6-14

IN THE SUPREME COURT OF FLORIDA

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POLYGARD, INC., a Florida Corporation

Petitioner/Cross-Respondent,

CASE NO. 87,638
DCA CASE NO. 95-00427

vs.

JARMCO, INC., d/b/a Joe's Auto-Marine Supply, a Florida Corporation,

Respondent/Cross-Petitioner.
_____/

RESPONDENT'S/CROSS-PETITIONER'S ANSWER BRIEF ON THE MERITS

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PREFACE

This case is before this Court on certified conflict from the Fourth District Court of Appeal. Petitioner/distributor, Polygard, Inc., a Florida corporation, was the third party defendant/appellee in the lower courts and respondent/retailer, Jarmco, Inc., a Florida corporation, d/b/a Joe's Auto-Marine Supply, was the defendant/third party plaintiff/appellant. MacLean Sinclair, the purchaser/boat builder, was the plaintiff. They are referred to herein by their proper names.

The following symbols are used:

R - Record on Appeal

A - Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Polygard's statement of the case and facts is correct as far as it goes. It omits, however, the specifics regarding the resin involved in this case.

Reichhold Chemicals, Inc., manufactured and sold 33-199 resin to Polygard, Inc. using the description, "Distress Material Sold - 'as is' - reworked," and warning Polygard that it was unsuitable for high structural strength applications such as boat building (R 58-99). Reichhold had warned Polygard, the distributor of this

particular resin, on at least two occasions in 1991, not to sell the product to boat builders (R 3). Reichhold told Polygard to tell Jarmco, the retailer, not to sell this resin to boat builders (R 3). Instead, Polygard changed the description to "generic resin", sold it to Jarmco, and told Jarmco that many boat builders purchased it (R 318-321, 326).

Between July 18 and December 5, 1991, Sinclair purchased 14 drums of the resin from Jarmco and applied it to a 58 foot yacht he had started building in 1984 (R 319-320). Jarmco's representative described the resin to Sinclair as good boat building resin and changed the label description to "GP" for "General Purpose" resin on the invoices (R 320).

Around Thanksgiving of 1991, Sinclair began noticing problems with the curing of the resin (R 320). In January of 1992, he sent samples of the resin to Reichhold Chemicals, Inc. (R 320). Reichhold advised Sinclair that the resin was off-specification, over-aged, odd lot resin of inferior and inconsistent quality, mixed from left overs at the plant and sold as such (R 320). Sinclair testified in his affidavit filed in opposition to Polygard's motion for summary judgment as follows:

> ...I learned the resin had been sold to POLYGARD at POLYGARD'S request with written and oral warnings as to the off spec, odd lot

nature of the resin and its unsuitability for structural applications given to the distributor, POLYGARD. I learned that Reichhold labeled the resin "DISTRESSED" on its invoices to POLYGARD.

8. In addition, I learned from depositions and discovery that Robert Emerson, owner of POLYGARD, had told Robert Bohemier, owner and manager of JARMCO, that the resin was suitable for boat builders and was popular with boat builders.

9. POLYGARD changed the labelling of the resin on its invoices to JARMCO from "DISTRESSED" to "GENERIC", meaning equal to name brand products.

10. JARMCO then changed the nomenclature to "GP" for "GENERAL PURPOSE" and sold the resin to me.

11. I then applied the resin to my boat, resulting in the boat being damaged and ruined and more than three years of my labor plus out of pocket costs in excess of $100,000.00 going down the drain. (R 320-321).

Sinclair sued Jarmco for breach of contract, negligent misrepresentation, fraud, breach of express warranty, breach of warranty of fitness for a particular purpose and violation of Florida's Deceptive and Unfair Trade Practices Act (R 1-35). Jarmco filed a third party complaint against Polygard for fraud, negligent misrepresentation, deceptive and unfair trade practices, negligence, indemnity and contribution (R 58-99). Polygard moved

for summary judgment on the basis that the contract claims were barred by the exculpation and limitation of liability clauses contained on the invoices between Polygard and Jarmco and that the tort claims were barred by the economic loss rule (R 234-314). By order of September 19, 1994, the trial court granted Polygard's motion for summary judgment on Jarmco's third party claim (R 378-380).

Jarmco appealed the final summary judgment to the Fourth District Court of Appeal who, on February 21, 1996, affirmed in part and reversed in part (A 1). The Fourth District reversed the final summary judgment regarding the fraud in the inducement claims and held that the economic loss rule does not apply to Jarmco's fraud in the inducement claims, which constitute a tort independent of breach of contract (A 1). The Fourth District cited TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996), and HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995), rev. granted, 670 So. 2d 938 (Fla. 1996), as support for its holding and certified conflict with Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995) (A 1, pp. 1-2). The Fourth District affirmed those portions of the final summary judgment which found that the "other property" exception did not apply and that the contract claims were barred based on the

exculpatory and limitation of damages clauses in the contract (A 1).

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal correctly held that the economic loss doctrine does not apply to fraud in the inducement claims, which constitute a tort independent of breach of contract. In a fraudulent inducement claim, the intentional fraud occurs and is completed before the contract is formed. Because the party was deceived into entering into the contract, that party did not have a fair opportunity to negotiate adequate contractual remedies. Thus, there is no reason to insulate the intentional tortfeasor simply because the parties were involved in a contractual relationship.

The Fourth District erred, however, in holding that the "other property" exception to the economic loss rule did not apply here. The plaintiff had purchased the resin as a finished product from Jarmco, the retailer, who had purchased it as a finished product from Polygard, the distributor. This finished product, the resin, damaged other property, the boat, rendering the economic loss doctrine inapplicable. The facts of this case fall precisely within the definition of "other property" as defined in Casa Clara.

The Fourth District correctly reversed that portion of the final summary judgment in favor of Polygard because fraud in the inducement is an exception to the economic loss rule. The Fourth District erred in refusing to reverse the final summary judgment on the remaining tort claims based on the "other property" exception to the economic loss rule. This Court should affirm in part, reverse in part, and remand for further proceedings.

ARGUMENT

FRAUD IN THE INDUCEMENT IS AN INDEPENDENT TORT AND IS NOT BARRED BY THE ECONOMIC LOSS RULE.

The economic loss rule does not apply where "a tort 'distinguishable from or independent of [the] breach of contract,'" was committed. AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987); Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc., 629 So. 2d 252, 255 (Fla. 3d DCA 1993). To constitute an independent tort, the tort claim must be based on "some additional conduct" beyond the conduct constituting the breach of contract. AFM Corp. v. Southern Bell Tel. & Tel. Co., supra. Fraud in the inducement is an independent tort and, therefore, excluded from the economic loss rule.

With the exception of the Second District in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), every Florida court that has considered this issue has held that fraud in the inducement is an exception to the economic loss rule. Monco Enterprises, Inc. v. Ziebart Corp., 21 Fla. L. Weekly D755 (Fla. 1st DCA March 25, 1996), and cases cited therein; HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995); TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996); Lee v. Paxson, 641 So. 2d 145 (Fla. 5th DCA 1994) (Griffin, J., concurring - the "argument that the economic loss rule bars the fraudulent inducement claim is specious"). Florida federal cases acknowledge that fraud in the inducement, as compared to fraud in the performance of a contract, is an independent tort, excluded from the economic loss rule. Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 739-744 (Fla. 11th Cir. 1995); Sfc Valve Corp. v. Wright Mach. Corp., 883 F. Supp. 710 (D. Fla. 1995); Serina v. Albertson's, Inc., 744 F. Supp. 1113 (M.D. Fla. 1990). None of the cases Polygard cites on pages 9-10 of its brief involved fraud in the inducement.

Fraud in the inducement occurs where a party claims it was tricked into contracting. It is based on precontractual conduct and not performance of the contract. See American Eagle Credit Corp. v. Select Holding, Inc., 865 F. Supp. 800, 815 (S.D. Fla.

1994). In a fraudulent inducement claim, the intentional fraud occurs and is completed before the contract is formed and, thus, is "independent" of the contract and falls within the "independent contract" exception to the economic loss rule. Brass v. NCR Corp., 826 F. Supp. 1427, 1428 (S.D. Fla. 1993). As the Second District emphasized in John Brown Automation, Inc. v. Nobels, 527 So. 2d 614, 618 (Fla. 2d DCA 1988), the misrepresentation involved must be associated with "performance of the contract" to be within the economic loss rule. (Emphasis added).

Rather than focusing on the character of the loss as this Court required in Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244, 1246 (Fla. 1993), Polygard tracts the Second District's analysis in Woodson v. Martin, supra, and inappropriately focuses on the damages. This Court defined the test in Casa Clara, supra, 1247, as follows:

> The character of a loss determines the appropriate remedies and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant.

Nothing in Casa Clara or its progeny indicates that this Court intended to abolish, in the words of Judge Altenbernd's dissenting opinion in Woodson v. Martin, supra, "a 700-year old intentional

tort in the context of limiting a negligence theory." Casa Clara, supra, 1247, recognized that while the homeowners there could not pursue tort remedies for purely economic losses under a negligence theory, the remedy of damages for fraud in the inducement remained:

> There are protections for homebuyers, however, such as statutory warranties,[4] the general warranty of habitability,[5] and the duty of sellers to disclose defects,[6] as well as the ability of purchasers to inspect houses for defects.
>
> [4]§§ 634.301 et seq., Fla.Stat. (1991).
>
> [5]*Gable v. Silver*, 264 So.2d 418 (Fla. 1972).
>
> [6]*Johnson v. Davis*, 480 So.2d 625 (Fla. 1985). (Emphasis added).

Johnson v. Davis, supra, recognized the homebuyer's cause of action for fraud in the inducement.

In addition, where the wrong complained of constitutes a breach of a statutory duty, as Jarmco alleged in Count IV, deceptive and unfair trade practices, the economic loss rule is inapplicable under the independent tort doctrine. AmeriFirst Bank v. Bomar, 757 F. Supp. 1365, 1378 (S.D. Fla. 1991); Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566, 1576 (S.D. Fla. 1992). Moreover, Section 672.721, Florida Statutes (1994), preserves recovery for economic loss suffered as a result of fraud in cases involving contracts for the sale of goods.

Allowing a claim for fraud in the inducement as an alternative or in addition to contractual remedies does not undermine the purpose of the economic loss rule of preventing tort remedies from engulfing contractual remedies. Claims for fraud in the inducement involve conduct independent of that which resulted in the contractual breach. A party who is deceived into entering into a contract is not presumed to have had a fair opportunity to negotiate adequate contractual remedies.

The economic loss rule does not and should not limit a victim of fraud in the inducement to contractual remedies he would not have agreed to had he not been defrauded. Parties who engage in intentional tortious conduct have no right to rely upon or be protected by a rule designed to uphold contractually bargained-for damage limitations. There is no reason to insulate intentional tortfeasors from tort liability simply because the parties are involved in a contractual relationship, the tortious conduct also happens to amount to a breach of contract, or the tort and contract damages are the same. See also Williams Elec. Co. v. Honeywell, Inc., 772 F. Supp. 1225 (N.D. Fla. 1991); Moro-Romera v. Prudential-Bache Securities, Inc., 1991 WL 494175 (S.D. Fla. 1991). Applying the economic loss rule in this context could create inconsistency and provide fraud perpetrators a "safe harbor" to commit fraud and escape the deterrent, punitive damages. See First

Interstate Development Corp. v. Ablanedo, 511 So. 2d 536, 539 (Fla. 1987).

The economic loss rule does not bar a claim for fraud in the inducement, an "independent tort," separate from the contractual performance. The Fourth District Court of Appeal correctly interpreted Florida law in reversing the final summary judgment as it pertains to those claims which allege fraud in the inducement.

POINT ON CROSS NOTICE TO INVOKE

THE "OTHER PROPERTY" EXCEPTION TO THE ECONOMIC LOSS RULE APPLIES HERE WHERE THE PRODUCT PURCHASED, THE RESIN, WAS A FINISHED PRODUCT WHICH DAMAGED "OTHER PROPERTY."

Casa Clara, supra, 1247, held that the character of the plaintiff's loss determines the nature of the available remedies, citing King v. Hilton-Davis, 855 F.2d 1047 (3d Cir. 1988), cert. denied, 488 U.S. 1030, 109 S. Ct. 839, 102 L.Ed. 2d 971 (1989):

> [T]o determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant. (Emphasis added).

As the Third Circuit explained in King v. Hilton-Davis, supra, 1051:

> When loss of the benefit of a bargain is the plaintiff's sole loss, the judgment of the Supreme Court [in East River] was that the

> undesirable consequences of affording a tort remedy in addition to a contract-based recovery were sufficient to outweigh the limited interest of the plaintiff in having relief beyond that provided by warranty claims. The relevant bargain in this context is that struck by the plaintiff. It is that bargain that determines his or her economic loss and whether he or she has been injured beyond that loss. (Emphasis added).

The Fourth District refused to follow this test and instead held:

> The fundamental basis of the ELR as applied in Florida by *Casa Clara* is not found in subtle distinctions among products purchased and the usages and roles of the product with other property it will come in contact with after the sale. In short, the other property exception argued by appellee in this case is not the central teaching of *Casa Clara*.[4] Rather, the holding is that, when the essential claim is by the purchaser of a product against the manufacturer, distributor or seller for non-personal injury damages arising from some purely economic wrong, Florida will not use its tort law to provide remedies to the purchasers of products that they, themselves, did not bargain for in their contracts of sale.
>
> [4]We disagree with the argument that the "key phrase" in *Casa Clara* is the illustration that to determine the character of the loss one must look at the product purchased by the plaintiff and not the product sold by the defendant. The key phrase is in the holding itself adopting the ELR and not in rejecting an asserted exception. (A 1, pp. 8-9).

Jarmco, the retailer, and Sinclair, the boat builder, bargained for and purchased a separate, finished product from Polygard, the distributor, the resin, not the boat. This finished product, the resin, damaged other property, the boat. The resin was not defective as manufactured. Rather, Polygard, the distributor, misrepresented to Jarmco, the retailer, that it was suitable for boat building after being warned that it was not.

Sinclair lost the expected value of the boat in addition to losing the expected performance of the resin. Conversely, in Casa Clara, the faulty concrete used in building the plaintiffs' homes was an "integral part of the finished product" - the homes the plaintiffs/buyers had bargained for. The finished product which Jarmco and the plaintiff purchased was the resin. This finished product damaged other property, the boat.

E.I. Du Pont de Nemours & Co. v. Finks Farms, Inc., 656 So. 2d 171 (Fla. 2d DCA 1995), is directly on point and held that the damage to other property exception applied where a farmer had sprayed benelate, a fungicide manufactured by Du Pont, on his tomato plants to prevent disease, and the crop failed to grow at a normal pace or normal size. The Second District held that benelate, the finished product bargained for and purchased by the farmer, had caused damage to other property, the tomato plants or

land in which they grew. Thus, the economic loss rule did not bar recovery.

Adobe Bldg. Centers, Inc. v. Reynolds, 403 So. 2d 1033 (Fla. 4th DCA), rev. dismissed, 411 So. 2d 380 (Fla. 1981), which this Court quashed without explanation in Casa Clara, is factually similar to this case, with two crucial distinctions. First, Adobe did not discuss the economic loss rule or the other property exception. The sole issue was "whether one who purchases a product from a retailer or wholesaler and mixes or combines it with another product or substance with the intention of reselling the end product may recover against that seller for property damage under the doctrine of strict liability in tort." Id., at 1033. Secondly, the purchaser of the cement product in Adobe sought to hold the distributor strictly liable in tort for damage occasioned to homes to which the purchaser had applied the cement product. Unlike here, there was no argument in Adobe that the cement product/stucco also damaged the homes. Like the faulty plywood treated with osmose chemicals in Pulte v. Osmose Wood Preserving, Inc., supra, the concrete in Adobe did not fit the other property exception because the concrete/stucco was the only property damaged. The same is not true here.

The facts of this case fall precisely within the definition of "other property" as defined in Casa Clara. The Fourth District erred in holding the other property exception inapplicable, requiring reversal.

CONCLUSION

The Fourth District correctly reversed that portion of the final summary judgment in favor of Polygard because fraud in the inducement is an exception to the economic loss rule. The Fourth District erred in refusing to reverse the final summary judgment on the remaining tort claims based on the "other property" exception to the economic loss rule. This Court should affirm in part and reverse in part and remand for further proceedings.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 20th day of May, 1996, to:

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