IN THE SUPREME COURT OF FLORIDA

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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

REPLY BRIEF OF PETITIONERS

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RESPONSE TO RAYMOND JAMES' STATEMENT OF THE CASE AND FACTS

The decision of the Second District Court of Appeal in this case essentially constituted a directed verdict in favor of Raymond James. In reviewing a directed verdict, an appellate court must view the evidence and all inferences therefrom in a light most favorable to the party opposing a directed verdict. See R. Bodden Coin-Op Laundry, Inc. v. Brandychase Condominium Ass'n, 557 So. 2d 663, 665 (Fla. 2d DCA 1990). Raymond James' statement of the case and facts ignores this foregoing standard of review. Raymond James has presented isolated bits of evidence in a light most favorable to it. Moreover, it has mischaracterized pertinent evidence. Therefore, before addressing Raymond James' economic loss rule arguments, the investors are compelled to correct such mischaracterizations.[1/]

Perhaps Raymond James' most audacious assertion of purported fact concerns the quality of reserves. At page 3 of its brief, Raymond James asserts that the Confidential Memorandum suggested to its readers that Zephyr be operated as a roadbase mine. This assertion is ludicrous. The Confidential Memorandum plainly, emphatically and repeatedly suggested that Zephyr was an aggregate mine and that production should be limited to aggregates until the market was saturated. See Initial Brief of Petitioners at 10-11.

Incredibly, later in its brief, Raymond James contradicts itself and suggests that Zephyr's "reserves are primarily

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[1/] Because of the limitation on the length of this brief, the investors are constrained to address only the most significant of those mischaracterizations.

aggregates," citing an excerpt from Marcus Jobes' trial testimony. See Respondent's Brief at 13. Raymond James' brief omits any reference to Jobes' ultimate admission on cross-examination that based on his experience at the mine, in an aggregate operation, Zephyr would generate, at best, 40% aggregates and 60% fines. (T-711-712) Furthermore, at trial, Raymond James offered no expert testimony whatsoever to rebut the testimony of the investors' geology experts, Henry Lamb and Richard Powers, which is discussed at pages 21-23 of the investors' initial brief. Thus, the evidence that substantially less than half of Zephyr's reserves were of aggregate quality was overwhelming.

At page 4 of its brief, Raymond James attempts to blame the seller's employee, Roger Carolin, for the assurance in the Confidential Memorandum that the vast majority of Zephyr's reserves were of aggregate quality.[2/] Carolin prepared a report concerning visual observations (and not analysis or testing) at one pit comprising less than 2% of Zephyr's reserves (T-253) The conclusion Raymond James included in the Confidential Memorandum, however, was revised to suggest that it applied to all of Zephyr's reserves, and that it was supported not only by visual observations, but also by testing and analysis.

[2/] In footnote one of its brief, Raymond James also tries to shift the blame for withholding the Zellars-Williams report to Carolin. The evidence, however, demonstrated Andrew Duffy of Raymond James actively participated in physically handing the other geological information to Rose (R-5106; T-375-376) and, notwithstanding any self-serving testimony to the contrary, the evidence supported a finding that Duffy withheld the report or knew it had been withheld.

In discussing the disclaimer in the Confidential Memorandum, Raymond James continues to ignore that the disclaimer did not purport to relieve the seller or Raymond James from accurately conveying information in their possession. Furthermore, under Florida law, the disclaimer was ineffective to disclaim responsibility for fraudulent or negligent misrepresentations. See Investors Answer Brief filed with the Second District (Tab 1, Appendix to Initial Brief of Petitioners) at 23-24. The disclaimer was also ineffective because it was a blanket disclaimer not tailored to any specific assurances in the Confidential Memorandum. Id.

At page 6 of its brief, Raymond James grossly distorts the testimony of Robert Rose in suggesting that after he received Mills' July 10, 1987 letter, he knew that he could not trust the information in the Confidential Memorandum. In fact, when asked whether he was on notice that he couldn't trust such information, Rose's verbatim response was: "That the numbers may vary slightly, yes." (R-5269) (referring to the product mix table reflected at page 20 of the Confidential Memorandum) The evidence demonstrated that Rose and the investors always relied upon the assurance that Zephyr's reserves were primarily of aggregate quality. (e.g., R-5136-5139; 5177-5179)

Raymond James also distorts Henry Lamb's testimony. For example, it attempts to create the impression that Lamb's conclusions were rough estimates. In fact, Lamb's "educated estimate" of 61% fines was conservative. As Lamb testified, that number was based on the quality of rock as it "breaks naturally"

(R-4972) and after processing, the percentages of fines could even be higher (R-4973) resulting in even a lower percentage of aggregates. Lamb also testified that prior to the closing, he never apprised Rose of the possibility that Zephyr was primarily a roadbase mine. (R-5079) To the contrary, Lamb's report to Rose tended to confirm that, based on a review of the materials that had been provided to Lamb,[3/] Zephyr appeared to be primarily an aggregate mine.[4/] (R-4950; R-3267-3269) Thus, the totality of the evidence plainly supported a finding of reasonable reliance. See Investors Answer Brief filed with the Second District (Tab 1, Appendix to Initial Brief of Petitioners) at 32-36.

Finally, at page 13 of its brief, Raymond James states that at the time of trial, the mine was being operated profitably. Raymond James fails to disclose that the mine was then being operated primarily as a roadbase mine (T-715) and that its owner had purchased the mine for far less than did the investors in this case. (R-5172-5173) Therefore, this evidence actually buttresses the overwhelming evidence that Zephyr was not the aggregate mine Raymond James represented it to be.

[3/] Raymond James' suggestion that the absence from the materials of the Zellars-Williams report did not concern Lamb is misleading. Lamb was not concerned because he did not know what the report stated. Furthermore, he did not have adequate time to independently seek to collect information which he had not been provided. (R-5031-5032)

[4/] Raymond James states that Lamb recommended more testing. Such testing would have been expensive and Lamb did not know whether time constraints permitted independent testing. (R-5033-5034). Indeed, Raymond James' statements to Rose suggested that there would not have been sufficient time for such testing before Zephyr ceased its operations and lost its permits. (R-5146-5148; 5112)

ARGUMENT

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

Raymond James argues that it "conceptually" raised the economic loss rule by referring, in its motion to dismiss, to a lack of privity between it and the investors.[5] Its argument is meritless.

Raymond James specifically noted the difference between the absence of privity and the economic loss rule in its initial brief filed with the Second District Court of Appeal (Respondent's Appendix, Tab B, p. 36). Specifically, in discussing City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279 (Fla. 2d DCA 1994), Raymond James observed that the trial court had "dismissed the breach of contract claims against the consultants for lack of privity and then dismissed the tort claims because the economic loss rule barred recovery." Thus, under appropriate circumstances, a lack of privity defense applies to contract claims and the economic loss rule applies to tort claims, regardless of the presence or absence of privity. This is consistent with this Court's application of the economic loss rule. See, e.g., AFM Corp. v. Southern Bell Tel. & Tel., 515 So. 2d 180 (Fla. 1987) (economic loss rule barred tort claims even though there was privity between the parties).

Even had Raymond James' motion to dismiss been construed as implicating the economic loss rule, Raymond James' failure to

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[5] The lack of privity defense was invalid in any event. See, e.g., First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9, 14 (Fla. 1990) (otherwise viable claim under section 552 of the Restatement (2d) of Torts not barred by lack of privity).

subsequently raise, in any fashion, the economic loss rule in its motion for directed verdict or post-trial motions resulted in a waiver of any argument based on the economic loss rule. Although Raymond James suggests that Cargill, Inc. v. Highland Coin and Jewelry, Inc., 964 F.2d 1146 (Table) (11th Cir. 1992) (Tab 4, Appendix to Initial Brief of Petitioners) is not controlling, the opinion is, at a minimum, persuasive. Furthermore, contrary to Raymond James' assertion, just as in Cargill, it would have been improper for the trial court in this case to have dismissed the complaint with prejudice even if it believed the economic loss rule might have been applicable because there could have been a set of facts entitling the investors to relief. For example, the complaint on its face does not preclude the possibility of implicating the "damage to other property" exception to the economic loss rule. In addition, even under Raymond James' view of the law, negligent misrepresentation claims are viable under certain circumstances. See Respondent's Brief at 39. Thus, it would have been inappropriate for the trial court to dismiss the investors' claims without further factual development of the underlying circumstances.

Finally, Raymond James' incorrectly suggests that even had it not previously raised the economic loss rule, the Second District properly considered it. The economic loss rule is not a jurisdictional issue. See Lerer v. Arvida Realty Co., 134 So. 2d 798, 800 (Fla. 2d DCA 1961) (questions other than jurisdictional issues not raised at trial generally will not be considered on appeal). Furthermore, Raymond James' reliance on Sanford v. Rubin,

237 So. 2d 134 (Fla. 1970) is misplaced. There, this Court concluded that the district court improperly considered a constitutional issue not raised before the trial court, and quashed the district court's opinion. Id. at 138. It further admonished that appellate courts "should exercise [their] discretion under the doctrine of fundamental error very guardedly." Id. at 137. As previously noted, Raymond James has acknowledged the viability of negligent misrepresentation claims under appropriate circumstances. Thus, the failure of the trial court to rule whether the circumstances in this case supported a negligent misrepresentation claim, particularly when Raymond James did not raise the issue, cannot have constituted fundamental error.

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

Raymond James contends that a claim based on a negligent misrepresentation which induces a party to enter into a contract should not survive an economic loss rule challenge. It argues that Burton v. Linotype Co., 556 So. 2d 1126 (Fla. 3d DCA 1989), rev. denied, 564 So. 2d 1086 (Fla. 1990) is inapplicable because Burton did not expressly address the economic loss rule and because in Burton, the parties were in privity. First, Burton did expressly address the economic loss rule. At the outset of its opinion, the Third District Court of Appeal noted that the defendant contended that the tort claims against it were barred by the plaintiffs' "failure to allege a tort independent of contract claims, a fact they contended also precluded claims for economic damages." Id. at 1127 (emphasis added). Second, as discussed earlier in this brief,

the presence or absence of privity simply does not impact the applicability, or inapplicability, of the economic loss rule.

Raymond James also suggests that negligent misrepresentation in the inducement should be treated differently than fraud in the inducement. It ignores the historical record of the judiciary's virtually identical treatment of these claims. See Initial Brief of Petitioners at 35-39. See also, Burton, supra at 1129; Ostreyko v. B. C. Morton Organization, Inc., 310 So. 2d 316, 318 (Fla. 3d DCA 1975) (negligent misrepresentation is tantamount to fraud); Monco Enterprises, Inc., et al. v. Ziebart Corp., et al., 21 Fla. L. Weekly D755 (Fla. 1st DCA March 25, 1996) (three claims for misrepresentation in the inducement labelled "fraud and misrepresentation," "negligent misrepresentation" and "conspiracy" held not to be barred by the economic loss rule). Indeed, in this very case, the Second District Court of Appeal plainly perceived no operative difference between negligent misrepresentation and fraud as reflected by its observation that the "only difference" between this case and Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995) is that this case involves commercial rather than residential property. See Raymond James & Associates, Inc. v. PK Ventures, Inc., et al., 666 So. 2d 174 (1995).

Raymond James also ignores that, except for the different "scienter" requirements, the torts of negligent misrepresentation and fraud are substantially identical. Moreover, negligent misrepresentation includes elements of intentional conduct, such as the requirement that the representor make a false statement of material fact to another intending for that person to rely on that

statement. See Standard Jury Instructions - Civil Cases, 613 So. 2d 1316 (Fla. 1993).

Raymond James cites one economic loss rule case which it asserts treats fraud in the inducement and negligent misrepresentation differently. See Jarmco, Inc. v. Polygard, Inc., 21 Fla. L. Weekly D478 (Fla. 4th DCA Feb. 21, 1996). It is not clear from that opinion, however, whether the negligent misrepresentation claim was based on a misrepresentation in the inducement, or misrepresentation in the performance of a contract. Moreover, Jarmco did not consider those cases which hold that negligent misrepresentation is tantamount to fraud, or those cases which hold that pre-contractual tortious conduct is independent of any breach of contract claim and thus, survives analysis under the economic loss rule. In contrast, subsequent to Jarmco, the First District Court of Appeal upheld the viability of several claims, including a claim for negligent misrepresentation in the inducement, based on an "independent tort" analysis. See Monco, supra, (reversing, inter alia, dismissal of count for negligent misrepresentation).

Raymond James' brief focuses on section 552 of the Restatement (2d) of Torts. It is noteworthy that in arguing the case law under that section, Raymond James concedes that the opinions of this Court and intermediate appellate courts "by no means served to abolish [the] tort of negligent misrepresentation." Instead, Raymond James suggests that a claim for negligent misrepresentation exists only in narrow circumstances. Respondent's Brief at 39.

None of the cases relied on by Raymond James suggests that a negligent misrepresentation made by a broker/investment banker directly to a potential investor in order to induce a purchase should be non-actionable. In Palau International Traders, Inc. v. Narcam Aircraft, Inc., 653 So. 2d 412 (Fla. 3d DCA 1995), rev. denied, 661 So. 2d 825 (Fla. 1995), the court emphasized that the defendant "was in the business of servicing airplanes. It was not in the business of supplying information for the guidance of others as contemplated by section 552 of the Restatement of Torts." Id. at 418. This obviously was the critical factor underlying the Palau decision. Here, of course, Raymond James was in the business of supplying information to potential investors in order to induce purchase transactions and generate commissions.

Raymond James also relies heavily on City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279 (Fla. 2d DCA 1994). That opinion, which does not even contain the phrase "negligent misrepresentation," is patently inapplicable. It was a pure negligence case involving negligence in the performance (not the inducement) of a contract. Moreover, there was not a "close nexus" between the plaintiff and defendants. Id. at 282. In contrast, there was a very close nexus between Raymond James and the investors in this case as Raymond James conveyed its Confidential Memorandum directly to Rose (R-5099-5100) and communicated extensively with him in an effort to consummate the transaction. (R-5101-5120; 5127) Furthermore, contrary to Raymond James' suggestion, Raymond James' preparation and distribution of its Confidential Memorandum to potential buyers, including the

investors, clearly had as its "end and aim" the consummation of a substantial sales transaction.

Fla. Bldg. Inspection Serv. v. Arnold Corp., 660 So. 2d 730 (Fla. 3d DCA 1995) is not even remotely similar to this case. There, the roof inspector provided its report to a broker for a lessee who, without the inspector's knowledge, furnished that report to a potential sub-lessee. Id. at 731. The court concluded that "[a]lthough it might be possible that a lessor [sic] would give an inspection report to a potential sub-lessee, mere foreseeability is not sufficient to impose liability for economic damages." Id. at 733. Clearly, the case was resolved adversely to the plaintiff because the plaintiff was not within the class of persons protected by Section 552.

Raymond James' reliance on Linn-Well Development Corp. v. Preston & Farley, Inc., 666 So. 2d 558 (Fla. 2d DCA 1995) is particularly curious. Raymond James suggests that because Judge Altenbernd and Judge Blue joined in the opinion, they are of the belief that the buyer of property is prevented from suing a seller's broker. It is apparent, however, that the judges who joined in the Linn-Well opinion simply recognized that they were bound by the prior en banc decision in Woodson, supra.

The case law cited by Raymond James does not justify application of the economic loss rule to this case. Similarly, Raymond James' policy arguments ring hollow. Raymond James is in the business of selling securities and other investments for a profit. Florida's legislation plainly reflects a public policy of holding those in such a position responsible for misrepresenting or

omitting material facts in connection with the sale of an investment or security. See Section 517.301(1), Florida Statutes (1995).

Raymond James did not even attempt to refute this policy argument in its brief. Instead, utilizing hindsight, it argued that the investors "could have done more for their own protection." See Respondent's Brief at 38. The record, however, demonstrates that the investors acted reasonably, particularly in light of the totality of the circumstances such as the latent condition of the quality of Zephyr's reserves, the positive assurances the investors received from Raymond James and the seller (R-5101-5120; 5138-5139), the time constraints on closing the transactions which Raymond James suggested were present (R-5146-5148), the withholding of a report which truthfully reflected the quality of the reserves (R-5112-5116) and the opinion the investors ultimately received from a geologist, Henry Lamb, which, based on a review of information received from Raymond James and the seller, tended to confirm that Zephyr's reserves were primarily of aggregate quality. (R-3267-3269;4950)

Raymond James' suggests that the investors could have bargained for additional contractual protection. No contractual provision, however, would have enabled the investors to actually collect their damages from the individual seller in this case. Furthermore, Raymond James was not a party to the purchase contract and presumably would have refused to be made a party. Thus, the investors did not have an opportunity to bargain with Raymond James. Therefore, if Raymond James' version of the economic loss

rule were adopted, the only realistic source of recovery (Raymond James) would be insulated from liability.

As the jury in this case correctly determined, Raymond James should be liable for the damages it caused the investors. Furthermore, Raymond James' comment that it could not have contemplated a $2 million judgment against it is conclusively refuted by Raymond James' own admission that its representative was present at a pre-closing meeting where Rose was told that the investors would be well-advised to inject approximately $2 million (over and above the purchase price) into Zephyr. (T-336-338)

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

Notwithstanding Raymond James' protestations to the contrary, should this Court approve and adopt the opinion in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), the torts of fraudulent and negligent misrepresentation will have been essentially abolished. For the reasons set forth in the investors' initial brief, such a ruling should not be applied retroactively.

A retroactive application would inevitably lead to harsh results in pending cases, including this one. Not only have the investors incurred substantial costs and attorneys' fees in prosecuting this action, Raymond James is now seeking to recover, in addition to substantial taxable costs, attorneys' fees incurred by Raymond James, pursuant to offers of judgment it served in 1992. See Respondent's April 8, 1996 Motion for Attorney's Fees filed with this Court. Indeed, Raymond James contends that prior to its appeal to the Second District, it incurred $230,000 in attorneys' fees. See Exhibit A to Petitioners' Response in Opposition to

Respondent's Motion for Attorneys' Fees, filed with this Court on April 23, 1996. Although the investors submit that Raymond James' offer of judgment was reasonably rejected (See Petitioners' Response), the mere possibility of such an award, particularly in a case where the economic loss rule was not even raised below, highlights the type of gross inequities and upheaval that would be encountered in pending cases should this Court impose its ruling retroactively.

IV. THERE WAS NO OTHER BASIS FOR REVERSING THE VERDICT IN FAVOR OF THE INVESTORS

Contrary to Raymond James' assertion, there was no other basis for reversing the jury's verdict in favor of the investors. The investors' arguments pertaining to the other issues raised by Raymond James are set forth in the answer brief the investors filed with the Second District on July 26, 1995. See Tab 1, Appendix to Initial Brief of Petitioners. As did Raymond James, rather than reiterate those arguments here, the investors respectfully refer this Court's attention to that brief.

CONCLUSION

For the reasons set forth in this brief and in their initial brief, the investors 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. The investors further request that in remanding this case, this Court direct the lower court to amend the judgment in favor of the investors to provide for the accrual of post-judgment interest on the prejudgment interest component of the judgment, in light of this Court's recent decision in Quality

Engineered Installation, Inc. v. Higley South, Inc., et al., 21 Fla. L. Weekly S141 (Fla. March 28, 1996).[6] Finally, the investors request this Court to award such other relief it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Guy M. Burns, Esquire, Bruce W. Barnes, Esquire, 100 North Tampa Street, Suite 1800, Tampa, FL 33602, and Roy D. Wasson, Esquire, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, FL 33130 this 23d day of April, 1996.

Richard M Zabak
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[6] As noted at page 3 of the Initial Brief of Petitioners, the investors had filed a cross-appeal on this issue with the Second District with the hope that this Court would resolve the inter-district conflict on this issue in favor of the investors' position. It has now done so.