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IN THE SUPREME COURT OF FLORIDA

CASA CLARA CONDOMINIUM ASSOCIATION, INC., etc., et al., Petitioners, v. CHARLEY TOPPINO AND SONS, INC., etc., Respondent.	:	CASE NO. 79,127
CHRISTOPHER H. CHAPIN , et al., Petitioners, v. CHARLEY TOPPINO AND SONS, INC., etc., Respondent.	:	CASE NO. 79,128

BRIEF OF AMICUS CURIAE THE BABCOCK COMPANY

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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INTRODUCTORY STATEMENT

At all times pertinent to this action, The Babcock Company ("Babcock") was a large Florida corporation engaged in the business of developing, building and selling residences throughout the state of Florida. Beginning in 1980, Babcock caused its subcontractors to purchase and install a product known in the construction industry as Fire Retardant Treated Plywood ("FRT Plywood") in the roofs of several hundred of its homes in Palm Beach, Orange, St. Lucie, Seminole and Pinellas Counties. In virtually all instances, Babcock's subcontractors purchased the FRT Plywood directly from various local suppliers, which, in turn, had purchased it from one or more of several companies engaged in treating, manufacturing or distributing FRT Plywood for use as, among other things, roof sheathing material. Significantly, Babcock did not have a contractual relationship with the suppliers or treaters of the FRT Plywood.

Several years later, Babcock, like countless other similarly situated developers, contractors and homeowners across the country, discovered that the FRT Plywood contained a latent defect which caused it to buckle, degrade, deteriorate and become brittle under normal weather conditions and usage. Those defects, in turn, rendered the roofs containing the FRT Plywood structurally weak and dangerous to walk on and, by doing so, created a real and imminent risk of serious bodily harm to homeowners, repairmen and others who may have occasion to be on the roofs. In fact, the risk was so great that Babcock felt com-

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pelled to and did send written notice to all affected homeowners advising them of the defective condition and warning them to stay off their roofs until the condition could be corrected.

In an effort to eliminate that risk and restore the affected homes to a habitable condition, Babcock then undertook to inspect and, when necessary, remove and replace the defective FRT Plywood in several hundred homes across the state of Florida. The restoration program included the removal and replacement of costly barrel tile, cement tile and asphalt shingles, the installation of galvanized metal sheeting, the removal and replacement of the deteriorated FRT Plywood, the repair/replacement of damaged stucco, the replacement of galvanized and copper flashing, the replacement of roofing felt, repainting stucco and fascia and the repair of driveways, sod, atrium screening and landscaping affected by the repair process. In addition, Babcock incurred substantial labor and hauling costs in performing the repairs, running the total cost of the FRT Plywood replacement program into the millions of dollars.

In October of 1990, Babcock filed a products liability action against the treaters, manufacturers, distributors and suppliers of the subject FRT Plywood styled The Babcock Company v. Osmose Wood Preserving, Inc., et al., Case No. 90-50145 CA 21, which presently is pending in the Eleventh Judicial Circuit Court in and for Dade County, Florida. In its original Complaint, which was predicated on claims of negligence, strict liability and fraud, Babcock alleged, among other things, each of the facts

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contained in the foregoing summary. Babcock further alleged that the defects in the FRT Plywood were latent and, therefore, were not discoverable upon reasonable inspection. Babcock also alleged that, at the time they manufactured and/or sold the FRT Plywood, defendants knew or should have known that it was defective. Finally, Babcock alleged that, although they possessed such knowledge, defendants failed to warn consumers of the FRT Plywood and, in the case of the treaters, affirmatively misrepresented that it was suitable for use as fire resistant sheathing in roofs.

Despite these allegations, the trial court subsequently dismissed Babcock's tort claims against the defendants with prejudice, based on its conclusion that, as interpreted by the Third District Court of Appeal in Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 588 So.2d 631 (Fla. 3d DCA 1991), the "economic loss rule" bars Babcock from pursuing the defendants in tort, notwithstanding the fact that: (1) Babcock is not in privity with the defendants and, therefore, does not have a contractual remedy against them; (2) Babcock does not have a viable contractual remedy against the only entities with which it is in privity (i.e., its roofing subcontractors), because the FRT Plywood contained a latent defect which was not discoverable upon reasonable inspection and, in any event, the subcontractors did nothing more than purchase and install the product (i.e., FRT Plywood) that Babcock specified for use; and (3) the FRT Plywood impaired the structural integrity of the affected homes and its

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replacement caused substantial damage to "other property" in the subject roofing systems. The court also necessarily concluded that the imminent risk of serious personal injury resulting from the defective FRT Plywood was insufficient to render the economic loss rule inapplicable.

Thus, as a direct result of the Casa Clara decision, Babcock has been left without a remedy for the substantial damages caused by defendants' tortious conduct. Such a result directly contravenes the holdings in several prior decisions of this and other Florida appellate courts and is wholly inconsistent with the public policy considerations which underlie the economic loss rule. Accordingly, in the hope of preserving and clarifying the scope of already recognized exceptions to the economic loss rule and ensuring that this Court will continue to limit the rule's application so that Babcock and similarly situated parties are not left without a viable remedy, Babcock requested and was granted leave to file an amicus brief in this action. Specifically, Babcock requests that this Court limit application of the economic loss rule to cases where there is contractual privity between the plaintiff and the alleged tortfeasor. Alternatively, Babcock asks this Court to recognize that the economic loss rule does not insulate a remote manufacturer of defective building products from tort liability, where: (1) those products cause substantial damage to other building products in the structure or impair the integrity of the structure as a whole; (2) the defect creates a real and imminent risk of personal injury or property

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damage; and (3) the injured party does not have a viable contractual remedy for the economic damages caused by the product.

STATEMENT OF THE CASE AND OF THE FACTS

Babcock agrees with the Statement of the Case and of the Facts set forth in the Petitioners' Brief.

SUMMARY OF THE ARGUMENT

When limited to its intended scope, the economic loss rule serves several compelling public policy interests. First, it recognizes that commercial parties have differing interests when it comes to negotiating contracts for the sale of goods and services and it encourages them to fully express those interests in their contracts. Thus, the rule affords a party who is willing to accept more risk in exchange for a lower price the freedom to do so, while at the same time allowing another, who is risk averse, to contract for greater warranty protection and pay a higher price. More importantly, however, the rule preserves the sanctity of written contracts by assuring the parties that, once they have reached an agreement, neither side will be permitted to utilize traditional tort principles as a means of altering the negotiated allocation of risks and benefits. This, in turn, adds certainty and predictability to commercial transactions.

Over the past several years, however, Florida courts, including the Third District Court of Appeal in Casa Clara, have expanded the economic loss doctrine well beyond its intended scope, leaving the law in this area in a state of disarray and obviously injured plaintiffs, like Babcock, without a remedy. In

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the Fourth District, for example, a building product is deemed to be property that is legally distinct from the products to which it is applied and the building into which it is incorporated. Thus, if that product later proves to be defective and causes injury to surrounding products or the structure as a whole, the party injured by the defect (e.g., the owner or developer) may pursue the manufacturer in tort to recover its economic damages. In contrast, a similarly situated injured party in the Third District is left without a remedy, since, under Casa Clara, the finished structure is deemed to be "the product" for purposes of applying the economic loss rule. As a result, a defective building product can never cause compensable damage to other products within the structure or the structure as a whole.

Similarly, while some Florida courts continue to interpret the "no alternate remedy exception" to the economic loss rule recognized by A.R. Moyer and its progeny as being applicable whenever the injured party is not in contractual privity with the wrongdoer, others, including the Casa Clara court and the trial court in the Babcock case, have held that the no alternate remedy exception is not available to an injured party if it has or, arguably, could have had a contractual remedy against anyone for its economic losses. By doing so, these courts have forced parties like Babcock to file suits against arguably nonculpable defendants in the hope that they, in turn, will sue the parties with whom they are in privity and that the "chain reaction" will continue until the party who actually is at fault is brought into

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the case, if at all, as a fourth or fifth party defendant. The inequity and inefficiency of such a system is obvious. Indeed, it was the same kind of inequities that ultimately led this Court to abandon the tortured construction that Florida courts had given the privity requirement in breach of implied warranty claims in favor of the doctrine of strict liability.

Finally, there is the question of whether the existence of a real and imminent risk of serious bodily harm is sufficient to satisfy the economic loss rule's requirement that there be a "personal injury," so that a party who takes steps to remedy such a defect by removing and replacing the product before the risk manifests itself is not left without a remedy against the party responsible for its creation. Again, there is a division of thinking among Florida courts. Some, including the Third District, apparently believe that the tort system provides manufacturers of defective building products with sufficient incentives to mitigate their potential liability by correcting the defective condition before an injury arises, without their (i.e., the courts) having to fashion a rule which would encourage others who discover the condition to take immediate corrective measures at their own expense, knowing that they can seek and obtain reimbursement from the responsible party at a later date. Others, including the Fourth District, have reached the opposite conclusion and interpreted the economic loss rule in a manner that does not discourage pre-injury corrective action by safety conscious parties.

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Fortunately, the instant case presents this Court with the opportunity to address these inequities, so that victims of latently defective building products, who are not in contractual privity with a remote manufacturer, will not be left without a remedy when those products cause substantial damage to the structure as a whole or create a real and imminent risk of serious bodily injury, or both. This Court should seize that opportunity and limit the application of the economic loss doctrine to instances where the injured party has a viable contractual remedy against the alleged wrongdoer. It also should reaffirm that, even after it is incorporated into a structure, a building product is a legally distinct piece of property for purposes of applying the economic loss rule, such that any damage that it causes to other property within the structure or to the structure as a whole constitutes cognizable tort damages. In addition, this Court should embrace the holding in Drexel Properties, Inc. and recognize that the economic loss rule does not apply where a latently defective building product creates a real and imminent risk of serious bodily injury or property damage, so as to encourage remedial action before such injuries occur.

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ARGUMENT

I. THE ECONOMIC LOSS RULE SHOULD NOT PRECLUDE SUING A REMOTE MANUFACTURER OF A LATENTLY DEFECTIVE BUILDING PRODUCT IN TORT, WHERE THERE IS NO VIABLE CONTRACTUAL REMEDY AGAINST THE MANUFACTURER.

Florida courts have consistently held that a party may not utilize traditional tort remedies to recover purely economic losses from a person or entity with whom it is in contractual privity, without a claim of personal injury or damage to property other than the allegedly defective goods. See, e.g., Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987) (holding that tort principles were not available in an action between the purchaser and seller of six allegedly defective nuclear steam generators). See also Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir.), reh'g en banc denied, 929 F.2d 704 (11th Cir. 1991) (wherein the court held that clients could not pursue claims based on negligent handling of their account and breach of fiduciary duty against a brokerage firm with whom they were in contractual privity); City of Miami Firefighters', & Police Officers' Retirement Trust v. Invesco Capital Mgt., Inc., 6 FLW Fed. D110 (S.D. Fla. May 1, 1992); AFM Corp. v. Southern Bell Telephone & Telegraph Co., 515 So.2d 180 (Fla. 1987) (holding that a purchaser of advertising services could not use a tort theory to recover economic losses, where the parties' contract "defined the limitation of liability through bargaining, risk acceptance and compensation").

This so-called "economic loss rule" evolved as a result of the unwillingness of Florida courts "to intrude into [contract-

ing] parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public." Florida Power & Light Co., 510 So.2d at 902 (noting that a purchaser, particularly in a large commercial transaction, "can protect his interests by negotiation, contractual bargaining or insurance ... [or, alternatively, choose] to forego warranty protection in order to obtain a lower price"). Indeed, this Court has recognized that the principal function served by the rule is that it "encourages parties to negotiate economic risks through warranty provisions and price." Id. at 901. Significantly, however, the rule is not intended to be applied in a manner that would leave an injured party without a viable remedy for recovering its economic losses. AFM Corp., 515 So.2d at 181. In fact, in each instance where Florida courts have applied the rule, they have hastened to point out that its effect is merely to relegate the injured party to its existing contractual remedies for reimbursement of its economic loss. Florida Power & Light Co., 510 So.2d at 902 (wherein this Court notes that the UCC contains statutory remedies for dealing with economic losses under warranty law).

Conversely, where alternate contractual remedies do not exist, Florida courts have repeatedly allowed injured parties to pursue tort claims against culpable defendants for the recovery of purely economic losses. See, e.g., A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973); Latite Roofing Co. v. Urbanek, 528 So.2d 1381 (Fla. 4th DCA 1988). See also Pinnacle Port Community Ass'n, Inc. v. Orenstein, 872 F.2d 1536, 1545-46 (11th

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Cir. 1989) (holding that a condominium association could pursue a negligence action against a lender who had negligently performed or supervised remedial work on the condominiums which was beyond the scope of its obligations under a settlement agreement); Interfase Marketing, Inc. v. Pioneer Technologies Group, Inc., 774 F. Supp. 1355 (M.D. Fla. 1991) (wherein the court, citing A.R. Moyer and its progeny, applied the no alternate remedy exception to allow a computer lessee to maintain a negligent misrepresentation claim against a supplier with which it was not in contractual privity).

In A.R. Moyer, for example, a general contractor filed a negligence action against a supervising architect and engineer, with whom he was not in direct contractual privity, to recover economic losses he sustained as a result of the defendants' alleged negligent preparation and presentation of the project plans and specifications. The Fifth Circuit Court of Appeals, in turn, certified the following question to this Court:

> I. Under Florida law, may a general contractor maintain a direct action against the supervising Architect or Engineer, or both, for the general contractor's damages proximately caused by the negligence of the Architect or Engineer, or both, for said building project, where there is an absence of direct privity of contract between the parties.

Id. at 398. This Court answered the question in the affirmative, holding that:

> the principle is established that a third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding the

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absence of privity.

Id. at 402. In reaching its decision, this Court adopted, in part, the reasoning of the court in Audlane Lbr. & Bldrs. Supply v. D.E. Britt, 168 So.2d 333 (Fla. 2d DCA 1964), which recognized that "to argue that [an architect] is absolutely free of liability for negligence to known users or consumers of its work is to disregard the half century of development in negligence law." Id. at 335, quoted with approval in A.R. Moyer, 285 So.2d at 400 (emphasis added).

Similarly, in Latite Roofing, the purchasers of a partially completed shopping center filed a negligence action against a roofing contractor for economic damages they sustained as a result of alleged defects in the construction and installation of the mall's roof. At trial, the defendant moved for a directed verdict, based on its contention that, since the plaintiff had not sustained any personal injury or property damages, its negligence claim was barred by the "economic loss rule." The trial court denied the motion and the jury returned a verdict for the plaintiff from which the defendant appealed. The Fourth District, in turn, affirmed the trial court's judgment. In doing so, the court rejected the defendant's argument that the rule of GAF Corp. v. The Zack Corp., 445 So.2d 350 (Fla. 3d DCA 1984), and its progeny mandated reversal, emphasizing that it is clear from A.R. Moyer that:

> invocation of the rule precluding tort claims for only economic losses applies only when there are alternative theories of recovery better suited to compensate the damaged party for a peculiar kind of

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loss.

Id. at 1383 (emphasis added). The court noted that, since negligence appeared to be the sole theory upon which the mall purchasers could recover against the roofing contractor, the "economic loss rule" could not operate to bar the claim. See also AFM Corp., 515 So.2d at 181 (wherein this Court acknowledged and reaffirmed its holding in A.R. Moyer that, "since there was no contract under which the general contractor could recover his [economic] loss, he did have a cause of action in tort").

Notwithstanding the plain import of this Court's decisions in Westinghouse Electric and AFM Corp., several Florida courts including Casa Clara, have implicitly or explicitly construed the no alternate remedy exception to the economic loss rule to mean that the rule is applicable so long as the plaintiff has or could have negotiated for a contractual remedy against someone for its alleged damages, even though that party is not in privity with and, therefore, does not have a contractual remedy against the actual tortfeasor. See, e.g., American Universal Ins. Group v. General Motors Corp., 578 So.2d 451, 454-55 (Fla. 1st DCA 1991) (wherein the court rejected an attempt by an insurer, whose insured was not in contractual privity with the manufacturer of an allegedly defective oil pump, to rely on the no alternate remedy exception, noting that its argument overlooked the fact that a contract action remained pending against the seller). See also Casa Clara, 588 So.2d at 632 (stating that, in addition to their claims against the supplier of the allegedly defective concrete,

the homeowners had claims pending against "the general contractor and numerous defendants associated with the development of the condominium").

However, such a construction is wholly inconsistent with the underlying rationale of the economic loss rule, since it precludes obviously injured parties like Babcock from pursuing tort claims against manufacturers of defective building products, without their ever having been afforded the opportunity to bargain with the manufacturer for the allocation of that risk of loss. See, e.g., Interstate Securities Corp., supra, 920 F.2d at 777, n.12 (noting that "[o]ne of the central tenets of the AFM doctrine is that the parties have negotiated or at least agreed to execute a contract that allocates various risks among them"). See also Butchkosky v. Enstrom Helicopter Corp., 6 FLW Fed. D29 (S.D. Fla. February 7, 1992) (wherein Judge King refused to adopt the holding in American Universal and, instead, held that the economic loss rule did not bar a helicopter owner from maintaining a tort action against a manufacturer with whom it was not in contractual privity).[1/]

More importantly, adherence to such a rule is almost certain to leave injured parties like Petitioners and Babcock without a viable remedy for several reasons. First, the peripheral parties with whom homeowners and developers are likely to be in contrac-

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[1/]On April 6, 1992, Judge King entered an order staying proceedings in Butchkosky pending the resolution of the instant appeal.

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tual privity (e.g., subcontractors and material suppliers) frequently cannot be held liable for damages caused by a latently defective building product, particularly where such product was called for on the developer's plans and specifications. See, e.g., Wood-Hopkins Contracting Co. v. Masonary Contractors, Inc., 235 So.2d 548 (Fla. 1st DCA 1970) (wherein the court held that a subcontractor could not be held liable on theories of negligence or implied warranty for damages caused by defective brick because "[t]he latent defect present in the brick was not discernible by the exercise of care and skill in inspecting them, and was present in the brick through no fault and with no knowledge of the subcontractor"). See also Wisconsin Red Pressed Brick Co. v. Hood, 67 Minn. 329, 69 N.W. 1091 (1897) (holding that a subcontractor "who did not manufacture the [defective] brick, had no knowledge of the defect in them, acted in good faith and exercised reasonable care and skill" could not be held liable for the damages that the deterioration of the brick caused to the buildings into which they were incorporated). Thus, even if the injured party could initiate such an action in good faith, such defendants would have neither the right, nor the incentive to pursue the chain of third party claims needed to bring the actual tortfeasor (i.e., the manufacturer) into the litigation.

In addition, such peripheral parties in the home building industry are frequently undercapitalized, insolvent, or defunct when, several years later, latent defects ultimately are discovered, thereby further diminishing the likelihood that the

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actual tortfeasor (i.e., the manufacturer) ultimately will be held accountable for its actions. Moreover, even in those rare instances where the "chain reaction" of claims and third party claims results in the actual tortfeasor becoming a party, the procedures required to affect its involvement would place an unjustifiable burden on the court system and result in an indefensible waste of litigant and judicial resources. In view of these considerations and the plain language of its holdings in Florida Power & Light and AFM Corp., this Court must overrule Casa Clara to the extent that it insulates manufacturers or suppliers of latently defective building products from liability in tort to ultimate consumers with whom it is not in contractual privity.

Indeed, a contrary result would be inconsistent with Florida's long standing commitment to ensuring that homeowners and related parties, who have sustained substantial damages as a result of latently defective conditions in their homes, are not left without an effective remedy. Illustrative of that commitment is Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978). In that case, remote purchasers brought a negligence action against a builder who allegedly had not allowed for sufficient clearance between the wood siding on their home and the ground. Plaintiffs alleged that, as a result of the latently defective condition created by the builder, their home was damaged by water rot and termite infestation. The trial court dismissed the complaint, on the grounds that plaintiffs "failed

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to allege facts disclosing a dangerous condition or unreasonable risk to third persons" and the homeowners appealed. Id. at 143.

The First District reversed, holding that a remote purchaser may sue a builder in negligence for latent defects which create a "dangerous condition or unreasonable risk." Id. In reaching its decision, the court emphasized the need

> [to] be realistic. The ordinary purchaser of a home is not qualified to determine when or where the defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy or recourse. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence.

Id. The court then went on to conclude that:

> To preclude remote purchasers from pursuing a builder in tort would result in the anomaly of fault without liability and wrong without a remedy, contrary to our sense of justice and directly conflicting with the express mandate of the Florida Constitution, Declaration of Rights, that "every person for any injury done him . . . shall have remedy . . .."

Id. at 144, quoting Slavin v. Kay, 108 So.2d 462 (Fla. 1959).

II. THE ECONOMIC LOSS RULE SHOULD NOT APPLY TO REMOVING AND REPLACING A LATENTLY DEFECTIVE PRODUCT WHERE THE DEFECT CREATES A REAL AND IMMINENT RISK OF PERSONAL INJURY OR PROPERTY DAMAGE OR RENDERS THE STRUCTURE UNINHABITABLE.

It is, of course, axiomatic that the economic loss rule does not operate as a bar to a tort claim where the allegedly defective product causes personal injury or damage to other property. However, prior to the Casa Clara decision, only one Florida

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appellate court had considered the question of whether the existence of a real and imminent risk of serious bodily injury is sufficient, standing alone, to render the economic loss rule inapplicable, so as to allow a party to recover the economic losses it sustains in removing and replacing a defective building product. See Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515 (Fla. 4th DCA 1981), rev. denied, 417 So.2d 328 (Fla. 1982). In Drexel, a condominium association and original and remote home buyers brought a negligence and breach of implied warranty action against the developer of the Bay Colony Club Condominiums. The owners alleged, among other things, that the developer was negligent, in that: (1) it failed to install decorative aluminum fencing around the air conditioning units on the roof; (2) the ceiling roof assembly was not capable of a one hour fire resistive rating; and (3) the bedroom windows could not be opened to a five square foot opening. The trial court entered judgment in favor of plaintiffs on both counts and the developer appealed.

The Fourth District, in turn, affirmed the judgment. In reaching its decision, the court rejected the developer's contention that the economic loss rule barred plaintiffs from pursuing a negligence claim, because the alleged defects had not yet resulted in injury to plaintiffs or their property. The court reasoned that:

> a buyer [should not] have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects[.] In the final analysis, the cost to the developer for a resulting tragedy

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> could be far greater than the cost of remedying the condition.

Id. at 519. Accordingly, the court went on to hold that there can be recovery for [such] economic loss." Id. The court also held that, unlike plaintiffs' claims for breach of implied warranty, "no privity of contract must exist in order for [plaintiffs to pursue their negligence claim] for damage to an intangible economic interest." Id.

Significantly, a number of courts in other jurisdictions have reached similar results in analogous fact situations. In Council of Co-Owners Atlantis Condominium, Inc. v. Whitin-Turner Contracting Co., 517 A.2d 336 (Md. App. Ct. 1986), for example, a condominium association and three unit owners filed a tort action against the general contractor, developer and architect of the building. Plaintiffs alleged that the defendants were negligent in constructing or allowing the construction of utility shafts with materials that did not have a fire resistance rating of two hours. Plaintiffs further alleged that the latently defective utility shafts "create[d] a fire hazard that present[ed] a threat to the safety and welfare of the owners and occupants of the [condominium] and to [their] personal and real property." Id. at 338. The defendants moved to dismiss the complaint on the grounds that, in the absence of an allegation of personal injury or property damage, they could not be held liable in tort for purely economic losses. The trial court granted the defendants' motions and the homeowners appealed.

The appellate court reversed. In doing so, it joined what it

characterized as "an increasing number of courts," including Drexel Properties, Inc., which "have declined to distinguish between a risk of personal injury or property damage on the one hand and a risk of economic loss on the other" for purposes of determining a party's right to maintain a tort claim. Id. at 344 (cases cited therein). Specifically, the court concluded that:

> the determination of whether a duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage. Where the risk is of death or personal injury the action will lie for recovery of the reasonable cost of correcting the dangerous condition.

Id. at 345. As support for its conclusion, the court adopted the reasoning of the Indiana Supreme Court in Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976):

> The contention that a distinction should be drawn between mere "economic loss" and personal injury is without merit. Why there should be a difference between an economic loss resulting from injury to property and an economic loss resulting from personal injury has not been revealed to us. When one is personally injured from a defect, he recovers mainly for his economic loss. Similarly, if a wife loses a husband because of an injury from a defect in construction, the measure of damages is totally economic loss. We fail to see any rational reason for such a distinction.
>
> If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?

Council of Co-Owners Atlantis, 517 A.2d at 345, quoting Barnes,

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342 N.E.2d at 621.

Similarly, in Kennedy v. Columbia Lumber Mfg. Co., 384 S.E.2d 730 (S.C. 1989), a remote purchaser brought an action for breach of implied warranty of merchantability against a material supplier who had taken title to and sold the property to satisfy an outstanding debt owed by the builder. In that action, plaintiff sought to recover damages he had incurred in repairing a defective foundation. The trial court directed a verdict in favor of the material supplier, based on its conclusion that a mere lender, who does not participate in the construction of a home, cannot be held liable on a breach of implied warranty theory for defects caused by the builder.

The South Carolina Supreme Court affirmed. However, the court then took the opportunity to address a recent South Carolina decision, wherein the intermediate appellate court had held that the economic loss rule prevented a homeowner from pursuing a builder in tort for cracking in the exterior facial brick walls of a condominium. Although the court acknowledged that the lower court had properly applied the doctrine, it went on to note that

> the opinion reaches a result which is repugnant to the South Carolina policy of protecting the new home buyer. The result is that a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions.

Id. at 734, 735. Specifically, the court found that:

> [the] legal framework [of the economic loss rule] generates difficulties. This is so because [it] focus[es] on consequence not action. Builder "A" and Builder "B" can be equally blameworthy, and

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> build equally shoddy housing, but because Builder "A"'s negligence happened to be discovered early enough, no one was harmed. It hardly seems fair that Builder "A" should profit from a diligent buyer's discovery, or because he was fortunate.

Id. at 737. The court rejected such a rule, emphasizing that "a builder is no less blameworthy where lady luck has smiled upon him and no physical harm has yet occurred." Id. Instead, the court held that "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage." Id.

Finally, in the City of Greenville v. W. R. Grace & Co., 827 F.2d 975 (4th Cir. 1987), reh. denied, 840 F.2d 219 (4th Cir. 1988), the city and others brought a negligence action against a manufacturer of asbestos-containing thermal insulation products to recover the costs they had incurred in removing and replacing those products from city hall. The jury returned a verdict for the plaintiffs and the defendant moved for judgment n.o.v. or, alternatively, for a new trial. The district court denied the motion and the defendant appealed, arguing, among other things, that South Carolina's version of the economic loss rule barred plaintiffs from utilizing a negligence claim to recover their purely economic losses since they had not yet sustained "some actual, physical injury to persons or property." Id. at 977 (emphasis added).

However, the Fourth Circuit rejected that argument and affirmed the denial of the motion for new trial. In doing so, the court distinguished a number of cases, including East River S.S.

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Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), on the grounds that they involved situations where

> the defective products injured only themselves. There was no claim of any injury or threat of injury to persons or to other property. By contrast, the injury that resulted from the installation of Monokote in this case is the contamination of the Greenville City Hall with asbestos fibers, which endanger the lives and health of the building's occupants. In our opinion, this is not the type of risk that is normally allocated between the parties to a contract by agreement, unlike the risk of malfunctioning turbines at issue in the East River or the risk of faulty shingles involved in Watermark.

Id. at 977-78 (emphasis added). The court went on to hold that

> [the city could not be] precluded from asserting a claim for negligence on the part of Grace simply because none of the occupants of the Greenville City Hall has yet developed an asbestos-related disease. Such diseases may not develop until decades after exposure to asbestos. We think that a plaintiff such as Greenville should not be required to wait until asbestos-related diseases manifest themselves before maintaining an action for negligence against a manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment.

Id. at 978. See also Trustees of Columbia Univ. v. Mitchell Giurgola Associates, 492 N.Y.S.2d 371 (1st Dept. N.Y. 1985).

The compelling public policy considerations which led the courts in Drexel Properties, Inc., Council of Co-Owners Atlantis, Kennedy and City of Greenville, to reject the distinction between the existence of a risk of serious bodily injury and the actual occurrence of such an injury for purposes of applying the economic loss rule mandate the adoption of a similar rule in the instant case. The adoption of such a rule would, for example,

provide an incentive for homeowners, builders and developers, like Babcock, to take immediate steps to remedy hazardous conditions created by defective building materials, even though they are not responsible for the conditions, by ensuring that, once the work is complete, they will be able to recover those costs from the culpable party, irrespective of whether they have a contract with that party. More importantly, such a rule eliminates the risk of serious injury to persons or property before such injuries occur, thereby reducing the societal costs associated with such injuries and mitigating the amount of a manufacturer's potential liability for such defects. Finally, by restricting the application of such a rule to defective conditions which create a risk of serious bodily harm or property damage, this Court would not be imposing duties on manufacturers which are markedly different from those they already are required to comply with under the common law.

In contrast, the rule espoused by the Third District in Casa Clara precludes a party who is not in contractual privity with the manufacturer of a latently defective building product from obtaining relief for costs it incurs in remedying a known defective condition caused by those products, unless that party already has sustained an actual personal injury or substantial damage to property outside the structure. Moreover, it does so, in part, on the mistaken assumption that a manufacturer, who already has proven itself to be negligent (i.e., in manufacturing the defective building product) and who has limited economic

interest in monitoring the defective product or its performance once it is sold and placed in the stream of commerce, will voluntarily take steps to correct such dangerous conditions simply to mitigate its damages. The fact is that the Casa Clara rule provides manufacturers with an incentive to do just the opposite. Indeed, if the Babcock case is representative, the rule in Casa Clara will encourage manufacturers of latently defective building products not to act, in the hope that: (1) the dangerous conditions created by those products will not result in actual personal injury or, alternatively, will do "nothing more" than impair the integrity of the structure or cause damage to other products in the building; or (2) others will undertake to remedy the defect before personal injury occurs. Such a result is wholly inconsistent with the underlying rationale of West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976) and its progeny and is antithetical to the best interests of Florida homeowners. Accordingly, this Court must reverse Casa Clara.

III. THE ECONOMIC LOSS RULE SHOULD NOT SHIELD A REMOTE MANUFACTURER OF A LATENTLY DEFECTIVE BUILDING PRODUCT FROM TORT LIABILITY WHERE THAT PRODUCT CAUSES SUBSTANTIAL DAMAGE TO OTHER BUILDING PRODUCTS IN THE STRUCTURE OR IMPAIRS THE INTEGRITY OF THE STRUCTURE AS A WHOLE.

As originally defined by this Court, the "economic loss rule" does not bar a tort claim for the recovery of purely economic losses where a defective product's failure causes personal injury or damage to property "other than the product itself." Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899, 900 (Fla. 1987) (emphasis added). See also GAF Corp. v. The Zack

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Corp., 445 So.2d 350 (Fla. 3d DCA 1984). Thus, it is not surprising that, prior to the Casa Clara decision, a number of Florida courts had recognized the right of building owners and developers to pursue manufacturers and suppliers of defective building materials in tort for the recovery of property damage caused by those products. See, e.g., Kerry's Bromeliad Nursery, Inc. v. Reilino, 561 So.2d 1305 (Fla. 3d DCA 1990). See also Adobe Bldg. Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA), rev. dismissed, 411 So.2d 380 (1981).

In Kerry's Bromeliad, for example, a greenhouse owner filed a negligence and breach of contract action against the manufacturer of fiberglass roofing materials, which failed during a harsh rainstorm, resulting in substantial property damage to plaintiff's plant inventory. The trial court dismissed the negligence count, based, in part, on its conclusion that the owner's sole remedy for its economic losses was the manufacturer's written express warranty. The greenhouse owner appealed and the Third District Court of Appeal reversed the order of dismissal. In reaching its decision, the court rejected the defendant's contention that the manufacturer's warranty precluded the owner from maintaining an action in tort. Instead, the court concluded that, since the warranty did not expressly absolve the manufacturer from liability for its own negligence, "the defendant [could be held] personally liable in tort for any property damage

caused by his own negligence." Id. at 1306 (emphasis added).[2/]

Similarly, in Adobe Bldg. Centers, several residential housing developers filed suit against a distributor of building materials to recover the cost of repairing and/or replacing defective stucco that their plasterer subcontractors had prepared and applied to a number of South Florida homes. The evidence at trial revealed that none of the developers were in privity with the supplier, but each had caused its subcontractors to purchase and prepare the stucco material for its intended use. The evidence also established that, while only one of the developers still held title to an affected unit, the remaining plaintiffs were required to repair the defective stucco pursuant to the warranties they had extended to their home buyers. Based on these facts, plaintiffs went to trial on a theory of strict liability and the trial court directed a verdict in their favor on the issue of liability. The defendant appealed.

After tracing the history of the development of strict liability, the Fourth District Court of Appeal affirmed the trial court's judgment and held that one who purchases and prepares or causes a third party to purchase and prepare a product (e.g., stucco) for its intended use may hold the retail or wholesale

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[2/]In its opinion, the Bromeliad court does not specifically mention the economic loss rule. However, it is apparent from reviewing the parties' briefs that, in reaching its decision, the court also considered and rejected the defendant's contention that the rule barred plaintiff's tort claims because the crop damage alleged in the complaint was not the "damage to other property" needed to avoid the rule.

seller of the product strictly liable in tort for damages that the product causes to its property. Id. at 1034. In reaching its decision, the court rejected defendant's contention that one who buys or causes another to buy a product (e.g., stucco), mixes it with something else and then resells the resulting end product (i.e., the home) cannot invoke the doctrine of strict liability. Id., citing Comment 1 to the Restatement (Second) of Torts §402A (1965) (which broadly defines the term "consumer" to include "those who prepare [product] for consumption"). The court also rejected defendant's contention that this Court's decision in West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976) only extends the doctrine of strict liability to cases involving personal injury, noting that, by its plain language, Section 402A applies to "physical harm thereby caused to the ultimate user or consumer or to his property". Id.

Significantly, a number of courts in other jurisdictions have reached similar results in analogous fact situations. See, e.g., Mike Balalia, Inc. v. Amos Constr. Co., 235 S.E.2d 664 (Ga. App. Ct. 1977) (wherein the court held that the economic loss rule did not preclude building owners from pursuing the manufacturer of defective building products on theories of negligence or strict liability where defects in those products damaged components supplied by sources other than the defendant). See also Drayton Public School D19 v. W. R. Grace & Co., 728 F.Supp. 1410 (D. N.D. 1989) (permitting a school district to maintain negligence and strict liability claims against the manufacturer of asbestos-

containing plaster for the cost of removing and replacing the plaster, which had rendered the building uninhabitable); Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075 (Nev. 1983) (holding that an apartment owner could pursue strict liability and negligence claims against the manufacturer of a defective plumbing and heating system, where the system caused substantial leakage of water throughout the complex and damaged an apartment); Trustees of Columbia v. Mitchell, 492 N.Y.S.2d 371 (N.Y. App. Div. 1985) (wherein the court allowed a building owner to maintain a strict liability claim against the supplier of defective pre-cast concrete panels and tiles which were installed as part of a wall for property damage to building); Reeder v. Old Oak Tow Center, 465 N.E.2d 113 (Ill. App. Ct. 1984) (restaurant owner entitled to pursue negligence and strict liability claims against the builder and supplier of treated beams for odor caused by a preservative in the beams); Sam Finey, Inc. v. Barnes, 275 S.E.2d 380 (Ga. App. Ct. 1980) (holding that operator of roller skating rinks could proceed in tort for negligent construction of a roller rink floor against a paving contractor that laid a defective asphalt base when plastic skating surface cracked). See also Philadelphia Nat'l Bank v. Dow Chemical Co., 605 F.Supp. 60 (E.D. Pa. 1985); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979); United Air Lines v. CEI, 505 N.E.2d 363 (1987).

Despite the plethora of contrary authority in Florida and elsewhere, the Casa Clara court summarily rejected Petitioners'

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argument that a building product (e.g., the chloride contaminated concrete) retains its status as a legally distinct piece of "property" for purposes of applying the economic loss rule even after it becomes a part of the structure. Instead, the court analogized the concrete used to construct the Casa Clara Condominiums to the defective component part at issue in Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So.2d 992 (Fla. 1987) and concluded that "the homes and the buildings, not the concrete, are the 'property' for purposes of applying the economic loss doctrine." Id. (emphasis added). The court then went on to hold that "[s]ince the homeowners only allege damage to the structures and the components thereof and do not allege any personal injury or damage to other property, Aetna mandates that they cannot maintain a cause of action against [the concrete supplier] in tort." Id. at 633, 634 (emphasis added).

The Casa Clara court's conclusion that a building product ceases to be a legally distinct piece of property once it is incorporated into a structure for purposes of applying the economic loss rule, directly conflicts with the holding in Adobe Bldg. Centers. It also is inconsistent with a long line of Florida cases which have recognized an exception to the general rule that the doctrine of strict products liability does not apply to structural improvements to real estate, where the alleged

> injuries result not from the real property as improved, but directly from a defective product manufactured by defendant, which product may have itself been incorporated into the improvement of the

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realty before the injury from the product occurred.

See, e.g., Jackson v. L.A.W. Contracting Corp., 481 So.2d 1290, 1292 (Fla. 5th DCA 1986) (emphasis added) (wherein the court acknowledges the exception, but refuses to apply it, in part, because "the supplying of goods was a minor element of the transaction"). See also Craft v. Wet 'n Wild, Inc., 489 So.2d 1221, 1222 (Fla. 5th DCA 1986) (recognizing the exception, but holding that it did not apply because the plaintiff alleged that the structural improvement itself (i.e., a water slide which was built of soil and poured concrete and incorporated into the land like footings for a building was defective).

There is a world of difference between a machine part and a home. A home is simply not a product.[3/] A home is realty which is governed by different laws and policy considerations. A home is unquestionably the largest and most necessary investment most people will ever make.

There is a strong public policy which exists in Florida of protecting howeowners from the destruction of their lifetime investment, particularly as a result of latent defects. Johnson v. Davis, 480 So.2d 625 (Fla. 1985); Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA), cert. discharged, 264 So.2d 418 (1972); Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978). So strong is this public policy that many states have made an exception to

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[3/] See, e.g., Lowrie v. City of Evanston, 365 N.E.2d 923 (1977); Messier v. Association of Apartment Owners, 735 P.2d 939 (Ha. App. 1987).

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the economic loss rule for homes. See Kennedy v. Columbia Lumber and Mfg. Co., Inc., 384 S.E.2d 730, 737 (S.C. 1989) and cases cited therein. In Kennedy, the court opined:

> Thus, a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. The "economic loss" rule will still apply where duties are created solely by contract.[3] In that situation, no cause of action in negligence will lie.
>
> [3]An example of such a situation might be where the buyer contracted for blue paint but instead received brown.

Virginia appears to be the only state which would prohibit recovery to a homeowner for latent defects. Sensenbrenner v. Rust, Orling & Neale Architects, Inc., 374 S.E.2d 55 (Va. 1988).

This case involves the first time this Court will address the applicability of the economic loss rule to homes. It is respectfully submitted that the exception recognized by other states based upon public policy grounds should also be adopted in Florida.

The economic loss rule in Florida started out with the simple concept that when the "product itself" is injured, recovery is limited to contract. See FPL v. Westinghouse, supra. The problem which has arisen is that the term "product itself" has been unnecessarily expanded to include entire condominium complexes, Casa Clara, and entire residential subdivisions which incorporate the same latently defective products. Babcock v. Osmose, et al., Case No. 90-50145 CA 14, Dade County Circuit Court. The construction of a home is really composed of thousands of individual products which are manufactured by companies that have no con-

tractual privity with either the builder, developer or homeowners. By expanding the definition of "product itself" far beyond these individual products to include an entire home, the economic loss rule has needlessly immunized manufacturers of dangerously defective products incorporated into a home, where the realities of the construction business do not permit home buyers and developers to contract with these parties and where the manufacturer of the product has no reasonable expectation of limited liability. Homeowners, builders or developers have no way to negotiate these risks with remote manufacturers and they have no warranties or insurance which cover such latent defects. On the other hand, products liability insurance is freely available to manufacturers of defective products.

This unwarranted expansion of the "product itself" requirement has led to absurd results which have insulated negligent and even willful or intentional manufacturers of latently defective products from liability. For example, where a product with a latent defect is purchased by a subcontractor and later used in the construction of a home, the subcontractor cannot be held liable for the latent defect under Florida law. Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., 235 So.2d 548 (Fla. 1st DCA 1970). Under these circumstances, neither the home buyer nor developer has any remedy whatever against the negligent or willful manufacturer. This could lead to the absurd result that whole condominium complexes or residential subdivisions could be rendered uninhabitable because of a defective product used in the

construction of the units and still have the developer and buyer without legal recourse against the manufacturer of the defective product.

Another absurd result exists under the facts of the Babcock case described in this brief. Here, the developer, pursuant to the requirements of local building ordinances, directed subcontractors to use FRT plywood. Thus, the subcontractors are not liable to the developer, and the developer is not in privity with anyone except the subcontractor. Consequently, the manufacturer of the defective FRT plywood is insulated from liability to anyone.

By defining the whole house or condominium as the "product itself", manufacturers of latently defective products are being provided complete immunity which was neither bargained for nor contemplated by any contract. Consequently, where a remote manufacturer of building products negligently, willfully or even intentionally places products with latent defects onto the market, such remote manufacturers should not be permitted to raise the economic loss rule as a shield against any person who is not in direct privity with them.

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CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully submitted that the Third District's decision below be reversed for the reasons advanced in this brief.

Respectfully submitted,

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