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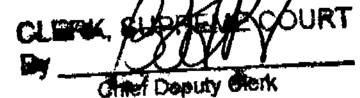
IN THE SUPREME COURT OF FLORIDA



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 OF FLORIDA, SECOND DISTRICT

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STATEMENT OF THE CASE

The petitioners, PK Ventures, Inc., et al., (sometimes referred to in this brief as "the investors") filed this action against Raymond James & Associates, Inc. (Raymond James) in 1991 in the Circuit Court in and for Hillsborough County. (R-1-45) [Record citations in this brief will generally be in the form (R-); provided that certain portions of the trial testimony have been indexed by their transcript page numbers, and citations to those portions will be in the form (T-). Furthermore, those documents included within the appendix to this brief will be referenced as (A-[tab no.]).] The investors' complaint alleged that Raymond James' misrepresentations induced them to purchase the stock of Zephyr Rock & Lime, Inc. (Zephyr), a company which owned a limerock mine located in Pasco County, Florida. The misrepresentations were contained in a document prepared by Raymond James entitled "Confidential Memorandum." (R-4694-4730)

The complaint contained three counts based on fraudulent misrepresentation, negligent misrepresentation and negligence, respectively. (R-1-45) The focal point of the investors' claims was that Raymond James misrepresented the quality of Zephyr's limestone reserves. 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.

Raymond James filed a motion to dismiss the complaint based on its assertion that a disclaimer contained within the Confidential Memorandum defeated any claims against Raymond James as a matter of law. (R-46-48) The motion to dismiss also contained the following sentence: "Plaintiffs' claims for negligent misrepresentation and negligence should be dismissed insofar as they are claims against a party not in privity with plaintiffs." (R-46-48) (The foregoing assertion was not directed to the investors' fraud claim). Raymond James did not include the economic loss rule as a basis for its motion to dismiss. The motion to dismiss was denied. (R-49)

Raymond James never raised the economic loss rule before the trial court notwithstanding the fact that it had filed the above-referenced motion to dismiss (R-46-48), an answer and affirmative defenses (R-50-53), amended affirmative defenses (R-452-457), a motion for judgment on the pleadings/motion for summary judgment (R-90-94) and two additional motions for summary judgment (R-79-505; 2025-2041), made an oral motion for directed verdict during trial (T-538-542), and filed post-trial motions. (R-2353-2360) The first time Raymond James ever alluded to the economic loss rule was in its initial brief filed before the Second District Court of Appeal on or about June 1, 1995.

The investors' claims were tried before a jury beginning on August 22, 1994. (T-1) On August 31, 1994 the case was submitted to the jury on the fraud and negligent misrepresentation

claims. (T-803-814) The jury returned a verdict in favor of the investors on their negligent misrepresentation claim in the principal sum of $1 million, but found in favor of Raymond James on the fraud claim. (R-2287-2288) On September 21, 1994, the trial court entered its final judgment in favor of the investors in the amount of $1,840,000, which included prejudgment interest. (R-2364-2365)

Raymond James filed post-trial motions (R-2353-2363) which were denied by virtue of the trial court's October 20, 1994 order. (R-2422) Subsequently, Raymond James filed its notice of appeal before the Second District Court of Appeal. (R-2423-2427) Thereafter, the investors filed a notice of cross-appeal based on the trial court's refusal to award post-judgment interest on the pre-judgment interest component of the final judgment. (R-2434-2435) As noted in the investors' answer brief before the Second District Court of Appeal, the investors filed that cross-appeal with the hope that the conflict among the District Courts of Appeal on this interest issue would have been resolved by the Supreme Court of Florida by the time the appeal was decided. Because it had not been resolved, and because the trial court's ruling was in conformance with the view of the Second District Court of Appeal, the investors did not argue the issue before the appellate court. See Answer Brief [DCA], page 1, note 1. (A-1)[1/]

[1/] The undersigned understands that this issue is presently pending before this Court in Central Bank of the South v. Seppala & Aho Construction Company, Inc., et al., Case No. 86-556. In the event this Court rules in that case that post-judgment interest does accrue on a prejudgment interest component of a judgment, and

The Second District Court of Appeal heard argument in Raymond James' appeal on November 7, 1995. Subsequent to that oral argument, and on November 17, 1995, the Second District Court of Appeal decided Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995) which held that the economic loss rule barred claims based on fraudulent inducement. Thereafter, on December 6, 1995, the Second District Court of Appeal reversed the jury's verdict in this case based solely and expressly on Woodson. Raymond James & Associates, Inc. v. PK Ventures, Inc., et al., 666 So. 2d 174 (Fla. 2d DCA 1995). In doing so, it observed that the "only difference" between Woodson and this case is that this case involved commercial property, and found that this difference was of "no significance." Id. at 174.

The investors filed a motion for rehearing and for rehearing en banc on December 18, 1995, suggesting that the Second District Court of Appeal overlooked the fact that Raymond James never raised the economic loss rule at trial and thus, did not preserve the issue for appeal. (A-2) The motion argued, alternatively, that application of the economic loss rule to misrepresentation claims should not be applied retroactively. (A-2) The Second District Court of Appeal denied the motion for rehearing and for rehearing en banc on January 17, 1996. (A-3) The investors subsequently

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1/ (cont'd)

in the event the judgment in favor of the investors is reinstated, the investors would request that this Court direct that the judgment be amended accordingly.

filed their notice to invoke discretionary jurisdiction of this Court.

STATEMENT OF FACTS

A. INTRODUCTION

This case comes before this Court upon the reversal of a jury verdict by the Second District Court of Appeal. The Second District, however, did not pass upon any disputed factual issues. Instead, it reversed the jury verdict based on its view of the economic loss rule. Because the jury returned a verdict in favor of the investors on their negligent misrepresentation claim, the applicable standard of review would require that the verdict be reinstated if there is any competent evidence to support it. See generally Florida Dept. of Transportation v. Raiche, 527 So. 2d 842, 845 (Fla. 2d DCA 1988), rev. denied, 534 So. 2d 401 (Fla. 1988). Thus, the investors set forth this Statement of Facts in conformance with that standard of review.

The investors were induced to purchase the stock of a limestone mining company by virtue of misrepresentations communicated to them by Raymond James. The misrepresentations were contained in a document authored by Raymond James entitled "Confidential Memorandum." The Confidential Memorandum is a facially impressive bound document, and its 29 pages of text include detailed, site specific information and representations regarding Zephyr. (R-4694-4730)

The most serious misrepresentation and the focal point of the trial concerned the quality of limestone reserves at Zephyr Rock & Lime, Inc. (Zephyr), a limestone mine located in Pasco County. Specifically, the Confidential Memorandum stated that it was proven

that the vast majority of Zephyr's reserves consisted of high-value aggregates (R-4700) when, in fact, a substantial majority of the reserves were of inferior quality and would yield a low-value product. A chronology of the events leading to the investors' purchase of Zephyr's stock, as reflected by the evidence at trial, follows.

B. BACKGROUND

Prior to August, 1987, the Zephyr mine was operated and primarily owned by Eli Mills (Mills). (T-543-544) Mills envisioned operating the mine on two tracts of land, one of which Zephyr owned (sometimes referred to herein as "the owned property"), and one of which, at that time, it leased (sometimes referred to herein as "the leased property"). (R-4697) The only active mining occurred on the owned property. (R-4697)

In general, limestone mines produce one of two products - aggregates or roadbase. Aggregate products are far more valuable than roadbase. Aggregates are produced by mining the raw material, crushing it, and separating the resulting limestone rocks according to size. (R-3087-3215, at pages 5-8) This process generates a by-product known as "fines" (T-237) which consist of very small particles of limestone. (R-5122) Fines are sometimes broken down into two subcategories: (1) fines, and (2) ultra-fines or slimes. Ultra-fines or slimes are a waste product; fines also constitute a waste product although at times there is a limited market for them. (R-5170; T-264-265)

In contrast to an aggregate mining operation, a roadbase operation involves mining the raw material and crushing it so that the largest pieces are no larger than 3½ inches in diameter. (R-5071) This process does not involve the separation of the product into different size rocks (R-5071) and results in virtually all of the mined material being combined into one product, roadbase. (T-261-262)[2]

Mills operated the Zephyr mine since approximately 1984. (R-4697) During his ownership of the mine, he restructured the processing plant to produce solely aggregates. (R-4720) Zephyr, however, encountered financial difficulties and supposedly needed additional capital. (T-544) Consequently, Mills decided to sell the mine. (T-544)

C. RAYMOND JAMES' INVOLVEMENT

In 1986, Mills engaged Raymond James to assist in selling the mine. The September 8, 1986 engagement letter between Mills and Raymond James set forth Raymond James' responsibilities which included the preparation of a "descriptive memorandum" and the negotiation of the terms and conditions of any bona fide offers. (R-3218-3220) The engagement letter also provided for Raymond James' fee to be contingent upon the consummation of a transaction with the amount of the fee to be based upon a percentage of the total transaction value. Based on the ultimate transaction value

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[2] It is possible to run a hybrid mine where the primary product is roadbase but a small percentage of large rocks are separated from the roadbase in order to produce a limited amount of aggregates. In fact, this is the type of operation which is currently conducted at Zephyr's former site. (T-691-693)

of $8 million (R-5151), Raymond James' fee would have been one and one-half percent of that amount, i.e., $120,000.

The engagement letter was signed on behalf of Raymond James by Ronald Miller, Senior Vice President of Raymond James. A Raymond James associate, Andrew Duffy, actually prepared the descriptive memorandum which was ultimately entitled "Confidential Memorandum." (T-641)

Raymond James' role was far more than that of a passive conveyor of information from the seller to potential buyers. Roger Carolin, Zephyr's vice-president and operating officer (T-637-639) testified that he provided information to Duffy and Duffy then prepared the Confidential Memorandum. (T-641) Thus, Duffy determined what information to include in the Confidential Memorandum. Indeed, Carolin testified that Zephyr had only minor comments regarding the Confidential Memorandum and that Raymond James did not give Zephyr the option of approving the Confidential Memorandum as "it was their documents [sic]." (T-642-643)

Duffy actually calculated the amount of minable reserves that was included in the Confidential Memorandum. (T-629-630) He also mathematically calculated the depth of the overburden reflected by various geological data. (T-294) The depth of overburden was significant because overburden must be removed before an operator can mine the limestone, and the cost to remove overburden was a "material component of the total cost of mining." (T-292) Duffy also investigated the quality of the limestone reserves. He interviewed various limerock producers in Florida, and was told,

among other things that the limestone at Zephyr was more suitable for roadbase. (T-289) He also gathered information from Zephyr's management regarding the amount of ultra-fines generated. (T-128) Most importantly, Duffy also reviewed various geological reports, (T-538) including a February, 1984 Zellars-Williams report (R-3087-3215) which stated at page 3-12 that the rock at Zephyr was generally soft although "possibly as much as 35% will be available for specification or non-specification aggregate." (emphasis added) Page 4-1 of that report reiterated that in the area of Zephyr, "the limestone has been recrystallized and is therefore too soft for use as aggregate." Although the report concerned only the owned property, Duffy knew of no geologist's report which contradicted the Zellars-Williams report with regard to either the owned or leased property by stating that the vast majority of Zephyr's reserves were of aggregate quality. (T-247)

Notwithstanding the information Duffy reviewed, Raymond James included in its Confidential Memorandum as one of the five principal "acquisition merits" the following bold and unequivocal assertion (R-4700):

> First hand investigation and testing (in addition to analysis of core drilling samples) has proven that the vast majority of the Company's reserves are of aggregate quality. Although the Company has been certified by the Florida Department of Transportation as a source for limerock roadbase, current production of the quarry is devoted entirely to higher-margin aggregates. (emphasis added)

The importance of this statement cannot be over-emphasized. As reflected by the information at pages 21-23 of the Confidential Memorandum (R-4714-4716), the price range of the

aggregate products (identified as No. 4 aggregate, No. 57 aggregate, No. 89 aggregate and block screenings) ranged from $6.75 to $7.50 per ton. Roadbase, on the other hand, sold for $3.25 a ton, less than one-half of the average sales price for aggregates.

Raymond James' assurance that the Zephyr mine was predominantly an aggregate mine was emphatically and repeatedly advanced elsewhere in the Confidential Memorandum. For example, in addition to the statement quoted above from the "Acquisition Merits" portion of the Confidential Memorandum, the Confidential Memorandum further stated:

> 1. "The cornerstone of the Company's marketing strategy has been to concentrate on the higher priced (and higher margin) products, namely the aggregates." Confidential Memorandum, page 17. (R-4710)
>
> 2. "Although the Company is an approved Florida DOT source for limerock roadbase, management plans to continue devoting the mine's entire production to the higher margin aggregates until the demand for those products is met." Confidential Memorandum, page 18. (R-4711)
>
> 3. "Although Zephyr Rock & Lime is a Florida DOT approved source for roadbase, it does not currently produce that material because the financial yields are greater with its current product mix which consumes all of its production capacity." Confidential Memorandum, page 20. (R-4713)

Although the Confidential Memorandum contained a "boilerplate" disclaimer (R-4695),[3] the disclaimer was not directed to any

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[3] The disclaimer stated: "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

particular representations and did not purport to relieve Raymond James from responsibility for conveying information which it knew or should have known was false. Moreover, Duffy acknowledged that "the ultimate responsibility and decision for what was in the document rested with Raymond James in that it is our document" (T-237) and that all of the contents of the Confidential Memorandum, including the assurance that the vast majority of the Company's reserves were of aggregate quality, had been approved by Raymond James. (T-252, 282) Duffy also recognized that Raymond James' reputation was behind the Confidential Memorandum and admitted that potential investors would place some weight on Raymond James' name in investigating the investment. (T-234-235)

Raymond James prepared the Confidential Memorandum during 1986. It developed an "A" list and a "B" list of potential buyers and forwarded the memorandum primarily to those entities on the "A" list which expressed an interest in the investment. (T-316-318; 325-326) During these solicitation efforts, several of the potential buyers made negative remarks regarding the mine, particularly the quality of the reserves. (T-318-321) After these solicitation efforts failed, Raymond James' activity temporarily subsided. (T-326-327) Thereafter, in 1987, Raymond James resumed

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3/ (cont'd)

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-4695)

an active role in the Zephyr project in a manner that substantially, and adversely, affected the investors.

D. THE AUGUST, 1987 STOCK PURCHASE TRANSACTION

The events leading to the stock purchase transaction were put into motion when Robert L. Rose (Rose), who then resided and worked in New Jersey, wrote a letter to Raymond James in April, 1987 seeking investment opportunities. (R-5097-5098) That letter was evidently forwarded to Duffy who, on May 13, 1987, sent Rose the Confidential Memorandum. (R-5099-5100)

Rose was president of PK Ventures, Inc. (PK Ventures). (R-5097) He also acted on behalf of the group of the individual investors (who were shareholders in PK Ventures) as their authorized agent in connection with this investment. (R-5133)[4/] Rose was the principal of the group and the other individuals were passive investors who relied upon Rose's recommendation to purchase the Zephyr stock. (*See generally* deposition testimony of investors at T-468-525; *see also* Rose testimony at R-5341) The individual investors did not personally investigate the attributes of the mine.[5/]

Upon his review of the Confidential Memorandum, Rose became interested in Zephyr as a potential investment. He spoke with

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4/ The stock purchase agreement was executed by Rose on behalf of PK Ventures, Inc. on August 20, 1987 and was immediately assigned to the individual investors, including Rose, so that Zephyr could maintain its sub-chapter S status. (R-5150)

5/ The plaintiffs in this case were PK Ventures and all of the individual investors, except Amos T. Beason, a minor investor. (T-427)

Duffy to arrange a meeting (R-5101) and, on May 28, 1987, met with Duffy and Roger Carolin, Zephyr's Vice-President, in Largo. (R-5101-5102) Duffy and Carolin gave Rose certain documents, including geological information, but they did not give him the February 1984 Zellars-Williams report, which disclosed in plain English that the mine's reserves contained no more than 35% aggregates. (R-5112-5116)

They also gave Rose a document entitled "Pro Forma Income Statement." (R-5112) That document reflected, among other things, an assumption that the mine would yield 48% fines. Rose was told at the time of the May 28 meeting and during his visit to the mine on the following day that the assumption was based on a previously abandoned method of excavation which had generated more fines than the current method. Specifically, Rose was told that Zephyr had previously excavated material using a dredge, which generated excess fines. Therefore, Zephyr changed its excavating method. (R-5108-5110; 5121-5122; 5138; see also Confidential Memorandum, R-4694-4730, at page 26)

The pro forma income statement also reflected the production of roadbase. Nonetheless, as Duffy acknowledged at trial (T-290), the Confidential Memorandum suggested that, due to the high price of aggregates, an operator of the mine would not begin to produce roadbase until the market demand for aggregates was met.

During the May 28, 1987 meeting, Duffy and Carolin advised Rose that a buyer should inject about $2,000,000 over and above the sales price into Zephyr. (R-5117; T-337) In addition, at the May

28 meeting, Rose was advised that due to Zephyr's cash flow problem, it would soon be "closed down" and, if that occurred, Zephyr's mining permits would lapse. (R-5112,5117) Thus, Rose was led to believe that if his group wanted to purchase the mine, it would have to move quickly.

After the May 28 meeting and during June, Duffy and Rose spoke approximately ten to twelve times by telephone. (R-5127) Rose ultimately became enthusiastic about what he believed to be a good investment opportunity and, on July 9, 1987, sent a letter of intent to Mills, the mine owner. (R-3253-3260) Among Rose's requirements set forth in the letter of intent was the requirement that the seller warrant that the Confidential Memorandum set forth "a fair and reasonable statement on Zephyr . . . ."

Mills balked at providing such a warranty but, upon Rose's insistence, eventually agreed to do so. (T-578-579) In his July 10, 1987 letter containing that warranty, however, Mills stated that although when written the Confidential Memorandum gave a fair and reasonable statement on Zephyr, since then "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-3261-3262) Among the changes was a statement that "[w]e generally use 15 feet of overburden as an average . . . ." (this differed from the 12 feet set forth at page 11 of the Confidential Memorandum). Furthermore, with regard to the product mix set forth at page 20 of the Confidential Memorandum (indicating 28% fines), Mills' letter stated:

> "The product mix percentages will vary based on the strata being mined, the blasting pattern, the elimination of the dredge for transporting material, the crusher settings, and the screen settings. The proportions of materials are likely to be closer to those on the pro forma Roger gave you on your trip to Florida." [the pro forma indicated 48% fines and 52% aggregates] (R-3261-3262)

Upon his receipt of the Mills' letter, Rose called Duffy to discuss it. (R-5138) Duffy told Rose that the ultimate product mix would depend on "how we [the new operators] do it [mine the limestone] now . . . " and assured Rose that the pro forma described "the worst case." (R-5138) Duffy then suggested that Rose discuss the letter with its author, Mills. (R-5139) Rose telephoned Mills who explained that he, Mills, did not want to be held to an exact percentage. (R-5139) Furthermore, as Mills acknowledged during his trial testimony, his July 10, 1987 letter did not modify the statement in the Confidential Memorandum that it was proven that the vast majority of Zephyr's reserves were of aggregate quality (T-581), and Rose understood that this statement pertaining to the reserves in the ground had not been modified. (R-5424)

After receiving Mills July 10 letter, Rose wanted to engage a geologist to visit the site in order to give Rose "some comfort." (R-5140). Rose initially engaged Bobby Timmons who arranged to visit the mine. (R-5140-5141) Rose flew from New Jersey to meet Timmons at the mine. (R-5141) That day, however, Roger Carolin showed Mr. Rose into a conference room to wait for Timmons (R-5142) and no one told Rose when Timmons ultimately arrived at the site.

Timmons telephoned Rose the next day and was angry because he had waited for Rose for hours at the site. (R-5142)

In any event, Rose later received an August 4, 1987 letter from Timmons. (R-3264-3266) The letter was somewhat rambling in nature and acknowledged that its contents might be perceived as "sour grapes." Furthermore, although it raised certain "red flags" which concerned Rose, it also stated that "rock quality and quantity are established." After reviewing the letter, Rose first telephoned Duffy who questioned how Rose could worry about what a person whom Rose had not even met, Timmons, had said when there were prior geological studies which supported the high quality of the mine's reserves. (R-5145-5146) Rose then telephoned Mills who conveyed the same type of assurances and reminded Rose that he, Mills, had spent approximately $150,000 in having core drillings performed and reserve studies prepared. (R-5146)

After the foregoing conversations, Mr. Rose contacted another geologist, Henry Lamb, who had been recommended by Timmons. (R-5146) Lamb reviewed the geological studies which had been given to Rose and visited the site. In connection with his review, Lamb asked Rose about the product mix. (R-5282) As of this time, Rose had been given the Confidential Memorandum which contained a product mix table at page 20; Roger Carolin's "pro forma income statement;" and Mills' July 10, 1987 letter; all of which when viewed together reflected variability in the precise percentage of fines that would be generated. Consequently, when asked about the product mix by Lamb, Rose called Carolin to inquire about the

product mix. Carolin told Rose to use the product mix set forth in the Confidential Memorandum. (R-5282) Rose conveyed those percentages to Lamb in a July 29, 1987 letter (R-2701) along with Carolin's telephone number so that "the people who are supposed to know something" (Lamb and Carolin) could speak with one another about the issue. (R-5283-5284) Although Rose was skeptical about the 28% fines figure set forth in the Confidential Memorandum as a "hard number," he maintained his belief that the mine was still an aggregate mine, that the absolute worst case scenario would yield no more than 48% fines (the percentage in the proforma) after processing, and that even at that level, Zephyr could have been profitable. (R-5336)

Lamb reviewed the materials available to him[6/] and on August 20, 1987, wrote a letter to Rose setting forth his conclusions. (R-3267-3269) Because Lamb knew the parties contemplated an imminent closing of the stock purchase transaction, he telephoned Rose and gave him an oral report on the contents of the letter. (R-4950) Lamb's letter suggested that, as represented by Raymond James and the seller, this was predominantly an aggregate mine. Specifically, the letter summarized Lamb's conclusion as follows:

6/ The February 1984 Zellars-Williams report, which had not been given to Mr. Rose, was not among the materials reviewed by Mr. Lamb. (R-4952) Furthermore, because of time and monetary constraints, Lamb did not perform an independent drilling and analysis program prior to the purchase transaction in August, 1987. (R-5033-5034) Subsequently, in 1989, Lamb performed such a study, which took two months and cost approximately $35,000. (R-5034)

> In summary, the geologic potential of the Zephyr Rock & Lime property is real, if the market is available for non-FDOT approved aggregate[7] and a <u>secondary</u> product line of FDOT approved limerock roadbase is developed.[8] (emphasis added)

On behalf of the group of investors, Rose proceeded with the closing on August 20, 1987. On that day, the seller and the purchasers executed a stock purchase agreement. (R-3514-3774) Raymond James was not a party to that agreement. As reflected by the agreement, the stock purchase involved a modest cash payment, the assumption of certain liabilities, and the provision of promissory notes by the investors to Mills. The total "transaction value" was approximately $8 million. (R-5151) Although Zephyr's stock was assigned to the individual investors, PK Ventures retained certain obligations to Mills. (R-5151)

The investors, through Rose, executed the Stock Purchase Agreement and consummated their purchase of Zephyr's stock in reliance on the Confidential Memorandum, particularly on its assurance that the vast majority of Zephyr's reserves were of aggregate quality. (R-5136-5138) At the time of closing, Rose had every reason to believe that even after considering all mining variables, under a worst case scenario, those reserves would still yield, after processing, at least a majority (52%) of aggregate

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7/ For purposes of pricing, it made little or no difference whether the aggregate was approved by the Florida Department of Transportation. <u>See generally</u> February 1984 Zellars-Williams report, Plaintiffs Exhibit 6 (R-3087-3215), at pages 3-12, 3-13.

8/ In fact, the investors anticipated ultimately producing some roadbase, if it would be profitable, once the aggregate market was saturated. (R-5210)

products. At that level, the mine could still have been profitable. (R-5178; R-3513, consisting of plaintiffs' exhibit No. 104;) As the investors ultimately learned, however, the composition of the mine was far inferior to what Rose had been told and, given its actual composition (at least 61% fines, leaving no more than 39% aggregates), the investment was doomed to fail. (R-5174-5179; R-3513)

E. POST-CLOSING EVENTS

On August 20, 1987, the individual investors paid $1,000,000 into Zephyr. (R-5338-5339) This initial investment was funded by a loan to the individual investors from PK Ventures.[9/] (R-5339) In addition, on the same date, PK Ventures advanced $13,800 in equipment to Zephyr. (R-4891, consisting of plaintiffs' trial exhibit No. 156; R-5157) Subsequently, the investors[10/] furnished money and equipment to Zephyr in an additional amount of approximately $2.7 million. (R-4891) The total amount paid into Zephyr by way of money and equipment was $3,740,379 (R-5158), most of which was paid from August, 1987 through December, 1988. (R-4891) These funds constituted the consequential damages the

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9/ PK Ventures itself had borrowed the money from Summit Bank. (R-5339)

10/ The individuals who were then partners of Printon, Kane & Co. in New Jersey did not convey these additional funds to Zephyr separately. Instead, their firm conveyed funds to Zephyr and the capital accounts of the individuals were debited on a pro rata basis determined by each individual's percentage of Zephyr stock. (T-429; initial portion of Ernst & Young work papers, plaintiffs' exhibit 109, R-4011-4605)

investors sought to recover in their suit against Raymond James.[11]

As Zephyr's new president, Rose attempted to make Zephyr a viable aggregate mine and remained optimistic about that possibility for some time. (R-5163-5164) Although there were periods where Zephyr "held its own" on an operating level (i.e., current income less current expenses) (R-5162), in general, Zephyr lost money. (R-5162) At the time, Rose thought this was due to inadequate volume, but he later realized Zephyr's inability to generate income was because of poor rock quality. (R-5163)

In December 1988 Zephyr filed bankruptcy. (R-5173) The main reason Zephyr failed subsequently became obvious to Rose - the quality of Zephyr's reserves would not support an aggregate mining operation. (R-5163) In fact, during Zephyr's bankruptcy proceedings, Angelo Iafrate's Crushed Concrete Company (Iafrate) hired Henry Lamb of Mineral Resource Associates (the same person who had conducted a brief review of the site and geological data in 1987, and an additional review of data in 1988 (R-4952-4953)) to conduct a drilling program and perform an independent analysis of the mine's reserves. (R-4955) Lamb's analysis demonstrated that Zephyr's reserves were composed of 61% fines and only 39% aggregates. (R-4968) Based on this composition, Zephyr, in reality, was primarily a roadbase mine with the potential to

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[11] The precise amount of damages sought by the investors did not include that portion of the funds paid into Zephyr which were attributable to Amos Benson, the investor who did not participate in the prosecution of the suit.

generate "some" aggregates. (R-4969) In addition Lamb also concluded that there were only 33.5 million tons of reserves at Zephyr (R-4966) rather than the approximately 93 million tons represented by the Raymond James Confidential Memorandum; and that the overburden averaged approximately 18 feet in depth (R-4970) as opposed to the 12 foot figure set forth in the Confidential Memorandum or the 15 foot figure referenced in Mills' July 10, 1987 letter. Thereafter, another geology firm, Bromwell & Carrier, Inc., performed an analysis similar to that of Lamb for one of Zephyr's lenders, and arrived at similar conclusions. (T-394-409; R-3372-3483)

Both Lamb and Richard Powers of Bromwell & Carrier testified at trial regarding their conclusions. Lamb also testified that his conclusion regarding the percentage of fines dealt with the quality of rock as it "breaks naturally". (R-4972) After processing, the percentage of fines could even be higher. (R-4973) Even Raymond James' own witness, Marc Jobes, admitted on cross-examination that based on his years of experience at the mine,[12/] in an exclusively aggregate operation, Zephyr would generate, at best, 40% aggregates, with the balance of the mined product, 60%, constituting fines. (T-711) In fact, Jobes realized in hindsight that when Rose's group owned the mine, they were probably mining only about 40% aggregates. (T-711-712) Jobes further acknowledged

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12/ Jobes continued as manager of the mine after Zephyr's bankruptcy under the mine's new owner, Plaza Materials Corporation. (T-656-657) Unlike the prior owners of the mine, Plaza has operated it primarily as a roadbase mine. (T-715)

that, at this level, given the transaction value of the investors' purchase of Zephyr, he had "a real problem" about whether the mine could have supported a viable aggregate operation. (T-716)

In short, the overwhelming weight of the evidence coincided closely with the Zellars-Williams report which was withheld from Rose and which demonstrated that the reserves at Zephyr contained no more than approximately 35% aggregates. At the levels reflected by the Zellars-Williams report as well as the Lamb and Bromwell & Carrier studies, it was economically impossible for Zephyr to have viably operated as an aggregate mine. (plaintiffs' exhibit 104, R-3513)

SUMMARY OF ARGUMENT

This case comes before this Court on the reversal by the Second District Court of Appeal of a judgment and verdict in favor of the petitioners (sometimes referred to as "the investors") on their claim of negligent misrepresentation against Raymond James. The claim was based on the investors' assertion that Raymond James, acting in its capacity as a broker/investment banker for the seller of the stock in a limestone mine (Zephyr Rock & Lime, Inc.), induced the investors to purchase Zephyr's stock by misrepresenting the mine's attributes in a document Raymond James gave to the investors entitled "Confidential Memorandum." The investors asserted that Raymond James knew or should have known that the representations were false.

The Second District's reversal was based exclusively on its view that the economic loss rule barred the investors' claims. The investors submit that the Second District Court of Appeal erred for a number of reasons.

First, Raymond James never raised the economic loss rule before the trial court. Thus, it failed to preserve this issue for appeal.

Second, the economic loss rule does not apply to misrepresentations which induce a contract and, therefore, are independent from any breach of contract claim. Here, Raymond James' misrepresentations induced the investors to enter into a purchase contract with the prior owner of Zephyr.

Third, even if this Court decides that the economic loss rule does bar misrepresentation in the inducement claims, its decision should not apply retroactively in this case. Such a decision would, in effect, abolish the torts of fraudulent and negligent misrepresentation which have been recognized in Florida either separately or under the general denomination of "fraud" for more than one hundred years. Moreover, this Court has authorized the publication and use of standard jury instructions for both fraudulent and negligent misrepresentations. Thus, any decision which would operate to abolish causes of action for these long-established torts should not be applied retroactively.

Finally, the investors suggest that there is no other basis for sustaining the reversal of the trial court's judgment which was entered in their favor. Therefore, the investors will request this Court to direct that the judgment and underlying verdict be reinstated and for such other relief this Court deems appropriate.

ARGUMENT

I. RAYMOND JAMES DID NOT PRESERVE THE ISSUE OF THE ECONOMIC LOSS RULE FOR APPEAL

Raymond James never raised the economic loss rule before the trial court and therefore, did not preserve the issue for appeal.[13/] Specifically, as the record reflects, the investors filed this action against Raymond James in 1991. (R-1-45) The action was vigorously litigated at obvious substantial expense to the parties, and was ultimately tried before a jury for more than a week in August of 1994. Throughout that entire time, Raymond James never raised the economic loss rule despite the fact that it filed a motion to dismiss (R-46-48), an answer and affirmative defenses (R-50-53), amended affirmative defenses (R-452-457) a motion for judgment on the pleadings/motion for summary judgment (R-90-94) and two additional motions for summary judgment (R-79-505; 2025-2041), made an oral motion for directed verdict during trial (T-538-542), and filed post-trial motions (R-2353-2360). Thus, Raymond James never gave the investors the opportunity to argue against the application of the economic loss rule, and never gave the trial judge (the same trial judge who applied the economic loss rule in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995))

13/ Raymond James first referenced the economic loss rule in its initial brief filed with the Second District Court of Appeal. Although the investors argued in both their answer brief (A-1, pages 38-39) and their motion for rehearing and rehearing en banc (A-2) that Raymond James had failed to preserve this issue, the Second District did not address this argument in its opinion in this cause, or in its subsequent order denying motion for rehearing. (A-3)

the opportunity to consider the economic loss rule in the context of this case. Consequently, this issue was not preserved for appeal. **See Lerer** v. Arvida **Realty** Co., 134 So. 2d 798, 800 (Fla. 2d DCA 1961) (questions other than jurisdictional questions not raised in the trial court generally will not be considered on appeal); and, Kozich **v.** Hartford Ins. Co., 609 So. 2d 147, 148 (Fla. 4th DCA **1992)** (argument not specifically made before trial court could not be raised on appeal).

In the reply brief it filed with the Second District Court of **Appeal,** Raymond James acknowledged that it did not specifically raise the economic loss rule below. (Reply brief **[DCA],** pages **9-10)** Raymond James, however, argued that it did raise the lack of privity in its initial motion to dismiss. That motion's reference to an absence of privity consists of a single, perfunctory sentence which states: "Plaintiffs' claims for negligent misrepresentation and negligence should be dismissed insofar as they are claims against a party not in privity with plaintiffs." (R-46-48) (This assertion was not directed to petitioners' fraud claim). Raymond James never again raised the privity argument in any of the motions it filed or orally made before, during or after trial. Moreover, lack of privity is a concept entirely different from the economic loss rule. **See, e.g.,** Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995) (rejecting the "no alternative theory of recovery" exception to the economic loss rule, thus indicating that the presence or lack of privity generally would have no bearing on whether the economic loss rule applies),

Even had Raymond James invoked the economic loss rule in its motion to dismiss, because it failed to raise the issue in its motion for directed verdict (T-538-542) or its post-trial motions (R-2353-2363), the issue has not been preserved. See, e.g, Cargill, Inc. v. Highland Coin and Jewelry, Inc., et al., 964 F.2d 1146 (Table) (11th Cir. 1992) (copy of full opinion at A-4) (economic loss rule not preserved for appellate review because defendant failed to renew motion for directed verdict at close of all the evidence, even though economic loss rule had been raised in motion for directed verdict and in motion to dismiss); United States Fire Insurance Co. v. Johnston, 431 So. 2d 1018, 1020-21 (Fla. 4th DCA 1983) (sufficiency of evidence on issue not referenced in motion for directed verdict or post-trial motion not preserved for appeal).

To allow Raymond James to raise the economic loss rule for the first time on appeal would not only violate a fundamental principle of appellate jurisprudence, it would also be manifestly unjust. The investors filed their case in 1991 (R-1-45) and diligently pursued their claims through a lengthy jury trial and subsequent appellate proceedings. If Raymond James truly believed the economic loss rule barred the investors' claims, Raymond James should not have been allowed to totally ignore that rule of law until after it lost at trial, while the parties to the litigation incurred substantial costs and attorneys' fees in litigating their claims. Because Raymond James did not raise the economic loss

rule at the trial court level, it should not have been permitted to seek review of that issue on appeal.

II. THE ECONOMIC LOSS RULE DOES NOT BAR CLAIMS BASED ON MISREPRESENTATION IN THE INDUCEMENT OF A CONTRACT

In Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), the Second District Court of Appeal held that the economic loss rule barred a claim for fraud in the inducement. Within weeks after deciding Woodson, the Second District Court of Appeal rendered its decision in this case, applying Woodson and reversing the jury verdict obtained by the investors on their negligent misrepresentation claim.[14/] The investors respectfully submit that the Second District Court of Appeal erred.

Until Woodson, Florida's appellate courts, with virtual unanimity, had held that the economic loss rule does not bar claims based on misrepresentations which induce a party to enter into a transaction. For example, in Burton v. Linotype Co., 556 So. 2d 1126 (Fla. 3d DCA 1989), rev. denied, 564 So. 2d 1086 (Fla. 1990), the Third District analyzed claims that the plaintiffs were induced by fraud, negligent misrepresentation and false advertising to enter into an equipment lease. 556 So. 2d at 1127. The defendants argued that the plaintiffs had failed to allege a tort independent

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[14/] In its opinion in this case, the Second District Court of Appeal did not distinguish between fraudulent inducement and inducement by negligent misrepresentation. Furthermore, as discussed in more detail hereinafter, the investors submit that, at least for purposes of considering the economic loss rule, there is no practical distinction because negligent misrepresentation is tantamount to fraud. See Burton v. Linotype Co., 556 So. 2d 1126, 1129 (Fla. 3d DCA 1989), rev. denied, 564 So. 2d 1086 (Fla. 1990).

of their contract claims, and, therefore, that plaintiffs' claims for economic damages were barred. Id. The Third District rejected this argument, finding that the fraud, negligent misrepresentation, and false advertising claims were all independent of the breach of warranty claims. Id. at 1128. See also HTP, Ltd. v. Lineas Aereas Costarricences, S.A., 661 So. 2d 1221, 1222 (Fla. 3d DCA 1995), rev. granted, 1996 Fla. LEXIS 336 (Fla. Feb. 19, 1996) (fraud in the inducement is an independent tort not barred by the economic loss rule).

Similarly, in John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1988), rev. denied, 547 So. 2d 1210 (Fla. 1989), the Second District reversed a plaintiff's verdict based on negligent misrepresentation "associated with the performance of a contract." Id. at 618 (emphasis original). The court clearly suggested that its ruling would have been different had the misrepresentation induced a transaction, but observed: "we are unable to extract anything from the record to sustain a finding that by misrepresentation, negligently uttered, the appellants induced Nobles and McHan to enter a contract." Id.[15]

The Fourth District Court of Appeal also has held, in a succinct opinion, that fraud in the inducement "is the kind of independent tort that is not barred by the economic loss rule." TGI Development. Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th

[15] The Second District's later decisions in Woodson and the instant case are inconsistent with the earlier John Brown opinion.

DCA 1996). In so holding, it certified conflict with Woodson, supra.

The view adopted by Florida's district courts of appeal prior to Woodson was so widely accepted[16] that a respected jurist on the Fifth District Court of Appeal observed that an argument that the economic loss rule bars fraudulent inducement was "specious." See Lee v, Paxson, 641 so. 2d 145 (Fla. 5th DCA 1994), Griffin, J. concurring in part and dissenting in part.

Although this Court's opinions concerning the economic loss rule do not directly and explicitly discuss fraud or misrepresentation in the inducement, its opinions strongly and consistently suggest that claims based on misrepresentations which precede and induce the entry into a contract are not barred by the economic loss rule. For example, in one of this Court's earliest opinions expressly discussing the economic loss rule, the Court observed that the economic loss rule does not bar torts independent of a breach of contract. See AFM Corp. v. Southern Bell Tel. & Tel., 515 so. 2d 180, 181-182 (Fla. 1987) (finding no basis for recovery in negligence because the plaintiff "has not proved that a tort independent of the breach itself was committed.") Clearly, misrepresentations which induce a contract must necessarily precede that contract and be independent of a claim for breach of that contract.

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[16] Most jurisdictions outside Florida also recognize the viability of misrepresentation claims for pecuniary losses. See Restatement (2d) of Torts, §§ 525, 552 (1976), and cases cited in the 1989 appendix thereto, and its 1995 cumulative annual pocket part.

This analysis is further supported by one of this Court's most recent economic loss rule decisions. See Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995). In that case, this Court analyzed, among other claims, a negligent failure to warn claim regarding buses purchased by the plaintiff and manufactured by the defendant. Id. at 629. The duty to warn allegedly arose after the buses were manufactured and apparently after they were sold. Id. at 632. This Court held that the claim was barred by the economic loss rule. In so ruling, it stated:

> In sum, failure to warn, without the requisite harm, will not circumvent the economic loss rule to allow a cause of action where the plaintiffs allege a duty to warn which arose from facts which came to the knowledge of the company after the manufacturing process and after the contract. Id. (emphasis added)

The underscored language plainly implies that torts which precede a contract are independent of the contract and survive analysis under the economic loss rule.

Casa Clara Condominium Association, Inc. v. Charlie Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) is consistent with the foregoing principle. Casa Clara involved a breach of a duty to perform a contractual obligation by a concrete supplier, Charlie Toppino and Sons, Inc., although such contractual obligation was not between that supplier and the plaintiffs/end-users of the product. This Court observed: "Contractual duties . . . come from society's interest in the performance of promises." Id. at 1246-47 (emphasis added).

While applying the economic loss rule in Casa Clara, this Court observed that there are other established protections for home buyers citing, inter alia, Johnson v. Davis, 480 So. 2d 625 (Fla. 1985). 620 So. 2d at 1247, n.6. Johnson not only affirmed a final judgment in favor of certain home buyers based on fraudulent inducement, but it further held that where the seller of a home knows of latent facts materially affecting the property's value, the seller has an affirmative duty to disclose such facts to the buyer. 480 So. 2d at 629. Thus, this Court's recognition in Casa Clara of the continued viability of Johnson supports the proposition that the economic loss rule does not bar torts based on misrepresentations which induce transactions.

In Woodson, the Second District Court of Appeal also cited two Eleventh Circuit opinions involving the economic loss rule. 663 so. 2d at 1329. One of these opinions directly supports the investors' position in this case. See Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734 (11th Cir. 1995). There, the Eleventh Circuit Court of Appeals stated:

> Although the economic loss rule bars recovery for tort claims arising from breach of a contract, the doctrine does not preclude a claim for damages occasioned by an independent tort, including fraud in the inducement of a contract. Id. at 742.

The Eleventh Circuit Court of Appeals cited AFM, supra, and Burton, supra, in support of its conclusion. Furthermore, while the foregoing quote utilizes the phrase "fraud in the inducement," Pulte's definition of that tort encompasses the negligent misrepresentation claim involved in the instant case as framed in

the complaint (R-1-7), i.e., a misrepresentation of material fact made when the representor "knew or should have known of the statement's falsity . . . ." 60 F.3d at 742 (emphasis added).[17] See also Kingston Square Tenants Assoc. et al. v. Tuskesee Gardens, Ltd., et al., 792 F. Supp. 1566, 1576 (S.D. Fla. 1992) (fraud in the inducement is an independent tort not barred by the economic loss rule; scienter element described as "knew or should have known").

Woodson also cited Hoseline, Inc. v. U.S.A. Diversified Products, Inc., 40 F.3d 1198 (11th Cir. 1994). Hoseline held that the claims before the court for fraud and civil theft were barred by the economic loss rule. In so holding, however, the court emphasized that "both of Hoseline's claims arose from USA's breach of its contractual obligation to ship certain quantities of wire harness cable to Hoseline." Id. at 1200. Thus, Hoseline involved fraud in the performance of a contract rather than fraud in the inducement, and its holding is entirely consistent with the Eleventh Circuit's later decision in Pulte, and the decisions rendered by this Court.

Not only are the foregoing decisions consistent in demonstrating that independent torts, such as inducement by misrepresentation claims, are not barred by the economic loss rule, such a proposition is conceptually sound. Certainly, a party, such as the broker/investment banker in this case, who has a substantial

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[17] The Eleventh Circuit Court of Appeals did hold that the plaintiff's negligence claim consisting of a failure to warn was barred by the economic loss rule. 60 F.3d at 741.

financial incentive to induce a potential buyer to enter into a purchase transaction, has a duty under the law to refrain from conveying material information which it knows or should know is false. A breach of that duty has historically resulted in a viable claim and should continue to result in a viable claim.

The existence of such a duty, at least under circumstances such as those in the instant case, is plainly reflected by a specific enactment of Florida's legislature. Under Florida statutory law, it is and has been unlawful for any person, in connection with the sale of any investment or security, to obtain money or property by means of an untrue statement of material fact, or an omission to state a material fact necessary to make a statement not misleading. **See** Section **517.301(1), Florida Statutes** (1995). The cited statute is broad and applies even to securities and transactions exempted under other provisions of Chapter 517. **Id.** Thus, the viability of the investors' misrepresentation claim is not only supported by the case law cited above, it is also supported by the sound public policy expressed by this state's legislature. See also **Op. Att'y** Gen. **Fla.** 96-20 (March 7, **1996)** (any provision in a contract purporting to relieve a real estate broker from responsibility for misrepresentation is contrary to public policy and therefore void).

Raymond James presumably will argue that even if this Court concludes that the economic loss rule does not bar claims for fraud in the inducement, it should bar claims for negligent

misrepresentation in the inducement. Such a position would be unfounded.

As previously argued, the economic loss rule does not bar independent torts. A misrepresentation which induces a party to enter a contract, regardless of whether the representor knew or should have known it was false, constitutes an independent tort. See, e.g., Burton v. Linotype Co., 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989), rev. denied, 564 So. 2d 1086 (Fla. 1990) (fraudulent and negligent misrepresentations are independent torts).

In addition, there is no analytical basis for distinguishing between fraudulent and negligent misrepresentation for purposes of applying the economic loss rule. The investors' misrepresentation claim was based on essentially the same factual predicate as their fraud claim, but with regard to the "scienter" element, alleged that Raymond James "knew or should have known that the misrepresentations made by it were false." (R-1-7) Furthermore, both torts require that a defendant make a false statement of material fact to another person intending for that person to rely on the statement. See Standard Jury Instructions - Civil Cases, 613 So. 2d 1316 (Fla. 1993). Indeed, under Florida law, "[n]egligent misrepresentation is tantamount to fraud . . . ." Burton, supra, at 1129. See also Ostreyko v. B.C. Morton Orsanization, Inc., 310 So. 2d 316, 318 (Fla. 3d DCA 1975).

Historically, the distinction between fraudulent and negligent misrepresentation in Florida has been blurred. For many decades, Florida law provided that the "scienter" element of fraud could be

satisfied not only by proving a knowing misstatement, but by showing that a statement was made "under circumstances in which the person making it ought to have known, if he did not know, of its falsity." See Wheeler v. Baars, 15 So. 584, 588 (Fla. 1894); see also Joiner v. McCullers, 28 So. 2d 823, 824 (Fla. 1947); Kutner v. Kalish, 183 So. 2d 763, 765 (Fla. 3d DCA 1965), cert. denied, 183 So. 2d 210 (Fla. 1965). Thus, under those decisions, the tort which is now referred to as "negligent misrepresentation" was encompassed within the term "fraud."

Without expressly overruling those earlier decisions, however, this Court, at least by 1984, began to issue opinions describing the "scienter" element of fraud as "knowledge by the person making the statement that the representation is false." See Lance v. Wade, 457 So. 2d 1008, 1011 (Fla. 1984); Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985).

Even after Lance and Johnson were decided, some intermediate appellate court decisions continued to apply the "knew or should have known" formulation for scienter in fraud cases. See, e.g., Lou Bachrodt Chevrolet, Inc. v. Savase, 570 So. 2d 306, 308 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 165 (Fla. 1991). Similarly, various federal decisions involving Florida law described the scienter element in fraud cases as "knew or should have known." See, e.g., Pulte Home Corp. v, Osmose Wood Preserving, Inc., 60 F.3d 734, 742 (11th Cir. 1995); Kingston Square Tenants Assoc., et al. v. Tuskegee Gardens, Ltd., et al., 792 F. Supp. 1566, 1576 (S.D. Fla. 1992). Other decisions, however, began to describe as

"**negligent misrepresentations**" statements made when the representor "knew or should have known" of their falsity. See, e.g., Atlantic National Bank of Florida v. Vest, 480 So. 2d 1328, 1331-32 (Fla. 2d DCA **1985), rev**. denied, 491 So. 2d 281 (Fla. 1986); Baasett v. Electricians Local **915** Credit Union, 620 So. 2d 784, 786 **(Fla.** 2d DCA 1993). Even decisions specifically referencing "negligent misrepresentation," however, have treated that tort in virtually the same manner as fraudulent misrepresentation. See, e.g., Bassett, supra, at 785 (evidence of inducement of contract by fraud or negligent misrepresentation constitutes an exception to the par01 evidence rule); Burton, supra at 1128-29, (negligent misrepresentation and fraud are torts independent of breach of contract claims; negligent misrepresentation is tantamount to fraud). Thus, there are no sound analytical or historical reasons to treat inducement by negligent misrepresentation and fraudulent inducement, both of which are torts independent from breach of contract claims, differently for purposes of applying the economic loss rule.

It is also noteworthy that in 1993, this Court expressly authorized the publication and use of standard jury instructions for fraudulent misrepresentation and negligent misrepresentation claims. See Standard Jury Instructions - Civil Cases, 613 So. 2d 1316, 1317-18 (Fla. 1993) (Standard Jury Instruction MI 8). The standard negligent misrepresentation instruction, which was given in this case (T-807), required, inter alia, that a defendant make a false statement of material fact to another when, "in the

exercise of reasonable care under the circumstances, (defendant) should have known the statement was false." Id at 1318. The investors submit that this Court's authorization of standard jury instructions for fraudulent and negligent misrepresentation claims in the same year that Casa Clara was decided is also indicative of the fact that this Court did not intend for its economic loss rule decisions to effectively abolish such torts.

In addition to the tort of negligent misrepresentation discussed above, Florida has recognized a similar tort where information is negligently supplied for the guidance of others. Specifically, in First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990), this Court adopted, as to accountants, Restatement (2d) of Torts, Section 552 (1976). That section, entitled "Information Negligently Supplied for the Guidance of Others" reads, in part:

> 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 their justifiable reliance on the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Section 552 of the Restatement obviously would include negligent misrepresentation in inducement. Compare Florida Standard Jury Instruction MI 8 (negligent misrepresentation) with Restatement (2d) of Torts, Section 552 (1976).[18] Section 552,

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[18] Although at trial the investors proposed a jury instruction which included language from Section 552 of the Restatement as well as language from the case law upon which the standard instruction was based (R-2118-2144, proposed instruction

however, is broader than the tort of negligent misrepresentation in the inducement. For example, Section 552 does not require that a representor directly make a misrepresentation to a putative plaintiff. Instead, it applies where a person "supplies false information for the guidance of others . . . ." In First Florida, supra, this Court concluded that claims could be brought against an accountant not only by persons in privity or near privity with him, but by "those persons or classes of persons whom an accountant 'knows' will rely on his opinion . . . ." Id. at 15.

Because Florida's courts had recognized the tort of negligent misrepresentation long before their adoption of Section 552 of the Restatement, the viability of the investors' claim for negligent misrepresentation in the inducement is not dependent on Section 552 of the Restatement as adopted in First Florida, supra. Nonetheless, even if Section 552 of the Restatement were the only vehicle by which to bring a claim for negligent misrepresentation, the investors' claim would be valid. In its First Florida opinion, this Court never suggested that the economic loss rule might impact the applicability of Section 552. Furthermore, in its later economic loss rule decisions, this Court neither explicitly nor implicitly overruled First Florida. Thus, the economic loss rule clearly does not bar claims under Section 552.

18/ (cont'd)

13), Raymond James proposed an instruction patterned after the standard instruction, and the Court gave only the standard instruction. (T-807)

In addition, the circumstances of this case clearly implicate the provisions of Section 552. Specifically, Raymond James in the course of its business or profession as a broker/investment banker, and in a transaction in which it had a substantial pecuniary interest, supplied false information for the guidance of others. In fact, in this case, it supplied such information directly to Mr. Rose, president of PK Ventures and the "point man" for the investor group. (R-5097, 5133, 5341; T-468-525) Under these circumstances, the investors suggest that there is no credible legal or policy argument which would exclude Raymond James' conduct from the scope of Section 552 of the Restatement (2d) of Torts. To the contrary, Section 517.301 (1), Florida Statutes (1995) (discussed above) reflects a public policy of prohibiting such misrepresentations.

III. ANY EXPANSION OF THE ECONOMIC LOSS RULE SHOULD NOT BE APPLIED RETROACTIVELY

Even if this Court were to determine that the economic loss rule should bar claims for fraudulent inducement or negligent misrepresentation, such an expansion of the economic loss rule should not be applied retroactively. As Judge Altenbernd noted in his dissent in Woodson, an action for deceit has existed at common law since 1201, and modern common law fraud traces its roots to Pasley v. Freeman, 3 Term Rep. 51, 100 Eng. Rep. 450 (1789). Woodson v. Martin, 663 So. 2d 1327, 1330 (Fla. 2d DCA 1995). Judge Altenbernd further noted that, if the majority's reasoning in Woodson were correct, both fraud and negligent misrepresentation essentially would be abolished in Florida. Id. at 1331.

Under Florida law, the tort of fraud, which for many decades encompassed what is now characterized as "negligent misrepresentation," has existed since prior to the turn of the century. **See, e.g.,** Wheeler v. **Baars,** 15 So. 584, 588 (Fla. 1894). Thus, an abrupt judicial abolition of fraud and negligent misrepresentation in the inducement would trigger a general upheaval in many pending misrepresentation cases. In such circumstances (particularly in cases such as this one where the economic loss rule was not raised at the trial court level), an expansion of the economic loss rule should not apply. **See, e.g.,** Linder v. Combustion **Engineering,** Inc., 342 So. 2d 474 **(Fla. 1977).**

In Linder, this Court addressed the application of the newly adopted doctrine of strict liability. It observed that to apply the doctrine retroactively would result "in a general upheaval in many pending *negligence* cases." **Id.** at 476. Therefore, the Court specifically ruled that in cases in which a trial had already begun or in which a verdict or judgment had already been rendered, the strict liability doctrine would not be applied unless the applicability of the doctrine had been appropriately and properly raised during some stage of the litigation. **Id.** Thus, even if this Court decides to expand the application of the economic loss rule, such expansion should not be applicable to this case.[19/]

19/ In Florida Power & Lisht Co. v. **Westinghouse** Electric **Corp.,** **510 So.** 2d 899 **(Fla. 1987),** this Court held that the economic loss rule is not a new principle of law in Florida and had not changed *or* modified any decisions of the Supreme Court of Florida. Consequently, this Court held that the economic loss rule should be applied retroactively in the case before it. Florida Power, however, was a products liability case. Holding

Although the application of the rule set forth in Linder would protect the investors in this case, the investors respectfully suggest that even if this Court adopts Woodson's view, such adoption should not be applied retroactively to transactions which occurred prior to Woodson, or at least prior to the 1993 Casa Clara opinion upon which Woodson is, in part, based. Specifically, had parties to pre-Woodson and pre-Casa Clara transactions known that misrepresentation remedies were to be abolished, many undoubtedly would have scrutinized the transactions in a different light and either sought additional contractual protection or avoided the transactions altogether. Consequently, a retroactive application of the Woodson rule would, in essence, deprive parties of vested rights. See senerallv Brackenridse v. Ametek, Inc., 517 So. 2d 667, 669 (Fla. 1987), cert. denied, 488 U.S. 801 (1988) (where contract or property rights are acquired under prior statutory construction, such rights should not be destroyed by giving retrospective operation to a subsequent overruling decision).

IV. THERE ARE NO OTHER BASES FOR SUSTAINING THE REVERSAL OF THE JURY VERDICT IN FAVOR OF THE INVESTORS

For reasons previously set forth, the investors submit that the economic loss rule is not a valid basis for reversing the jury's verdict in favor of the investors. If this Court concurs, there would be no other basis to sustain the reversal. The

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19/ (cont'd)

in Woodson, Florida Power did not apply the economic loss rule in a manner which would have abolished well-established tort claims.

standard for review of a jury verdict is: "If there is any competent evidence to support a verdict, the verdict must be sustained regardless of this court's opinion regarding its propriety." Florida Dept. of Transportation v. Raiche, 527 So. 2d 842, 845 (Fla. 2d DCA 1988), rev. denied, 534 So. 2d 401 (Fla. 1988). Clearly, there was substantial competent evidence supporting the verdict in favor of the investors. In addition, the trial court properly denied Raymond James' motion for directed verdict and motion for new trial, and properly instructed the jury on the claims before it. These arguments were all included within the answer brief filed by the investors before the Second District Court of Appeal, a copy of which is included in the appendix in this cause. (A-1)

CONCLUSION

For the foregoing reasons, the investors respectfully request that this Court vacate the December 6, 1995 decision of the Second District Court of Appeal and remand this cause with directions that the verdict and judgment in favor of the investors be reinstated, and for such other relief as this Court deems appropriate.241

20/ If this Court were to rule that the economic loss rule barred the investors' negligent misrepresentation claim, and rules against the investors on the other arguments presented in this brief, the investors submit that, at a minimum, this cause should be remanded for a new trial on their fraudulent misrepresentation claim. See Francis v. St. Louis County Water Co., 322 S.W. 2d 724, 728 (Mo. 1959) (new trial appropriate where a jury instruction is confusing, misleading likely to divert the jury from the main issue, and injects a "wrong theory" into the case). If, as a matter of law, the investors' negligent misrepresentation claim was invalid, its submission to the jury with an accompanying jury instruction would have had the effect of confusing, misleading and

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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 Guy M. Burns, Esquire and Bruce W. Barnes, Esquire, 100 North Tampa Street, Suite 1800, Tampa, FL 33602 and by Federal Express to Roy D. Wasson, Esquire, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, FL 33130 on this 15th day of March, 1996.

Attorney

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diverting the jury's attention, and injecting a "wrong theory" into the case.