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IN THE SUPREME COURT OF FLORIDA

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App reg.

Polygard, Inc., a Florida corporation,)

Petitioner,)

v.)

Jarmco, Inc., d/b/a Joe's Auto-Marine Supply,)

Respondent.)

Case No. 87,638
DCA No. 95-00427

PETITIONER/CROSS RESPONDENT'S BRIEF ON THE MERITS

APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

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PRELIMINARY STATEMENT

The Petitioner/Cross-Respondent, Polygard, Inc., will be referred to as "Polygard." The Respondent/Cross-Petitioner, Jarmco, Inc., d/b/a Joe's Auto-Marine Supply, will be referred to as "Jarmco." The plaintiff, MacLean Sinclair, will be referred to as "Sinclair." The 33-199 resin at issue in this matter will be referred to as "Resin."

Polygard seeks review and reversal, in part, of the decision of the Fourth District Court of Appeal, reported at Jarmco, Inc. v. Polygard, Inc., 21 Fla. L. Weekly D478 (Fla. February 21, 1996). Jurisdiction is based on the Fourth District's certification of conflict with the Second District's opinion in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995). Woodson was an *en banc* decision of the Second District in which the majority concluded that the Economic Loss Rule would bar a claim of fraud in the inducement. The dissent in Woodson argued that such a rule would eliminate both fraud and negligent misrepresentation. The Fourth District agreed with the conclusion of the dissent.

STATEMENT OF THE CASE AND FACTS

This case involves a commercial transaction: the sale of fiberglass resin by a distributor -- Polygard -- to a retail dealer of fiberglass and resin products -- Jarmco -- and the retailer's subsequent resale of the Resin to its customer, Sinclair. (R 58-59). The matter before this Court concerns the retailer's third party claim against the distributor; the customer is not a party to this appeal.

Jarmco is a retail dealer of fiberglass and resin products to the automobile and marine industry. (R 58). Jarmco has been a customer of Polygard's for many years. In fact, Jarmco still purchases goods from Polygard. Polygard's invoices are its "contracts" with its customers. (R 378-9). Polygard has used the same invoices as those at issue in this appeal since 1987. (R 235; 242 and 245).

Jarmco began to purchase the Resin from Polygard in January 1991 (R 248) and purchased the Resin, thereafter, on a regular basis. (R 248-317). Polygard purchased the Resin from Reichhold Chemicals, Inc., the manufacturer. (R 235). Polygard simply distributes the Resin to its customers, like Jarmco. (R 3; 59; 341).

In July 1991 -- seven months after Jarmco first began to purchase the Resin -- Sinclair, the customer, began purchasing the Resin from Jarmco. (R 2; 248-287). Thus, for seven months before Sinclair ever bought the Resin from Jarmco, Jarmco purchased the Resin from Polygard and resold it to its other customers. During

those seven months, Jarmco purchased 125,000 pounds -- or 250 drums -- of Resin in 17 separate transactions. (R 248-287). All of the Polygard-Jarmco invoices identify the Resin as "generic resin." (R 248-317).

Between July and December 1991, Sinclair bought 14 drums of Resin from Jarmco. All of Jarmco's invoices to Sinclair identified the Resin as a "GP" or "general purpose" resin, (R 12; 14; 16; 18; 20; 22; 25; 26; 28; 30; 32; and 320), although Jarmco's salesman, David Chapman, acknowledged that Polygard described the Resin to Jarmco as an "out-of-spec" resin, meaning that its catalyzation time varied because it is made from a mixture of resins. A "general purpose" resin is a resin that can be used for all purposes. (R 214-215; Chapman Deposition at 8-9).

Sinclair intended to use and did use the Resin in the construction of the hull of a boat Sinclair had started building in 1984. (R 319-320). Sinclair alleges that Jarmco knew that he wanted to use the Resin in the construction of his boat and represented that the Resin was appropriate for that purpose. (R 2; 3 and 320). Correspondingly, Jarmco alleges that Polygard knew that the Resin should not be used for boat building purposes, but sold the Resin to Jarmco anyway and represented that many boat builders purchased it. (R 59-60).

In January 1992, Sinclair learned that the Resin was a non-standard resin, which Sinclair contends should not be used for boat building purposes. (R 320). When Sinclair learned this, he ceased purchasing the Resin from Jarmco and brought suit against Jarmco

seeking solely economic damages, including the cost of the Resin, delay, lost profit or use, out-of-pocket expenses and wages and a waste of three years of his labor, all arising out of his purchase of the Resin from Jarmco. Sinclair's complaint does not allege damage to any property other than the boat nor any bodily injury. (R 1-11).

Sometime thereafter, Jarmco brought a third party action against Polygard alleging indemnity, contribution and warranty (the "1992 Action"). (R 58-59; 339). The damages sought by Jarmco were derivative of those sought by Sinclair. Accordingly, Jarmco's third party complaint did not allege damages arising out of any damage to property other than Sinclair's boat or any bodily injury. (R 58-99).

The court, in the 1992 Action, granted summary judgment in Polygard's favor finding that the provisions of the Polygard/Jarmco contracts limited Polygard's liability and that Jarmco's tort-based claims were barred by the Economic Loss Rule. (R 339-340).

One week before the scheduled trial of the 1992 Action, Jarmco sought to amend its third party complaint against Polygard to add several new claims, including claims of fraud, negligent misrepresentation and deceptive and unfair trade practices. (R 341). That motion was denied. (R 341). Thereafter, Sinclair and Jarmco voluntarily dismissed their claims. (R 341).

Two months later, Sinclair refiled its claim against Jarmco and Jarmco refiled its claim against Polygard (the "1994 Action"). (R 1-11; 58-64; and 341). The claims in the 1994 Action are the

claims before this Court. (R 341). Prior to answering the complaint, Polygard filed its motion for summary judgment on the legal ability of Jarmco to assert a claim against Polygard based on the language of the contracts between Jarmco and Polygard and the application of the Economic Loss Rule. For purposes of the summary judgment motion, only, Polygard accepted the allegations of Jarmco's third party complaint as true. (R 599). Accordingly, Polygard accepts the allegations of that complaint for purposes of this appeal. However, Polygard has denied and continues to deny the facts as they are set out in Jarmco's third amended complaint or as they are alleged in the briefs Jarmco filed with the Fourth District below. Jarmco's complaint and its brief are predicated on the self-serving affidavits of Jarmco and Sinclair, both of whom seek to retain Polygard in this litigation.

On September 19, 1994, the trial court granted final summary judgment in Polygard's favor finding that the provisions of the Polygard/Jarmco contracts exculpated Polygard from liability, or in the alternative, limited Polygard's liability and that Jarmco's tort-based claims -- including its claim of fraud in the inducement -- were barred by the Economic Loss Rule. (R 378-380). On September 27, 1994, Jarmco sought rehearing of Polygard's motion for summary judgment, (R 381-385), and on January 13, 1995, rehearing was denied. (R 483-484).

Jarmco sought review of the court's Final Summary Judgment before the Fourth District Court of Appeal. (R 486-492). On February 21, 1996, the Fourth District affirmed the Final Summary

Judgment on all grounds except one, the application of the Economic Loss Rule to Jarmco's claim of fraud in the inducement ("[W]e conclude that the economic loss rule (ELR) does not bar a common law fraud in the inducement claim seeking to recover only economic losses."). The Fourth District based its opinion on its prior decision in TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996), and certified conflict to this Court with the majority's decision in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995). Thereafter, Polygard timely invoked the jurisdiction of this Court.

SUMMARY OF ARGUMENT

The trial court was correct when it granted final summary judgment in favor of Polygard and ruled that Jarmco's tort-based claims -- including its claim of fraud -- were barred by the Economic Loss Rule. Accordingly, the Fourth District Court of Appeal erred when it concluded that Jarmco's claim of fraud was an "independent" tort and thus outside the scope of the Economic Loss Rule. Where, as here, the damages sought by the plaintiff in a commercial transaction are purely economic and the facts and damages which underlie the tort-based claim are the same as those supporting its contract claim, and there is no claim of bodily injury or other property damage, then there is no separate and independent tort and the Economic Loss Rule will bar even a claim for fraud in the inducement.

This Court should reverse the district court's decision as to Jarmco's claim of fraud in the inducement and remand for entry of a final summary judgment in Polygard's favor.

ARGUMENT

THE APPELLATE COURT ERRED IN FINDING THAT FRAUD IN THE INDUCEMENT WAS ALWAYS A SEPARATE AND INDEPENDENT TORT AND THUS NOT BARRED BY THE ECONOMIC LOSS RULE. WHERE THE PLAINTIFF ALLEGES PURELY ECONOMIC DAMAGES AND THERE IS NO SEPARATE AND INDEPENDENT TORT, THE ECONOMIC LOSS RULE WILL BAR TORT CLAIMS, EVEN A CLAIM OF COMMON LAW FRAUD IN THE INDUCEMENT.

A. The Economic Loss Rule Bars All But Separate and Independent Torts.

In each and every instance when this Court has considered the scope and application of the Economic Loss Rule,¹ this Court has never limited that scope by distinguishing between negligent and intentional torts. Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995); Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993); AFM Corp. v. Southern Bell Telephone & Telegraph Co., 515 So. 2d 180 (Fla. 1987); Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987). Instead, the Court's analysis has always defined the Economic Loss Rule by focusing on the damages sought and then, if those damages were purely economic, on whether the party can allege a "separate and independent tort." Id. This analysis applies equally to claims of intentional tort where, as here, the facts involve a commercial transaction, the

¹The Economic Loss Rule prohibits the recovery in tort of purely economic damages -- those seeking inadequate value, cost of repair and replacement of defective products -- unless those damages are accompanied by physical property damage to "other property" or bodily injury, Airport Rent-A-Car, Inc., 660 So. 2d 628 (Fla. 1995); Casa Clara Condominium Ass'n, Inc., 620 So. 2d 1244 (Fla. 1993), and -- in the context of property damage -- the property is outside the scope of the contract between the parties. Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991).

plaintiff seeks only economic damages and the plaintiff can evidence no bodily injury or other property damage.

The district courts have followed this analysis and concluded that the Economic Loss Rule will preclude intentional torts, even a common law claim of fraud in the inducement, if the damages sought are economic and there is no separate and independent tort. Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995); Florida Temps, Inc. v. Shannon Properties, Inc., 645 So. 2d 102 (Fla. 2d DCA 1995); John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1988); Morton L. Ginsberg & MLG Properties, Inc. v. Lennar Florida Holdings, Inc., 645 So. 2d 490 (Fla. 3d DCA 1994); Richard Swaebe, Inc. v. Sears World Trade, Inc., 639 So. 2d 1120 (Fla. 3d DCA 1994);² J. Batten Corp. v. Oakridge Investments 85, Ltd., 546 So.2d 68 (Fla. 5th DCA 1989); Hoseline, Inc. v. Diversified Products, Inc., 40 F.3d 1198 (11th Cir. 1994); Crain v. Sun Bank/Gulf Coast, Inc., 9 Fla. L. Weekly Fed. D701, 703 (M.D. Fla. April 11, 1996) (finding fraudulent inducement, tortious interference and fraudulent conspiracy all barred by the economic loss rule because the party did not ". . . show harm above and beyond disappointed economic expectations."); Serina v. Albertson's, Inc., 744 F. Supp. 1113 (M.D. Fla. 1990). Thus, the

² See, Richard Swaebe, Inc. v. Sears World Trade, Inc., 529 So. 2d 774 (Fla. 3d DCA 1988), evidencing that the claim which the Third District later determined (in the 1994 appeal, Swaebe v. Sears, 639 So. 2d at 1121), was not "independent" of the contract, was in fact a claim for fraud in the inducement ("...Swaebe had acted as an agent for both the Venezuelan suppliers of the ore and the purchaser, Sears, without full disclosure to either."). Swaebe v. Sears, 529 So. 2d at 775.

Fourth District erred when it reversed the trial court's grant of final summary judgment and concluded that Jarmco's fraud in the inducement claim, which sought only economic damages and did not allege a "separate and independent tort" was not barred, as a matter of law, by the Economic Loss Rule.

Here there is no question that Jarmco seeks economic damages. Jarmco has suffered no damages independent of those asserted by Sinclair in its claims against Jarmco (R 1-11). Sinclair seeks as damages the cost of the Resin, delay, lost profit or use, out-of-pocket expenses and wages and a waste of three years of his labor, all arising out of his purchase of the Resin from Jarmco. (R 1-11). Thus, Sinclair, and so Jarmco, seek economic damages. Therefore, the question becomes whether Jarmco's claim of fraud is a "separate and independent tort."

B. There Was No Separate and Independent Tort in this Case; therefore, Jarmco's Tort Claims are Barred.

Jarmco asserts that by simply pleading a tort, a claim is removed from the application of the Economic Loss Rule. However, the answer is not that simplistic. Instead, as this Court has stated, a plaintiff must demonstrate that the tort pled is "separate and independent" by alleging bodily injury or separate property damage, or damages in tort that are separate and distinguishable from the damages recoverable in contract or facts supporting the tort that are separate and distinguishable from the facts which underlie the contract action. John Brown Automation, Inc., 537 So. 2d 614 (Fla. 2d DCA 1988); SFC Valve Corp, v. Wright

Machine Corp., 8883 F. Supp. 710 (S.D. Fla. 1995). See, Burke v. Napieracz, 21 Fla. L. Weekly D754 (Fla. 1st DCA March 25, 1996).

Moreover, every instance in which the Economic Loss Rule has been applied, the courts have refused -- as this Court should here -- to create a blanket rule under which the effect of that Rule would be to bar, automatically, all torts, including intentional torts. Instead, the courts have insisted upon a careful and studied, case-by-case analysis of the pleadings to determine if the complaint alleges bodily injury or property damage or separate and distinct facts or damages, to determine if the tort alleged is truly "separate and independent" and thus not barred.

Here, Jarmco has alleged no damages separate and distinct from those which underlie its contract claims and the facts which support its claim for fraud are the same as those which form the basis for the contract action. (R 1-11; 58-64). Thus, the rationale of Woodson, John Brown Automation, SFC Valve, Florida Temps, J. Batten Corp. and Richard Swaebe control, and the Economic Loss Rule bars Jarmco's negligent and intentional tort claims -- even its claim of fraud in the inducement. Thus the District Court erred when it reversed the trial court's conclusion that Jarmco had alleged no separate and independent tort and its tort-based claims -- including its claim of fraud in the inducement -- were barred by the Economic Loss Rule.

C. What is a Separate and Independent Tort?

In the three years since Casa Clara, two methods have evolved for determining if a plaintiff has alleged a "separate and

independent tort" so that a claim for economic damages will exist outside the scope of the Economic Loss Rule. This Court has looked to the plaintiff's allegations of harm for that evidence; the district courts, on the other hand, have looked at the damages alleged and the facts giving rise to the claim.

This Court has addressed the subject of a "separate and independent tort" in at least two instances. In AFM Corp., 515 So. 2d 180 (Fla. 1987), this Court held that the existence of an independent tort would be defined by "...some conduct resulting in personal injury or property damage." Id. at 181. That principle was reaffirmed in Airport Rent-A-Car, Inc., 660 So. 2d 628, 632 (Fla. 1995), ("AFM Corp. reaffirms that there can be no independent tort action for purely economic loss without an accompanying physical injury or other property damage."

Thus, using this Court's analysis, application of the Economic Loss Rule begins with a consideration of the damages alleged and if those damages are economic, then a determination of whether the plaintiff has alleged harm in the form of bodily injury or damage to other property. Id. This is because purely economic damages, even when the subject of an intentional tort, are "...'disappointed economic expectations,' which are protected by contract law, rather than tort law." Casa Clara at 1246. Thus, "[f]or recovery in tort 'there must be a showing of harm above and beyond disappointed expectations'." Id. (Emphasis added.)

1. There are No Allegations of Bodily Injury or Damage to Other Property.

Here, Jarmco has alleged no bodily injury or damage to other property.³ Thus, Jarmco has alleged no harm "above and beyond disappointed expectations." Instead, Jarmco has simply passed onto Polygard, Sinclair's allegations of damage in the form of lost profit, lost wages and repair/replacement costs -- in short, Sinclair's disappointed expectations. Moreover, while Jarmco's damages are derivative of the damages sought by Sinclair, this Court should not forget that the claim before this Court arises out of a commercial -- not a consumer -- transaction between two merchants. (R 341).

Since the damages sought by Jarmco are purely economic and neither Jarmco's third party complaint nor Sinclair's complaint against Jarmco allege any bodily injury or other property damage (R 1-11; 58-54), then under the rationale of AFM and Airport Rent-A-Car, the analysis should stop, and this Court should conclude that Jarmco has alleged no "separate and independent tort" and that the

³Neither Jarmco nor Sinclair can allege damage to "other property." Sinclair bought the resin for the express purpose of using the resin in the construction of the hull. Thus, the resin became a part of the hull. Where a product is purchased with the intent that it be incorporated into or become a component, or integral part, of another product, then the other product, if damaged, is not "other property" and the Economic Loss Rule will bar any tort-based claims even where the component part is alleged to be the cause of the damage. See, e.g., Casa Clara Condominium Ass'n, 620 So. 2d at 1244; Aetna Life and Casualty Co. v. Therm-O-Disc, Inc., 511 So. 2d 992 (Fla. 1987); American Universal Insurance Group, 578 So. 2d at 451; and GAF Corp. v. the Zack Co., 445 So. 2d 350 (Fla. 3d DCA 1984). Cf. Southland Construction, Inc. v. The Richeson Corp., 642 So. 2d 5 (Fla. 5th DCA 1994), and Nat. Marine Underwriting, Inc. v. Donzi Marine Corp., 655 So. 2d 176 (Fla. 3d DCA 1995).

Economic Loss Rule bars Jarmco's claim of fraud in the inducement. Woodson, 663 So. 2d 1327, 1329 (Fla. 2d DCA 1995), ("We believe that the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories. If the damages sought are economic losses only, the party seeking recovery for those damages must proceed on contract theories of liability."). The Fourth District erred in this respect and its decision on this issue should be overturned.

2. The Factual Allegations Supporting the Fraud and Contract Claims and the Damages Sought in those Claims are the Same; Therefore, there is no Independent Tort.

The district courts' "separate and independent tort" analysis, on the other hand, focuses on whether the damages alleged in tort are separate and distinct from those arising out of contract, Florida Temps, 645 So. 2d 102 (Fla. 2d DCA 1995); John Brown Automation, Inc., 537 So. 2d 614 (Fla. 2d DCA 1988), and whether the facts relied upon in tort are the same as those supporting the contract action.⁴ SFC Valve Corp. 883 F. Supp. 710 (S.D. Fla. 1995); Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc., 629 So. 2d 252 (Fla. 3d DCA 1993). These guideposts, however, are simply another way of determining if the tort alleged is truly "separate and independent."

⁴ This analysis is nothing more than another way of determining if there has been damage to "other property." Where there is property damage or bodily injury meeting the "other property" exception, then those claims will arise out of facts different than those giving rise to the breach of contract and that claim will support damages that differ from the damages for breach.

Where the damages alleged are not separate and distinct or the facts supporting the tort action do not differ from those which support the contract action, then the Economic Loss Rule prohibits the plaintiff from recovering in tort -- even a claim of an intentional tort -- and limits that party's damages to those arising under contract. Woodson, 663 So. 2d 1327 (Fla. 2d 1995); Florida Temps, Inc., 645 So. 2d 102 (Fla. 2d DCA 1995); Leisure Founders, Inc. v. CUC Intern, Inc., 833 F. Supp. 1562 (S.D. Fla. 1993); John Brown Automation, Inc., 537 So. 2d 614 (Fla. 2d DCA 1988); Richard Swaebe, Inc. v. Sears, 639 So. 2d at 1121. ("Where the complaint alleges fraudulent inducement, but the facts comprising the fraudulent inducement claim are closely interwoven with those constituting the breach of contract, the economic loss rule bars the pleading of a separate tort claim." Leisure Founders, 833 F.Supp. at 1572.). See, Burke v. Napieracz, 21 Fla. L. Weekly at D755 (where court reviewed damages alleged and concluded that claims of conversion and civil theft constituted a "separate and independent tort" that was not barred by the Economic Loss Rule).

Here, the damages Jarmco seeks in fraud are identical to the damages it seeks in contract and the facts giving rise to its claim of fraud are identical to those supporting the tort action. (R 58-64). Thus, there is no "separate and independent tort."

Jarmco's third party complaint against Polygard states one claim in contract, that of indemnity. (R 6). The factual

allegations of Jarmco's fraud and indemnity claims are exactly the same. Count V - Indemnity of Jarmco's complaint states:

35. The sale and any damage from the Resin occurred through no fault of JARMCO, but solely through the actions of Polygard as set forth in Counts I [Fraud], II [Negligent Misrepresentation], III [Deceptive and Unfair Trade Practices] and IV [Negligence].

¶35, Jarmco's Third Party Complaint. (R 6).

Thus, Jarmco's contract claim incorporates and relies on the same facts alleged in all its claims, including its claim of fraud. Therefore, by the very language of Jarmco's complaint, it is clear that the facts supporting Jarmco's claim of fraud in the inducement are the same as those supporting its contract-based action. Accordingly, because the same facts support those two claims, Jarmco's allegations of fraud do not constitute a "separate and independent" tort and are barred by the Economic Loss Rule. John Brown Automation, Inc., 537 So. 2d at 617 ("The misrepresentation ascribed to the appellants [that they had all machine parts on hand when in fact they did not] is inherent in and inextricable from the events constituting a breach of the contract." Id.)

Moreover, even if this Court accepted Jarmco's assertion that fraud in the inducement is always a "separate and independent" tort because the claim relates to pre-contractual conduct, the Economic Loss Rule would still bar those claims where, as here, the party incurs no damages separate from those arising under contract. Florida Temps, Inc., 645 So. 2d 102 (Fla. 2d DCA 1995).

Jarmco seeks the same damages in indemnity as it does for fraud. (R 2-3, 6). Because both counts seek exactly the same

damages, Jarmco's damages for fraud are not "separate and distinguishable" from the damages recoverable in contract and Jarmco's claim of fraud cannot and does not constitute a "separate and independent" tort. Thus, the Economic Loss Rule bars all of Jarmco's tort claims, even its claim of fraud in the inducement.

The only difference between the damages alleged by Jarmco in its contract claim from that alleged in its fraud claim are the punitive damages that would be available to Jarmco but for the "inextricable link" between his contract claim and his fraud claim which preclude the claim of fraud and the punitive damages available under that claim. John Brown Automation Inc., 537 So. 2d 614, 617.

Punitive damages for breach of contract are barred by Florida law. [citations omitted]...[A] separate and independent tort, if pleaded and proved, will support a claim for punitive damages.

* * *

A constant untangled thread running through all the cases involving punitive damages in the context of a contractual breach is that the tort for which such damages are recoverable must be separate and independent from the breach of contract.

Id. at 617.

This position supports the analysis this Court has employed when considering the Economic Loss Rule. See, Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982) ("We conclude that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." Id. at 181-182); Rolls v. Bliss & Nyitray, Inc., 408 So. 2d 229, 237 (Fla. 3d DCA

1981) ("...since plaintiffs failed to prove that they sustained compensatory damages based on a theory of fraud which were any way separate or distinguishable from their compensatory damages based on the contract, we conclude that plaintiffs have failed to meet the strict pleading and proof requirements necessary to recover compensatory and punitive damages based on fraud...").

Thus, irrespective of the "rule" employed, a plaintiff cannot sue in contract and tort unless the tort is separate and independent of the contract, and where, as here, the facts giving rise to the contract claim are the same facts giving rise to the fraud claim, then there is no "separate and independent" tort. See, John Brown Automation, Inc., 537 So. 2d at 616-617 ("In the course of our deliberations we have consistently and repeatedly been returned to one salient point: when all is said and done, this is essentially a breach of contract case.").

When analyzing Jarmco's claims against Polygard, it is important for this Court to remember that those claims are all third party claims seeking damages derivative of those sought by Sinclair. Sinclair's damages are specified in paragraph 18 of his complaint:

18. As a result, Sinclair has been damaged in the following ways:

- a. Sinclair has paid Joe's \$4,970.00 for resin that was improper for use in fabricating a new ocean-going vessel.
- b. Sinclair has suffered delay in his boat fabrication job as he will have to re-fabricate the entire vessel.
- c. Sinclair has been damaged by lost profit or lost use in that he will now be required to begin the boat fabrication job anew.

d. Sinclair has been damaged by virtue of out-of-pocket expenses for other fabrication materials incorporated into a vessel that cannot be used due to his use of the inappropriate resin sold to him by Joe's.

¶18, Sinclair's Complaint (R 3-4).

These allegations set out the specific damages Sinclair sought from Jarmco. Thus, this case is distinguishable from Burton v. Linotype, 556 So. 2d 1126 (Fla. 3d DCA 1989), where the Third District refused to affirm the dismissal of the claim of fraud because the complaint alleged only general damages. In that case, unlike the case at bar, the court was unable to conclude that the damages alleged -- and thus the damages that would be sought at trial -- under the fraud and contract claims were the same. Here, this Court can conclude that those damages are the same and consequently, there is no tort separate and independent of the impact of the Economic Loss Rule.

Moreover, Sinclair's complaint incorporates the same allegations of damage into each of the claims. (R 4-9, 10). Thus, Sinclair seeks the same damages from Jarmco under each theory of his case. Every count of Jarmco's complaint against Polygard seeks damages that are derivative of those sought by Sinclair. (R 58-64). Thus, each count of Jarmco's complaint seeks the same damages from Polygard that Sinclair seeks from Jarmco. (R 1-11; 58-64). Because each count of Sinclair's complaint requests the same damages, then each count of Jarmco's complaint seeks the same specific damages. Thus the damages Jarmco seeks in fraud are the same damages that it seeks in its contract or indemnity action.

Because Jarmco seeks the same damages in fraud as in contract, the damages Jarmco seeks to recover in fraud are not "separate and distinguishable" from the damages recoverable in contract. Therefore, Jarmco's claim of fraud cannot be a "separate and independent" tort and the Economic Loss Rule bars all of Jarmco's tort claims, even its claim of fraud in the inducement. Woodson, 663 So. 2d 1327; Florida Temps, Inc., 645 So. 2d 102; John Brown Automation, Inc., 537 So. 2d 614, 617 ("Therefore, since plaintiffs failed to prove that they sustained compensatory damages based on a theory of fraud which were in any way separate or distinguishable from their compensatory damages based on the contract, we conclude that plaintiffs have failed to meet the strict pleading and proof requirements necessary to recover compensatory and punitive damages based on fraud, and that those damages must therefore be reversed."); Swaebe v. Sears, 639 So. 2d at 1121.

C. The Dissent in Woodson Does Not Support the Fourth District's Reversal.

The Fourth District's reversal of the application of the Economic Loss Rule to Jarmco's claim of fraud was based upon its decision in TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366, 366 (Fla. 4th DCA 1996), wherein the court concluded, without benefit of any analysis, that "[f]raud in the inducement, even when only economic losses are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule." (citing HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995). Moreover, the rationale employed by the Fourth District remains unclear even after reviewing the Third

District's opinion in HTP, Ltd., on which the Fourth District relied:

First, we find that the trial court properly ruled that the plaintiffs' cause of action for fraud in the inducement was an independent tort that was not barred by the economic loss rule. Burton v. Linotype Co., 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989), *review denied*, 564 So. 2d 1086 (Fla. 1990) ("Fraud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered.").

HTP, Ltd., 661 So. 2d at 1222.

As stated supra, Burton predated Casa Clara and in that case, unlike the case at bar, the court was unable to conclude that the damages alleged -- and thus the damages that would be sought at trial -- under the fraud and contract claims were the same. Here, the damages are the same and thus there is no tort separate and independent of the impact of the Economic Loss Rule.

Moreover, after considering the analysis this Court employed in AFM and Airport Rent-A-Car to determine whether a specific allegation of fraud constitutes a "separate and independent" tort, this Court cannot impose a blanket and superficial determination that if the complaint alleges fraud in the inducement, it alleges an independent tort.

The only guidance the Fourth District provided in its reversal of the trial court's conclusion in this case was the reference to Woodson and the reliance upon the dissents of Judges Altenbernd⁵

⁵We do not address Judge Lazzara's dissent, except to the extent that it joins in the dissent of Judge Altenbernd, since Judge Lazzara's dissent focuses on homebuyers and the duty of real estate brokers, which are not at issue in this case, a commercial transaction between merchants.

and Lazzara. Ironically, Judge Altenbernd's dissent -- on which the Fourth District relied in reversing the trial court's ruling in this case -- would agree that Jarmco's claims of "fraud" are barred by the Economic Loss Rule:

There is an argument that the products liability rule should bar a broad range of tort theories, including fraud. If so, I am inclined to believe that it should apply to a narrowly defined concept of product and only in claims against manufacturers and retailers where warranty theories can provide an adequate remedy.

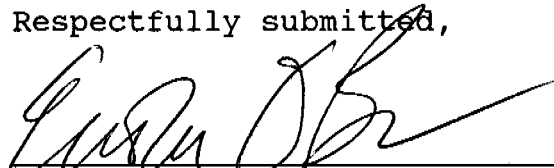
Woodson, 663 So. 2d at 1331.

Thus, there is simply no basis for the contention that the Economic Loss Rule does not bar Jarmco's claim of fraud in the inducement where the damages sought are economic and Jarmco alleges no separate and independent tort.

CONCLUSION

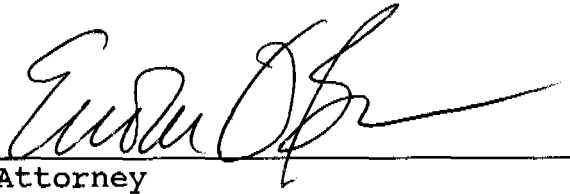
It was proper for the trial court to grant final summary judgment in Polygard's favor. Accordingly, based on the foregoing this Court should reverse the Fourth District and affirm the trial court's grant of final summary judgment in favor of Polygard on Jarmco's tort based claims.

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 Jane Kreuzler-Walsh, Esquire, Jane Kreuzler-Walsh, P.A., Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401 and David J. Chesnut, Esquire, David J. Chesnut, P.A., 215 South Federal Highway, Suite 200, Stuart, Florida 34994 this 25th day of April, 1996.



Attorney

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