Zephyr. (R. 5371).[3]

The Investors would have the Court believe that the "investment was doomed to fail" because the composition of the reserves was "far inferior to what Rose had been told." (Initial Brief, p. 20). The Investors maintain that the actual composition is "at least 61% fines, leaving no more than 39% aggregates." (Initial Brief, p. 20). In fact, to this day, no one knows what the composition of the reserves is. The Investors' own expert, Lamb, testified that all he could do was make an "educated estimate" with regard to the composition of the reserves. (R. 4963). Further, Lamb admitted that, with respect to the drilling program which he later undertook for prospective buyers of Zephyr and upon which his opinions were based, his drilling program was not "all inclusive." (R. 5062).[4] As noted above, by Lamb's own admission, estimating the quality and quantity of reserves is not an exact science, and, consequently, it is inappropriate for the Investors to have the Court believe that "at least 61%" of the composition of the reserves is fine material. (R. 5065).

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[3] The Investors claimed that Rose had a conversation with Duffy after Rose received Mills' July 10, 1987 letter wherein Duffy allegedly told Rose that the pro forma which Mills referenced described the "worse case" scenario. (Initial Brief, p. 16). The Investors further claim that Duffy spoke with Rose after Rose learned of Timmons' opinions and, in that conversation, Duffy allegedly questioned how Rose could worry about what Timmons had said when there were "prior geological studies which supported the high quality of the mine's reserves." (Initial Brief, p. 17). Duffy denied ever having these conversations with Rose. (T. 644-48).

[4] Lamb wore a number of hats in this matter. He was the second geologist hired by Rose and the Investors prior to closing, and he also did work for the Investors after the closing. Subsequently, he was hired by prospective purchasers of Zephyr, the Iafrates, and it was then that he conducted a drilling program at Zephyr. He served not only as a fact witness, but also as an expert witness at trial. (R. 4996-97).

The actual experience at Zephyr supports the view that the reserves are primarily aggregates. One of the witnesses who testified at trial was Robert Marcus Jobes. Jobes is a mining engineer who operated the mine under Mills' ownership, operated the mine when the Investors owned Zephyr, and Jobes continues to run the mine today for the new ownership group, Plaza Materials. (T. 656-57). According to Jobes, as of the time of trial, roughly 68 acres of the estimated 420 acres of the mine had been excavated. (T. 679-89). With regard to the reserves which have been excavated, Jobes testified that the reserves were primarily aggregates before processing. (T. 698). Road base is composed of both aggregates and fines. Thus, although the mine, in the past few years, has not produced and sold primarily aggregates, the composition of the reserves, according to Jobes, is mostly aggregates. (T. 692-701).

Immediately after the closing, the Investors were in default on one of their obligations under the Purchase Agreement. More specifically, Mills required the purchasers to pay certain payables within ten days of the closing, which did not happen. (R. 5374-75). Under Rose's direction, Zephyr's production decreased, some 20 creditor lawsuits were filed against Zephyr, and other creditors of Zephyr were not paid. (R. 5377-79). The other Investors fired Rose as the president of Zephyr in November of 1988. (R. 5165-66). Mills himself was one of the creditors who filed suit against the Investors. (R. 97, 489). In that lawsuit, the Investors filed a counterclaim, alleging that Mills defrauded the Investors in connection with the representations and warranties which Mills made to the Investors. (R. 489).

Contrary to what the Investors would have the Court believe, Zephyr was not "doomed to fail." Under new management, as of the time of trial, Zephyr was operating profitably. (R. 5233).

Interestingly, during Zephyr's bankruptcy, Rose, personally, tried to buy the assets of Zephyr, but he was unable to do so. (R. 5172).

SUMMARY OF ARGUMENT

The Second District Court of Appeal properly reversed the judgment and verdict in favor of the Investors. In this action against Raymond James, the Investors were seeking damages for "disappointed economic expectations" in connection with their purchase of Zephyr. This case fits squarely within the economic loss rule, and the Second District was correct in holding that the economic loss rule doctrine, when applied to the facts of this case, precluded the Investors' claim for negligent misrepresentation against Raymond James.

This is not a fraud in the inducement case. The jury found in favor of Raymond James on the fraud count. The jury only found in favor of the Investors on their negligent misrepresentation claim. Every district court of appeal in Florida which has recently had the occasion to consider the issue of whether the economic loss rule precludes a claim for negligent misrepresentation, in a commercial setting, has concluded that the doctrine does, in fact, preclude such a claim. There are limited exceptions to this view, none of which are applicable to the instant action.

As this Court and the district courts have suggested, buyers, particularly those in a commercial setting, can protect themselves through contract. That is exactly what the Investors in this case did, but they could have done more. Perhaps most significantly, the Investors hired two geologists to conduct geological due diligence with regard to Zephyr. Additionally, the Investors sought and secured representations and warranties from the Seller, Mills. Raymond James was never asked to represent or warrant the quality of Zephyr's limestone reserves. In essence, the Investors would have the Court believe that Raymond James guaranteed a certain

level of quality of limestone reserves simply by virtue of the fact that Raymond James prepared a descriptive brochure on Zephyr, a brochure which included a clear and unambiguous disclaimer putting the readers on notice that Raymond James made no representation or warranty. The Investors' claims, if any, lie against the seller, Mills, or against their own geologists.

The Second District Court of Appeal properly considered the economic loss rule argument. Although Raymond James did not artfully raise the doctrine when it filed its Motion to Dismiss, it did allege that the Investors failed to state a cause of action against Raymond James on the negligent misrepresentation claim, inasmuch as there was no privity between the parties. After Raymond James filed its appeal, the law was clarified with regard to negligent misrepresentation in a commercial setting absent privity. Thus, the argument was properly considered below.

In its decision, the Second District Court of Appeal did not retroactively abolish the tort of negligent misrepresentation. Negligent misrepresentation remains a viable cause of action, but only under limited factual settings. The uncontroverted facts of this case did not lend themselves to a negligent misrepresentation claim.

Finally, the Investors maintain that there is no other basis for sustaining the reversal of the trial court's judgment. In its opinion, the Second District specifically noted that, given its disposition of the case on the economic loss rule ground, it did not address the other issues raised by Raymond James. Raymond James steadfastly maintained that, under the facts, the Investors could not have justifiably relied on Raymond James Memorandum. The Memorandum contained a clear and unambiguous disclaimer, advising the readers that Raymond James made no representation or warranty. At the letter of intent stage and also in the purchase and sale document Mills, the seller, however, did specifically represent and warrant certain attributes of

Zephyr, including those addressed in the Raymond James Memorandum. Nevertheless, the most significant fact is that the Investors hired two geologists to assist them with the due diligence investigation of the mine. These facts belie any justifiable reliance on a marketing document prepared by non-geologists.

Raymond James also argued below that the verdict and judgment should be reversed on the ground that the Investors failed to prove damages. The Investors never established that they paid too much for Zephyr, either under a benefit of the bargain or out-of-pocket theory of damages. These and other issues were raised below, none of which were addressed by the Second District due to its reversal on the economic loss rule doctrine.

ARGUMENT

I. The Economic Loss Rule Precludes Recovery for Economic Losses in a Contractual Setting.

As Judge Altenbernd of the Second District Court of Appeal observed in his dissenting opinion in Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995), there appear to be three different types of scenarios where the economic loss rule is applicable. Id. at 1331. First, there is the situation where a product malfunctions or is defective, but no physical injury or property damage is caused to any property other than the product itself. Casa Clara Condominium Association v. Charley Toppino & Sons, Inc., 620 So.2d 1244 (Fla. 1993). The second scenario is where the parties are in contractual privity. As this Court held in AFM Corporation v. Southern Bell Telephone & Telegraph Company, 515 So.2d 180 (Fla. 1987), the plaintiff has no negligence claim where there is a contractual remedy, absent some "independent tort." Id. at 181.

The remaining scenario is one such as that in Palau International Traders, Inc. v. Narcam Aircraft, Inc., 653 So.2d 412 (Fla. 3d DCA 1995). In Palau, there was no privity between the

mechanic for the seller of the aircraft and the plaintiff/buyer of the airplane. Id. The negligence claims asserted against the aircraft mechanic by the buyer, including a negligent misrepresentation claim, were not viable. Id. This action falls into this latter category of economic loss rule cases.

In Casa Clara, this Court observed:

> Economic loss has been defined as 'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property.' Note, *Economic Loss in Products Liability Jurisprudence,* 66 Colum. L. Rev. 917, 918 (1966). It includes 'the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.' Comment, *Manufacturers' Liability to Remote Purchases for "Economic Loss" Damages-Tort or Contract?*, 114 U. Pa. L. Rev. 539, 541 (1966). In other words, economic losses are 'disappointed economic expectations,' which are protected by contract law, rather than tort law. (Citations omitted). This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party. For recovery in tort 'there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.' Redarowicz v. Ohlendorf, 92 Ill.2d 171, 65 Ill. Dec. 411, 414, 441 N.E.2d 324, 327 (1982).

Casa Clara, 620 So.2d at 1246.

In the instant action, the Investors sought nothing more than economic losses for their alleged "disappointed economic expectations" in connection with their purchase of Zephyr. They sought these economic losses from Raymond James, an investment banking firm with which they had no privity. Raymond James was sued for, *inter alia*, allegedly making negligent misrepresentations in the marketing brochure which Raymond James prepared, a document which clearly and unambiguously advised the Investors that Raymond James made no representation or warranty and further advised the Investors that they needed to secure written verification of any

of the matters included in the marketing document. The Investors did just that by securing express representations and warranties from the seller, Mills, both at the letter of intent stage and in the actual purchase and sale document itself. Further, the Investors independently verified the attributes of the limerock mine by hiring two geologists. This is a case which clearly falls within the economic loss rule. Consequently, the Second District properly considered the matter, and the Second District reached the correct decision in holding that the Investors had no viable negligent misrepresentation claim against Raymond James.

II. The Second District Court of Appeal Properly Considered the Economic Loss Rule Argument.

As they did in the Second District Court of Appeal, the Investors again maintain that Raymond James did not preserve the economic loss rule issue for appeal. (Initial Brief, pp. 26-29). This argument was rejected twice by the Second District, once when the Second District issued its initial opinion, and subsequently when the Second District denied the Investors' Motion for Rehearing. (A.D.-F.).

In its Motion to Dismiss filed in response to the Investors' Complaint, which was denied, Raymond James argued:

> Plaintiffs' claims for negligent misrepresentation and negligence should be dismissed insofar as they are claims against a party not in privity with the Plaintiffs.

(R. 47).

Thus, although Raymond James did not expressly use the phrase "economic loss rule" in its Motion to Dismiss, it conceptually raised the doctrine by referencing the fact that there was no privity between Raymond James and the Investors. In the leading economic loss rule opinion in Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244

(Fla. 1993), an opinion which postdated the trial court's denial of Raymond James' Motion to Dismiss, this Court held that homeowners could not recover "purely economic losses" from a concrete supplier with which there was no privity under a negligence theory. Id. at 1245, 1248. Recognizing that the homeowners, in addition to suing the concrete supplier, filed contract actions against a number of other defendants, this Court noted that "the resulting failure to receive the benefit of the bargain is a core concern on contract, not tort, law." 620 So.2d 1246, n. 3, 1247. Thus, the homeowners in Casa Clara had contractual remedies against those with whom they were in privity. There being no privity with the concrete supplier, no viable tort claim existed as to that defendant. 620 So.2d at 1247.[5]

In the case of City of Tampa v. Thorton-Tomasetti, P.C., 646 So.2d 279 (Fla. 2d DCA 1994), an opinion which was issued after Raymond James post trial motions were denied by the trial court in this case, the Second District Court of Appeal had the occasion to entertain the issue of whether two professional engineering firms which were not in privity with the City of Tampa could be liable for the economic losses which the City allegedly suffered in connection with the construction of a public building. The City contended Section 552 of the *Restatement (2d) of Torts*, the restatement section which allows for a negligent misrepresentation claim against a professional, provided an exception to the economic loss rule doctrine. Id. at 281. The Second

[5] In Casa Clara, this Court specifically disapproved of the holdings in Latite Roofing Company v. Urbanek, 528 So.2d 1381 (Fla. 4th DCA 1988), Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515 (Fla. 4th DCA 1982), rev. denied, 417 So.2d 328 (Fla. 1982), and Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA 1981), rev. dismissed, 411 So.2d 380 (Fla. 1981). In each of those cases, there was an absence of privity between the parties, yet the plaintiffs were nevertheless allowed to pursue negligence claims against the defendants.

District Court of Appeal specifically rejected this argument, and, in doing so, based its decision on the lack of privity between the consulting engineers and the City of Tampa. Id. at 282, 283.

The absence of privity was also a salient fact in the recent case of Palau International Traders, Inc. v. Narcam Aircraft, Inc., 653 So.2d 412 (Fla. 3d DCA 1995). Palau International Traders, Inc. ("Palau") purchased a used airplane from International Airlines Holding Corporation ("International"). Id. at 413. Narcam Aircraft, Inc. ("Narcam") was the aircraft mechanic for the seller, International. Prior to the sale of the aircraft, Narcam inspected the plane and verified that it was airworthy, thereby allowing an airworthiness certificate to be issued by the Federal Aviation Administration. Id. at 413, 414. After purchasing the aircraft, Palau experienced problems with the plane, incurring repair costs and allegedly suffering loss of use of the airplane and consequential damages. Id. at 414. Palau then sued Narcam, not only for negligent repair work, but also for negligent misrepresentation regarding the condition of the plane. Id. As did the City of Tampa in Thorton-Tomasetti, supra, Palau argued that Section 552 of the *Restatement (2d) of Torts* was an exception to the economic loss rule under the facts. Rejecting this argument, the Third District opined:

> Therefore, we hold as a matter of law that Narcam did not owe the buyer of an airplane with whom it had no privity of contract a duty of care under Section 552. If we held otherwise, 'contract law would drown in a sea of tort.' Casa Clara, 620 So.2d at 1247 (quoting East River, 476 U.S. at 866, 106 S. Ct. at 2299-3000).

Palau, 653 So.2d at 420.

In an even more recent opinion than Palau, the Third District observed:

> Florida's long-standing general rule of law is that economic damages are not recoverable in a tort action where there is an absence of privity between a plaintiff and defendant.

Florida Building Inspection Services, Inc. v. Arnold Corporation, 660 So.2d 730, 731 (Fla. 3d DCA 1995) (citing Casa Clara and other cases for the proposition that negligent misrepresentation claims do not lie where there is an absence of privity).

Thus, the trial court in the instant action erred when it denied Raymond James' Motion to Dismiss the negligent misrepresentation claim. The foregoing authorities, all of which were authored after Raymond James' hearing on its Motion to Dismiss, have solidified and clarified the law insofar as the absence of privity relates to the economic loss rule doctrine. Despite the Investors' contention to the contrary, this Court's recent opinion in Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So.2d 628 (Fla. 1995), by no means supports the view that "the presence or lack of privity generally would have no bearing on whether the economic loss rule applies." (Initial Brief, p. 27). As it did in Casa Clara, this Court in Airport Rent-A-Car held that the economic loss rule precludes a negligence claim in the absence of privity. 660 So.2d at 631. In both Casa Clara and in Airport Rent-A-Car, this Court strictly limited the holding in A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973), to its facts.[6]

Again, given the fact that the absence of privity issue was raised at the motion to dismiss level, it follows that the economic loss rule doctrine was implicitly raised as well. The Investors submit that, even if Raymond James' raising of the absence of privity at the motion to dismiss stage could be deemed the invoking of the economic loss rule, Raymond James waived the doctrine by not moving for a directed verdict on that ground or by raising the issue in a post trial

[6] In A.R. Moyer, this Court held that a third party general contractor could advance a claim against a negligent architect, notwithstanding the fact that there was no privity between the parties. 285 So.2d at 402. However, in A.R. Moyer, there was such a degree of supervision that the architect maintained over the third party general contractor that this Court deemed it appropriate to allow a negligence action to lie. Id.

motion. (Initial Brief, p. 28). In support of that argument, the Investors cite the unpublished opinion in Cargill, Inc. v. Highland Coin and Jewelry, Inc., 964 F.2d 1146 (11th Cir. 1992), (reported as "AFFIRMED"), a case which is not controlling. In Cargill, however, unlike in the instant action, the district court properly denied the plaintiff's motion to dismiss based on the economic loss theory, as there was then a set of facts in the complaint which could circumvent the doctrine. (A.G., n.1). Further, the Eleventh Circuit otherwise held that the economic loss rule doctrine did not apply in the case. (A.G., p.2). There appears to be no Florida case which would require a defendant who files a motion to dismiss attacking the validity of a cause of action to thereafter raise the issue repeatedly throughout the case in order to preserve the issue for appeal.

Regardless, even if Raymond James did not specifically raise the economic loss rule issue at the trial court level, once the Second District had jurisdiction over the cause it could exercise its discretion to consider any issue affecting the case. Dralus v. Dralus, 627 So.2d 505, 508 (Fla. 2d DCA 1993). Given the fact that there was a clarification of the economic loss rule, particularly in a negligent misrepresentation context, from the time the Investors filed their Complaint until the time the Second District ruled in favor of Raymond James, it was appropriate for the Second District to entertain the economic loss rule doctrine.

Moreover, the economic loss rule is not "a bar to an existing cause of action" as is in an affirmative defense. Sandarac Association v. W.R. Frizzell Architects, 609 So.2d 1349, 1355 (Fla. 2d DCA 1992), rev. denied, 626 So.2d 207 (Fla. 1993). Instead, the economic loss rule is a doctrine which provides that, in a setting such as this one, no tort claim exists. Sandarac, 609 at 1355. An appellate court always has the discretion to reverse a judgment when there is "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). Thus, it was appropriate for this Second District to

consider the economic loss rule doctrine, even if it concluded that Raymond James did not specifically raise the issue at the trial court level.

III. The Second District Properly Held That No Cause of Action for Negligent Misrepresentation Exists in the Absence of Privity.

Conspicuously absent from the Initial Brief of the Investors and from the Amicus brief filed by the Academy of Florida Trial Lawyers is one authority which, under an analogous factual scenario, supports the view that the Investors' negligent misrepresentation claim should survive an application of the economic loss rule. While it is acknowledged that there is a split of authority with regard to the application of the economic loss doctrine in a fraud in the inducement case, there is unanimity amongst the district courts insofar as the negligent misrepresentation claim is concerned, particularly in a commercial setting where there is no privity between the parties.[7]

There are two significant facts which support the affirmance of the Second District's holding in this case. First and foremost, despite the Investors' implications to the contrary, this is *not* a fraud in the inducement case. The jury specifically found in favor of Raymond James on the fraud in the inducement count. (R. 2287-88/A.B.7). The Investors did not appeal the jury's verdict in this regard. This is instead merely a negligent misrepresentation case, and, in particular, a negligent misrepresentation case where there was no privity between the parties. Secondly, this is a commercial case where the Investors are sophisticated, successful businessmen. When these

[7] In Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995), the Second District held that the plaintiff home buyer could not assert a fraud in the inducement claim against the broker for the seller, based on an application of the economic loss rule; Linn-Well Development Corp. v. Preston & Farley, Inc., 666 So.2d 558 (Fla. 2d DCA 1995); *Contra*, See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So.2d 1221 (Fla. 3d DCA 1995), rev. granted _____ So.2d _____ (fraud in the inducement is an independent tort not barred by the economic loss rule); TGI Development, Inc. v. Cvreit, 665 So.2d 366 (Fla. 4th DCA 1996); and Jarmco, Inc. v. Polygard, Inc., 21 Fla. L. Weekly D478 (Fla. 4th DCA February 21, 1996).

two facts are kept in mind, it can only be concluded that the Second District appropriately ruled in favor of Raymond James.

Throughout their Initial Brief, the Investors try to blur the distinction between fraud in the inducement and negligent misrepresentation. The two are separate and distinct causes of action. On the fraud claim, the trial court gave the jury the following instruction:

> . . . the issues for your determination are, first, whether Raymond James intentionally made a false statement concerning a material fact; second, whether Raymond James knew the statement was false when it made it or made the statement without knowing it was without knowledge of its truth or falsity; third, whether in making the false statement, Raymond James intended that another rely on the false statement; fourth, whether the Plaintiffs relied on the false statement; fifth, whether the Plaintiffs suffered damages legally caused by Raymond James.

(T. 806) (Patterned after Florida Standard Jury Instructions, MI 8a). On the negligent misrepresentation claim, the trial court instructed the jury:

> . . . the issues for your determination are, first, whether Raymond James made a false statement to another concerning a material fact; second, whether in the exercise of reasonable care under the circumstances, that Raymond James should have known the statement was false; third, whether in making the false statement, Raymond James intended that another rely on the false statement; fourth, whether the Plaintiffs reasonably relied on the false statement; and, whether the Plaintiffs suffered damage as a result.

(T. 807). (Patterned after Florida Standard Jury Instructions, MI 8c).

The jury expressly found that Raymond James did not intentionally make a misstatement of a material fact. Instead, Raymond James was found liable for failing to exercise "reasonable care under the circumstances"-clearly a negligence type of claim. If there was ever confusion as to the differences between the torts of fraud and the inducement and negligent misrepresentation, the recent economic loss rule case law has cleared up any such confusion.

The fact that there is a distinction between fraud in the inducement and negligent misrepresentation in the context of an economic loss rule analysis was addressed by the Fourth District Court of Appeals in the recent case of Jarmco, Inc. v. Polygard, Inc., 21 Fla. L. Weekly D478 (Fla. 4th DCA February 21, 1996). In Jarmco, as it did in TGI Development, Inc. v. Cvreit, Inc., 665 So.2d 366 (Fla. 4th DCA 1996), the Fourth District held that the economic loss rule does not bar a fraud in the inducement claim where the plaintiff is seeking to recover only economic losses. 21 Fla. L. Weekly D478. In addition to advancing a claim for fraud in the inducement, the third party plaintiff in Jarmco, a dealer in resins used in boat construction, filed claims against the distributor of an allegedly defective resin, seeking recovery based on theories of negligent misrepresentation, deceptive and unfair trade practices and negligence. Id. The Fourth District held that, although the trial court in Jarmco improperly granted summary judgment in favor of the distributor on the fraud in the inducement claim, the trial court otherwise properly dismissed the non-fraud counts, including the negligent misrepresentation count. Id. at D480.

The Investors would have the Court believe that there is some tort of "negligent misrepresentation in the inducement" which should survive an economic loss rule challenge. (Initial Brief, pp. 29-41). In support of this position, the Investors rely heavily on the opinion in Burton v. Linotype Company, 556 So.2d 1126 (Fla. 3d DCA 1989), rev. denied, 564 So.2d 1086 (Fla. 1990). The Investors' reliance on the Burton opinion is terribly misplaced.

Burton was decided in 1989. Further, there was privity between the parties in that Burton involved claims by a lessee and its principals against the lessor and its principals. In summary, the plaintiffs alleged that the defendants made misrepresentations which induced them to enter into a

lease. 556 So.2d at 1127. The economic loss rule was not specifically addressed in the opinion. 556 So.2d at 1126.

Moreover, the Third District, the very court which decided Burton, has since made it clear that negligent misrepresentation claims do not lie against third parties with whom the plaintiff has no privity in factual scenarios analogous to those in the instant case. Palau International Traders, Inc. v. Narcam, Inc., 653 So.2d 412 (Fla. 3d DCA 1995); Florida Building Inspection Services, Inc. v. Arnold Corporation, 660 So.2d 730 (Fla. 3d DCA 1995). Thus, regardless of whether Burton remains good law under its facts, the Third District has made it clear that no cause of action lies for negligent misrepresentation, where there is no privity, except in the narrowest of circumstances. Palau, 653 So.2d at 417.[8]

As noted above, in Palau, the purchaser of an aircraft claimed that the mechanic for the seller negligently misrepresented the condition of the airplane prior to the purchase. 653 So.2d at 414. The issue in the case was whether, "under a negligence theory, a purchaser of a used airplane can recover for purely economic losses from an airplane mechanic with whom it has no privity." Id. at 413. The buyer sought recovery for economy losses such as repair costs, loss of use of the airplane and consequential damages. Id. at 414. The buyer contended that the economic loss rule did not apply based on this Court's holding in A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). Notwithstanding the absence of privity, the buyer argued that it was "a third party who could foreseeably sustain an economic loss proximately caused by the negligent performance of Narcam as a certified airplane mechanic and repair station." Id. Alternatively, the

[8] Although the Third District made it clear in Palau that no cause of action lies for negligent misrepresentation, in HTP, Ltd. v. Lineas Aereas Costarricenses, 661 So.2d 1221 (Fla. 3d DCA 1995) the court, citing Burton, held that fraud in the inducement is an exception to the economic loss rule.

buyer in Palau argued that "it reasonably relied upon information which was negligently supplied by Narcam and which guided the buyer in its decision to purchase the airplane" under the Florida Bank, N.A. v. Max Mitchell & Company, 558 So.2d 9 (Fla. 1990), line of cases.

In analyzing the opinion in Moyer, the Third District in Palau recognized that this Court limited the holding in Moyer to its facts in the Casa Clara opinion. Further, in First American Title Insurance Co. v. First Title Service Co. of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984), the case involving the issue of whether an abstract company could be held liable for negligent preparation of an abstract to a party not in privity, this Court found that the purchaser was a third party beneficiary of the abstractor's employment contract. 457 So.2d at 473. However, liability was limited to the parties to the abstract transaction which were intended and known third party beneficiaries, as opposed to all parties who might be foreseeably injured by the negligent acts of the abstracting company. Id. at 472-73. Relying on the holding in Casa Clara, the Third Circuit in Palau, in rejecting the "foreseeability" argument under Moyer, opined:

> Like the homes in Casa Clara which did not meet the homeowner's expectations, the airplane in this case did not meet the buyer's expectations. The only harm to the buyer was for purely economic losses. The buyer sought recovery of damages for inadequate value, costs of repairing the airplane on a specific island rather than in Miami, and loss of use of the airplane. As Casa Clara instructs, however, the buyer's failure to receive the benefit of his bargain is a core concern of contract, nor tort law.

Palau, 653 So.2d at 416.

The Third District in Palau also rejected the aircraft buyer's argument based upon the holding in Max Mitchell, 653 So.2d at 417. In Max Mitchell, a certified public accountant, Max Mitchell, prepared financial statements for one of his clients who was also a customer of First

Florida Bank. Mitchell prepared the financial statements knowing that the bank would be relying on his work product when making a loan to the customer. Max Mitchell, 558 So.2d 10, 11. In Max Mitchell, this Court adopted Section 552, Restatement (2d) of Torts (1976) which provides:

> **Section 552 Information Negligently Supplied for the Guidance of Others.**
>
> (1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by the justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3) the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Recognizing that Section 552 is a "narrow exception to the economic loss rule," the Third District refused to extend liability under Section 552 to the facts in Palau. 653 So.2d 417, 418. In doing so, the Third District recognized that the "existence of a duty of care in a negligence action is a question of law," citing McCain v. Florida Power Corp., 593 So.2d 500, 502 (Fla. 1992). Further, quoting the Second District in the opinion of Sandarac Association v. W.R. Frizzell Architects, Inc., 609 So.2d 1349, 1353 (Fla. 2d DCA 1992), rev. denied, 626 So.2d 207 (Fla. 1993), the Third District noted:

> When the judiciary creates a new duty in negligence to protect economic interests, however, it should be aware that it is not merely creating an exception to an existing common law rule of

> damages. It should be convinced that the problem justifies a judicial allocation of the relevant risks among the members of society, and that an adequate remedy cannot realistically exist through private contracts and statutory remedies.

Palau, 653 So.2d at 418.

The Third District reached a similar holding in the recent case of Florida Building Inspection Services, Inc. v. Arnold Corporation, 660 So.2d 730 (3d DCA 1995). In Florida Building Inspection, the sublessee of commercial property filed an action against the building inspection company hired by the lessee. Prior to subleasing the space, the sublessee demanded that a roof inspection be undertaken. There was no privity between the sublessee and the inspection company, as it was the lessee which hired the roof inspector. The sublessee experienced problems with the roof, and ultimately an action was filed for negligent misrepresentation and negligent inspection against the inspection company. 660 So.2d at 731. Recognizing that, under limited circumstances found in cases such as Max Mitchell and its progeny, wherein courts allowed recovery from negligent providers of information or services who are not in privity with the plaintiffs, the Third District noted that in those cases "a duty was established to plaintiffs who were identifiable third party beneficiaries of the contract to provide services." In First American, there was such an intended known beneficiary for the abstracting services. However, in Angel, Cohen and Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987), this Court refused to impose liability on an attorney, notwithstanding the fact that the plaintiff was an incidental third party beneficiary of the underlying contractual services performed by the attorney. 512 So.2d at 194.

In Florida Building Inspection, the lessee which hired the inspection company was the intended beneficiary of the roof inspection report, not the sublessee which claimed it relied on the

report. 660 So.2d at 730. Further, the roof inspection report prepared for the lessee was "not the type of document heavily relied upon by third party sublessee/buyers in the financial world." Id. As it did in Palau, the Third District refused to extend liability to the roof inspection company. Id.

In the City of Tampa, the opinion wherein the Second District refused to impose Section 552 liability on engineering/consulting firms not in privity with the City of Tampa, the court opined:

> It is true that in limited circumstances, professionals can be held liable to non-contractual parties for economic damages arising from professional negligence. See First Florida Bank, N.A. v. Max Mitchell & Company, 558 So.2d 9 (Fla. 1990; First American Title Insurance Co, Inc. v. First Title Service Co. of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984); Lorraine v. Grover, Cement, Weinstein & Stauber, P.A., 467 So.2d 315 (Fla. 3d DCA 1985). As these case make clear, liability is extended not to all who may be within the class of foreseeably injured but only to distinct third parties whose reliance upon documents or information furnished by the professional constituted the 'end and aim of the [underlying] transaction.'

City of Tampa, 646 So.2d 281, 282 [quoting language from First American, 457 So.2d at 472].

Stated another way:

> Unless a contract is entered into for the direct and substantial benefit of a third party, it binds and benefits only the parties themselves.

City of Tampa, 646 So.2d at 282.

Turning to the facts in the instant case, Raymond James was not in the business of guaranteeing the quality of the limestone reserve at Zephyr. In fact, Raymond James was not even in the business of supplying geological information or making any representations or warranties regarding Zephyr. The clear and unambiguous disclaimer in the very front of the Raymond James Memorandum put the reader on notice that Raymond James made "no

representation or warranty regarding the accuracy or completeness" of the information included in the Memorandum, and "all such information is subject to" the reader's written verification. (R. 9/A.B.1, p.2). As noted above, one of the Investors' expert geologists who assisted them with their due diligence investigation of Zephyr, Henry Lamb, testified that he never contacted Raymond James prior to the sale, as Raymond James is not a good source of geological information (R. 5010). Similarly, the Memorandum was not the definitive document on the quality of the reserves.

Moreover, the only contractual relationship which Raymond James had was with the seller of Zephyr, Mills. In its capacity as the investment banker for Mills, Raymond James agreed to prepare the marketing Memorandum. The "end and aim" of the underlying agreement between Raymond James and Mills was for Raymond James to assist Mills in securing a buyer for Zephyr. Although the preparation of the Memorandum was incidental to this, by no means was the Memorandum prepared for the direct and substantial benefit of the Investors. If anything, the Memorandum was prepared to benefit Mills. There was no intention on the part of Raymond James to confer a direct and substantial benefit on the Investors, as evidenced by the clear and unambiguous disclaimer. The Investors did not view Raymond James as the guarantor or warrantor of the quality of the limestone reserves, as confirmed by the fact that the Investors hired their own geologists and by the fact that the Investors sought and secured written representations and warranties from Mills.

In City of Tampa, the engineering firms with which the City had no privity were engaged by the architect for the City for the purpose of assisting in the design of the public building. City of Tampa, 646 So.2d 280. In Palau, the aircraft mechanic knew that the purpose of the inspection of the aircraft was so that an airworthiness certificate could be secured, thereby allowing the sale

of the aircraft to take place. Palau, 653 So.2d at 414. The courts in City of Tampa and in Palau refused to extend Section 552 liability to these professionals, notwithstanding the fact that the professionals performed services directly within their respective fields, knowing that third parties would be benefited by their work. Raymond James was sued because the Investors claimed that the quality of the limerock mine was less than what they expected. In essence, the Investors maintained that the lay people at Raymond James knew more about the quality of the limestone reserves than did the Investors' own geologists. It would be absurd to extend negligent misrepresentation liability to Raymond James when Raymond James is not in the business of rendering geological opinions.

IV. The Economic Loss Rule Requires Parties in a Contractual Setting to Protect Themselves.

A common theme that runs throughout the recent cases on the economic loss rule is that, in a contractual setting, particularly in a commercial context, parties are able to take steps to protect themselves. Moreover, parties otherwise have contractual remedies available to them. In Casa Clara, this Court opined:

> Thus, the 'basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault. . . or to one who is better able to bear the loss and prevent its occurrence.' Barrett, supra at 935. The purpose of a duty in tort is to protect society's interest in being free from harm, Spring Motors Distributors, Inc. v. Ford Motor Company, 98 N.J. 555, 489 A.2d 660 (1985), and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. Id. When only economic harm is involved, the question becomes 'whether the consuming public as a whole should bear the cost of economic losses sustained by those who fail to bargain for adequate contract remedies.' Barrett, supra at 933.

Casa Clara, 620 So.2d at 1246, 1247.

Even in a consumer setting such as in Casa Clara, this Court recognized that, absent personal injury or property damage, the appropriate remedy for a buyer with disappointed economic expectations is a contractual one. This Court observed:

> If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of a bargain is a core concern of contract, not tort, law. East River, 476 U.S. at 870, 106 S. Ct. at 2301. There are protections for home buyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects. Coupled with home buyers' power to bargain over price, these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses. 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.' East River,, 476 U.S. at 866, 106 S. Ct. at 2300. We refuse to hold that homeowners are not subject to the economic loss rule.

Casa Clara, 620 So.2d at 1247.

In a commercial context, the reasons for invoking the economic loss rule are even more compelling. As noted in the recent case of SFC Valve Corporation v. Wright Machine Corporation, 883 F. Supp. 710 (S.D. Fla. 1995), "parties in commercial transactions-rather than the tort system-are responsible for allocating the risk of, and remedying, economic losses." SFC Value Corporation, 883 F. Supp. at 715.

In the commercial case of Palau wherein the Third District held that the aircraft buyer had no viable negligent misrepresentation claim against the mechanic for the seller, the court observed that there are many ways in which the buyer could have protected itself. 653 So.2d at 416. The

buyer could have hired its own mechanic rather than rely on the seller's mechanic. In such a case, the buyer "would have a contractual remedy directly from its own mechanic." Id. The buyer otherwise could have negotiated a lower price or secured warranty protection directly from the seller. Id. In noting that, had the buyer taken steps such as the above, it could have remedied any damages which resulted when its expectations were not met, the Third District opined:

> To expand negligence law under the facts of this case would result in providing the buyer with a remedy against Narcam (the seller's mechanic) without consideration, that is of longer duration and greater financial impact than the remedy the buyer contracted for with the seller in the first place. Such a result would be contrary to the well established policy of limiting recovery and contract actions to damages which were within contemplation of the parties. Hadley v. Baxendale, 156 Eng.Rep. 145 (1854).

Palau, 653 So.2d at 416 (emphasis added).

In their Initial Brief, the Investors, in urging this Court to reverse the Second District, rely on the dissenting opinion of Judge Altenbernd in Woodson v. Martin, 663 So.2d 1327, 1330-1331 (Fla. 2d DCA 1995). (Initial Brief, p. 41). In Woodson, a buyer of residential property sought to recover damages for fraud in the inducement against the real estate agent for the sellers. 663 So.2d at 1327. The trial court granted the real estate broker's motion for summary judgment on the ground that no viable claim existed in light of the economic loss rule. Id. at 1328. Noting that the home buyer sought damages for economic losses only, the Second District affirmed the trial court, holding that buyer could only proceed in a contract theory of liability. Id. at 1329.

Stressing that Casa Clara actually supports the view that fraud in the inducement in a consumer setting remains a viable tort, Judge Altenbernd wrote a strong dissenting opinion in Woodson. In Casa Clara, for example, this Court cited the Johnson v. Davis, 480 So.2d 625 (Fla. 1985) opinion as a form of protection for the buyer. Judge Altenbernd opined that intentional

torts such as fraud in the inducement should therefore survive an economic loss rule analysis. 663 So.2d at 1330, 1331.

Interestingly, in a commercial transaction, it appears that Judge Altenbernd is of the opinion that a buyer of property is prevented from suing the seller's broker. One month after it issued its opinion in Woodson and two weeks after it published its opinion in this action, the Second District Court of Appeal entered its ruling in the case of Linn-Well Development Corporation v. Preston & Farley, Inc., 666 So.2d 558 (Fla. 2d DCA 1995). In holding that the buyers of commercial property had no viable claim against the sellers' broker, the Second District certified to this Court the following question:

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

Linn-Well, 666 So.2d at 558.

Significantly, Judge Altenbernd concurred in the Linn-Well opinion authored by Acting Chief Judge Frank. Also concurring in Linn-Well was Judge Blue, one of Second District judges who dissented in Woodson. Linn-Well, 666 So.2d at 558; Woodson, 663 So.2d at 1330, 1334. Again, this is not a fraud in the inducement case. It is rather a negligent misrepresentation action. Moreover, it arose not out of a consumer transaction, but, instead, out of an $8 million stock purchase by buyers who held themselves out to be "experts" in business acquisitions.

Unlike in a consumer context, the doctrine of caveat emptor is alive and well in a commercial transaction. Mostoufi v. Presto Food Stores, 618 So.2d 1372, 1377 (Fla. 2d DCA 1993), rev. denied, 626 So.2d 207 (Fla. 1993). The caveat emptor doctrine goes hand in hand

with the policy reasons behind the economic loss rule. A sophisticated buyer of a business or a good can take a number of steps to protect itself. If the purchase does not live up to the buyer's expectations, the buyer can avail itself of appropriate contractual remedies.

Turning to the facts of the instant action, the Investors sought to recover from Raymond James their investment in Zephyr. (R. 5156-58). They maintained that they suffered economic losses in connection with their investment. Their losses, however, were nothing more than "disappointed economic expectations" for which the law provides a remedy in contract, not in tort. Casa Clara, 620 So.2d at 1246. There was no showing of "harm above and beyond disappointed expectations." Id.

When the facts leading up to the closing in Zephyr are considered, it can only be concluded that the economic loss rule was properly applied by the Second District. Interestingly, the Investors did exactly what the Casa Clara line of cases suggest--that is, they sought and secured appropriate contractual remedies, both from the seller, Mills, and from their own expert geologists.

This is not a case where the Investors reviewed the Raymond James Memorandum and immediately proceeded to a closing in the $8 million transaction. Instead, Rose knew that if he wanted to rely on the matters contained in the Memorandum, he was required to have that information separately verified in writing, and he undertook to do just that when he secured representations and warranties from Mills, the seller, in Mills' July 10, 1987 letter of intent. (R. 5196). Thereafter, Mills again represented and warranted the matters included in the Memorandum, as modified by his July 10, 1987 letter, in the final purchase and sale document. (R. 3546-47). Thus, if the Memorandum, as modified, contained false statements, the Investors

would have a breach of express warranty claim against Mills.[9] In addition to a contractual remedy insofar as Mills is concerned, the Investors could have pursued claims against the geologists they hired, particularly Lamb. It was Lamb who opined that Zephyr could be profitable, even if the Investors had to produce road base. (R. 3267-69/A.B.5, p.3).[10]

The Investors could have, however, protected themselves further by undertaking the geological drilling and testing due diligence which both expert geologists, Timmons and Lamb, urged be done prior to a closing. As Lamb testified, the Zephyr tract had not been properly drilled so as to allow any geologists to draw any reasonable conclusions with regard to the quality and quantity of the reserves. (R. 5022-24). Rose ignored the admonitions of the geologists and proceeded with a closing. Although the Investors claimed that they were never provided with a copy of the body of the Zellars-Williams Report, it is uncontroverted that Rose and Lamb were on notice of the report, but never bothered to ask for a copy of the report. The Investors therefore could have protected themselves further by requesting this report which they did not have in their possession.[11]

Moreover, the Investors could have negotiated a better price from Mills. Interestingly, the first geologist hired by the Investors, Timmons, in his August 4, 1987 letter to Rose, after noting

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[9] Litigation, in fact, ensued between Mills and the Investors. (R. 97). Thus, the Investors were able to litigate those claims against Mills.

[10] As noted above, under new ownership and management, the mine was profitable as of the time of trial. (R. 5233).

[11] As noted above, Lamb did not request a copy of the Zellars-Williams Report because it was not a concern to him that he did not have that report. As the drillings which formed the basis for that report were of poor quality, Lamb put "minimal faith" on those prior drillings and reports. (R. 5022-33).

that rock quality and quality were established but insufficiently known "for proper mine planning and subsequent product blending," added: "Contingencies in many aspects would be necessary in any contract negotiations and a bargain price paramount." (R. 2702-04/A.B.4) (emphasis added). Thus, although the Investors did have contractual remedies available to them, the Investors certainly could have done more for their own protection.

The Investors paid no consideration to Raymond James in connection with the transaction. The only consideration which was paid to Raymond James was a fee of approximately $110,000 paid by Mills for its role in assisting with the sale. (R. 3218-20,3537). Notwithstanding this limited pecuniary interest in the transaction, at trial, the Investors sought to impose $3.7 million of liability on Raymond James. (R. 5156-58). The jury awarded $1 million in damages on the negligent misrepresentation claim, and, post trial, the trial court ruled that accrued interest should run from the date of purchase, August 20, 1987. (R. 2364-65). Had the Second District not properly reversed the judgment, the judgment, with accrued interest, would now approximate $2 million. When it undertook the preparation of the Memorandum for Mills, Raymond James certainly could not have contemplated that it would be subject to such exposure to a third party purchaser whose expectations were not met.

Under the facts of this action, it was appropriate for the Second District to reverse the judgment in favor of the Investors. Raymond James never guaranteed the Investors that they would be purchasing a perfect limerock mine. The Investors did bargain for certain contractual protections with Mills and with their own geologists. If they failed to do more in terms of protecting their own interests or bargaining for additional contractual remedies, they have no one to blame but themselves. They were in the best position to protect their own interests, and therefore tort law is inapplicable. It is they who should bear the risk of the economic losses

allegedly sustained by them. Casa Clara, 620 So.2d at 1246, 1247. Their alleged "failure to receive the benefit of the bargain" is a core concern of contract, not tort, law. Id. at 1247. If this Court were to hold otherwise, contract law "drown in a sea of tort." Id., quoting East River, 476 U.S. at 866, 106 S. Ct. at 2300.

V. The Second District Court of Appeal Properly Applied the Economic Loss Rule.

The Investors disingenuously argue that the Second District Court of Appeal should not have retroactively applied any expansion of the economic loss rule in this action. (Initial Brief, pp. 41-43). There was no such improper retroactive application of the doctrine.

Although the opinions in cases such as Casa Clara, City of Tampa, Palau and Florida Building Inspection Services served to clarify the economic loss rule doctrine, particularly where negligence or negligent misrepresentation has been alleged against the party not in privity with the plaintiff, the holdings in these cases by no means served to abolish tort of negligent misrepresentation. Rather, the opinions made it clear that a claim for negligent misrepresentation will lie only in the narrowest of circumstances, such as against the certified public accountant in Max Mitchell who knowingly prepared financial statements which were intended to be utilized by First Florida Bank in making a loan to the accountant's client. First Florida Bank, N.A. v. Max Mitchell & Company, 558 So.2d 9 (Fla. 1990).

The "retroactive" issue was addressed and rejected by this Court in the leading case of Florida Power & Light Company v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987) wherein the Court opined:

> [W]e hold the economic loss rule approved in this opinion is not a new principle of law in Florida and has not changed or modified any decisions of this Court. In fact, the economic loss rule has a long, historic basis originating with the

> privity doctrine, which precluded recovery of economic losses outside a contractual setting. Consequently, we hold that the economic loss rule should be applied to the instant case.

Id. at 902.

Moreover, the Investors would have the Court ignore one of the most fundamental principles of appellate review: "Decisional law and rules in effect at the time an appeal is decided govern the case even there has been a change since the time of trial." Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983); in accord, City of Pompano Beach v. Haggerty, 530 So.2d 1023, 1025 (Fla. 4th DCA 1988), cert. denied 489 U.S. 1054 (1989). ("It is a rule of long-standing that appellate courts will dispose of the case according to the law prevailing at the time of the appellate decision rather than the prevailing law at the time of the trial court's decision.") Moreover, even if there has been a change in substantive law as a result of the holding in Casa Clara or otherwise, "it is a general rule that a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to have prospective effect only." Brackenridge v. Ametek, Inc., 517 So.2d 667, 668-69 (Fla. 1988), cert. denied 488 U.S. 801 (1988).

The Investors rely heavily on the dissent of Judge Altenbernd in Woodson v. Martin, 663 So.2d 1327, 1330 (Fla. 2d DCA 1995), in support of their argument that the economic loss rule was improperly applied in a retroactive fashion. As noted above, Woodson involved a fraud in the inducement claim by a home buyer against the realtor for the seller. Id. Once again, this is a negligent misrepresentation case instituted by sophisticated plaintiffs. Regardless of whether this Court does or does not affirm Woodson, the Second District properly applied the economic loss rule in this action. Just as it was appropriate for this Court to apply the economic loss rule in

Florida Power, it was appropriate for the Second District to apply the doctrine when reversing the judgment against Raymond James. Although the decisional authorities existing at the time the trial court heard Raymond James on its Motion to Dismiss supported the dismissal of the action then, there was no doubt that, based on the law prevailing at the time the Second District issued its opinion in this cause, the decisional authorities amply supported the holding of the Second District.

VI. There Are a Number of Other Grounds Upon Which the Second District Could Have Reversed the Jury Verdict in Favor of the Investors.

In its opinion in this case, the Second District Court of Appeal specifically noted that, in light of its reversal on the economic loss rule ground, the court did not address the other issues raised by Raymond James. (A.D.). In addition to the economic loss rule argument, there were a number of other grounds upon which the Second District could have properly reversed the judgment, had the issues been addressed.

In summary, Raymond James made no actionable misrepresentation to the Investors. The Memorandum, on the very first page, contained the clear and unambiguous disclaimer which put the Investors on notice that Raymond James made no representation or warranty regarding Zephyr. The representations and warranties were made by Mills, the seller, both in the letter of intent and in the final purchase and sale document.

Even if the matters included within the Raymond James Memorandum could somehow be construed to be representations of Raymond James, there was no justifiable reliance on the Raymond James marketing brochure. It defies logic to think that these sophisticated Investors reached definitive conclusions with regard to the quality of the limestone reserves at Zephyr based on the Raymond James brochure. Rose's preclosing conduct and his testimony at trial confirmed

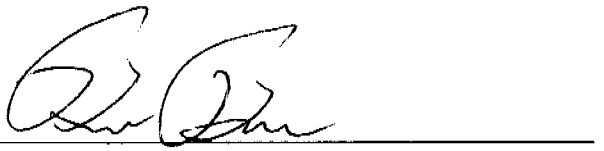
that there was no justifiable reliance on the Raymond James Memorandum. The Investors did not immediately close on Zephyr after Rose reviewed the Memorandum. Instead, Rose hired two geologists, both of whom visited the mine and reviewed geological reports. Both geologists also rendered opinions to Rose. When the disclaimer is considered in conjunction with the preclosing investigation by Rose and by the experts hired by the Investors, as a matter of law, there can be no justifiable reliance giving rise to a negligent misrepresentation claim. Tevini v. Roscioli Yacht Sales, 597 So.2d 913 (Fla. 4th DCA 1992), rev. denied, 613 So.2d 9 (Fla. 1993).

Additionally, the Investors failed to prove their damages at trial. The Investors never established that they paid too much for Zephyr under either a benefit of the bargain or out-of-pocket damages theory. Other grounds for the reversal were raised, such as the failure by the trial court to give a number of jury instructions requested by Raymond James.

Should this Court be inclined to entertain these other issues, rather than reiterate the arguments in this brief, Raymond James respectfully directs the Court's attention to its Initial Brief (A.B.) and its Reply Brief (A.C.) filed with the Second District Court of Appeal.

CONCLUSION

For the foregoing reasons, Raymond James respectfully submits that the Second District Court of Appeal properly held that the economic loss rule precludes the Investors' negligent misrepresentation claim. Raymond James therefore asks that the Second District's ruling be affirmed.



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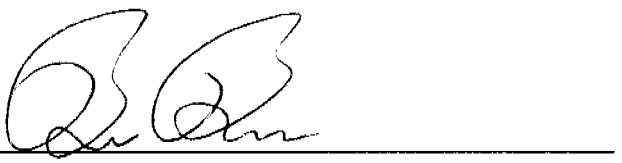
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by **hand delivery** to Richard M. Zabak, Esquire, Shackleford, Farrior, et al, 501 East Kennedy Blvd., Suite 1400, Tampa, FL 33602, and **via regular mail,** postage prepaid, to Roy D. Wasson, Esquire, Suite 402 Courthouse Tower, 44 West Flagler Street, Miami, FL 3 3130, this 4th day of April, 1996.



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