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SUPREME COURT OF FLORIDA

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

Petitioners,

vs. **CASE NO. 79,127**

CHARLEY TOPPINO AND SONS, INC., etc.,

Respondent.
_____/

CHRISTOPHER H. CHAPIN, et al.,

Petitioners,

vs. **CASE NO. 79,128**

CHARLEY TOPPINO AND SONS, INC., etc.,

Respondent.
_____/

AMICUS CURIAE BRIEF FOR ORIXGP INTRACOASTAL

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AMICUS FACTS

ORIXGP INTRACOASTAL CORPORATION, as managing General Partner of INTRACOASTAL PACIFIC LIMITED PARTNERSHIP, a Florida limited partnership ("INTRACOASTAL"), purchased the Intracoastal Mall, which included an already constructed office building. The office building had a glass wall comprised of individual glass "lites" (*i.e.* panes), which had been manufactured by PPG Industries, Inc.("PPG"), a material supplier when the building was originally constructed. INTRACOASTAL performed its due diligence requirements, including inspection of the property. The inspection did not, and could not, reveal that the lites had latent defects which ultimately resulted in individual lites "exploding" at unpredictable times. Only the manufacturer, PPG, was aware that these lites contained nickel sulfide which has a propensity to cause the lites to spontaneously shatter.

When PPG failed to correct this defective condition upon notice, INTRACOASTAL filed suit in the United States District Court for the Southern District of Florida, alleging breach of warranty and negligence. PPG moved to dismiss and District Court Judge Nesbitt ultimately granted this motion, finding lack of privity between INTRACOASTAL and PPG as to the warranty claim; and finding that the economic loss rule precluded a tort recovery.

INTRACOASTAL moved for rehearing and also advised the Court of the pendency of this Court's acceptance of certiorari in the present case. On September 11, 1992, Judge Nesbitt entered an order staying the Intracoastal action until this

Court renders its decision, in that the economic loss rule being examined herein "... is of pivotal importance to the resolution of [that] action."

SUMMARY OF AMICUS ARGUMENT

INTRACOASTAL finds itself in the same situation as the Casa Clara homeowners in that it was denied recovery in warranty because of lack of privity, and denied recovery in tort under the economic loss doctrine, for damage to its real property caused by a defective component.

While Casa Clara petitioners limit much of their argument to the application of the rule to residential purchasers, the economic loss rule is equally inappropriate when applied to subsequent purchasers of commercial property where a latent, defective product comprises part of the real property purchased.

Liability for a defective product should not hinge on the type of damage ultimately caused by the defect, but rather should be examined using the traditional notions of foreseeability and proximate cause. Otherwise, one reaches the incongruous result that, despite the inherently dangerous situation created by both the defective concrete in the case before this Court and the shattering glass in INTRACOASTAL's case pending in District Court, the owner cannot compel the tortfeasor to correct the situation; only "after the fact" recourse is left to the person ultimately seriously injured as a result of the unremedied condition.

Such application of tort law certainly does not comport with the general purposes of such law to protect the public and hold a tortfeasor responsible for his actions.

ARGUMENT

The Economic Loss Rule Makes Sense Only in the True Commercial Buyer/Seller Contractual Setting

In Florida Power and Light v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987), this court held that a claim by a buyer against a seller relating to a defective product is more appropriately handled under contract than tort principles. This rule, when dealing with such a contractual relationship, makes good sense as it ". . . encourages parties to negotiate economic risks through warranty provisions and price." 510 So.2d at 901.

However, this rule is now being applied in situations where there is no opportunity for such contractual negotiation, and no subsequent contractual remedy. Manufacturers are effectively freed from liability for defective products which cause subsequent purchasers economic injury, and which can result in serious personal injury if not remedied. The subsequent purchasers are precluded from recovery; and the manufacturer who placed the defective product into commerce is protected from liability by the fortuitous circumstance of resale.

The Economic Loss Rule Should Not Apply Where There is No Alternative Remedy

The economic loss doctrine makes sense only in the situation where a contractual relationship exists between the party injured and the party against whom the claim is brought. The relationship between those parties is defined by their agreement, presumably reached after a period of negotiation and bargaining. It is

elementary that any subsequent disputes between them should be resolved in the context of contractual claims and remedies.

The same is not true, however, where the parties do not have a contractual relationship, so that the plaintiff, injured by the negligence of the defendant, has no contractual recourse. In such situation, application of the economic loss rule forecloses any recovery, even where injury to this individual's property by virtue of the incorporation of the defendant's product was reasonably foreseeable.[1] Clearly, the rule should not foreclose a plaintiff whose real property is damaged by virtue of the defect from obtaining relief.[2]

In Latite Roofing Company, Inc. v. Urbanek, 528 So.2d 1381, 1383 (Fla. 4th DCA 1988), Urbanek purchased a partially completed building and subsequently sued Latite, the roofing company, for negligent construction and installation of the roof. The court allowed an economic loss tort claim against Latite because, "[T]he complaint is cast in negligence; which appears to be Urbanek's sole theory upon which recovery can be had against Latite." 528 So.2d at 1383. The court's only

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[1] Intracoastal agrees with the arguments put forth by petitioners herein as to the distinction between the building and the defective component part, and will not spend time reiterating these arguments.

[2] This of course does not mean that a party injured would always have a remedy against the supplier or manufacturer of the defective product where no privity exists. If that were the case the fears of open ended liability which led to promulgation of the economic loss rule would be realized. However, as discussed at length *infra*, application of the traditional requirements of foreseeability and proximate cause and the application of the applicable statute of limitations, would effectively achieve the proper result of limiting liability to reasonably foreseeable plaintiffs within a reasonably foreseeable period of time.

inquiry was whether Urbanek had an alternative remedy against Latite, the party against whom the claim was brought and, finding it did not, allowed the claim.

Similarly, in Interfase Marketing v. Pioneer Technologies Group, Inc., 774 F.Supp. 1351 (M.D. Fla. 1991), the United States District Court, applying Florida law, upheld a plaintiff's tort claim for misrepresentation, noting that the plaintiff did not have a contractual remedy against the named defendant. Citing Florida's "no alternative means of recovery" exception, the Court held:

> Since Interfase has no contract remedy against Pioneer for the alleged statements made by Pioneer representatives and relied upon by Interfase, the claim of misrepresentation found in Count I of the Amended Complaint must be allowed as an exception to the "economic loss rule." (emphasis added).

774 F.Supp. at 1354. Again, the court's inquiry was only whether Interfase had an alternative remedy against the party sued.

In AFM Corp. v. Southern Bell Tel. & Tel. Company, 515 So.2d 180 (Fla. 1987), this court was careful to distinguish A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973), which upheld a general contractor's right to bring a tort claim against an architect who had caused him economic loss. The Moyer court had found that the general contractor was not a third party beneficiary to the owner/architect contract. "Since there was no contract under which the general contractor could recover his loss, we concluded he did have a cause of action in tort." 515 So.2d at 181.

The Eleventh Circuit Court of Appeals also emphasized this distinction in Blu-J, Inc. v. Kemper C.P.A. Group, 916 F.2d 637, 641 (11th Cir. 1990):

> The AFM case does not stand for the proposition that the mere allegation of any alternate theory of recovery forecloses the award of economic damages in tort. Rather, the court in AFM merely held that a party to a contract could not recover economic damages on a tort theory in the absence of a tort independent of the breach of contract itself. That this was the holding of AFM is demonstrated by the fact that the court distinguished *A.R. Moyer, Inc. v. Graham,* 285 So.2d 297 (Fla. 1973).

It is hard to reconcile the extension of the economic loss rule to the Casa Clara and Intracoastal type situation with Moyers. In Moyers, this court held that a general contractor who suffered economic damage as a result of an architect's negligent performance has a cause of action in negligence against the architect despite the lack of privity between the parties. Yet as the economic loss rule is now being applied, an owner who suffers economic damage as a result of a supplier's negligent performance - an essentially similar situation - has no such remedy. This distinction makes no sense - in both cases the injury is foreseeable and proximately resulting from the negligent performance of a contractual duty. The distinction is even more egregious in that the contractor may in fact have insurance against such economic loss, whereas the owner generally does not have insurance covering latent construction defects.[3]

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[3] The Casa Clara Petitioners' Brief on the Merits confirms that the usual homeowner insurance policy would not cover this type of damage. Intracoastal likewise has been advised by its insurance carrier that the glass breakage in its building is not covered under its existing insurance policy.

Traditional Notions of Foreseeability and
Proximate Cause Should Determine the Issue of Liability

There is no sound policy reason for absolving a manufacturer of a component part of a building from liability to the subsequent purchaser where the defect in its product was the foreseeable and proximate cause of injury, merely because that injury is "economic" or involves costs for the repair or replacement of the defective product. In fact, such a holding contravenes traditional tort notions that the tortfeasor, as opposed to an innocent injured party, should be responsible for its actions, and conflicts with the proper allocation of risk and costs involved in the commercial setting.

That foreseeability and not the nature of the damage should be the determining factor in whether a cause of action exists has, in recent years, been acknowledged by this Court's decisions relating to the liability of professionals to third parties. First Florida Bank, N.A. v. Max Mitchell & Co., 588 So.2d 9 (Fla. 1990); First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984).

In First American, this Court held that an abstracter's duty of care extends to a subsequent purchaser when the abstracter knows that his report will be used by that prospective purchaser. In limiting its holding so that liability can exist in that situation only as to those the abstracter knows will use his report, this Court distinguished Moyer to the extent that the general contractor in Moyer was totally dependent on the architect's work, whereas the plaintiff purchaser of real property in First American "... is not so restricted in his quest for assurances that he is getting

what he is paying for. Rather than rely on the abstract of title prepared for the seller or for a previous owner, the purchaser can order his own abstract and an attorney's title opinion based thereupon." 457 So.2d at 471.

In the instant case it cannot be said that the Casa Clara petitioners (or INTRACOASTAL under its facts) had any possibility or opportunity to discover the latent defects which subsequently caused such serious economic damage and potential for physical injury. Therefore, the same rationale does not apply and actual knowledge by the manufacturer becomes irrelevant.[4]

The true question must be whether the manufacturer or supplier of a building product could reasonable foresee that the provision of a latently defective product would cause injury to the owner of the building, whether the original owner or a subsequent owner. Cases which have looked at that issue (particularly in terms of latent defects discovered after turnover of a building) have acknowledged the logical determination of liability in such context. Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA 1981), *rev. dismissed*, 411 So.2d 380 (Fla. 1981); Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978).

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[4] Admittedly, application of the economic loss rule in the Casa Clara fact situation does not even allow for the question of "actual knowledge" to become a factor. If this were not the case, original purchasers like the Casa Clara homeowners would clearly have valid claims against subcontractors and suppliers who certainly know that their products and services will be used by these consumers. It is therefore equally difficult to reconcile the Casa Clara decision with the decisions of this Court culminating in First Florida Bank, N.A. v. Max Mitchell & Company, 558 So.2d 9 (Fla. 1990).

In Simmons, a purchaser of a used home was held to have a claim against the original building contractor for negligent construction, even absent privity, where the defect was latent and not subject to discovery by reasonable inspection. Citing to Forte Towers South, Inc. v. Hill York Sales Corp., 312 So.2d 512 (Fla. 3d DCA 1975), in which the initial building owner was held to have a claim where the defective condition was latent, the Simmons court stated: "There is no logical reason why this rule should not apply to a subsequent purchaser of the building." 363 So.2d at 143.

Under the Casa Clara application of the economic loss rule, however, that subsequent purchaser is left remediless, and the manufacturer or contractor is relieved of liability, merely due to the fortuitous fact of resale of the building containing the defective component, and due to the artificial distinction between "economic" loss and "physical or property" loss.

There is No Rationale Basis for Allowing a Tortfeasor to Escape Liability to Remedy a Condition With Great Potential to Cause Physical Harm

Both the failing concrete in the Casa Clara homes and the shattering glass panes in Intracoastal's building create life threatening situations if left unremedied. As the economic loss rule has been applied in Casa Clara, however, the only way the potential for catastrophic injury can be avoided is by the property owner incurring costs (often beyond their resources) to cure the defective condition, with no potential for recovery of these costs from the actual tortfeasor. If the owner does not or cannot remedy the situation, it will clearly be liable to anyone ultimately injured as a

result of the condition. While the actual tortfeasor is also liable to the ultimately injured third party for physical injury, there is no means by which the owner can require him to remedy the defective condition before the physical injury occurs. The effect of this state of the law, therefore, is to dissuade any type of prophylactic action, and to create a scenario in which the potential for physical injury is left unchecked.

In Slavin v. Kay, 108 So.2d 462 (Fla. 1959), this court acknowledged that a contractor is not relieved of liability to a subsequently injured third party where he has created a dangerous condition or unreasonable risk which is latent and not discoverable by reasonable inspection. Again, application of this rule and the economic loss rule as presently applied creates a situation where an individual subsequently injured by the failing concrete or shattering glass could sue the manufacturer, but the owner of the building is given no means by which to get the manufacturer to remedy the defective condition before such injury occurs.

The Fourth District in Drexel Properties, Inc. v. Bay Colony Club Construction, 406 So.2d 515, 519 (Fla. 4th DCA 1981), properly acknowledged these anomalies:

> We reject the contention by appellant that there can be no recovery in negligence absent proof of personal injury or property damage. We hold that there can be recovery for economic loss. Why should a buyer 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 could be far greater than the cost of remedying the condition.

When the present application of the economic loss rule is examined in conjunction with these other rules of law, including this Court's pronouncements in A.R. Moyer, Inc. v. Graham, *supra*; Slavin v. Kay, *supra;* First American Title Insurance Company, Inc., *supra;* and First Florida Bank v. Max Mitchell & Company, *supra*, it is clear that the stretching of this concept to apply to these situations flies in the face of existing law and public policy.

Requiring Subsequent Purchasers to Bear the Burden for Defective Component Parts of Real Property Does Not Properly Allocate Costs and Risks of Business

Application of the economic loss rule makes sense in those situations where protection against such potential latent future problems is realistically and traditionally part of the negotiations between the parties and ultimately defined by the contractual duties and obligations assumed. Such is of course the case in a pure sale and purchase of a product, where UCC warranties and other protections come into play. The question, therefore, becomes whether the purchaser of existing residential or commercial property can effectively protect itself from liability for these latent defects in component parts of the structures through similar means.

The answer is no. There are, of course, no UCC warranties in such a transaction. INTRACOASTAL, as a subsequent purchaser, had no ability to contract with anyone involved in the actual construction of the mall. Intracoastal's insurance policy (and the usual owner policy) does not provide coverage for latent construction defects.

Sellers of real property do not as a rule warrant against latent defects in materials they did not manufacture or install. If a purchaser of commercial property must insist that the seller warrant against latent defects in component parts of the existing structure, the seller, in turn, will demand a higher price, and these costs will ultimately be passed on to tenants and their ultimate consumers. These increased costs, therefore, would ultimately be borne be those who had no control of or involvement with the defective product, while the manufacturer is protected. This allocation of the costs resultant from a defective product to innocent purchasers and ultimate consumers, rather than to the manufacturer responsible for placing that product in commerce, is inequitable and inappropriate.

CONCLUSION

The extension of the economic loss rule to the Casa Clara petitioners and other purchasers of real property containing latent defects in component parts does not comply with this Court's pronouncements and holdings in numerous cases throughout the years; nor does it comport with proper public policy and tort law policy providing a day in court and remedy for an innocent party injured as a result of the negligent actions of another.

We respectfully submit that this Court should quash the District Court's opinion affirming dismissal of the homeowners' complaints herein, and remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail this 24 day of September, 1992 to H. HUGH McCONNELL, ESQUIRE, STEVEN M. SIEGFRIED, ESQUIRE - Siegfried, Kipnis, Rivera, Lerner, De La Torre & Mocarski, P.A., 201 Alhambra Circle, Suite 1102, Coral Gables, Florida 33134; DANIEL S. PEARSON, ESQUIRE - Holland & Knight, 1200 Brickell Avenue, Post Office Box 015441, Miami, Florida 33131; LYNN E. WAGNER, ESQUIRE - Cabaniss, Burke & Wagner, P.A., One South Orange Avenue, Suite 500, Post Office Box 2513, Orlando, Florida 32802-2513; and MARK HICKS, ESQUIRE - Hicks, Anderson & Blum, P.A., Suite 2402, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132.

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