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SUPREME COURT OF FLORIDA

CASA CLARA CONDOMINIUM ASSOCIATION, INC., ETC., ET. AL.,

Petitioners,

v. **CASE NO. 79, 127**

CHARLEY TOPPINO & SONS, INC., ETC., ET. AL.,

Respondents.

_____/

CHRISTOPHER H. CHAPIN, ET. AL.,

Petitioners,

v. **CASE NO. 79, 128**

CHARLEY TOPPINO & SONS, INC., ETC., ET. AL.

Respondents.

_____/

AMICUS CURIAE BRIEF OF THE FLORIDA CONCRETE AND PRODUCTS ASSOCIATION, INC.

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INTRODUCTION

The Florida Concrete and Products Association, Inc. (hereafter "Association") is a voluntary association of ready-mix concrete manufacturers and concrete industry suppliers in the State of Florida. It consists of approximately seventy (70) member companies, constituting approximately eighty (80) percent of the ready-mix concrete manufacturers and concrete industry suppliers in the State of Florida.

The Association's members have relied on the long-established law in Florida that building material manufacturers and suppliers cannot be sued in tort for purely economic losses and do not have a duty to comply with the Florida Building Codes Act or other applicable building codes in the course of negotiating the terms of their contracts with general contractors and in assessing their insurance needs. Because the Association's members, other manufacturers and suppliers of building materials and the citizens of Florida as a whole will suffer dire consequences if this Court adopts the views being advanced by the Petitioners and departs from these long-established principles of law, the Association respectfully submits this *amicus curiae* brief in support of the Respondent, Charley Toppino & Sons, Inc. (hereafter "Toppino").

SUMMARY OF ARGUMENT

The Third District Court of Appeal's decision in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 588 So.2d 631 (Fla. 3d DCA 1991), simply reaffirmed the long-established law in Florida that a party seeking to recover purely economic losses may not recover those losses in tort and, instead, is limited to a breach of contract or warranty action against the party with whom it is in privity of contract. *See e.g., Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987).

In the construction context, this simply means that a building owner seeking to recover purely economic losses such as the costs associated with the repair or replacement of its structure or the diminution in the value of its structure, must sue the party with whom it contracted for the design, construction or purchase of the structure for breach of contract or warranty. The building owner, however, may not sue a remote material manufacturer or supplier with whom it is not in privity to recover purely economic losses either in tort or contract.

The economic loss and privity of contract doctrines encourage parties to negotiate and allocate economic risks through warranty provisions and price or to obtain insurance protection. Since both doctrines are in harmony with, and, indeed, mandated by, the Uniform Commercial Code, which governs all supply contracts between members of the Association and general contractors, any departure from the principles of law

reaffirmed in *Casa Clara* would effectively nullify the Uniform Commercial Code in the construction context and render meaningless all bargained for allocations of risk in the contracts between members of the Association and general contractors, as well as the contracts between building owners and the parties with whom they contracted for the purchase, design or construction of their structures.

The *Casa Clara* decision does not leave the Petitioners or other building owners without the means to recover their purely economic losses. To the contrary, they may sue the general contractors who constructed their structures, the developers or sellers who sold them their structures, or the design professionals they hired to design their structure for breach of contract, breach of warranty, and in some instances, for violation of applicable building codes. Nor does the decision in *Casa Clara* mean that material manufacturers and suppliers are not subject to liability if they manufacture or supply defective materials. Rather, the general contractor who purchased their materials is free to sue them for breach of contract or warranty.

Casa Clara also correctly reaffirmed the longstanding rule in Florida that material manufacturers and suppliers do not have a duty to comply with state or local building codes. This conclusion is compelled by the express language of the Florida Building Codes Act, the controlling Monroe County Building Code and the 1976 Standard Building Code incorporated therein, as well as the decisions of numerous courts.

Under the foregoing authorities, a manufacturer or supplier of building materials has no independent duty to ensure the materials specified by the owner's design professional and ordered and installed by the owner's general contractor meet any applicable building code requirements relating to the intended usage of those materials. To the contrary, the duty of building code compliance is properly limited only to those parties who design and construct structures. The only duty a material manufacturer or supplier has with regard to the materials it supplies arises from its contractual duty to supply the product requested by the general contractor in its purchase order.

If building owners are permitted to sue material manufacturers and suppliers in tort or for violation of applicable building codes to recover their purely economic losses, they will be forced to manufacture materials suitable for every conceivable use or misuse of their products or to insure against every conceivable risk associated with the use of their products notwithstanding the fact the general contractor with whom they negotiated for the purchase of their materials may wish to purchase a different grade of materials or be willing to forego warranty protection in exchange for a lower price.

In effect, material manufacturers and suppliers will become the ultimate guarantors and warrantors of the design and construction of every structure in which their materials are incorporated and will be forced to duplicate the efforts of the owner's design professionals and contractors. Not only will this

greatly increase the cost of construction and the price of new structures, it will render it impossible for material manufacturers and suppliers to allocate risks of material or structural failure in their contracts with general contractors, as building owners will be free at all times to bypass their contract actions against the parties with whom they are in privity and sue material manufacturers in tort.

Moreover, the positions advanced by the Petitioners actually will encourage building owners to forego seeking warranty protection from the parties with whom they are in privity and to forego purchasing insurance because they will know that they are free to sue material manufacturers and suppliers and others with whom they are not in privity to recover their economic losses. The very antithesis of the public policies this Court sought to advance in *Florida Power & Light* will be achieved.

Material manufacturers and suppliers have relied upon the principles of law reaffirmed in *Casa Clara* in allocating the risks of material failure under their sales contracts with general contractors, in setting the prices for their products and in assessing their needs for insurance against such risks. Any departure from these principles now will leave them exposed to many millions, if not billions, of dollars of unanticipated liability and will deny them the benefits of their contracts with general contractors. The very existence of many material manufacturers could be jeopardized by the imposition of such enormous and unanticipated exposure.

Such a departure from the established law not only will increase substantially the cost of ready-mix concrete, but all building materials. The inevitable result will be significantly higher costs for concrete construction and construction generally, potentially foreclosing the ability of Florida citizens, especially those at the lower end of the income scale, from purchasing or rebuilding homes and will result in the construction of fewer residential and commercial structures. The ensuing decline in the construction of residential and commercial structures ultimately will cause the loss of untold numbers of jobs in the construction industry and related industries. The Petitioners have wholly ignored these ramifications of their suggested change in the law.

The imposition of the economic burden on the public of higher priced construction and increased unemployment is neither necessary nor appropriate, particularly during this period of economic recession and in view of the need to rebuild South Florida in the wake of Hurricane Andrew. Building owners can protect themselves against the risks of economic loss at far less cost through contractual risk allocation and insurance. Those owners of structures who fail to do so should not be permitted to vitiate a doctrine promulgated for the public good and impose unnecessary and burdensome economic costs on the citizens of Florida as a whole.

ARGUMENT

I. THE ECONOMIC LOSS AND PRIVITY OF CONTRACT DOCTRINES LIMIT A BUILDING OWNER'S CAUSE OF ACTION FOR REPAIR, REPLACEMENT AND DIMINUTION IN VALUE DAMAGES TO A BREACH OF CONTRACT OR WARRANTY ACTION AGAINST THE PARTY WITH WHOM IT IS IN PRIVITY OF CONTRACT

The economic loss and privity of contract doctrines have long been controlling principles of law in Florida. *See, e.g., Aetna Life & Casualty Co. v. Therm-O-Disc, Inc.*, 511 So.2d 992, 994 (Fla. 1987); *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987); *American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 451 (Fla. 1st DCA 1991); *Belle Plaza Condominium Association v. B.C.E. Development, Inc.*, 543 So.2d 239, 240-241 (Fla. 3d DCA 1989), *rev. den.*, 551 So.2d 460 (Fla. 1989); and *GAF Corp. v. Zack Co.*, 445 So.2d 350 (Fla. 3d DCA 1984), *rev. den.*, 453 So.2d 45 (1984). *See also, East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) and *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 788 F.Supp. 1203 (S.D. Fla. 1992). The Third District Court of Appeal's decision in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 588 So.2d 631 (Fla. 3d DCA 1991), simply reaffirmed these established principles of law.

In *Florida Power & Light*, this Court explained the rationale and policy reasons supporting the doctrines as follows:

> The policy adopted by the majority of courts encourages parties to negotiate economic risks through warranty provisions and price. On the other hand, the minority view exposes a manufacturer to liability for negligence based on economic losses alone, replacing the freedom of bargaining and negotiation with a duty of care. A duty of care, as emphasized in *East River*, is

particularly unsuited to the vagaries of individual purchasers' product expectations. As important, under the minority view, a manufacturer faced with this kind of liability exposure must raise prices on every contract to cover the enhanced risk. Clearly, product value and quality is covered by express and implied warranties, and warranty law should control a claim for purely economic losses. . . .

* * *

Tort law imposes upon manufacturers a duty to exercise reasonable care so the products they place in the market will not harm persons or property. However, tort law does not impose any duty to manufacturer only such products that will meet the economic expectations of purchasers. Such a duty does, of course, exist where the manufacturer assumes the duty as a 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.

* * *

We agree and find no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public. We hold contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage.

* * *

[T]he economic loss rule . . . is not a new principle of law in Florida and has not changed or modified any decisions of this Court. In fact, the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting.

510 So.2d at 901-902 (emphasis and parenthetical added).[1]

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[1]Repair, replacement and diminution in value damages such as those sought by the Petitioners clearly fall within the classic definition of purely economic losses not recoverable in tort. *See Florida Power & Light*, 510 So.2d at 900; *Casa Clara*, 588 So.2d at 633. *See also, East River*, 476 U.S. at 870; *Florida Power & Light Co. v. McGraw Edison Co.*, 696 F.Supp. 617, 618, n.3 (S.D. Fla. 1988), *aff'd. without opin.*, 875 F.2d 873 (11th Cir. 1989); *Moorman Manufacturing Co. v. National Tank Co.*, 435 N.E.2d 443, 449 (Ill. 1982).

It is clear from *Florida Power & Light* that the economic loss and privity of contract doctrines operate together to bar a party from seeking purely economic losses in tort and to limit it to an action sounding in breach of contract or warranty against the party with whom it is in privity of contract. This follows not only from this Court's recognition in *Florida Power & Light* that "the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting", but also from this Court's heavy reliance therein on the United States Supreme Court's decision in *East River* and the Third District Court of Appeal's decision in *GAF Corp.*, wherein the plaintiffs' tort claims were barred by the economic loss doctrine even though the plaintiffs' lacked privity of contract with the defendants and were left with no remedy against them in contract or in tort. *Florida Power & Light,* 510 So.2d at 900-902; *East River*, 476 U.S. at 875-876; *GAF Corp.*, 445 So.2d at 351-352.[2]

Thus, *Casa Clara* is consistent with *Florida Power & Light*, *East River* and *GAF Corp.*, particularly since it has absolutely no

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[2]Other courts repeatedly have recognized that a lack of privity between a plaintiff and defendant or the unavailability of a contract action between them does not bar application of the economic loss doctrine even if that plaintiff is left without a remedy against the named defendant. *See e.g., Miller v. United States Steel Corporation*, 902 F.2d 573, 575 (7th Cir. 1990); *American Universal*, 578 So.2d at 454; *Belle Plaza*, 543 So.2d at 240-241; *Palco Linings, Inc. v. Pavex, Inc.*, 755 F.Supp. 1269, 1277 (M.D.Pa. 1990); *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246 (1986); *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 374 S.E.2d 55 (Va. 1988).

impact on the Petitioners' rights to sue the parties with whom they contracted for the sale, construction or design of their structures to recover their alleged economic losses.[3]

The soundness of *Casa Clara* and the interplay between the economic loss and privity of contract doctrines is perhaps best typified by the *GAF Corp.* decision, which this Court repeatedly has cited with approval. *See, Aetna,* 511 So.2d at 994; *Florida Power & Light*, 510 So.2d at 901. In *GAF Corp.*, a manufacturer of roofing materials was sued by a roofing contractor who had been held liable to building owners for the costs of repairing or replacing roofs damaged by the roofing materials. 445 So.2d at 350-351. Rather than sue the roofing supply company from whom it purchased the roofing materials, the roofing contractor sued the manufacturer of the materials in contract and tort. *Id.*

The court, however, held the economic loss doctrine barred the roofing contractor's tort action because no one suffered personal injury, the materials did not cause damage to other property and the damages sought were purely economic in nature. *Id.* Significantly, the court also held the roofing contractor had no breach of warranty action against the material manufacturer because they were not in privity of contract,

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[3]The record reflects that nearly all of the Petitioners are doing precisely that while one or two of them have elected not to pursue various statutory and contractual rights they might have against the parties with whom they are in privity.

leaving the plaintiff with no cause of action against the defendants in contract or tort. *Id.*[4]

It follows that building owners like the Petitioners have no direct cause of action against a remote material manufacturer or supplier to recover economic losses in tort or contract. Instead, they must sue the parties with whom they contracted for the design, construction or purchase of their structures for breach of contract or tort.

II. THE DAMAGES ALLEGEDLY SUSTAINED BY THE PETITIONERS DO NOT FALL WITHIN THE "OTHER PROPERTY" OR "PERSONAL INJURY" EXCEPTIONS TO THE ECONOMIC LOSS DOCTRINE

The Petitioners do not dispute the economic loss doctrine is fundamental law in Florida or that repair, replacement and diminution in value damages constitute purely economic losses under the doctrine. Rather, Petitioners attempt to fit their cases within the "personal injury" or damage to "other property" exceptions to the economic loss doctrine.

To accomplish this task, they allege the concrete supplied by Toppino caused steel reinforcing bars imbedded in the concrete to corrode and expand, causing the concrete itself to crack, spall and delaminate, thereby damaging their structures. They also contend the allegedly deteriorating condition of their

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[4]*See also East River*, 476 U.S. at 859-862, 874-875; *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.* 788 F.Supp. 1203, 1204-1206 (S.D. Fla. 1991); and *American Universal*, 578 So.2d at 452-455, which reach similar conclusions.

structures has created a "risk" of injury to persons on the premises.[5]

A. Petitioners have not Suffered Damage to "Other Property"

Petitioners' damage to "other property" argument must fail because it cannot be reconciled with the damages they seek: the cost of the repair or replacement of their entire concrete structures, including the steel reinforcing bars. They do not seek the costs of the concrete or steel reinforcing bars alone as it is a physical impossibility to repair or replace corrosion damaged concrete without repairing or replacing both the concrete and steel components. They cannot, however, logically seek damages for the repair or replacement of their entire concrete structures and then, when confronted with the economic loss doctrine, adopt the inconsistent position their actions are premised on the damage caused to the steel reinforcing bars, or, "other property", encapsulated within the concrete. If adopted, Petitioners' position will render the doctrine meaningless as to all manufacturers of building or machine components.

Thus, is not surprising that an overwhelming majority of courts have rejected Petitioners' "other property" position and held that damage caused by one component of a structure or product to other components thereof or to the structure or product as a whole does not constitute damage to "other property"

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[5]Significantly, although all of their structures are over a decade old and some are nearly two decades old, the Petitioners do not allege that any property other than their structures have been injured or that anyone has ever suffered actual personal injury.

under the economic loss doctrine. Indeed, the United States Supreme Court and this Court already have rejected Petitioners' "other property" position.

In *East River,* the Court held that damage caused by one component of a ship to other components thereof or to the ship itself does not constitute damage to "other property" under the economic loss doctrine. 476 U.S. at 867. The Court reasoned since "all but the very simplest of machines have component parts", a holding that damage caused by one component to other components constitutes damage to "other property" will all but eliminate the distinction between warranty and tort, causing contract law to "drown in a sea of tort". *Id.* at 866-867.

Thereafter, the rationale of *East River* was applied by this Court in *Aetna,* 511 So.2d at 992-994. In that case, Therm-O-Disc manufactured switches and sold them to another corporation which, in turn, incorporated them into heat transfer units. *Id.* at 993. The switches were designed to activate during cold weather to protect the heat transfer units from freezing. *Id.*

During the winter of 1981-82, the switches failed to activate, permitting water within the heat transfer units to freeze, thereby substantially damaging the units. *Id.* This Court, relying on *Florida Power & Light* and *GAF Corp.*, held the plaintiff's tort claims were barred by the economic loss doctrine even though one small component caused substantial damage to the entire machine within which it was incorporated. *Id.* at 994.

This same conclusion also was reached by the First District Court of Appeal in *American Universal*, 578 So.2d at 453-455. In that case, GM manufactured, distributed and sold a replacement oil pump to another corporation, which, in turn, sold and installed it in a fishing vessel. *Id.* at 451-452. The oil pump allegedly malfunctioned, destroying the vessel's engine while the vessel was operating off the coast of Florida. *Id.*

The plaintiff, who sued GM in negligence and strict liability, argued its case fell within the "other property" exception to the doctrine because the oil pump caused damage to the engine ("other property"). *Id.* at 453-454. The First District disagreed, holding that because the oil pump "was an integral or component part" of the engine, the damage it caused to itself and to the engine as a whole did not constitute damage to "other property" under the doctrine. *Id.* The court reasoned:

> In this case, American's insured merely suffered economic losses - cost of repairing the engine and lost profits - which are better suited to a contract action. Here the object of the bargain was a repaired engine, not just a replacement oil pump. The oil pump furnished essential lubrication and heat protection to the engine - this is the part of the 'bargain' purchased, not just the metal and parts making up the oil pump. The pump became an integral part of the repaired engine and when it damaged itself, and the engine parts, this was not damage to 'other property.' As in *King v. Hilton-Davis*, the 'character of the loss' is not just a useless pump - it is an engine deprived of a substance that is essential to its operation.

American Universal, 578 so.2d at 454 (emphasis added).

Similarly, in *GAF Corp.*, a roofing contractor incorporated allegedly defective roofing materials manufactured by GAF Corporation into various roofs. 445 So.2d at 350-351. The

roofing contractor suffered an adverse judgment when the roofing materials rendered the roofs as a whole defective. *Id.* In dismissing the contractor's action, the court reasoned:

> Without dispute, no personal injury or property damage was sustained by the plaintiff Zack or any other person as a result of the allegedly defective materials in this case. This fact, we think, is fatal to the plaintiff Zack's claims in this case....

445 So.2d at 351-352 (emphasis added).[6]

Numerous cases from other jurisdictions have reached the same conclusion, holding the economic loss doctrine applies not only to damages the defective component causes to itself, but also to damages it causes to other components or to the machine or building in which it is incorporated as a whole. *See, e.g., Petroleum Helicopters, Inc. v. Avco Corp.*, 930 F.2d 389 (5th Cir. 1991); *Miller v. United States Steel Corporation*, 902 F.2d 573, 575-576 (7th Cir. 1990); *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825

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[6]This same conclusion was reached in *Florida Power & Light v. McGraw Edison Co.*, 696 F.Supp. 617, 618-621 (S.D. Fla. 1988). In that case, a transformer manufactured by the defendant exploded, causing damage not only to the transformer but also to an adjacent concrete wall, pipes and concrete base. *Id.* The plaintiff argued the damage to the wall, pipes and base constituted "damage to other property," taking the case outside the economic loss doctrine. *Id.* Noting the wall, pipes and base were "sufficiently related to the transformer's proper operation that they can be viewed as analogous to component parts," the court, applying Florida law, rejected plaintiff's contention and held the economic loss doctrine barred its tort action. *Id.* Plaintiffs' reliance on *Adobe Building Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA 1981) for a contrary conclusion simply is misplaced. In *Adobe*, the plaintiffs were permitted to pursue a cause of action in tort notwithstanding the fact the allegedly defective stucco in that case damaged only itself. As a result, *Adobe* directly conflicts with *Florida Power & Light* and *Aetna* and no longer is good law in Florida.

F.2d 925 (5th Cir. 1987); *American Home Assurance Co. v. Major Tool & Machine, Inc.*, 767 F.2d 446 (8th Cir. 1985); *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 374 S.E.2d 55 (Va. 1988); *Minneapolis Society of Fine Arts v. Parker-Klein Associates, Architects, Inc.*, 354 N.W.2d 816 (Minn. 1984), *modified in Hapka v. Paquin Farms*, 458 N.W. 2d 683 (Minn. 1990); and *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982).

For example, in *King v. Hilton-Davis*, adopted in *American Universal*, a farmer contracted with another company to buy seed potatoes. 855 F.2d at 1048-1049. The seller of the seed potatoes purchased them from other growers. Some of the growers had treated the potatoes with a growth suppressing chemical manufactured by the defendant. *Id.* The chemical destroyed two-thirds of the potatoes plaintiff purchased and critically injured the other one-third. *Id.* Plaintiff sued the chemical manufacturer in strict liability, negligence and breach of warranty, arguing the chemical damaged the seed potatoes, or, in other words, "other property". *Id.*

The Third Circuit, in analyzing whether the chemical caused damage to "other property", relied heavily on *East River's* component part rationale. In rejecting plaintiff's "other property" argument, the court concluded:

> In determining whether a product 'injures only itself' for purposes of applying the *East River* rule in a context like this, does one look to the product sold by the defendant or to the product purchased by the plaintiff? We conclude that one must look to the product purchased by the plaintiff.

* * *

> As we read *East River*, it is the character of the plaintiff's loss that determines the nature of the available remedies... The relevant bargain in this context is that struck by the plaintiff. It is that bargain that determines his or her economic loss and whether he or she has been injured beyond that loss. Moreover, the *East River* analysis dictates that where the purchaser of a defective product sues the manufacturer from whom he or she has purchased the product, rather than a supplier of components for the product, the relevant product is what the plaintiff bargained for and the remedy is limited to a contract-based recovery. We perceive no principled basis for affording the purchaser of a defective product greater relief against the manufacturer of a component part that has rendered a product defective than against the manufacturer of the assembled defective product. This counsels against looking to the component part to define the product and 'economic loss'.

Id. at 1051 (emphasis added).

Similarly, in *Shipco*, 825 F.2d at 925, the Fifth Circuit addressed virtually the identical question, reasoning:

> In attempting to identify the product, our analysis leads us to ask what is the object of the contract or bargain that governs the rights of the parties? The completed vessels were obviously the objects of the contract. Shipco did not bargain separately for individual components of each vessel. We are persuaded that those same vessels which were the object of the contract must be considered 'the product' rather than the individual components that make up the vessels.
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> * * *
>
> In considering Avondale's liability to appellants, we rejected Shipco's contention that damage sustained to one component of the vessel caused by a defect in a different component of the vessel presented damage to 'other property.' We reasoned that as to Avondale, which assembled the entire vessel, the 'product' was the finished vessel rather than the components of the vessel. Shipco's argument against AEG requires that we consider whether we should reach a different result as to AEG because its contribution to the vessels was limited to a single component, the steering system.
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> * * *

> We see no rationale reason to give the buyer greater rights to recover economic losses for a defect in the product because the component is designed, constructed, or furnished by someone other than the final manufacturer. The buyer ordinarily has no interest in how or where the manufacturer obtains individual components. The buyer is usually interested in the quality of the finished product and is content to let the manufacturer decide whether to do all the work or delegate part of it to others.
>
> * * *
>
> Permitting a buyer to assert a tort claim against a subcontractor or a component supplier may also implicate the seller; the supplier or subcontractor who is sued in tort can be expected to assert indemnity or contribution claims against the seller which assembled the product and incorporated the supplier's component or work in the finished product. The effect of such a claim, if successful, would visit ultimate tort liability for defects in the vessel on the manufacturer and seller and would nullify the objective of *East River* to limit the seller's liability in this type case to that assumed by contract.

Id. at 928-30 (emphasis added).

Finally, in *Sensenbrenner,* 374 S.E.2d at 55, a homeowner entered into a contract with a general contractor for the construction of a house with a swimming pool and pool enclosure. *Id.* at 56-58. The pool settled, causing water pipes to break and water to effuse. *Id.* The overflow of water caused erosion of the soil under the pool and foundation of the house, resulting in structural damage to both. *Id.* Rather than sue the general contractor for breach of contract, the plaintiff brought a tort action against the pool subcontractor. *Id.*

The Virginia Supreme Court held the economic loss doctrine barred the tort action against the pool subcontractor, reasoning:

> The plaintiffs here allege nothing more than disappointed expectations. They contracted with a builder for the purchase of a package. The package

> included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective -- one or more of its component parts was sufficiently substandard as to cause damage to other parts. The effect of the failure of the substandard parts to meet the bargained for level of quality was to cause a diminution in value of the whole, measured by the cost of repair. This is a purely economic loss, for which the law of contracts provides the sole remedy.

Id. at 58 (emphasis added).

Since the Petitioners concede, as they must, on page 20 of their Brief "there is no precedent in Florida decisional law for treating building products differently from other products that damage property", it is clear the concrete supplied by Toppino is not the focal point for purposes of applying the "other property" exception to the doctrine. Rather, the focal point is the objects purchased by Petitioners: their structures. Since they do not allege they have sustained any damages other than to their structures, they have not sustained damage to "other property" under the economic loss doctrine.

Petitioners' related, yet inconsistent, attempt to contend the concrete supplied by Toppino caused damage to "other property" because it damaged their "real property" is sophistry at its worst. Their argument ignores the fact this Court's decision in *Florida Power & Light* concerned the design, manufacture and furnishing of two nuclear steam supply systems by Westinghouse to Florida Power & Light, or, in other words, an improvement to real property. 510 So.2d at 900. The damages allegedly sustained by Florida Power & Light are no different

from those allegedly sustained by the Petitioners using their own logic. Their attempt to distinguish *Florida Power & Light* on this ground, therefore, must fail because their damages, if any, are limited to the objects of their bargains: their structures.[7]

B. Risk of Personal Injury, as Opposed to Actual Personal Injury, is Insufficient to Defeat Application of the Economic Loss Doctrine

Petitioners' argument their claims fall within the "personal injury" exception to the economic loss doctrine also must fail as a matter of law.[8] Under Florida law, allegations of <u>risk of personal injury</u>, as opposed to <u>actual personal injury</u>, are insufficient to defeat application of the doctrine.

For example, in *East River,* a defective engine component caused one of the ships in question to lose power during a severe storm, exposing the ship and its crew to a great <u>risk</u> of injury. 476 U.S. at 860-862. The Court, after reviewing positions taken

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[7]The Petitioners do not allege their <u>land</u>, as opposed to their structures, have been damaged as cleverly suggested by their use of the word "real" property.

When an owner of a lot contracts with a general contractor to erect a structure, he is contracting for the manufacture of the structure on a building site. There is no difference, either in logic or in policy, between the construction, i.e., manufacture, of a house and the manufacture of a ship such as in *East River*. The fact that the former is affixed to land and the latter floats on the ocean is an irrelevant distinction. The losses alleged by Petitioners, repair, replacement and diminution in value, are all due to damage to the manufactured structure and not due to any damage to the underlying land.

[8]For this argument, they rely heavily on cases that predate *East River* and this Court's decisions in *Aetna* and *Florida Power & Light* for the proposition the economic loss doctrine is inapplicable where the defective product poses only a <u>risk</u> of physical injury to persons or other property. However, virtually all of the cases they rely on have been effectively overruled by *East River*, *Aetna*, and *Florida Power & Light*.

by various courts, described as the "intermediate" position the view that the doctrine does not apply where the product "creates a situation potentially dangerous to persons or other property". 476 U.S. at 869-870. The Court rejected that position, stating:

> We find the intermediate ... positions unsatisfactory. The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior.

Id. at 870.

This Court specifically agreed with the reasoning of *East River* in *Florida Power & Light* and held "contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage." 510 So.2d at 901-902. It follows that risk of injury, as opposed to actual injury, is insufficient to avoid application of the economic loss doctrine.

This conclusion also is supported by *American Universal*. In that case, a fishing vessel was left without power in the open seas after its engine was destroyed by a defective oil pump. 578 So.2d at 451-452. Clearly, the vessel operator faced a "risk" of being injured or killed after the vessel's engine was destroyed. Nevertheless, the court held his tort action was barred under the doctrine. *Id.* *See also, Airport Rent-A-Car*, 788 F.Supp. at 1204-1206 (where the court applied the doctrine even though buses were destroyed by fire while operating, necessarily exposing their occupants to a serious risk of injury or death).

Thus, it is clear that absent actual personal injury or damage to property other than to their structures, the Petitioners may not sue Toppino in tort or contract under *East River, Aetna, Florida Power & Light, GAF Corp.*, and *American Universal*.

III. TO PERMIT BUILDING OWNERS TO SUE REMOTE MATERIAL MANUFACTURERS AND SUPPLIERS IN CONTRACT OR TORT TO RECOVER PURELY ECONOMIC LOSSES WOULD UNDERMINE THE POLICIES THIS COURT SOUGHT TO ADVANCE IN *FLORIDA POWER & LIGHT* AND IMPOSE UNNECESSARY, ADVERSE ECONOMIC CONSEQUENCES ON ALL CITIZENS OF FLORIDA

The citizens of Florida as a whole, not just manufacturers and suppliers of building materials, will suffer unnecessary economic consequences if building owners are permitted to sue remote material manufacturers and suppliers in tort or contract to recover purely economic losses. This section of the Association's brief discusses why sound public policy and the general welfare of all Florida citizens compels the affirmance of the *Casa Clara* decision.

The choice of requiring a building owner to bring a breach of contract or warranty action against the party with whom it is in privity of contract or permitting him to bypass his contractual remedies and sue a material manufacturer in tort is not a choice between imposing the risk of loss due to product defects on the manufacturer or leaving it with the plaintiff. Rather, it is:

> [A] choice between contractual and legal risk-spreading. If the...[building owner] is given a cause of action [against the manufacturer], the entire risk of consequential loss is imposed on the manufacturer.

> If no such action is permitted, the manufacturer and intermediary [general contractor or developer] may allocate the risk of loss by means of limitations on consequential damages in their respective warranties. The intermediary [general contractor or developer] selling directly to the plaintiff...[building owner] can more clearly foresee the consequential loss that would be suffered by the particular enterprise of the plaintiff if the product proves defective ... But if recovery were permitted on a strict tort theory, the manufacturer would be liable for the full amount even though he could not accurately predict the magnitude of his possible liabilities and in spite of these carefully developed risk-spreading arrangements [with the general contractor].

Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum.L.Rev. 917, 965 (1966) (parenthetical added).

The common denominator running through *East River, Aetna, Florida Power & Light, GAF Corp.*, and the majority of decisions addressing the issue is the policy favoring freedom of contract and the right of contracting parties to rely on the terms of their agreements, especially those allocating risks. The public policy this Court sought to advance in *Florida Power & Light* "encourages parties to negotiate economic risks through warranty provisions and price" and recognizes that a building owner can "protect his interests by negotiation and contractual bargaining or insurance" or may elect to "forego warranty protection in order to obtain a lower price". 510 So.2d at 901-902.

Under this clearly announced public policy, Petitioners were encouraged to protect their rights by bargaining with their sellers, contractors or design professionals for warranty protection (including HOW warranties, *see Harrow v. Remke Development, Inc.*, 573 So.2d 181 (Fla. 2d DCA 1991), to allocate

the risk of economic losses in their contracts with those parties and to obtain insurance or other means of protection.[9]

To the extent the Petitioners chose not to negotiate with their privies for warranty or insurance protection in exchange for a lower price, they elected to bear the economic risk of defects in their structures. Petitioners should not be permitted to ignore the bargain they struck regarding risk allocation, pocket the economic benefit of the lower price and then seek to recover against non-privies, like material manufacturers, and, in the process, deny the material manufacturer the benefit of its bargain with the general contractor who purchased its materials.

Indeed, the very antithesis of the policies announced in *Florida Power & Light* will be achieved by the position advanced by the Petitioners. Under their theory, building owners will be encouraged to forego obtaining any warranty protection from the person with whom they are in privity of contract and to forego purchasing insurance to protect themselves because they will have the "safety net" of being able to sue the subcontractors and building material manufacturers and suppliers with whom they are not in privity of contract in tort to recover their purely economic losses. They should not be permitted to have it both ways. Such a sociably undesirable and repugnant outcome would

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[9]In addition to warranty protection and insurance, the Florida Legislature and the judiciary have provided the building owners with the means to recover economic losses from those parties who design, construct and sold them their structures. *See, e.g.*, Section 553.84, Florida Statutes; Section 718.203, Florida Statutes, and cases like *Gable v. Silver*, 258 So.2d 11 (Fla. 4th DCA 1972), *aff'd.*, 264 So.2d 418 (1972).

assure that "contract law would drown in a sea of tort". *East River*, 476 U.S. at 866. This Court "should refrain from injecting the judiciary into this type of economic decision-making". *Florida Power & Light*, 510 So.2d at 902.

That Petitioners have no cause against remote material manufacturers and suppliers like Toppino either in tort or contract, however, does not mean they have no viable or alternative remedy available to them to recover their economic losses. To the contrary, this Court's decision in *Florida Power & Light* simply means they must pursue actions for breach of contract or warranty[10] against those parties with whom they contracted for the design, construction or purchase of their structures.[11]

A contrary conclusion would permit dissatisfied building owners to maintain tort actions against remote material manufacturers and suppliers with whom they had no prior contractual dealings, although their claims against their contractors, sellers or design professionals would be limited to contract. This illogical outcome becomes even more anomalous by

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[10]Or any statutory remedies they may have.

[11]The record reflects five of the Petitioners are doing precisely that. As to the other two Petitioners, one already settled a suit with its general contractor and released the contractor from any and all claims arising from construction defects in the structure. In the other case, the Petitioner failed to allege that it had no cause of action against the design professional it hired who had a duty under the building codes not only to specify acceptable concrete, but to test the concrete to insure that it was acceptable for use in the construction of its structure.

the fact the remote building material manufacturer or supplier who is found liable in tort would then be justified to turn around and sue the general contractor to whom it sold its concrete for contribution or indemnity, imposing ultimate tort liability on the Petitioners' developers, sellers, contractors and design professionals in contradiction of the policies underlying the economic loss doctrine, the Uniform Commercial Code, and the mandates of *East River*, *Florida Power & Light*, *Aetna*, *GAF Corp.*, *American Universal*, *Hilton-Davis* and *Shipco*.

In *Florida Power & Light*, this Court emphasized the economic loss doctrine is aimed at preservation of contractual bargaining and risk allocation. The Uniform Commercial Code, which controls all contracts between members of the Association and the general contractors who buy their products, permits material manufacturers and suppliers to limit their liability for economic loss in their contracts with general contractors. The creation of a tort action by building owners against material manufacturers and suppliers would deprive them of their bargains with general contractors and defeat their ability to defend themselves based on the contractual provisions disclaiming or limiting warranties that were negotiated in their contracts.

While the Uniform Commercial Code may not apply to the contracts between the Petitioners and their privies, the contracts between building material manufacturers and suppliers and general contractors are governed by the Uniform Commercial Code. If tort actions against material manufacturers and

suppliers to recover purely economic losses are permitted, "important provisions in the Uniform Commercial Code intended to permit contracting parties to control their economic relations through the bargaining process" would be nullified. Note, *Economic Loss in Product Liability Jurisprudence*, 66 Colum.L.Rev. 917, 958 (1966); *Florida Power & Light*, 510 So.2d at 902 ("[w]e note the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view"). *See also, Minneapolis Society of Fine Arts*, 354 N.W.2d at 820, where the Minnesota Supreme Court reasoned:

> To hold that buildings constitute 'other property' would effectively overrule [Minnesota's economic loss doctrine] as to every seller of basic building materials such as concrete, brick or steel because the 'other property' exception would always apply. The U.C.C. provisions as applicable to component suppliers would be totally emasculated.

Any decision to nullify the Uniform Commercial Code must be made by the Legislature, not this Court.

If tort actions against material manufacturers and suppliers are permitted when only economic losses are at stake, building material manufacturers and suppliers will be forced to manufacture products suitable for every conceivable use or misuse of their products or to insure against every conceivable or inconceivable risk. They would become warrantors of their materials even if they had contractually disclaimed liability in their agreements with the general contractors to whom they sold their products. Indeed, they would, in most instances, become

the ultimate guarantors and warrantors of the design and construction of every structure in which their materials were incorporated notwithstanding the fact the owner of the structure employed contractors, architects and engineers with knowledge of the construction and design industry and standards to specify the correct materials, to oversee the construction of their structures, and to construct their structure. Such unlimited potential liability will force material manufacturers to produce only the highest quality, most expensive materials in all cases, regardless of the needs or risk-taking desires of the individual purchaser, and to duplicate the duties of the owner's design professionals and contractors by overseeing the design and construction of the structures themselves.

Alternatively, material manufacturers will be forced to purchase insurance against concrete failure in every conceivable and inconceivable use of their materials in the construction of structures of yet unknown size or value. In today's market, such insurance may be unavailable at any cost. If available, the cost of such insurance would be so high that, if purchased by all manufacturers and suppliers of building materials, the cost of construction of residential and commercial structures would increase dramatically.

If these enormously costly precautions are not taken, manufacturers and suppliers of building materials could be held liable in tort for errors in the materials specified by the architect and in the use of those materials by the general

contractor. It will become impossible for material manufacturers and suppliers to allocate risks of material or structural failure in their contracts with general contractors, as building owners will be free at all times to bypass their contractual rights against their general contractors, design professionals and/or sellers, and, instead, sue the material manufacturer in tort, rendering meaningless the contractually bargained for risk allocation provisions in the contracts between themselves and the parties with whom they are in privity of contract, as well as the contracts between the general contractors and the material manufacturers. The Uniform Commercial Code would be nullified. *See*, Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum.L.Rev. 917, 964-966 (1966). *See also,* House & Bell, *The Economic Loss Rule: A Fair Balancing of Interests, 11 The Construction Lawyer 2* (1991).

Petitioners also miss the mark when they contend they should be exempted from application of the economic loss doctrine because they lacked sufficient bargaining power when they purchased their structures. *See,* Barrett, *Recovery of Economic Losses in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L. *Rev.* 891, 932-942 (1989). The Petitioners do not allege and nothing in the record suggests that they lacked sufficient bargaining power to negotiate for warranty or insurance protection against latent structural defects.[12] It simply is not

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[12]Indeed, the Petitioner in *Ontario,* for example, is a Canadian corporation. When its principal shareholder, Jerry (continued...)

realistic to characterize homeowners as being unable to protect themselves through contractual bargaining with their developers or contractors for warranty protection (or for a lower purchase price in lieu thereof) and through insurance, particularly in view of the substantial investment involved in the purchase of a home and the availability of home insurance and HOW warranty programs. *Id.* *See also Harrow*, 573 So.2d at 181-182.

Indeed, if the Petitioners' argument is carried to its logical extreme, not only would all consumer transactions escape application of the doctrine, but also all transactions where the plaintiff is not as large and economically powerful as the defendant even if the transaction is between "commercial" entities. Such a boundaryless and ill-defined exemption would emasculate the doctrine and the Uniform Commercial Code, and would require courts to determine the relative bargaining power of all plaintiffs and defendants in every case.

Moreover, there is nothing in *Florida Power & Light* to suggest the economic loss doctrine applies only to commercial entities. In fact, the doctrine has been applied to homeowners and consumers repeatedly in Florida and throughout the nation. *See e.g., Jacobson v. Heritage Quality Construction Co.,* 17 F.L.W. D1878, 1879 (Fla. 4th DCA 1992) (where the doctrine was applied to bar a homeowner's tort claim against a surveyor with

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[12](...continued)
Vann, contracted for the construction of his structure, he (or his attorney) negotiated a lengthy and detailed written contract with the builder, which is attached to the Second Amended Complaint in *Ontario*.

whom it was not in privity); *Belle Plaza*, 543 So.2d at 240-241 (condominium unit owners); *Begley v. Truly Nolan Exterminating, Inc.*, 573 So.2d 1038, 1039 (Fla. 3d DCA 1991) (homeowner); *Dansforth v. Acorn Structures, Inc.*, 608 A.2d 1194 1200 (Del. 1992) (where the Delaware Supreme Court recognized there is no principled basis to treat "consumers" differently than commercial entities); *Karshan v. Mattituck Inlet Marina & Shipyard, Inc.*, 785 F.Supp. 363, 365 (E.D.N.Y. 1992) (where the court noted the United States Supreme Court in *East River* clearly analyzed decisions relating to consumers in reaching its decision and thus, its decision was broad enough to cover ordinary consumers); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982) (homeowner); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 745 P.2d 1284 (Wash. 1987) (homeowners); *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 374 S.E.2d 55 (Va. 1988) (homeowners), among others.

Similarly, Petitioners' reliance on *Latite Roofing Co. v. Urbanek*, 528 So.2d 1381 (Fla. 4th DCA 1988) is misplaced. In *Latite*, a roofing contractor engaged by the original owner of the building allegedly installed a defective roofing system. *Id.* at 1382. The plaintiff in *Latite* was a subsequent purchaser of the partially completed building and, thus, was not in privity with the roofing contractor. *Id.* at 1383. The court concluded that because it appeared the new owner had no other action against the roofing contractor, application of the economic loss doctrine

would leave the new owner without any remedy against anyone to recover its economic losses. *Id.*

Latite, therefore, has no bearing on the Petitioners' claims against Toppino because they have alternative remedies available against their sellers, contractors and design professionals with whom they are in privity. Indeed, nearly all of the Petitioners currently are pursuing actions against those entities.

However, if *Latite* stands for the proposition that the economic loss doctrine must be applied on a defendant by defendant basis and is inapplicable if a plaintiff has no cause of action against a given defendant in contract as Petitioners contend, then *Latite* simply is wrong and conflicts with *Florida Power & Light, East River, American Universal* and *GAF Corp.*[13]

The very soundness of *Latite* is called into question by the fact the court held the trial court had committed harmless error by refusing to admit into evidence the contract entered into between the original owner of the building (who had contracted with the defendant for the construction of the roof) and the subsequent purchaser of the incomplete structure. Under the policy announced by this court in *Florida Power & Light*, that contract is the instrument through which the subsequent purchaser of the structure bargained or could have bargained for warranty

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[13]It appears that even the Fourth District Court of Appeal does not agree with the Petitioners' version of what *Latite* means. *See Jacobson v. Heritage Quality Construction Co.*, 17 F.L.W. D1878 (Fla. 4th DCA 1992) (where the Fourth District Court of Appeal applied the economic loss doctrine to bar a homeowner's claim against a subcontractor notwithstanding the fact the plaintiffs lacked privity of contract with the subcontractor).

protection in the event it incurred economic losses. By affirming the trial court's decision to leave that critical contract out of evidence notwithstanding the fact it may have controlled the subsequent purchasers rights to recover purely economic losses, the reasoning of *Latite*, to the extent it stands for the proposition being advanced by the Petitioners, must ring hollow.[14]

When a general contractor enters into a purchase agreement with a concrete manufacturer, each should be free to allocate the risk of potential product failure between them and should be able to rely on their agreement in the event of such a failure. As it stands now, a general contractor is free to negotiate the purchase of a lower grade concrete for a lower price without warranty protection and concrete manufacturers are free to insist on warranty limitations or disclaimers in view of the lower price. Conversely, general contractors also are free to insist upon superior concrete with warranties and manufacturers are free

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[14]It is also clear from this Court's decision in *AFM Corp. v. Southern Bell Telephone and Telegraph Co.*, 515 So.2d 180, 181 (Fla. 1987), that *Latite* misinterpreted this Court's earlier decision in *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973). In *AFM,* this Court recognized its decision in *Moyer* was distinguishable from *Florida Power & Light* because in *Moyer* "we based our decision on the fact that the supervisory responsibilities vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract" and "[s]ince there was no contract under which the general contractor could recover his loss, we concluded he did have a cause of action in tort". *AFM,* 515 So.2d at 181. Thus, it is clear that *Latite*, by erroneously focusing only on the second prong of the *Moyer* rationale and ignoring this Court's focus on the unique facts in *Moyer* concerning the supervisory responsibilities of the architect, conflicts with *AFM* and *Florida Power & Light*.

to negotiate a higher price for such concrete. The doctrine, therefore, assures that the interests of all parties directly or indirectly linked to a building owner's structure are fairly balanced. House & Bell, *The Economic Loss Rule: A Fair Balancing of Interests, 11 The Construction Lawyer 2* (1991).

Any departure from these timed-honored principles of contract law will force material manufacturers and suppliers to produce only the highest quality, most expensive product in all cases, regardless of the purchaser's desire to purchase lower grade materials in exchange for a lower price. Freedom of contract clearly will become a principle of the past.

Departure from these principles to permit a building owner to sue a concrete manufacturer directly in tort also will prevent efficient risk-spreading through insurance. Concrete is not a fungible product. It is manufactured in a variety of strengths and mixes specified by the architect and ordered by the general contractor and is utilized in a variety of circumstances. It is used in many different types of reinforced and non-reinforced concrete structures, such as driveways, highways, bridges, sidewalks, parking lots, girders, beams, floor slabs, roofs, swimming pools, boat docks, athletic facilities, and monuments, among other uses. It may be used with plain steel reinforcing bars or bars coated with zinc, epoxy or stainless steel to isolate the steel from contact with the concrete and outside influences causing corrosion. Sometimes waterproof sealers are used on the outer portion of the structures, sometimes they are

not. Each project may require a different depth of cover (concrete) over the steel reinforcement and may require variations in the aggregates, add-mixtures or water-cement ratios.

When the concrete manufacturer receives an order from a general contractor, he only is asked to deliver a certain quantity of a certain type concrete to a particular geographic location. He rarely, if ever, knows the specific identity of the owner, or for what particular purpose the order of concrete will be used on the job site. Nor does the manufacturer know whether the concrete will be altered at the job site by the general contractor or what the size or value of the completed structure will be. The concrete manufacturer simply provides the concrete ordered by the general contractor. He should not be compelled to second-guess general contractors, the design professionals or owners of structures as to what type concrete is required for a particular project or how it should be used unless he agrees to do so through contract.[15]

In the absence of the economic loss doctrine, these variations in type, use and purpose of concrete will render

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[15]Contrary to the position advanced by the Petitioners, concrete manufacturers and suppliers do not perform a "service" within the meaning of the *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So.2d 9 (1990) line of cases. Rather, they supply a product - concrete. The only "service" they provide is the delivery of that product to the building site. There are no allegations in the Petitioners' complaints that Toppino engaged in the construction or design of their structures. Rather, they alleged Toppino manufactured concrete and delivered it to the building site.

insurers unable to evaluate reliably the concrete manufacturer's risk of product failure or potential damage exposure, making it difficult, if not impossible, for the manufacturer to obtain sufficient insurance coverage without paying extremely high premiums which may well result in the economic failure of many manufacturers and resultant unemployment and higher prices due to reduced supply. In fact, insurance coverage may be unavailable to concrete manufacturers at any price because the insurance carriers may be unwilling to provide coverage for the potentially enormous and clearly undefined exposure. Self-insurance against the many millions, if not billions, of dollars worth of buildings containing its concrete also is not a viable alternative for most Association members, given their relatively small size and limited financial resources.

Conversely, insurance (including HOW warranty programs) is readily available to the building owner or general contractor for the risk of concrete failure in a particular building at a fixed amount. The cost of such insurance will not significantly increase the price of the structure. The insurer can estimate the value of a specific building, review the plans and specifications prepared by the architect and evaluate the competence and reputation of the general contractor. Insurance of specific risks at this level will cost substantially less than insuring undefined, unlimited risks at the level of the concrete manufacturer.

If material manufacturers and suppliers are exposed to tort liability, the dramatic increase in the cost of insurance, if available, in duplicating the responsibilities of the design professionals and contractors hired by the building owners and in the course of producing only the highest quality, most expensive grade of product even if the general contractor desires a lower grade of product, necessarily will be reflected in the price charged for concrete and other building materials generally, dramatically increasing the cost of building materials, construction generally, and ultimately, the purchase price of all structures utilizing concrete and other building materials.

This increased cost of construction will be passed on to the citizens of Florida, pricing many potential purchasers of homes, especially those on the lower end of the income scale, out of the market for new homes or small businesses.[16] This, in turn, will result in a significant decline in the construction of structures generally, potentially putting many members of the Association and many of the other small entities comprising the bulk of the construction industry out of business. This, of course, could significantly increase unemployment in the construction industry and related industries, potentially resulting in millions of dollars being unavailable for spending, saving and investing by

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[16]As such, the positions advanced by the Petitioners are particularly inappropriate in the wake of Hurricane Andrew, as many individuals and businesses may not be able to afford to rebuild their hurricane-devastated structures due to the dramatic increase in the cost of materials and in the overall cost of construction.

the citizens of Florida, causing a ripple or "trickle-down" effect detrimental to an already devastated economy.

The potential impact on the construction industry, the economy and the citizens of Florida as a whole is as limitless as the imagination. The Petitioners clearly have ignored these serious policy issues and the ramifications of their legal positions.

However, these detrimental consequences to the public are without purpose, as insurance coverage and risk spreading through contractual negotiation is available at a much lower cost at the owner/contractor level. Indeed, this unnecessary economic burden on the public is the very reason the Court in *East River* and this Court in *Florida Power & Light* embraced the economic loss doctrine and recognized the judiciary should not interfere with "the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public". 510 So.2d at 902.

This Court should refrain from injecting itself into an area of the law already governed by long-standing common law principles of contract and by the Uniform Commercial Code. The issues raised by the Petitioners and the impact they could have on the construction industry, the insurance industry, building material manufacturers and suppliers generally and the citizens of Florida as a whole should be addressed to and resolved by the Florida Legislature.

IV. THE FLORIDA BUILDING CODES ACT DOES NOT CREATE A CAUSE OF ACTION AGAINST MATERIAL MANUFACTURERS AND SUPPLIERS LIKE TOPPINO AND MEMBERS OF THE ASSOCIATION

Material manufacturers and suppliers are not persons upon whom the Florida Building Codes Act, Sections 553.70 - 553.895, Florida Statutes (1991), imposes a duty of compliance when their only connection with the building under construction is the manufacture and delivery of materials specified by the owner's design professional and ordered and installed by the owner's general contractor. Rather, only those persons or entities who "construct" or "design" structures have a duty of compliance under the Act and under the applicable local codes.

This conclusion is mandated by simple logic and the realities of the construction industry. As discussed previously, there are many different types and uses of concrete and many different construction techniques which affect its strength and effectiveness on any given project. When a general contractor places an order for concrete, he specifies the strength and other qualities he desires and requests the concrete manufacturer to deliver the concrete at a certain time to a street address or a legal property description.

The concrete manufacturer does not know and is not asked to determine whether the concrete ordered is suitable for its intended use or whether the architect specified and the contractor ordered the proper concrete for the project in question. Typically, the concrete manufacturer does not know for which of the many purposes his concrete will be utilized or in

what combination it will be used with other products. Nor does he know whether the product will be altered by the general contractor at the construction site or whether it will be properly poured, placed or cured. He also has no way of knowing whether the contractor will utilize the concrete correctly during construction of the structure, including whether the contractor will place sufficient cover over the steel reinforcing bars.

Under these circumstances, the imposition of a duty of building code compliance on concrete manufacturers will require them to second-guess the owner's design professionals and general contractors as to whether the concrete specified by the architect or engineer and ordered by the general contractor meets applicable code requirements for the intended usage, and to supervise and oversee the actual pouring, placing and curing of the concrete and the actual construction of the structure in question. Compliance with such a duty also will require the concrete manufacturer to retain its own architects, engineers and experts in concrete construction practices to ensure each load ordered by the general contractor meets all building code requirements for the purpose that particular load will be used and to ensure it is used only in accordance with whatever codes are applicable. The cost of this unnecessary duplication of effort will inevitably be passed on to the general contractor and, in turn, to the owner of the structure.

The concrete manufacturer will, in effect, be made the ultimate guarantor and warrantor that the concrete specifications

provided by the owner, owner's architect or engineer to the general contractor and the concrete construction practices of the general contractor comply with every applicable building code requirement. This task will be made many times more difficult because building codes are enacted locally and differ from one community to the next.

To protect itself against claims under the Florida Building Codes Act, the concrete manufacturer will have two choices: retain its own architects, engineers, contractors and job site construction experts to second-guess the owner's design professionals and general contractors or obtain insurance, if available, against what amounts to undefinable risks and exposure. As in the case of any departure from the economic loss doctrine, the cost of such precautions will, at a minimum, greatly increase the price of ready-mix concrete and building materials generally resulting in the public paying substantially higher prices for construction of homes and other structures. It also will place a financial choke-hold on many material manufacturers while effectively reducing, if not eliminating, the liability of the architects, engineers and contractors expressly charged with a duty of code compliance and with whom the building owner or his developer contracted for the design and construction of the structure.

The imposition of such adverse consequences and duplication of effort are unnecessary since owners, design professionals and general contractors have the clear obligation to comply with

applicable building codes. Moreover, it is illogical and economically inefficient to require concrete manufacturers to ensure the owner's representatives charged expressly with the duty of code compliance have properly performed their duties of designing and constructing buildings that meet provisions of the applicable building code. The Legislature could never have intended such a bizarre result when it enacted the Florida Building Codes Act.

Any obligation a material manufacturer or supplier may have to comply with the applicable building code arises solely from its contract with the general contractor to supply the concrete specified in the purchase order. It has no independent duty to ensure the concrete ordered by the general contractor meets local building code requirements for whatever use the general contractor intends to make of it at the job site. This conclusion follows not only from the foregoing analysis, but also from decisions such as *Mastrandrea v. J. Mann, Inc.*, 128 So.2d 146, 147-49 (Fla. 3d DCA 1961), *cert. den.*, 133 So.2d 320 (Fla. 1961), and the express language of the building codes in question.

In *Mastrandrea,* a concrete block supplier delivered blocks to a construction site and stacked them in a manner prohibited by the applicable building code. *Id.* The blocks fell, causing personal injury to a construction worker. *Id.* The construction worker sued the block supplier alleging it was liable for violation of a building code provision governing the stacking of

concrete blocks. *Id.* This Court held plaintiff had no cause of action against the block supplier for violation of the building code because the duty of code compliance rested solely on the general contractor and masonry subcontractor. *Id.* It is clear from *Mastrandrea* material manufacturers and suppliers have no duty of compliance with building codes.

This same conclusion unquestionably follows from the express language of the Florida Building Codes Act. For example, Section 553.73(2)(d) of the Act states that the State Minimum Building Codes adopted by each local government "shall govern the construction, erection, alteration, repair or demolition of any building for which the local government or state agency has building construction regulation responsibility". The Petitioners' complaints allege only that Toppino supplied concrete to the general contractor which used the concrete in the construction of their structures. Nowhere do the Petitioners allege that Toppino performed any construction, erection, alteration, repair or demolition of their structures or that Toppino was involved in any way in the design or construction of their structures.[17] It follows that Toppino, as an alleged

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[17]Similarly, Section 553.79 of the Act specifically defines the classes of persons charged with the duties of code compliance, none of which include material manufacturers:

> [I]t shall be unlawful for any person, firm or corporation to construct, erect, alter, repair or demolish any building within this state without first obtaining a permit... . The enforcing agency is empowered to revoke any such permit upon a demonstration by the agency that the construction,
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> (continued...)

material manufacturer and supplier only, is not charged with the duty of compliance with the Florida Building Codes Act and cannot be sued for violating the Act or local building codes.

Similarly, the Monroe County Building Code, the building code which controls all construction in Monroe County, specifically exempts material suppliers from any duty of compliance with its provisions. *See* Section 6-66 of the Monroe County Building Code (which designates those actions prohibited under the building code and designates the persons who have a duty not to violate same), and Section 6.55(12) (which expressly exempts material suppliers from a duty to comply with Section 6-66). Indeed, this exemption of material suppliers from the ambit of the Monroe County Building Code renders debate over the applicability of the Act and the other codes cited by Petitioners unnecessary because said codes are applicable only if the Monroe County Building Code applies.

Even if the 1976 Standard Building Code (incorporated by reference into the Monroe County Building Code) was applicable, it also compels the same conclusion. Specifically, Section 101.3, entitled "Scope", states that:

> The provisions of this code shall apply to the construction, alteration, repair, equipment, use and occupancy, location, maintenance, removal and demolition, of every building or structure, or any

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[17](...continued)
erection, alteration, repair or demolition of the building for which the permit was issued is in violation of, or not in conformity with the provisions of the State Minimum Building Codes.

> appurtenances connected or attached to such buildings or structures.

Additionally, the specific chapter of that code on concrete provides in Section 1601 that:

> All structures of reinforced concrete, including prestressed concrete, shall be designed and constructed in accordance with the provisions of 'Building Code Requirements for Reinforced Concrete, ACI 318,' as amended by the '1974 Supplement to Building Code Requirements for Reinforced Concrete, ACI 318.'

Petitioners do not allege that Toppino either designed, constructed, erected, altered, repaired or demolished their structures. In the absence of such activities, material manufacturers like Toppino simply are not covered by the Act, the Monroe County Building Code or the Standard Building Code.

A contrary interpretation of the Act will make material manufacturers, however remote from the owner, the ultimate guarantors and warrantors that an owner's agent, design professional or general contractor specified, ordered and utilized materials in compliance with building code provisions for the locality in which its building is located. The Legislature could not have intended such an absurd result.

Even the American Concrete Institute's Building Code Requirements for Reinforced Concrete (ACI 318-77) (hereinafter "ACI 318-77"), on which Petitioners base virtually their entire argument regarding the alleged violation of the Act by Toppino,[18]

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[18]No version of ACI 318 applies in Monroe County because the Monroe County Building Code only adopted by specific and descriptive terms the 1976 Standard Building Code. See Section 6-16, Monroe County Building Code and Goodman v. Kendall Gate-Investco, Inc., 395 So.2d 240, 241 (Fla. 3d DCA 1981).

supports the conclusion material manufacturers and suppliers have no duty to comply with applicable building codes. To this end, Section 1.3.1 of ACI 318-77 provides:

> Concrete construction shall be inspected throughout the various work stages by a competent engineer or architect, or by a competent representative responsible to that engineer or architect.

Section 1.3.2 provides:

> The Inspector shall require compliance with design drawings and specifications and keep a record that shall cover:
>
> (a) Quality and proportions of concrete materials ...
>
> (d) Mixing, placing, and curing of concrete ....

The authors of ACI 318-77, in their commentary on inspection generally and Sections 1.3.1 and 1.3.2 of ACI 318-77, state:

> The quality of reinforced concrete structures depends largely on workmanship in construction. The best of materials and design practice will not be effective unless the construction is performed well. Inspection is provided to assure satisfactory work in accordance with the design drawings and specifications....
>
> * * *
>
> The code does not set responsibility for inspection [of concrete quality, etc.] other than by a competent engineer or architect, or by a competent representative responsible to him... Inspection responsibility and the degree of inspection required should be set forth in the contracts between the owner, architect, engineer, and contractor.
>
> * * *
>
> Inspection in no way relieves the contractor from his obligation to follow the plans and specifications implicitly and to provide the designated quality and quantity of materials and workmanship for all job stages. The inspector should be present as frequently as he deems necessary to explain design requirements;

> to judge whether the quality and quantity of the work complies with the contract documents;...to see that concrete is of the correct quality, properly placed and cured; and to see that tests for quality control are being made as specified.

See Commentary on American Concrete Institute, Building Code Requirements for Reinforced Concrete (ACI 318-77), Section 1.3 (1977) (emphasis added).

If the applicable building code imposes requirements for how concrete should be manufactured for a certain use, the general contractor's purchase order must instruct the concrete manufacturer to provide only concrete that meets those requirements. In the absence of such specifications, a concrete manufacturer must be able to reasonably assume the architect and contractor have concluded the code either does not impose any special requirements for the purpose the concrete will be used or that its concrete is in compliance with the applicable building code. The concrete manufacturer also must be able to reasonably assume the general contractor's purchase order includes all the specifications of the architect and the general contractor will pour, place and cure the concrete and construct the structure in accordance with any applicable code provisions.[19]

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[19]Interpretation of the Florida Building Codes Act and the applicable local codes as imposing civil liability only on those parties engaged in the construction or design of buildings is supported by the decisions of other Florida appellate courts, as well as decisions of federal courts. *See Mastrandrea, supra; see also Atlantic National Bank v. Modular Age, Inc.*, 363 So.2d 1152, 1155 (Fla. 1st DCA 1978), *cert. den.*, 372 So.2d 466 (Fla. 1979); *Robsol, Inc. v. Garris*, 358 So.2d 865, 866 (Fla. 3d DCA 1978); *Maritime Construction Co. v. Benda*, 262 So.2d 20, 22 (Fla. 1st DCA 1972); and *Bradford Builders, Inc. v. Sears, Roebuck & Co.*, 270 F.2d 649, 654-655 (5th Cir. 1959), among others.

When the ramifications of the positions advanced by the Petitioners are considered, it becomes apparent the Legislature could never have intended the building code provisions of Monroe County to reach remote material manufacturers. For example, the steel reinforcing bars used in Petitioners' structures no doubt were manufactured outside of Monroe County. The Monroe County Building Code contains provisions dealing with the size of steel reinforcing bars used in the construction of reinforced concrete buildings. If material manufacturers are under a duty of code compliance, the remotely located steel manufacturer will not be able to rely on the size stated in the general contractor's purchase order (and presumably specified by the owner's architect) because, if it errs, it will be subject to liability for violation of the Act. Under Petitioners' theory, the steel manufacturer will have to obtain a copy of the local building code and conduct an independent review of the architect's plans and specifications and the general contractors purchase order to determine whether the materials ordered are in compliance with the codes in the locality of the construction site, and also will be required to supervise construction to ensure its steel is used correctly during construction.

Since the steel manufacturer is likely to supply steel reinforcing bars to many different counties in Florida, it will be under a very expensive burden if, in connection with every order, it must review the plans and material specifications of the architect and the purchase order of the general contractor

and compare them to the building codes of the jurisdiction to which the bars are to be shipped. In addition, the steel reinforcing bar manufacturer will be compelled to obtain costly insurance against the new liability imposed by the Act should it err in second-guessing or not second-guessing the owner's design professional and general contractor. Such substantial costs necessarily will increase the cost of steel reinforcing bars, ultimately causing construction prices to rise and, in turn, imposing a higher price on the public for steel-reinforced concrete structures.

The imposition of such an enormous economic burden on every building material manufacturer will cause a substantial overall increase in the cost of construction. Since the cost of every building material, not just concrete, will be substantially increased by the new duty advanced by the Petitioners, the end result will be substantially higher prices for new concrete structures and a concomitant reduction in construction and construction jobs. Like any departure from the economic loss doctrine, such an economic burden on the citizens of Florida and on the construction industry is unnecessary, as the owner's architect and general contractor already are charged with the duty of code compliance regarding the materials used in a given structure and have been compensated to assure the structures they designed and constructed comply with the controlling building codes.

Clearly, the Legislature could not have intended to impose such unnecessary and duplicative responsibilities with regard to building code compliance. The Florida Building Codes Act must be construed reasonably in accordance with its express provisions to impose duties only on design professionals, general contractors, and others engaged in design and construction activities. It should not be held applicable to remote material manufacturers and suppliers not involved in actual design or construction of the structures containing their materials.

CONCLUSION

For the foregoing reasons, the Association respectfully requests this Court to affirm the decision of the Third District Court of Appeal in *Casa Clara*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 19th day of October, 1992 to H. Hugh McConnell, Esquire and Steven M. Siegfried, Esquire, 201 Alhambra Circle, Suite 1102, Coral Gables, FL 33134; Daniel S. Pearson, Esquire, Holland & Knight, 1200 Brickell Avenue, P.O. Box 015441, Miami, FL 33101; Mark Hicks, Esquire, Hicks, Anderson & Blum, Suite 2402, New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132; Robert W. Boos, Esquire and M. Elizabeth Wall, Esquire, Honigman, Miller, Scwartz, et al, 2700 Landmark Centre, 401 East Jackson Street, Tampa, FL 33602; Arthur J. England, Jr., Esquire and Charles M. Auslander, Esquire, Greenberg, Traurig, Hoffman et al, 1221 Brickell Avenue, Miami, FL 33131; Kimberly Ashby, Esquire, Maguire, Voorhis & Wells, P.A., 2 South Orange Plaza, 2 South Orange Avenue, Orlando, FL 32801; Susan E. Trench, Esquire, Goldstein & Tanen, P.A., One Biscayne Tower, Suite 3250, Two South Biscayne Boulevard, Miami, FL 33131; Lynn E. Wagner, Esquire and Richard A. Solomon, Esquire, Cabaniss, Burke & Wagner, P.A., 800 N. Magnolia Avenue, Suite 1800, Orlando, FL 32803; G. William Bissett, Jr., Preddy, Kutner, et al, 501 N.E. 1st Avenue, Miami, FL 33132; Andrew J. Toland, Esquire, Patton, Boggs & Blow, 250 W. Pratt Street, Suite 1100, Baltimore, MD 21201; and Edward T. O'Donnell, Esquire, Herzfeld and Rubin, 801 Brickell Avenue, Suite 1501, Miami, FL 33131.

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