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SUPREME COURT OF FLORIDA

CASA CLARA CONDOMINIUM ASSOCIATION, INC., etc., et al.,

Petitioners,

vs. CASE NO. 79,127

CHARLEY TOPPINO AND SONS, INC., etc.,

Respondent.
_____/

CHRISTOPHER H. CHAPIN, et al.,

Petitioners,

vs. CASE NO. 79,128

CHARLEY TOPPINO AND SONS, INC., etc.,

Respondent.
_____/

AMICUS CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION

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STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association ("FDLA") adopts the Statement of the Case and Facts submitted by the Respondents herein. This Brief is intended to address only the issue of the economic loss rule and does not address the issues relating to the application of building codes to Respondents as an additional cause of action.

SUMMARY OF ARGUMENT

On behalf of Respondents, FDLA urges the Court to reject the Petitioners request to abandon the economic loss rule which prohibits tort recovery when only economic loss has been incurred, and when no other property has been damaged. This Court reaffirmed the viability of this doctrine five years ago and the underlying logic for its application has not changed during that time frame to justify the destruction of it now.

If Petitioners were to prevail, the Court would establish rights for recovery in tort for nonprivy plaintiffs who were the end recipients of allegedly defective products. As a plaintiff in tort, they would be entitled to be placed back in the position they were in before purchasing or receiving the product. A plaintiff in contract would be entitled to receive the benefit of his bargain. Thus, if a seller had limited the warranties given contractually to his privy in exchange for a reduction in price, the plaintiff in privity would only be able to argue that he had not received that for which he had bargained. A plaintiff in tort, however, would have much greater rights, free from any contractual limitations. An anomaly is thus created when nonprivy plaintiffs will more likely have the greater rights over the contracting party.

If any adjustment is to be made to the economic loss rule, it should be made by the Legislature as the existing UCC provisions permitting sellers to limit their liability to buyers will

necessarily be affected. The Court should affirm the Third District and reconfirm the economic loss rule.

ARGUMENT

Petitioners seek to abolish the economic loss rule in Florida where there can be proven no personal injury has occurred, or that due to the structural damage, personal injury is imminent, or that damage to other property has occurred. In order to succeed with this proposition, Petitioners must demonstrate that the theories and rationales supporting the economic loss theory have become obsolete, or were never a proper premise for such a theory. FDLA will show that the theory has logical underpinnings, and that this Court was correct in sustaining the theory five years ago. Further, it will be shown that there has been no change in the marketplace since the Court last decided this issue which would justify the abolition of the theory now.

The Court surely realizes that one of the most primary of the concerns which must be dealt with is the impact that the abolition of the economic loss theory would have on private contracts, even if the doctrine were abolished only prospectively. As the parties and the various amici have demonstrated in their briefs, the negotiation of contract terms in construction matters, such as the instant ones, are often highly dependent on the scope of the work and the anticipated risks involved. The price for the goods is also dependent on the potential liability assumed by the sellers. It is standard in the industry for sellers to avail themselves of the ability to limit the warranties which will be presumed according to

the limits provided in the Uniform Commercial Code. See § 672.316, 672.718, 672.719, Fla. Stat.

Florida's UCC allows sellers to limit the liability which could occur from the sale of goods as between the seller and its privy. For example, the sale could be limited to "as is" eliminating most of seller's liability to buyer, and thus justifying a reduced price, assuming a nonprivy did not have a greater right to recover against the seller for "defects" in the product. If the economic loss rule were eliminated, in the absence of personal injury or damage to other property, the seller would be exposed to the direct and consequential damages of the nonprivy even though the seller had bargained for far less. In the latter scenario, the seller will not market the goods for the lesser price, and the buyer will be precluded from obtaining them under the limited contractual conditions as he had wished.

Similarly, the seller may now limit his contractual exposure by a stated dollar amount. See § 672.719, Fla. Stat. Under section 672.719, a seller may currently limit the liability flowing from any sale, absent personal injury or fraud, to allowing buyer to return the goods for a refund, or to repair and replace the nonconforming goods. The seller may also eliminate the buyer's right to recover for consequential damages entirely as part of the negotiated contract.

Florida law has consistently held that tort claims are barred by the economic loss doctrine when such claims allege purely economic damages. Cedars of Lebanon Hospital v. European X-Ray

Distributors, Inc., 444 So. 2d 1068 (Fla. 3d DCA 1984); GAF Corp. v Zack Co., 445 So. 2d 350 (Fla. 3d DCA 1984), rev. denied 453 So. 2d 45 (Fla. 1984). The Third DCA recognized that the privity requirement had been eliminated in suits against professionals such as A.R. Moyer, Inc. v. Graham, 285 So. 2d 387 (Fla. 1973). Even so, the Court refused to strip the privity requirement from tort actions with only economic losses. The expansion of liability in Moyer was justified because such expansion was limited to those foreseeable or known third parties who would be directly affected by the architect's work.

The First DCA recognized the overexpansiveness of tort remedies when applied to circumstances which are essentially contractual in nature. Monsanto Agricultural Products Co. v. Edenfield, 426 So. 2d 574 (Fla. 1st DCA 1982). The Court held that

> "tort law imposes upon manufacturers a duty to exercise reasonable care so that the products they place in the marketplace will not harm persons or property. However, tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers. Such a duty does, of course, exist where the manufacturer assumes the duty as part of his bargain with the purchaser, or where implied by law, but the duty arises under the law of contract, and not under tort law. Prosser, Law of Torts § 101 (4th Edition 1971); Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965); Clark v. International Harvester Co., 99 Idaho 326 581 P.2d 784 (1978).

The Court reversed the trial court's failure to direct a verdict in favor of the defendant on the negligence count.

Seely v. White Motor Co., 45 Cal Rptr. 17, 403 P. 2d (1965), cited by the First DCA, provides a well reasoned explanation for

the distinction between nonprivity warranty claims and the disallowance of nonprivity tort claims. In Seely the court held:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

The rationale offered by the Seely Court and as adopted by the First DCA has not diminished since the publishing of these two opinions. If anything, the reasons for requiring privity are more compelling. As the stream of commerce becomes more accelerated and global, a manufacturer or supplier will have little control over where the goods may ultimately be sold and into which hands they may fall. As Seely suggests, there are recognized standards that the manufacturer may have to comply with minimum codes which insure safety, but to go beyond these minimal standards to require compliance, with an amorphous duty of care dependent upon each circumstance and end receiver, is to require manufacturers to hedge against the toughest standards and to price goods accordingly.

These concepts were all duly noted by this Court in Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987). Decided just five years ago, this Court acknowledged that a majority of jurisdictions apply the economic loss theory and that this is not new to Florida. As the United States Supreme Court offered in East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L.Ed. 2d 865 (1986), an application of tort law to a product which "only injures itself" creates a tortured result because the wrong is totally different from one causing personal injury or other property damages. This Court correctly expressed the resultant "duty of care" which would be created from such a tort application as particularly unsuited to the vagaries of individual purchasers' product expectations. 510 So. 2d at 901.

Petitioners claim here, as did the petitioners in FP &L, that their remedies are unfairly restricted. While Petitioners may have no tort remedies against Toppino, they have not argued that they are entirely remediless. Also, Petitioners suggest that in the presence of an alleged wrong (that is presuming the correctness of the claim of defective cement arguendo) there must be a concomitant legal remedy. If this were necessarily so, this Court would never find that an injured party could not recover against an alleged wrongdoer. Yet, the law is not so free flowing that the mere presence of an injury requires that a cause of action be created even if a viable solvent defendant is far removed from the wrong itself. Sovereign immunity prevents claims where discretionary

decisions lead to the injury. The "fireman's rule" prevents the recovery of an admittedly negligent fireman or policeman who is acting in his or her line of duty. These are just a few instance where the injured party may have no viable legal remedy at all.

They further attempt to draw a distinction in this case due to the claim that the "product" supplied here is or has damaged other products, i.e. other components of the house. In support of this theory, Petitioners contend that the way homes are constructed and the way products are manufactured are fundamentally different but they do not specify how or offer why such a distinction would matter. It cannot categorically be said the assembly of a home with products from various manufacturers makes it any different from the assembly of a product with base materials from different sources. Further, the incorporation of the house into the realty does not affect the seller's expectations regarding its liability as opposed to the sale of a component part of another type of product. The Supreme Court opined that even the simplest of machines has component parts and it therefore to easy a mechanism to defeat the economic loss rule by arguing that a subset of the res has damaged the remainder of that same res. East River Steamship Corp., 476 U.S at 866 (quoting Northern Power & Engineering Corp. v. Caterpillar Tractor Co., 623 P. 2d 324, 330 (Alaska 1981).

This Court rejected the "other property" argument in Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So. 2d 992 (Fla. 1987). The property in question were defective switches which failed to operate properly thus causing water in heat transfer

units to freeze. Although there was damage to property other than the switches themselves, the Court ruled that since there were only economic damages alleged, there could be no tort recovery.

Abandonment of the economic loss theory creates a rather obvious imbalance in the rights of parties who are in privity versus those who are not. A seller may rightfully restrict its liability with its privy by using express waivers and rejections of statutory warranties, and by limiting the scope of the expectation of the product by expressing the specifications according to contract. Nevertheless, the nonprivy would be able to state a cause for negligence if the product did not comply with some general standard, which standard would most likely vary according to the expert testimony offered in an individual case. Thus, a noncontracting party would have greater rights than the one contracting with the seller. A purchaser could improve the cause against the seller by passing the product on to a nonprivy who could sue for breach of a vague "reasonable" standard of care, in total disregard of what the bargain the seller had negotiated.

This is not similar to the expansion of rights against professionals as in Moyer. A close reading of Moyer evidences that the duty was not expanded but the possible plaintiffs were expanded beyond those in direct privity to those who were reasonably foreseeable to be injured by the professionals breach of duty. Here the duty itself would change to one greatly expanded over what would be owed the privy. Thus, the expansion would be not only of the available plaintiffs but the expectations and rights of

recovery for those additional plaintiffs.

Finally, Petitioners suggest that the economic loss theory should be abandoned at least piecemeal in favor of "homeowners" or "consumers" as in the instant case. The problem with such a checkered approach goes back to the reason the rule exists. The seller is placing goods in the market of a certain quality level to meet the needs of the buyer; the price is set accordingly and the warranties are also limited accordingly. If a nonprivy "homeowner" has a negligence action against the seller, in the absence of personal injury or damage to other property, the homeowner may very well have a valid claim that he is entitled to more than was warranted to the actual buyer because the duty of care is greater than the requirements of the contract. This would effectively negate the ability of sellers to limit those warranties which it gives as provided in the UCC.

If this area creates a deficiency in the rights of these Petitioners, or others in similar situations, it is inappropriate for the Petitioners to ask the Court to create for them new rights. Such a creation of new rights or remedies would be best left to the Legislature, which can examine all of the ramifications to all types of sellers, buyers, and eventual users of products in Florida.

CONCLUSION

For the reasons stated herein, the Court should reconfirm the economic loss rule and prohibit the tort claims against the Respondents. The Third District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail delivery this 16th day of October, 1992, to H. Hugh McConnell, Esq., Steven M. Siegfried, Esq., 201 Alhambra Circle, Suite 1102, Coral Gables, FL 33134; Daniel S. Pearson, Esq., P. O. Box 015441, Miami, FL 33131; Lynn E. Wagner, Esq., P. O. Box 2513, Orlando, FL 32802-2513; Mark Hicks, Esq., Suite 2402, New World Tower, 100 North Biscayne Blvd., Miami, FL 33132; Susan E. Trench, Esq., One Biscayne Tower, Suite 3250, Miami, FL 33131; Stephen Wasinger, Esq., 2700 Landmark Centre, 401 E. Jackson Street, Tampa, FL 33602; and Edwin A. Scales, III, Esq., P. O. Box 3, Lakeland, FL 33802-0003.

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