IN THE SUPREME COURT OF FLORIDA

87,638

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 REPLY BRIEF ON THE MERITS

APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

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## SUMMARY OF ARGUMENT

### A. Independent Tort

The Fourth District erred when it concluded that Jarmco's claim of fraud in the inducement was an "independent" tort and thus outside the scope of the Economic Loss Rule. Mere allegations of "additional conduct" are insufficient for a claim to constitute an "independent tort." In order for an act flowing from a contractual breach to constitute an "independent tort" and thus justify a tort claim solely for economic losses, a party must allege conduct resulting in personal injury or damage to other property. Jarmco ignores this requirement because it cannot evidence personal injury or damage to other property. Accordingly, because Jarmco cannot allege an independent tort, its claim of fraud is barred by the Economic Loss Rule.

Jarmco suggests that intentional torts be treated differently from negligence claims in the context of the Economic Loss Rule. However, this Court has never distinguished negligent from intentional torts in applying and analyzing the Economic Loss Rule and "...there is simply no basis presented or found for disparate treatment of fraud and negligence within the 'Economic Loss Rule'." Serina v. Albertson's, Inc., 744 F. Supp. 1113, 1118 (M.D. Fla. 1990). This conclusion is even more applicable in a case such as this which involves a contract between two merchants -- Polygard and Jarmco -- in a commercial transaction -- where one of the merchants, Jarmco, apparently believes it failed to secure adequate remedies in contract and warranty for any representations made

concerning the quality or fitness of the resin. Now Jarmco seeks to create a new remedy -- in fraud -- for economic losses arising out of its failure to secure adequate contractual remedies and the failure of the resin to work for the purpose for which the resin was sold. Where, as here, the defective product does not cause personal injury or damage to other property, this Court should affirm its long standing position on the Economic Loss Rule as set forth in Casa Clara Condominium Ass'n, AFM Corp., and Airport Rent-A-Car, and refuse to provide a remedy in tort for solely economic losses.

Jarmco also asserts that its statutory claim falls outside the Economic Loss Rule and that Section 672.721, Florida Statutes, preserves its right to recover economic losses as a result of fraud. Both assertions are in error. Florida and Federal courts have rejected statutory and common law claims of intentional torts under the Economic Loss Rule. Moreover, Jarmco never raised -- and thus waived -- the applicability of the Uniform Commercial Code ("UCC"), much less Section 672.721, Florida Statutes, as an alternative basis for recovery of economic losses until Jarmco filed its initial brief with the Fourth District.

**B. Other Property**

The Fourth District ruled correctly that the resin was not "other property" and that Jarmco's non-fraud claims were barred by the Economic Loss Rule. In applying the "other property" exception to the Economic Loss Rule, this Court has always distinguished between component parts -- products purchased for the purpose of

being incorporated into or used to create another product -- and finished products. Where the product purchased by the plaintiff differs from the property damaged, the "other property" exception might apply and the claim may survive the Economic Loss Rule unless the plaintiff intended to use the product to create another product. Moreover, where a purchaser intends that a product become a component of or that it be used to create another product, then the other product -- the "created" product -- if damaged, is not "other property" and the Economic Loss Rule will bar any tort-based claims even where the component is alleged to be the cause of the damage. This rule applies even though the product may appear "finished" because it was sold in its own container. On the other hand, if a product is purchased for use with an existing "finished" product, then damage to the existing product will be damage to "other property."

Here, Sinclair purchased resin from Jarmco for the purpose of using the resin to construct a boat hull. Prior to his purchase of the resin, there was no "finished boat hull." Instead, Sinclair used the resin -- the product sold by the defendant -- with other components, to create the boat's hull -- the "created property." Thus, when the hull of Sinclair's boat was damaged, just as with the switch in Aetna Life & Cas. Co., the roofing material in GAF Corp., the oil pump in American Universal Ins. and the defective rebar in Casa Clara, no other property was damaged. Accordingly, the Fourth District was correct when it affirmed the trial court's

conclusion that the "other property" exception to the Economic Loss Rule did not apply.

This Court should affirm the Fourth District's decision on all points except its conclusion that Jarmco's claim of fraud in the inducement is an "independent tort." On that issue, this Court should conclude that Jarmco has alleged no personal injury or damage to other property and thus has alleged no "independent tort." Accordingly, this Court should overturn the Fourth District's conclusion and find that Jarmco's claim of fraud in the inducement is barred by the Economic Loss Rule.

## ARGUMENT

**WHERE A PARTY ALLEGES ONLY ECONOMIC DAMAGES -- WITHOUT PERSONAL INJURY OR DAMAGE TO OTHER PROPERTY -- THE ECONOMIC LOSS RULE BARS A CLAIM OF COMMON LAW FRAUD IN THE INDUCEMENT**

### A. The "Independent Tort" Test

Jarmco misstates the test of an "independent tort." Although the Economic Loss Rule does not bar a claim for economic losses where a plaintiff alleges a separate and independent tort, Jarmco's assertion -- that mere allegations of "additional conduct" are sufficient to meet this "independent tort" test -- is incorrect and is unsupported in the law.[1] Instead, this Court, beginning with AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987), and then later in Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993), and Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995), has held:

> ...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.
>
> AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d at 181-182 (emphasis added).

Thus, the very case upon which Jarmco relies, AFM Corp., actually refutes Jarmco's position and confirms that the "additional conduct" must manifest itself in personal injury or

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[1]The "additional conduct" language Jarmco refers to, while cited in the text of AFM, is not the holding of that case and has its source in the Third District's decision in Electronic Security System Corp. v. So. Bell Tel. & Tel. Co., 482 So. 2d 518 (Fla. 3d DCA 1986), which predates this Court's decisions in AFM, Casa Clara Condominium Ass'n and Airport Rent-A-Car.

damage to other property before it will constitute an "independent tort." AFM Corp., 515 So. 2d at 181-182; Casa Clara Condominium Ass'n, 620 So. 2d at 1247; Airport Rent-A-Car, 660 So. 2d at 632.

Jarmco ignores the "personal injury" or "property damage" element of an "independent tort" because it cannot evidence personal injury or damage to other property. It is undisputed that neither Jarmco's nor Sinclair's complaint alleges personal injury and, for the reasons set forth herein at pp. 22 to 27, neither party can allege damage to other property. Thus, Jarmco cannot allege an independent tort and its claim of fraud is barred by the Economic Loss Rule. Airport Rent-A-Car, 660 So. 2d at 632.

Despite this fundamental failing, Jarmco invites this Court to create an exception to this long-standing requirement of "personal injury" or "property damage" and allow intentional torts to be treated differently from claims of negligence. If adopted, such an exception would permit intentional claims to escape the Economic Loss Rule by requiring that the plaintiff allege only "additional conduct" -- without the need for personal injury or damage to other property -- even where the only damages alleged are economic losses recoverable in contract. However, this Court has never distinguished negligent from intentional torts in applying and analyzing the Economic Loss Rule and "...there is simply no basis presented or found for disparate treatment of fraud and negligence within the 'Economic Loss Rule'." Serina v. Albertson's, Inc., 744 F. Supp. 1113, 1118 (M.D. Fla. 1990).

The primary basis for Jarmco's request that claims of fraud be excluded from this Court's long-standing requirement of "personal injury" or "property damage" is Jarmco's policy argument that a party deceived into contracting is presumed not to have had a fair opportunity to negotiate adequate contractual remedies.[2] While initially appealing, that argument has no application in this case and this Court should reject Jarmco's request.

This case involves two merchants -- Polygard and Jarmco[3] -- in a commercial transaction.

Sinclair purchased the resin expressly for the purpose of constructing the hull of an "ocean-going vessel," (R 2-11; 320), a

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[2]Jarmco also asserts that the law should not "protect" intentional tortfeasors by allowing the Economic Loss Rule to bar claims against those parties. However, Jarmco's assertion does not comport with the law. First, and foremost, Florida's courts and the Federal courts in Florida have found statutory and common law intentional torts barred by the Economic Loss Rule. Hoseline, Inc., 40 F. 3d 1198 (11th Cir. 1994). See also, Kalman v. Morris-North American, Inc., 531 So. 2d 394 (Fla. 3d DCA 1988); Futch v. Head, 511 So. 2d 314 (Fla. 1st DCA 1987), rev. den., 518 So. 2d 1275 (Fla. 1987); John Brown Automation, 537 So. 2d 614 (Fla. 2d DCA 1988), rev. den. 547 So. 2d 1210 (Fla. 1988; Belford Trucking Co. v. Zagar, 243 So. 2d 646 (Fla. 4th DCA 1970); Ginsberg v. Lennar, 645 So. 2d 490 (Fla. 3d DCA 1994); Richard Swaebe, 529 So. 2d 774 (Fla. 3d DCA 1988); J. Batten Corp. v. Oakridge, 546 So. 2d 68 (Fla. 5th DCA 1989); Crain v. Sunbank/Gulf Coast, Inc., 9 Fla. L. Weekly Fed D702, (M.D. Fla. April 11, 1996); Keys Jeep Eagle, Inc. v. Chrysler Corp., 897 F. Supp 1437 (S.D. Fla. 1995). Moreover, by the Economic Loss Rule's effect of barring claims for intentional torts -- even claims of common law fraud in the inducement -- does not "provide fraud perpetrators a 'safe harbor' to commit fraud." A plaintiff would continue to have remedies -- such as recession -- available to address the "fraudulent conduct." However, as this Court determined in Casa Clara Condominium Ass'n, those remedies are more appropriately limited to contract. Casa Clara Condominium Ass'n, 620 So. 2d at 1247.

[3]The trial court found, and the Fourth District affirmed, the fact that Polygard and Jarmco are both merchants under the Uniform Commercial Code.

boat he had been working on this boat since 1984. Moreover, Sinclair had purchased other resin from other retailers before buying the resin at issue from Jarmco. (R 319). Thus, this case does not involve a person who had no familiarity with boat construction. Instead, it involves Sinclair, a person who had been constructing this very same boat for 7 years before he ever bought any resin from Jarmco. Accordingly, when Sinclair arrived at Jarmco's store, he knew that he wanted to buy a resin that was appropriate for use in the construction of a boat hull and he knew that strength was an important characteristic for whichever resin he purchased. (R 2-11). Therefore, if resin strength was as important to Sinclair as he now represents, he could have insisted that his contract with Jarmco include express warranties that would ensure that the resin's performance (or his expectation of the resin's performance) was as represented by Jarmco. Likewise, if Jarmco was a concerned that the resin met performance standards beyond the "generic" representation provided on Polygard's invoices, it could have requested that specific warranties be included in its contract with Polygard.[4] This is precisely the issue this Court debated in Casa Clara Condominium Ass'n:

> If a [product] causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort law...There are protections....such

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[4]Of course, Jarmco did not know of Sinclair and thus could not know of Sinclair's concerns regarding the strength of the resins until after Jarmco had purchased 250 drums (or 125,000 pounds) of the resin. This is because Jarmco purchased the resin from Polygard for 7 months before Sinclair made his first purchase of resin from Jarmco. (R 248-317).

> as...warranties. Coupled with the [purchasers] power to bargain over price, these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses. Therefore, we again 'hold contract principles more appropriate for recovering economic losses without an accompanying physical injury or property damage.'[5]
>
> Id. at 1247.

On more studied analysis, it is clear that Jarmco's claim is not that Sinclair was mislead into purchasing a product, but that the product sold to Sinclair did not perform as represented.[6] Sinclair's alleged losses are economic losses ("[economic loss] includes diminution in the value of the product because it...does not work for the general purposes for which it was...sold," Id. at 1246) which are more appropriately founded in contract and warranty.[7]

In short, Sinclair, and Jarmco, failed to secure adequate remedies in contract and warranty for any representations made concerning the quality or fitness of the resin and now seek to create a new remedy -- in fraud -- for economic losses arising out

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[5]Sinclair came to Jarmco to purchase resin precisely because of his "power to bargain over price." ("...I found Jarmco's Stuart store had the capability of supplying me with drums of resin which were comparable to the 087 general purpose resin that I was using at a reasonable price." (R - 320).)

[6]See, e.g., Sinclair's Complaint at ¶45 ("Sinclair relied upon the skill and judgment of [Jarmco] to select for him the resin that would be most appropriate in building a new ocean going vessel." (R 8)).

[7]Ironically, Jarmco alleged a breach of warranty claim against Polygard in the 1992 Action -- which was dismissed voluntarily by Jarmco after the court found its claims barred by the Economic Loss Rule. In the 1994 Action Jarmco dropped its warranty claim and substituted a claim of fraud.

of their failure to secure those remedies and the failure of the resin to work for the purpose for which the resin was sold. Where, as here, the defective product does not cause personal injury or damage to other property, this Court should affirm its long standing position on the Economic Loss Rule as set forth in Casa Clara Condominium Ass'n, AFM Corp., and Airport Rent-A-Car, and refuse to provide a remedy in tort for solely economic losses.

**B. The Cases Supporting the Economic Loss Rule**

Jarmco asserts that no Florida court -- with the exception of the Second District's decision in Woodson -- has held that fraud in the inducement is subject to the Economic Loss Rule. Jarmco is flat-out wrong. Florida's courts -- and the Federal courts within Florida -- have found fraud in the inducement as well as other intentional torts -- subject to the Economic Loss Rule. Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995); John Brown Automation, 537 So. 2d 617 ("the alleged misrepresentations on which McHan and Nobles pinned their punitive damage claims were, first, that the appellants represent that they had all machine parts on hand when in fact they did not..."); Ginsberg v. Lennar, 645 So. 2d at 494 ("the claims sued upon are clearly contractual in nature, consequently the counts for conversion, civil theft and RICO violations cannot lie."); Richard Swaebe, 529 So. 2d 774, 775 ("the undisputed evidence demonstrated that Swaebe had acted as agent for both the Venezuelan suppliers of the ore and the purchaser, Sears, without full disclosure to either."); J. Batten Corp. v. Oakridge, 546 So. 2d at 69 ("as to th[e fraud] count,

Batten alleged that in September 1987, Oakridge had refused to pay for work done by Batten and then induced Batten to complete construction based on Oakridge's fraudulent representation that it would pay the amount due under the contract."); Hoseline, Inc. v. U.S.A. Diversified Products, Inc., 40 F. 3d 1198, 1200 (11th Cir. 1994) ("because the Economic Loss doctrine bars tort recovery for contract claims which involve no injury to person or property, we reverse the judgement of the district court against Davis on both counts of fraud and civil theft."); Crain v. Sunbank/Gulf Coast, Inc., 9 Fla.L.Weekly Fed D702, 703 (M.D. Fla. April 11, 1996) ("additionally, this Court finds that Counts IX (fraudulent inducement), X (tortious interference), and XI (fraudulent conspiracy) are barred by the Economic Loss Rule. A party to a contract, who complains in tort, must show harm above and beyond disappointed economic expectations." citing Casa Clara); Keys Jeep Eagle, Inc. v. Chrysler Corp., 897 F. Supp 1437, 1443 (S.D. Fla. 1995), ("all of the fraud allegations[8] are wholly dependent on the contractual relationship. Under the economic loss doctrine as stated in AFM, the Court thus finds that Plaintiffs' fraud claim is barred and that Defendant CCC therefore is entitled to summary judgment."); Serina v. Albertson's, 744 F.Supp at 1118 (refusing to make an exception to the Economic Loss Rule, "when the facts surrounding the tort claim are interwoven with the facts

[8]The allegations of fraud included that Chrysler Credit Corporation (CCC) fraudulently concealed its intentions not to reinstate the floor plan and that those misrepresentations forced plaintiffs to close their dealership; the complaint did not allege personal injury or property damage outside the contract.

surrounding the breach of contract claim."); and In re Ford Motor Co. Bronco II Products Liability Litigation, 1995 U.S. Dist. LEXIS 12398, 12448 (E.D. La. August 17, 1995) ("Plaintiffs' fraud and misrepresentations claims are not independent from their breach of warranty and contract claims because the allegations underlying both and the damages sought are the same. Therefore plaintiffs cannot maintain separate fraud and misrepresentation claims under Florida's Economic Loss doctrine and plaintiffs' Florida state law fraud and misrepresentation claims must be dismissed.").

**C. The Cases Relied on by Jarmco**

The cases on which Jarmco relies do not refute Polygard's position that the Economic Loss Rule will bar a claim of common law fraud where the plaintiff's damages are economic and there is no claim for personal injury or damage to other property.

Jarmco relies upon two cases presently under review by this Court, 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).[9] However, upon careful analysis, it is clear that neither can be used to support Jarmco's position in this case.

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[9]Jarmco also relies upon Monco Enterprises, Inc. v. Ziebart Corp., 21 Fla. L. Weekly D755 (Fla. 1st DCA March 25, 1996), which bases its conclusion -- that the Economic Loss Rule does not bar a claim for fraud in the inducement -- on TGI, HTP and Burton. Polygard incorporates herein its argument at pp. 12-15 that addresses those cases. Moreover, the facts of Monco Enterprises differ from those at issue here because Ziebart (the franchisor) did not own or operate the franchises purchased by Monco and thus was wholly independent of the contract between Monco and the franchisee. Thus, Monco had no contract it could use to secure the remedies it needed to protect itself from Ziebart's acts.

In TGI, 665 So. 2d at 366, the Fourth District 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." Jarmco cites TGI for two reasons: it is the basis for the Fourth District's overturning of the trial court's decision in this case and it endorses the same simplistic and superficial analysis of the Economic Loss Rule that Jarmco urges this Court to approve. However, the Fourth District's reliance upon TGI, in this case, and its analysis, are not, and cannot be supported by this Court's prior decisions governing the Economic Loss Rule. Moreover, endorsing such an analysis would eviscerate the Economic Loss Rule as adopted by this Court.

In reaching its decision in TGI, the Fourth District relied upon HTP and Burton v. Linotype Co., 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989), rev. den'd, 564 So. 2d 1086 (Fla. 1990). An analysis of HTP and Burton confirm that HTP -- and thus TGI -- cannot be used to support the Fourth District's conclusion that the claim of fraud, as alleged by Jarmco, is an "independent tort" in the context of the Economic Loss Rule. The Third District's decision in HTP was predicated entirely upon its decision in Burton. However, Burton has no application to this case and thus, neither do the cases which rely upon Burton, including HTP and TGI.

Burton is inapplicable to this proceeding for two reasons. First, Burton predates this Court's decision in Casa Clara Condominium Ass'n. However, and most importantly, the Third

District's conclusion in Burton -- "[f]raud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered" -- is wholly dicta and thus without effect. In Burton, the Third District reversed the trial court's grant of summary judgment because the court could not conclude if the damages alleged under the fraud and contract claims -- and thus the damages that would be sought at trial -- were the same. Accordingly, because the plaintiff sought only general damages, the Third District concluded that it was premature to foreclose proof -- as a result of the grant of summary judgment -- of different damages at trial.

Here, neither Jarmco nor Sinclair have pled general damages and thus there is no concern that the damages alleged in fraud differ from those alleged in contract. Instead, the pleadings evidence that Jarmco -- and thus Sinclair -- seek the very same damages in fraud as contract.[10] Accordingly, the holding of

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[10]Jarmco's claims against Polygard 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

Burton, and thus HTP and TGI are inapplicable to this case and cannot support the Fourth District's decision on the Economic Loss Rule.

Moreover, the other cases cited by Jarmco are of no avail. For example, Lee v. Paxson, 641 So. 2d 145 (Fla. 5th DCA 1994), has no precedential value. That case is a per curiam affirmance of the trial court's dismissal of a claim of fraud and thus we cannot discern from the "opinion," the basis for that dismissal. Accordingly, the dissent's comment -- regarding the Economic Loss Rule -- is pure dicta and has no force and effect.

Likewise, Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F. 3d 734 (11th Cir. 1995), is of no help. In Pulte, the 11th Circuit affirmed the trial court's dismissal of Pulte's allegations of negligence and fraud. Dismissal of the negligence claims was based on the Economic Loss Rule; dismissal of the fraud claims was based on Pulte's failure to establish the essential elements of a claim of fraudulent inducement ("Pulte presented no evidence from which the jury could conclude that Osmose made any misrepresentations or guarantees to Pulte regarding the strength of

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into a vessel that cannot be used due to his use of the inappropriate resin sold to him by Joe's. (R 3-4).

Sinclair's complaint incorporates these allegations of damages into each of his 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 58-63). Thus, each count of Jarmco's complaint seeks from Polygard these same damages that Sinclair seeks from Jarmco and the damages Jarmco seeks in fraud are the same as those it seeks in its contract or indemnity action.

the FRT plywood treated with Osmose chemicals." Id., at 739). Accordingly, the court's comment -- that it disagrees that the Economic Loss Rule bars Pulte's claim for fraud -- is pure dicta and is of no legal force and effect.

Jarmco's reliance upon SFC Valve Corp. v. Wright Machine Corp., 883 F. Supp. 710 (S.D. Fla. 1995), and Serina v. Albertson's, Inc., 744 F. Supp. 1113 (M.D. Fla. 1990), is confusing. SFC Valve confirms that a tort will be considered independent "...if the facts comprising the breach [of contract] are not relied upon to establish the elements of the tort." Id., at 716. Thus, SFC Valve supports the trial court's dismissal of Jarmco's claim of fraud in the inducement. Moreover, the facts of this case are unlike those of SFC Valve where the "...fraudulent conduct occurred well after [the] initial breach of the contract." Id. at 716. Here, the facts giving rise to the "fraud" are inextricably interwoven with the facts giving rise to the breach. Accordingly, under the test of SFC Valve, Jarmco's claim of fraud should be dismissed.

Serina, 744 F. Supp. 1113 (M.D. Fla. 1990), also supports dismissal of Jarmco's fraud claim. In Serina, the Middle District reached several important conclusions. First, the court rejected the use of "additional conduct" -- the standard suggested by Jarmco -- as evidence that a tort is an "independent tort" concluding that analysis of the damages alleged was a better indicia of an "independent tort." Thus, where the damages alleged in tort differ from those alleged in contract, the tort claim may constitute an

"independent tort" and may not be proscribed by the Economic Loss Rule. Here, of course, the damages Jarmco seeks in its fraud claim mirror those it seeks in contract and thus -- under the Serina test -- Jarmco's claim of fraud is not "independent." Accordingly, the trial court's conclusion, that Jarmco's fraud claim was barred by the Economic Loss Rule, was correct. Finally, the court found that "...there is simply no basis presented or found for disparate treatment of fraud and negligence within the 'economic loss rule'," Id. at 1118, and held that the Economic Loss Rule would bar a claim of fraud where the facts giving rise to the fraud are the same as those giving rise to the breach of contract. Here, the facts underlying Jarmco's claim of fraud are the same as those underlying its breach of contract claim and thus, the trial court acted correctly when it held that Jarmco's claim of fraud in the inducement was barred by the Economic Loss Rule.

**D. Statutory Claims and the UCC**

Jarmco asserts that statutory claims fall outside the Economic Loss Rule and that Section 672.721, Florida Statutes, preserves Jarmco's right to recover economic losses as a result of fraud. Both assertions are in error. Florida's courts and the Federal courts in Florida have uniformly rejected both statutory and common law claims of intentional torts under the Economic Loss Rule, and Jarmco never raised -- and thus waived -- the applicability of the Uniform Commercial Code ("UCC"), much less Section 672.721, Florida Statutes, as an alternative basis for recovery of economic losses until Jarmco filed its initial brief with the Fourth District.

The Economic Loss Rule bars all tort claims -- including statutory claims -- where the relationship of the parties is governed by a contract. Serina, 744 F. Supp. 1113 (M.D. Fla. 1990). Moreover, the Eleventh Circuit held that even the statutory intentional tort of civil theft is barred by the Economic Loss Rule absent an "independent tort" as evidenced by personal injury or damage to other property. Hoseline, Inc., 40 F. 3d 1198. See also, Kalman v. Morris-North American, Inc., 531 So. 2d 394 (Fla. 3d DCA 1988) (no statutory civil theft claim where contractual relationship exists between the parties); Futch v. Head, 511 So. 2d 314 (Fla. 1st DCA 1987) (existence of contract negated trebling of damages under Anti-Fencing Act), rev. den., 518 So. 2d 1275 (Fla. 1987); John Brown Automation, 537 So. 2d 614 (Fla. 2d DCA 1988), rev. den. 547 So. 2d 1210 (Fla. 1988) (fraud claim barred); Belford Trucking Co. v. Zagar, 243 So. 2d 646 (Fla. 4th DCA 1970) (conversion barred).

Jarmco raises a claim of deceptive and unfair trade practices that is contractual in nature. The claim seeks the same damages that are sought in contract and arises out of the same facts that support the breach of contract; no personal injury or damage to other property is alleged. Accordingly, even though Jarmco attempts to allege a claim in tort, it cannot circumvent the existence and effect of the contractual relationship simply by disguising the claim as a tort. Ginsberg v. Lennar, 645 So. 2d 490 (Fla. 3d DCA 1994) (counts for conversion, civil theft and RICO barred by the Economic Loss Rule). This Court should affirm the

Fourth District's conclusion that the Economic Loss Rule bars all of Jarmco's tort claims including its claim of deceptive and unfair trade practices.

Moreover, Jarmco never raised the applicability of the UCC, much less Section 672.721, Florida Statutes, as an alternative basis for recovery of its claim for economic loss until it filed its initial brief before the Fourth District. As with the brief it filed with this Court, there is no reference to any portion of the record before the trial court or the Fourth District. In fact, Jarmco did not raise the applicability of Section 672.721 at any time before the trial court -- not at the hearing on Polygard's motion for summary judgment, in its memorandum in opposition to Polygard's motion, in its own motion for rehearing or at the hearing on that motion. (R 58-64; 327-331; 381-385; 553-613 and 614-653). By failing to raise this issue below, Jarmco waived its right to raise this issue on appeal. Wildwood Properties, Inc. v. Archer of Vero Beach, 621 So.2d 691 (Fla. 4th DCA 1993), (Where court affirms summary judgment because "...the grounds now raised [by appellant] were not brought to the attention of the trial court in opposition to the summary judgment."); Pohland v. First Nat'l Bar & Grill, 418 So.2d 1111 (Fla. 4th DCA 1982) (trial court erred when it applied statute not relied on in pleadings).[11] Moreover,

[11]Moreover, because Jarmco's theory regarding the applicability of Section 672.721, Florida Statutes, is more in the nature of an avoidance of the Economic Loss Rule, Jarmco was required to raise that issue in its response to Polygard's motion for summary judgment or that avoidance was waived. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), ("[F]ailure to raise as an affirmative defense before a trial court considering a motion for summary judgment

the Fourth District did not address Jarmco's assertions regarding the UCC in its opinion and thus that issue, not being in the record, is not within this Court's jurisdiction on review.

However, even if Jarmco had raised this issue before the trial court, this Court should reject this claim because Jarmco's theory is specious. First, the mere fact that a transaction falls within the UCC does not mean that it is immune to the application of the Economic Loss Rule. See, GAF Corp. v. Zack, 445 So. 2d at 352 ("Under no tort...theory known to our law, then, does the plaintiff Zack have a cause of action for negligence or breach of implied warranty against the defendant GAF for the economic losses it sustained in this case. The plaintiff Zach's sole remedy, if any, for these economic losses would be an action for breach of warranty of merchantability under the Uniform Commercial Code [cite omitted] or a related breach of contract action..."). Id. at 352 (emphasis added).

Furthermore, Section 672.721, Florida Statutes, does not create a cause of action where none exists. It merely identifies the remedies available to persons subject to the Uniform Commercial Code **who can allege a separate and independent tort** arising out of their dealings.

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precludes raising that issue for the first time in appeal."); F.M.W. Properties, Inc. v. People's First Financial Savings & Loan Association, 606 So.2d 372 (Fla. 1st DCA 1992); Goldberger v. Regency Highland Condominium Ass'n, Inc., 452 So.2d 583 (Fla. 4th DCA 1984). Accordingly, this Court should reject outright Jarmco's argument of the applicability of Section 672.721, Florida Statutes, to this matter. Dober v. Worrell, 401 So.2d 1322.

This Court should reject outright Jarmco's argument regarding the application of Section 672.721, Florida Statutes (1994), to this action because that argument has been waived by Jarmco or because it is irrelevant to this appeal since Jarmco can allege no separate and independent cause of action in tort.

**THE "OTHER PROPERTY" EXCEPTION TO THE ECONOMIC LOSS RULE DOES NOT APPLY TO PRODUCTS, LIKE THE RESIN, WHICH ARE USED TO CREATE, AND BECOME A COMPONENT OF, A FINISHED PRODUCT.**

The Fourth District correctly affirmed the trial court's finding that the resin purchased by Sinclair did not damage "other property" and thus the Economic Loss Rule barred Jarmco's tort-based claims. American Universal Ins. v. General Motors Corp., 578 So. 2d 451 (Fla. 1st DCA 1991).

The Economic Loss Rule prohibits recovery in tort of purely economic damages -- for inadequate value or the cost of repair and replacement of defective products -- unless those damages are accompanied by bodily injury or physical property damage to "other property." 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). Moreover, in the context of property damage, the property must be outside the scope of the contract between the parties. Interstate Securities Corp. v. Hayes Corp., 920 F. 2d 769 (11th Cir. 1991). Jarmco claims that the "other property" exception to the Economic Loss Rule removes its tort-based claims from the Rule's preclusive effect. Jarmco is incorrect; there is no "other property" damage here.

In applying the "other property" exception to the Economic Loss Rule, this Court has always distinguished between component parts -- products purchased **for the purpose** of being incorporated into or used to create another product -- and finished products. Casa Clara Condominium Ass'n, 620 So. 2d at 1245. See also, those

cases cited in the First District's discussion of "other property" in American Universal Ins., 578 So.2d at 453-454. Where a purchaser intends that a product become a component or integral part of or that it be used to create another product, then the other product -- the "created" product -- if damaged, is not "other property" and the Economic Loss Rule will bar any tort-based claims even where the component is alleged to be the cause of the damage. See, e.g., Casa Clara Condominium Ass'n, 620 So. 2d at 1244; Aetna Life & Cas. Co. v. Therm-O-Disc, Inc., 511 So. 2d 992 (Fla. 1987); American Universal Ins. Group, 578 So. 2d at 451; and GAF Corp. v. the Zack Co., 445 So. 2d 350 (Fla. 3d DCA 1984). Cf. Southland Constr'n, Inc. v. The Richeson Corp., 642 So. 2d 5 (Fla. 5th DCA 1994), and Nat'l Marine Underwriting, Inc. v. Donzi Marine Corp., 655 So. 2d 176 (Fla. 3d DCA 1995). On the other hand, if a product is purchased for use with an existing "finished" product, then damage to the existing product will be damage to "other property." E.I. DuPont de Nemours & Co. v. Finks Farms, Inc., 656 So. 2d 171 (Fla. 2d DCA 1995).

Jarmco misconstrues Casa Clara Condominium Ass'n when it urges this Court, in its analysis of the "other property" exception, to focus on the "character of the loss" as evidenced by the "product purchased" by the plaintiff. Jarmco asserts that the "product purchased" by Sinclair was the resin and thus the damage to the boat was damage to "other property." However, even though the product purchased by Sinclair was the resin, Jarmco distorts the

analysis of Casa Clara Condominium Ass'n when it asserts that any damage to the boat hull constitutes "damage to other property."

This Court instructed in Casa Clara Condominium Ass'n, that where the product purchased by the plaintiff differs from the product sold by the defendant, then we look to the product purchased by the plaintiff to determine if the property damage alleged constitutes "damage to other property." Casa Clara Condominium Ass'n did not endorse the superficial and simplistic analysis proposed by Jarmco -- where the product actually purchased by the plaintiff differs from the property damaged, then the "other property" exception applies automatically. If Jarmco's analysis was correct, then this Court would have reached an entirely different conclusion in Casa Clara Condominium Ass'n and would have affirmed the Fourth District's opinion in Adobe Building Centers v. Reynolds, 403 So. 2d 1033 (4th DCA 1981), disapp'd 620 So. 2d 1244 (Fla. 1993).

Instead, Casa Clara Condominium Ass'n teaches that where the product purchased by the plaintiff differs from the property damaged, the "other property" exception might apply and the claim may survive the Economic Loss Rule unless, as here, the plaintiff intended to use the product to create another product. Moreover, this rule applies even though the product may appear "finished" because it was sold in its own container. In this case, the "product purchased by the plaintiff" and the "property created from the product purchased by the plaintiff" became one and the same for purposes of the Economic Loss Rule. American Universal Ins., 578

So. 2d at 453-454 ("the pump became an integral part of the repaired engine and when it damaged itself and the engine parts, this was not damage to 'other property'."). Accordingly, where, the "finished product" -- the product sold by the defendant -- damages the "created property" -- the property created by or from the "finished product" -- then that damage is not damage to "other property" and the Economic Loss Rule will bar the plaintiff's tort-based claims. Id.

Here, Sinclair purchased resin from Jarmco for **the purpose of using the resin to construct a boat hull.** (R 2-4). Prior to his purchase of the resin, there was no "finished boat hull." Instead, Sinclair used the resin -- the product sold by the defendant -- with other components, to create the boat's hull -- the "created property." Thus, when the hull of Sinclair's boat was damaged, just as with the switch in Aetna Life & Cas. Co., the roofing material in GAF Corp., the oil pump in American Universal Ins. and the defective rebar in Casa Clara Condominium Ass'n, no other property was damaged. Accordingly, the Fourth District was correct when it affirmed the trial court's conclusion that the "other property" exception to the Economic Loss Rule did not apply. Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d at 628, ("AFM Corp. reaffirms that there can be no independent tort action for purely economic loss without an accompanying physical injury or other property damage.").

Jarmco alleges that E.I. DuPont de Nemours & Co. v. Finks Farms, Inc., 656 So. 2d 171 (Fla. 2d DCA 1995), controls this issue. However, Jarmco is mistaken; this is not Finks Farms.

In Finks Farms, the plaintiff owned tomato plants -- a completed or "finished" product -- before it bought the Benlate. Thereafter, the plaintiff bought Benlate for the express purpose of applying it to its tomato plants. The plaintiff did not buy the Benlate to create a product because the plaintiff already owned a "finished product" -- the tomato plants.[12] Thus, when the Benlate was sprayed on the plants, it damaged "other property" -- the tomato plants.

In this case, Sinclair had no "completed or finished product" before he purchased the resin; the "completed or finished product" arose out of his use of the resin.[13] In fact, the very purpose for his purchase of the resin was the "construction of an ocean-going vessel." (R 2-4). Therefore, even though the resin purchased by Sinclair was as "finished" -- i.e., sold in its own container -- as the Benlate purchased by Finks Farms, because Sinclair used the resin to create another product -- here, the boat hull -- any damage to the boat hull is not be damage to "other property."

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[12]While presumably, the Benlate would have helped the plant, it cannot be disputed that the tomato plant existed before the Benlate was applied.

[13]See, e.g., Affidavit of MacLean Sinclair at ¶2 ("From 1984 through 1991 I was engaged in building a 58 foot sail yacht custom designed and built for ocean charter trips to the Bahamas and the Caribbean Sea. The deck and the transom were finished and I had formed the hull by the time I started buying the...resin from Jarmco." R 319).

Quite simply, Sinclair had no "other property" to damage before he bought the resin.

This case is indistinguishable from Casa Clara Condominium Ass'n, American Universal Ins., Aetna Life & Cas. Co. and GAF Corp.

No other property "existed" in Casa Clara Condominium Ass'n when the contractor bought the rebar. Instead, the contractor bought rebar for the express purpose of creating a product -- a condominium. Therefore, because no "other property" existed when the rebar was purchased, no "other property" was damaged when the rebar rusted.

Likewise, no "other property" existed in GAF Corp., Aetna Life & Cas. Co. or American Universal Ins. prior to the plaintiff's purchase of the product. In GAF Corp., roofing materials were used to create the defective roofs; no home existed before the roof was constructed. In Aetna Life & Cas. Co., no "operable" heat transfer unit existed until the switch was installed; and in American Universal, no "working" engine existed before the oil pump was installed. This same situation is present here. "The 'character of the loss' is not just...useless [resin] -- it is a [boat hull] deprived of a substance that is essential to its [use]." American Universal Ins., 578 So. 2d at 454.

This Court should affirm the Fourth District's opinion on this issue. Casa Clara Condominium Ass'n, 620 So. 2d 1244; American Universal Ins., 578 So. 2d 451; and GAF Corp., 445 So. 2d 350.

## CONCLUSION

The Fourth District acted correctly when it concluded that the Economic Loss Rule barred Jarmco's tort claims. However, the Fourth District erred when it concluded that Jarmco's claim of fraud in the inducement was an "independent tort." Jarmco has alleged no personal injury or damage to other property and thus its claim for economic losses -- including its claim of fraud in the inducement -- was barred by the Economic Loss Rule. Accordingly, this Court should affirm the decision of the Fourth District on all points except its ruling on Jarmco's claim of fraud in the inducement and on that point, this Court should affirm its decisions in AFM, Casa Clara Condominium Ass'n and Airport Rent-A-Car, conclude that Jarmco's claim of fraud -- because it alleges no personal injury or damage to other property -- is not an "independent tort" and overturn the Fourth District decision to the extent that it concludes that Jarmco's claim of fraud is not barred by the Economic Loss Rule.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Jane Kreusler-Walsh, Esquire, Jane Kreusler-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 17th day of June, 1995.

Attorney

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