SUPREME COURT OF FLORIDA

CASE NO. SC10-1022

TIARA CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation, in its own name and as agent for all owners of record of all individual condominium parcels with the Tiara Condominium,

Movant/Appellant,

v.

MARSH & MCLENNAN COMPANIES, INC., a Delaware corporation; MARSH, INC.; and MARSH, USA, INC.,

Respondent/Appellee.

Lower Tribunal No. 09-11718-GG

MOVANT/APPELLANT'S REPLY BRIEF

QUESTION CERTIFIED FROM THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS

McAlpine & Associates, P.C.
Mark L. McAlpine
Attorney for Movant/Appellant
3201 University Drive, Suite 100
Auburn Hills, Michigan 48326
Telephone: (248) 373-3700
Facsimile: (248) 373-3708
mlmcalpine@mcalpinelawfirm.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Treatises

INTRODUCTION

There would be little reason for the Eleventh Circuit to certify a legal issue to this Court if, as Marsh argues, the issue centers on whether insurance brokers are required to hold a four year degree for licensure. The real issue is not so narrow.

Instead, the issue is whether Tiara's claims for negligence and breach of fiduciary duty are subject to the economic loss rule. Under this Court's precedent, the answer is *no*. In *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*,[1] this Court held that the economic loss rule does not apply to "causes of action based upon torts independent of the contractual breach."[2] And in *Moransais v. Heathman*,[3] this Court clarified that the economic loss rule does not bar "well-established common law causes of action," including, but not limited to, professional negligence actions:

> Today, we again emphasize that by recognizing that the economic loss rule may have some genuine, but limited, value in our damages law, we never intended to bar well-established common law causes of action, such as those for neglect in providing professional services.[4]

---

[1] *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996)

[2] *Id.* at 1239.

[3] *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999)

[4] *Id*. at 983.

Because Tiara's claims for breach of fiduciary duty and negligence are independent torts under *HTP*, and because they are well-established common law causes of action under *Moransais*, the economic loss rule has no application. Thus, it is of no moment whether insurance brokers are required to hold a four year degree.

The essence of Marsh's remaining arguments is that Tiara's breach of fiduciary duty and negligence claims are not independent torts. But applying the economic loss rule absent a contractual breach would thwart the purpose of the economic loss rule, which is to apply contractual remedies to a breach of contract—not to allow zero remedy for acts falling outside the scope of a contract. And because there was no contractual breach in this case (as held by the Eleventh Circuit), Tiara's claims easily qualify for the economic loss rule's exception for independent torts, i.e., "torts independent of the contractual breach."

Marsh's strategy, then, is to reformulate the test for what constitutes an "independent tort," arguing that a tort is not independent when it relates to the broadly-defined "subject matter" of a contract. But this Court has never adopted Marsh's test, and applying it would require overruling this Court's decision holding that claims for fraudulent inducement are independent torts,[5] as a

[5] *Indem. Ins. Co. v. Am. Aviation Inc*., 891 So.2d 532, 537 (Fla.2004) ("Fraudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract").

fraudulent inducement claim undoubtedly relates to the subject matter of a contract. Instead, this Court's decisions clearly hold that a tort is independent where the operative act does not constitute a contractual breach. Absent a contractual breach, all torts are necessarily independent. Accordingly, Tiara's claims are independent and not subject to the economic loss rule.

I. The purpose of the economic loss rule is to apply contractual remedies to a breach of contract.

The stated purpose of the economic loss rule is to "prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort."[6] This purpose is not served, however, if the economic loss rule were to apply when the parties *do not* allocate losses arising from a given event. And it naturally follows that the purpose is not served were the rule to apply when a broker and its insured do not allocate loss arising from (1) the broker's failure to advise an insured of its belief that it was under-insured, and (2) properly advise the insured regarding its complete insurance needs.

Here, the parties did not allocate losses arising from Marsh's breach of these duties, referred to as "collateral failures" by the Eleventh Circuit. [7] Marsh freely

---

[6] *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004).

[7] *Tiara Condo. Ass'n v. Marsh & McLennan Cos., Inc.*, 607 F.3d 742, 747–48 (11th Cir. 2010) ("Tiara contends that Marsh was negligent in failing to procure for it an insurance policy providing appropriate coverage and that Marsh's actions fell short

admits that they were "not specifically included in the contract." According to Marsh, "the 'collateral failures' were held not to give rise to breach of contract claims []because they were not among the agreed-upon duties specifically delineated" in the parties' oral contract. And the Eleventh Circuit agreed, rejecting the contention that "Marsh's contractual duties made it responsible for ensuring that Tiara was adequately insured."[8]

If the parties had actually contracted over Marsh's tort duties, then this Court would be presented with a different question: whether an insured can maintain a tort action despite the existence of a controlling contractual provision. But here, the question of contractual preemption of tort law is academic—this is because there is no arguably preemptive contract provision. Thus, absent a contract breach with a corresponding contractual remedy, tort liability provides the exclusive remedy for Marsh's breach of its longstanding obligations arising from independent legal duties.

---

of performing its duties as insurance broker and fiduciary. Specifically, Tiara cites several 'collateral failures' such as Marsh's failure to advise Tiara of its belief that it was under-insured and properly advise it regarding its complete insurance needs. . . . [T]o the extent that Tiara's claims are based on collateral failures, we find that Florida law is not sufficiently clear on whether such claims are barred as extra-contractual under the economic loss rule.").

[8] *Tiara Condo. Ass'n.*, 607 F.3d at 746.

II. Hypothetical contract remedies do not make tort relief unavailable.

Marsh seeks to resurrect the economic loss rule by imagining a hypothetical contract under which the parties *could have* allocated the risk of Marsh's breach of its duties. Invoking the broad concept of "subject matter," Marsh argues that the parties *could have* allocated losses if a tort is based on the "subject matter" of a contract; and if a tort is based on the "subject matter" of a contract, then the tort that causes those losses is not extra-contractual. In other words, Marsh asks this Court to assume that tort duties described by the Eleventh Circuit as "extra-contractual" are not, in fact, extra-contractual, because they relate to the "subject matter" of the contract. But this Court has never suggested that a hypothetical contract remedy makes tort relief unavailable. Nor has it required that a tort be independent from a contract's broad "subject matter."

To the contrary: This Court has merely required independence from a "contractual breach"—a much narrower legal concept.[9] Towards this end, this Court explained in *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc*.[10] and *HTP, Ltd. v. Lineas Aereas Costarricenses*[11] that "[t]he economic loss rule has not eliminated

[9] *See* Black's Law Dictionary (8th ed. 2004), breach (defining *breach* as "[a] violation or infraction of a law or obligation").

[10] *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc*., 891 So.2d 532 (Fla. 2004).

[11] *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238 (Fla.1996).

causes of action based upon torts ***independent of the contractual breach***."[12] In *Moransais v. Heathman,*[13] this Court explained that "[w]here a contract exists, a tort action will lie for either intentional or negligent acts considered to be ***independent from acts that breached the contract***."[14] Various jurisdictions, for that matter, simply require that the tort be premised on a legal duty independent of the contract.[15] So the question of independence only requires independence from a breach—not the contract's subject matter.

---

[12] *Indem. Ins. Co. of N. Am.*, 891 So.2d at 537 (quoting *HTP, Ltd.*, 685 So.2d at 1239).

[13] *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999).

[14] *Id.* at 981.

[15] *See, e.g*., *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc*., 573 F.3d 947, 962 (10th Cir. 2009) ("Even if a claim asserting only economic loss could be framed as a breach of contract, it is not barred by Colorado's economic-loss rule if it rests on an 'independent duty of care under tort law.'"); *KBI Transp. Servs. v. Med. Transp. Mgmt., Inc*., 679 F. Supp. 2d 104, 108–109 (D.D.C. 2010) ("[I]n most circumstances, a breach of contract may only give rise to a tort claim when there is an independent basis for the duty allegedly breached."); *Sheppard v. Yara Eng'g Corp*., 281 S.E.2d 586, 587 (Ga. 1981) ("It is axiomatic that a single act or course of conduct may constitute not only a breach of contract but an independent tort as well, if in addition to violating a contract obligation it also violates a duty owed to plaintiff independent of contract to avoid harming him."); *Baccus v. Ameripride Servs., Inc*., 179 P.3d 309, 313 (Idaho 2008) ("[I]n order for a cause of action to arise in tort, Claimants must establish the breach of a tort duty, separate and apart from any duty allegedly created by the contract.") (internal quotation marks omitted)); *Victory Lane Quick Oil Change, Inc. v. Hoss*, 659 F. Supp. 2d 829, 839 (E.D. Mich. 2009) ("In order to sustain a tort action which is based upon a contractual obligation depends on whether the conduct constituted a breach of duty separate and distinct from a breach of contract."); *Bennett v. ITT Hartford Group, Inc*., 846 A.2d 560, 564 (N.H. 2004) ("A breach of contract standing alone does not give rise to a tort action; however, if the facts constituting the breach of

If logic is to prevail, the absence of a contractual breach means, *ipso facto*, that all torts are independent and, as such, not barred by the economic loss rule. Applying this logic, the Eleventh Circuit's holding that there was no contractual breach means that Tiara's tort claims are independent and, as such, not subject to the economic loss rule.

III. This Court has never adopted Marsh's self-formulated test for contractual independence.

Marsh also advocates for another test for what constitutes an independent tort, arguing that a tort is not independent if it is "'intertwined with' the allegations

---

the contract also constitute a breach of duty owed by the defendant to the plaintiff independent of the contract, a separate tort claim will lie."); *Clark-Fitzpatrick, Inc. v. Long Island R. Co*., 516 N.E.2d 190, 193–94 (N.Y. 1987) ("It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.") (internal citations omitted)); *Kelly v. Georgia-Pacific LLC*, 671 F. Supp. 2d 785, 791 (E.D.N.C. 2009) ("To pursue a tort claim and a breach of contract claim concerning the same conduct, "a plaintiff must allege a duty owed him by the defendant separate and distinct from any duty owed under a contract."); *Schipporeit v. Khan*, 775 N.W.2d 503, 505 (S.D. 2009) ("Tort liability requires a breach of a legal duty independent of contract. This independent legal duty must arise from extraneous circumstances, not constituting elements of the contract.") (internal citations and quotations marks omitted)); *Foreign Mission Bd. v. Wade*, 409 S.E.2d 144, 148 (1991) (holding that a tort claim arising out of a contractual agreement may only stand as an independent claim where "the duty tortiously or negligently breached [is] a common law duty, not one existing between the parties solely by virtue of the contract.").

underlying the claim for breach of contract."[16] But this Court has never adopted such a test.

Rather than relying on this Court's jurisprudence, Marsh instead relies on isolated language from a federal district court opinion, *Action Nissan Inc. v. Hyundai Motor America*,[17] which contains the following language: "While the economic loss rule does not automatically bar a breach of fiduciary duty claim, the rule does apply when the claim for breach of fiduciary duty is based upon and inextricably intertwined with the claim for breach of contract."[18]

But *Action Nissan* is not precedential.[19] More importantly, common sense dictates that language contained in a judicial opinion is to be understood in the light of the facts and issue then before the deciding court. An examination of the facts and issues in *Action Nissan* actually strengthens the conclusion that Tiara's breach of fiduciary duty and negligence claims are not barred by the economic loss rule.

---

[16] Marsh Resp. Br. at 31.

[17] *Action Nissan Inc. v. Hyundai Motor America*, 617 F. Supp.2d 1177 (M.D. Fla. 2008).

[18] *Id*. at 1192-93.

[19] *See Hoffman v. Jones*, 280 So.2d 431, 434 (Fla. 1973) (holding that the Supreme Court prevails over any conflicting decision "until the Supreme Court overrules itself").

Action Nissan, concerned a dispute between a automobile dealership and a franchisor regarding the latter's disbursement of funds earmarked for advertising. The dealership claimed that the franchisor breached its fiduciary duty to the dealership by misusing the advertising assessments collected from the dealership.[20] The district court found that the fiduciary duty claim was essentially an action for breach of contract because, "[t]he fiduciary duty alleged by [the dealership] arises from [the franchisor]'s purported contractual obligation to collect advertising assessments.[21] The court further noted that the dealership did not "not allege[e] or offer[] evidence of any independent special relationship between the parties that caused [the dealership] to entrust [the franchisor] with this money; the duty is established entirely by the contract.[22] Thus, the court applied the economic loss rule to the plaintiff's breach of fiduciary duty claim, holding that the alleged duty was entirely subsumed in the contract.[23]

Action Nissan, if anything, stands for the principal that a claim for breach of contract is not actionable in tort. And the court even acknowledged that its ruling would be different if the defendant were to have breached in independent legal

---

[20] *Action Nissan*, 617 F. Supp. 2d at 1192.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 1193 ("Plaintiff has not alleged or offered evidence of any independent special relationship between the parties that caused Plaintiff to entrust Defendant with this money; the duty is established entirely by the contract.").

duty.[24] As examples of "fiduciary duties independent of the contractual obligations between the parties," the court cited the "professional obligation of a service professional to a consumer," the "independent fiduciary duty [that] arises from the purchase and sale of securities," and the "independent fiduciary duty" "between nursing home care providers and their residents."[25]

This case meets *Action Nissan*'s exception to the economic loss rule for "fiduciary duties independent of the contractual obligations between the parties" because—like the independent duties listed in *Action Nisson*—this case involves the well-established independent fiduciary duty that arises between a broker and its insured, a duty recognized by this Court most recently in *Wachovia Ins. Servs., Inc. v. Toomey*.[26] So even under *Action Nissan*, Tiara's tort claims are not barred by the economic loss rule.

Marsh's formulation of the test for what constitutes an independent tort simply fails to recognize that Florida courts, including this one, have recognized that an insurance broker's "duty to . . . his insureds, in performing insurance brokerage services [is] not solely defined by contract, but rather [is]

---

[24] *Id*. ("Under Florida law, whatever duty Defendant has to Plaintiff concerning these collected assessments is defined by the contract rather than an independent fiduciary duty.").

[25] *Id*. at 1194 n.8.

[26] *Wachovia Ins. Servs., Inc. v. Toomey*, 994 So. 2d 980, 990 (Fla. 2008); *Randolph v. Mitchell*, 677 So.2d 976, 978 (Fla. 5th DCA 1996) (holding that an insurance broker owes a fiduciary duty to the insured-principal).

extracontractual in nature."[27] This independent tort liability reflects a longstanding judicial recognition of the special relationship that exists between a broker and its principal. It reflects a public policy in favor of protecting a broker's principal from breaches of fiduciary duties and independent torts. Application of the economic loss rule would undermine the Court's recognition of independent tort liability, and it would fly in the teeth of the public policy that gave rise to that liability, essentially leaving brokers to perform important functions without liability. This is especially true under the facts of this case, where there is not even a contractual limitation of liability clause in the parties' contract. Thus, to allow Marsh to avoid liability under such circumstances would mean that the pendulum has swung from consumer protection to a wholesale absolution of broker liability.

IV. The pleading of Tiara's dismissed breach of contract count isirrelevant towards whether its tort claims are independent torts.

Marsh attempts to show a lack of independence between the contract and Tiara's tort claims by assuming the truth of Tiara's allegations in its dismissed contract claim. To be sure, Tiara would have a viable breach of contract claim if Marsh were to admit that it assumed contractual obligations to (1) advise Tiara of

[27] *Randolph v. Mitchell*, 677 So. 2d 976, 978 (Fla. 5th DCA 1996) (quoting *Kanter v. Deitelbaum*, 648 N.E.2d 1137, 1139-40 (Ill. App. Ct. 1995)); *see also Wachovia Ins. Servs., Inc. v. Toomey*, 994 So. 2d 980, 990 n.5 (Fla. 2008) ("Indeed, insurance brokers will often have both a fiduciary duty to their insured-principals and a common-law duty to properly procure requested insurance coverage.") (citing *Randolph*, 677 So. 2d at 978).

its belief that Tiara was under-insured, and (2) properly advise Tiara regarding its complete insurance needs. But Marsh contended otherwise, and the Eleventh Circuit held that there was no contractual breach, citing "inadequate evidence regarding the scope of the oral agreement."[28] Tiara's allegations in its complaint as to the scope of Marsh's contractual obligations are all the more irrelevant, *a fortiori*, because federal procedural rules allow parties to allege inconsistent and alternative allegations[29] (Florida's procedural rules similarly allow for the pleading of inconsistent and alternative allegations).[30] So the manner in which Tiara pleaded its breach of contract claim is of no moment.

---

[28] *Tiara Condo. Ass'n*, 607 F.3d at 746.

[29] *In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1321 (S.D. Fla. 2010) ("Federal Rule of Civil Procedure 8(d) allows pleading in the alternative, even if the theories are inconsistent."); 5 Fed. Prac. & Proc. Civ. § 1282 (3d ed.) (Federal Rule 8(e)(2) affords a party considerable flexibility in framing a pleading by expressly permitting claims for relief or defenses to be set forth in an alternative or hypothetical manner.").

[30] *Ed Ricke & Sons, Inc. v. Green*, 609 So. 2d 504, 506 (Fla. 1992) ("The present philosophy, as expressed in our Rules of Civil Procedure, is to allow both plaintiff and defendant to plead alternatively in presenting their claims and defenses . . . .") (citing Florida Rule of Civil Procedure)); *Innovative Material Sys., Inc. v. Santa Rosa Utils., Inc*., 721 So.2d 1233, 1233 (Fla. 1st DCA 1998) ("Pursuant to our rules of civil procedure, a party may assert inconsistent claims or defenses in a single pleading.") (citing Fla. R. Civ. P. 1.110(g))); *Arcade Steam Laundry v. Bass*, 159 So.2d 915, 917 (Fla. 2d DCA 1964) ("[A] pleader may set up in the same action as many claims or causes of action in the same right as he may have. One may plead two or more statements of a claim alternatively in one count or in separate counts.").

CONCLUSION

For the reasons presented in Tiara's initial brief and this reply, Tiara asks this Court to restate the certified question and respond that, under Florida Law, the economic loss rule does not foreclose causes of action against insurance brokers based on breach of fiduciary or negligence. To hold otherwise would be to reverse this Court's own recognition that insurance brokers are responsible for their actions in tort and on fiduciary principles. Particularly here, where the broker admits to being aware that the policy it sold was insufficient, this longstanding liability should not be overturned to protect the broker from its failure to share that critical information with its principal.

Respectfully submitted,

MCALPINE & ASSOCIATES, P.C.

MARK L. MCALPINE (*pro hac vice)*
Attorney for Movant/Appellant
3201 University Drive, Suite 100
Auburn Hills, Michigan 48326
Telephone: (248) 373-3700
Facsimile: (248) 373-3708
mlmcalpine@mcalpinelawfirm.com

CERTIFICATE OF SERVICE

I certify a copy of the foregoing was filed with the Clerk of the Florida Supreme Court by e-mailing the MS Word version to the Court and an original and seven copies were sent to the Court by U.S. mail on September 27, 2010; and the parties listed below were served by U.S. mail on September 27, 2010.

Francis Anthony Anania
Roberto Angel Torricella, Jr.
ANANIA BANDKLAYDER
BAUMGARTEN & TORRICELLA
Miami Tower, Suite 4300
100 Southeast Second Street
Miami, Florida 33131

Clerk of the Court
UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, GA 30303-2289

Christopher J. St. Jeanos (pro hac vice)
Mitchell J. Auslander (pro hac vice)
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019

Clerk of the Court
UNITED STATES DISTRICT COURT
701 Clematis Street, Room 202
West Palm Beach, FL 33401

By: _____
MARK L. McALPINE

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Brief was prepared in 14-point Times New Roman font.

By: _____

MARK L. McALPINE