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IN THE SUPREME COURT OF FLORIDA

CASA CLARA CONDOMINIUM ASSOCIATION INC., ET AL., Petitioners v. CHARLEY TOPPINO AND SONS, ET AL., Respondents	Case No. 79-127
CHRISTOPHER H. CHAPIN, ET AL., Petitioners v. CHARLEY TOPPINO AND SONS, ET AL., Respondents	Case No. 79-128

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APPEAL FROM THE THIRD DISTRICT COURT
OF APPEAL FOR THE STATE OF FLORIDA

COMBINED AMICUS CURIAE BRIEF OF
OSMOSE WOOD PRESERVING, INC. AND
HOOVER TREATED WOOD PRODUCTS, INC.

Donald M. Kaplan
Florida Bar No. 134010
McCARTER & ENGLISH
2255 Glades Road
Suite 319A
Boca Raton, Florida 33431
(407) 994-6262

Counsel for Hoover Treated
Wood Products, Inc.

Andrew White, III
Florida Bar No. 0473989
PATTON, BOGGS & BLOW
1660 Lincoln Street
Suite 1975
Denver, Colorado 80264
(303) 894-9239

Counsel for Osmose Wood
Preserving, Inc.

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INTRODUCTION

Osmose Wood Preserving, Inc. ("Osmose") has been a manufacturer of fire retardant chemicals that were sold to wood treating companies which use Osmose chemicals for the fire retardant treatment of various wood products, including plywood. Hoover Treated Wood Products, Inc. ("HTWP") is a producer of chemically treated wood products, including lumber and plywood treated with preservatives and fire retardants.

Fire retardant treated plywood ("FRT Plywood") was used by builders in the roofing systems of townhouses and condominiums; developers and builders used FRT Plywood as an alternative to constructing fire walls between homes and condominium units. The FRT Plywood resists burning and provides an area that helps contain and retard a fire. The use of FRT Plywood was approved by most building codes.

Litigation has been instituted against manufacturers, treaters and suppliers of FRT chemicals and plywood. In these actions, including those brought by amici Pulte Homes Corporation ("Pulte") and the Babcock Company ("Babcock"), plaintiffs have alleged that some of the FRT Plywood sold to them has shown signs of premature degradation while in service. FRT Plywood, when used as roof sheathing, is not intended to be a permanent product; therefore, the basis of

the plaintiffs' claim is that the FRT plywood product is defective because it degrades prematurely.[1]

In Pulte Home Corporation v. Osmose Wood Preserving, Inc., Civ. No. 89-788 (M.D. Fla.), Pulte instituted suit against Osmose, and two suppliers of FRT Plywood. See Judge Newcomer's Memorandum dated March 11, 1992, at 19 n. 7, attached as Appendix A to Amicus Curiae Brief of Pulte Home Corporation. Pulte settled its claims against the FRT Plywood suppliers. Id. Pulte also voluntarily dismissed its warranty count against Osmose and proceeded under products liability, negligence and fraud tort actions. Id. at 8 n.2, 19 n. 8. Pulte's tort claims were dismissed by Judge Newcomer because those tort claims were barred by the economic loss rule. Id. at 8-18.[2]

In applying the economic loss rule, the Court concluded that Pulte had a remedy against those persons from whom it had purchased the FRT Plywood. Indeed, Pulte originally did file suit against two suppliers. See Memorandum at 19 n. 76. Furthermore, in mid-April, 1992, Pulte filed suit in a state court against several other suppliers of FRT Plywood.

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[1] No plaintiff has alleged that any FRT product has not performed in response to a fire.

[2] The jury in Pulte Homes Corp. v. Osmose Wood Preserving, Inc. did return a verdict in favor of Pulte on the negligence and fraud counts. However, the jury also found that the FRT Plywood was not defective when it left Osmose's control. Obviously, if the product was not defective when it left Osmose's control, Osmose could not have been aware of any alleged defects.

Through use of its amicus brief, Pulte seeks an indirect appellate review of the litigation pending in the Middle District of Florida. For example, Pulte makes frequent reference to allegations of fraud. See, e.g. March 11, 1992 Memorandum at 6. However, fraud has not been raised by the Petitioner in the Casa Clara case. Therefore, that particular issue simply is not relevant in this Court's review of the Third District Court of Appeals decision in Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 588 So.2d 631 (Fla. 3d DCA 1991).[3]

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[3] In the March 11, 1992 Memorandum, Judge Newcomer concluded, with respect to Pulte's fraud claim that Florida would not permit recovery for fraud since the "damages which [Pulte] claims to have flowed from any fraud perpetrated in this case are the same damages that would flow from a warranty claim against the seller." March 11, 1992 Memorandum at 22-23 (relying on Kee v. National Reserve Life Insurance Co., 951 F.2d 1538 (11th Cir. 1990)).

SUMMARY OF ARGUMENT

As noted by this Court, the economic loss rule is "more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage." Florida Power and Light Co. v. Westinghouse Electric Corp., 510 So.2d 899, 902 (Fla. 1987). This is especially true in product defect cases in which the Uniform Commercial Code warranties are applicable. Furthermore, this Court should not create a "risk of personal injury or death" exception to the economic loss rule. Such concerns are already within the purview of warranty law and would create an unnecessary exception to the economic loss rule.

ARGUMENT

I. THE UNIFORM COMMERCIAL CODE PROVIDES THE APPROPRIATE REMEDY IN CASES INVOLVING PRODUCT FAILURE AND PURELY ECONOMIC LOSSES.

Casa Clara contends that the concrete used by Toppino is defective because it has begun to crack and spall, making the product unfit for its intended use. Casa Clara's resulting damages--decreased value of the homes, repair costs and replacement costs--are precisely what the law characterizes as "economic losses." The United States Supreme Court, in East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986), defined economic loss as "loss due to repair costs, decreased value and lost

profits" and ruled that the purchaser's failure to receive the benefit of its bargain was "the core concern of contract law." Id. at 2302.

Casa Clara, however, like other plaintiffs before it, is attempting to pursue a claim in tort despite having only allegedly suffered economic losses. Casa Clara alleges that the defective concrete has caused damage to the surrounding structure as a whole, resulting in other property damage recoverable in tort. This contention is insufficient, as a matter of law and fact, to take its damages out of the realm of purely economic losses.

This Court previously has noted that "warranty law should control a claim for purely economic losses." Florida Power, 510 So.2d at 901.

> "Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.' The maintenance of product value and quality is precisely the purpose of express and implied warranties."

Id. at 901 (quoting East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S. Ct. 2295, 2303, 90 L.Ed. 2d 865 (1986)).

In GAF Corp. v. Zack Co., 445 So. 2d 350 (Fla. 3d DCA), review denied, 453 So.2d 45 (Fla. 1984), a roofing contractor sued a manufacturer in negligence for installing defective

roofing materials in its building projects. The Court denied the plaintiff recovery in tort, stating:

> No one was ever personally injured due to the defective roofing materials; no one's property was ever damaged due to the defective roofing materials; and no claim was ever made below for personal injuries or property damage. This being so, the law of torts affords no cause of action for the plaintiff Zack to recover for its purely economic losses in this case.
>
> A negligence action against the defendant GAF cannot lie herein because no cognizable tort damages were sustained by the plaintiff Zack; stated differently, no personal injury or property damage was sustained by the plaintiff Zack as a result of its purchase and installation of the defective roofing materials manufactured by the defendant GAF and therefore no negligence action is maintainable herein.

445 So. 2d at 351-352 (citations omitted).[4]

Likewise, in Florida Power & Light Co. v. McGraw Edison Co., 696 F.Supp. 617 (S.D. Fla. 1988), the plaintiff purchased a generator step-up transformer which exploded, causing damage to the adjacent wall and to the surrounding pipes and concrete base. The Court dismissed the plaintiff's tort claims, explaining that the surrounding concrete walls, base and the

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[4] The Third District Court of Appeals added "[t]he plaintiff Zack's sole remedy, if any, for these economic losses would be an action for breach of implied warranty of merchantability under the Uniform Commercial Code [§672.314, Fla.Stat. (1981)] or a related breach of contract action against the party, East Coast Supply Corporation, which sold the defective roofing materials to the plaintiff Zack--actions which were not brought below." GAF Corp., 445 So.2d at 352.

connecting pipes were "sufficiently related" to the product's operation so as to be "analogous to component parts." Id.

Most recently, in a case involving tort and contract claims for allegedly defective FRT Plywood used as roof sheathing, the district court for the Middle District of Florida rejected plaintiff's argument that the deteriorated roof sheathing caused damage to other parts of the roof system. The court found:

> [o]nce the roofs were installed, they became an integral part of the homes. Any costs incurred as a result of damage to those roofs, or damage to the structure to the units, is not damage recoverable in tort.

Pulte Home Corp. v. Ply-Gem Industries, Inc. et al., Case No. 89-205-Civ-T-17A, slip op. at 17 (M.D. Fla. Sept. 23, 1992, Kovachevich, J.).

The alleged inherent damage to the structure of the Casa Clara homes is indistinguishable from the damage for which recovery was sought in GAF and McGraw Edison. Casa Clara's alleged damage amounts to a diminution in value, repair costs and replacement costs--classic economic losses governed by the Uniform Commercial Code.

Other Florida state and federal opinions are in accord with the rationale for the economic loss doctrine. See American Universal Ins. Group v. General Motors Corp., 578 So.2d 451, 453 (Fla. DCA 1991) (Where oil pump malfunctioned, damaging the entire engine, court held the pump was a component part of the engine and no tort action could lie for

this purely economic loss); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180, 181-182 (Fla. 1987) (plaintiff, a purchaser of services, denied tort recovery because "there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses"); Monsanto Agric. Prods. Co. v. Edenfield, 426 So.2d 574, 576 (Fla. DCA 1982) (farmer's negligence action against manufacturer of a herbicide which failed to prevent weeds from growing in crops dismissed because "tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers...such a duty arises under the law of contract, and not under tort law."); Government Personnel Serv., Inc. v. Government Personnel Mut. Life Ins. Co., 759 F. Supp. 792, 794 (M.D. Fla. 1991) (plaintiffs' fraud claim, against former employer, for tampering with computer records on which plaintiffs' compensation was to be based was dismissed on grounds that "the 'economic loss rule' disallows tort actions for recovery of economic damages without accompanying physical injury or property damage").

The benefit to plaintiffs, such as Casa Clara and Pulte, of pursuing tort claims, instead of contractual warranty claims, for economic losses are obvious. By suing on these purely commercial transactions in negligence and strict liability, they can avoid the effect of the traditional contract defenses such as privity and the UCC's statute of limitations. See GAF Corp., 445 So.2d at 352 (implied

warranty action would be barred for lack of contractual privity between the parties). However, "the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting." Florida Power, 510 So.2d at 902 (emphasis added).[5]

Buyers and sellers of building products have the opportunity to negotiate, and do negotiate, the terms under which the product is sold, including the point at which the risk of product failure is transferred. See Florida Power, 510 So.2d at 900. Manufacturers and sellers may agree to any allocation of risk transfer that they wish to negotiate "through warranty provisions and price." Id. at 901. However, in the absence of a contrary agreement, the Uniform Commercial Code, as adopted in a particular state, will imply the terms of risk allocation. In most states, these implied terms include a limitation of liability 1) to the immediate

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[5] In contrast, with respect to personal injuries actions which fall outside the economic loss rule, "[t]he injured person...is often not in a position to contract with the manufacturer regarding this issue, as the user of the product is not necessarily the purchaser of the product and is therefore not in privity with the manufacturer." Memorandum dated March 11, 1992 at 16 n.6. Of course, under Florida law, a person who suffers a personal injury due to a breach of an implied or express warranty may recover from the seller.

purchaser (U.C.C. 2-715) and 2) for no more than four years after tender of delivery (U.C.C. 2-725).[6]

These Code provisions were not drafted thoughtlessly. If manufacturers were held liable to remote users for alleged defects in products, manufacturers could not properly price the product to account for this unlimited and unforeseeable risk. See Florida Power, 510 So.2d at 901 ("[A] manufacturer faced with this kind of liability exposure must raise prices on every contract to cover the enhanced risk."). A manufacturer "cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." Florida Power, 510 So.2d at 900 (quoting Seely v. White Motor Co., 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 145, 151 (1965)). Such an agreement obviously does not exist where an action is brought by a party farther down the stream of commerce. For example, a manufacturer may "negotiate economic risks through warranty provisions and price" with its immediate buyer. Florida Power, 510 So. 2d at 901. "[P]roduct value and quality is covered by express and implied warranties...." Id. Similarly, the cost of a product may be a factor dependent on the extent of express or implied warranties (or whether such warranties are being disclaimed or

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[6] A few states, including Florida, have modified the U.C.C. statute to provide for a discovery rule in breach of warranty cases. See Dade County v. Rohr Industries, Inc., 826 F.2d 983 (11th Cir. 1987).

limited) and modifications to the statute of limitations. Such negotiations, however, become meaningless if a party farther down the line is able to ignore contractual agreements made between a manufacturer and its immediate buyer. For example, a product may be sold to a buyer "as is." Clearly, under these circumstances, the manufacturer should not be held "to the vagaries of individual...product expectations" of those persons who subsequently purchase the manufacturer's product. Florida Power, 510 So.2d at 901.[7]

These real-world consequences of altering traditional risk allocation principles were recognized by this Court in Florida Power. In a negligence case brought by the purchaser of nuclear steam generators against the seller for alleged defects in the generators, this Court explored the strong policy reasons supporting the doctrine:

> 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 [United States Supreme Court's decision 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...

[7] Consequently, a manufacturer may make an express limited warranty which follows the product to its ultimate user. In that case, the manufacturer has made an express agreement with the consumer concerning the product's level of performance.

> ...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... (citations omitted).
>
> We...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... Further, the purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.

Id at 901-902 (emphasis and parenthetical added).

II. NO EXCEPTION SHOULD BE MADE TO THE ECONOMIC LOSS RULE TO ALLOW TORT RECOVERY WHEN ALLEGEDLY DEFECTIVE PRODUCTS PRESENT A RISK OF PERSONAL INJURY OR DEATH

Relying in part on Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515, (Fla. 3d DCA 1981), rev. denied, 417 So.2d 328 (Fla. 1982), Pulte argues that this Court should adopt an exception to the economic loss rule to allow tort recovery when a product presents a risk of personal injury or death. Such an exemption, however, would substantially undercut the policy considerations supporting the economic loss rule.

First, it must be noted that Drexel was decided several years before Florida Power. Nonetheless, there is no suggestion in Florida Power that the potential risk of allegedly defective nuclear generators would require an exception to be made to the economic loss rule. Second, such an exception would quickly overwhelm the economic loss rule. Every plaintiff would simply allege that the defective product, however improbable, presented a risk of personal injury. Negotiated warranty terms would be rendered meaningless as plaintiffs ignored seeking recovery through warranty actions and instituted tort claims against everyone from their immediate seller to the manufacturer.

This does not mean that a buyer should ignore such risks and not remedy the condition. However, the issue focuses on

the risk that has been allocated and the type of remedy the buyer may seek. If a product, because of a defect, presents a risk of personal injury or death, then a breach of warranty has occurred. In that event, the buyer has a valid warranty action against his or her seller for these contractual damages. To also allow a tort claim, however, would undercut the various allocations of risk present in the numerous negotiated transactions that occurred among manufacturers, suppliers, wholesalers, retailers and purchasers down the line.

As Judge Newcomer, sitting by designation in Pulte v. Osmose Wood Preserving, Inc., U.S. District Court for the Middle District of Florida (Case No. 89-788 CIV-T-17A) (March 11, 1992) observed, a tort waiting to happen is not a tort. Tort law is logically and legally inapplicable to the present factual scenario. Tort remedies seek to compensate victims by compelling tortfeasors to pay damages for actual injuries; and in the case of punitive damages, by punishing tortfeasors for wrongdoing. The U.C.C. already provides remedies to compensate the non-breaching party to an agreement "by allowing it to obtain the benefit of its bargain." Florida Power, 510 So.2d at 901 (citation omitted).

CONCLUSION

Casa Clara's position, if adopted, would impose enormous, unforeseeable, incalculable and potentially unlimited liability upon manufacturers for results that the contracting parties cannot, and did not, anticipate or quantify. This unquantifiable exposure would greatly and unnecessarily increase product costs to the public as well as increase insurance costs and litigation.

The economic loss doctrine, as presently articulated, allows contracting parties to allocate risks. Subsequent purchasers can adequately protect themselves in a variety of ways. First, they can negotiate for additional warranties. Second, they can purchase general liability insurance to cover damage to the purchased product. Finally, they can institute a warranty action against the party with whom they contracted to recover their economic losses. There is no logical, legal or policy basis for this court to disturb the appellate court's decision or the majority rule and modify the "long, historic basis" of the economic loss doctrine. Florida Power, 510 So.2d at 902.

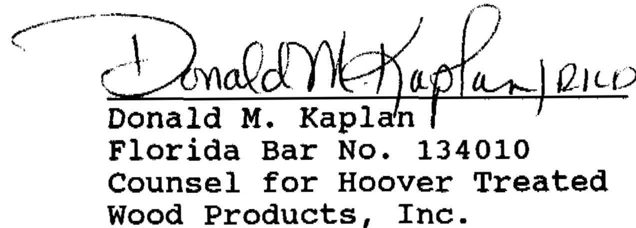
Andrew White, III
Florida Bar No. 0473989
Counsel for Osmose Wood
Preserving, Inc.

PATTON, BOGGS & BLOW
1660 Lincoln Street
Suite 1975
Denver, Colorado 80264
(303) 894-9239

OF COUNSEL:

Read K. McCaffrey
Andrew J. Toland
Counsel for Osmose Wood
Preserving, Inc.

PATTON, BOGGS & BLOW
Suite 1100
250 West Pratt Street
Baltimore, Maryland 21201
(410) 659-5600



Donald M. Kaplan
Florida Bar No. 134010
Counsel for Hoover Treated
Wood Products, Inc.

McCARTER & ENGLISH
2255 Glades Road
Suite 319A
Boca Raton, Florida 33431
(407) 994-6262

OF COUNSEL;

Gita F. Rothschild
Counsel for Hoover Treated
Wood Products, Inc.

McCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, New Jersey 07101-0652
(201) 622-4444

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October, 1992, a copy of the foregoing Combined Amicus Curiae Brief of Osmose Wood Preserving, Inc. and Hoover Treated Wood Products, Inc. was mailed, first class mail, postage pre-paid, to:

H. Hugh McConnell, Esquire
Steven M. Siegfried, Esquire
Seigfried, Kipnis, Rivera,
Lerner, De la Torre & Mocarski, P.A.
201 Alhambra Circle
Suite 1102
Coral Gables, Florida 33134
Attorneys for Petitioners

Daniel S. Pearson, Esquire
Holland & Knight
1200 Brickell Avenue
P.O. Box 015441
Miami, Florida 33131
Attorneys for Petitioner

Richard A. Solomon, Esquire
Lynn E. Wagner, Esquire
Cabaniss, Burke & Wagner, P.A.
Suite 1800
800 North Magnolia Avenue
P.O. Box 2513
Orlando, Florida 32802-2513
Attorneys for Respondent

Charles M. Auslander, Esquire
Greenberg, Traurig, Hoffman, Lipoff
Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Attorneys for Respondent

Mark Hicks, Esquire,
Hicks, Anderson & Blum, P.A.
Suite 2402, New World Tower,
100 North Biscayne Blvd.,
Miami, Florida 33132
Attorneys for The Babcock Company

Stephen Wasinger, Esquire
Robert W. Boos, Esquire
Elizabeth Norma McKenna, Esquire
Honigman, Miller, Schwartz and Cohn,
2700 Landmark Centre,
401 East Jackson Street,
Tampa, Florida 33602
Attorneys for Pulte Home Corporation

Edwin A. Scales, III, Esquire
David Brannon, Esquire
Lane, Trohn, Clarke, Bertrand
Vrelland & Jacobsen, P.A.
Post Office Box 3
Lakeland, Florida 33802-0003
Attorneys for Polk County

Susan E. Trench, Esquire
Goldstein & Tanen, P.A.
One Biscayne Tower, Suite 3250
Two South Biscayne Boulevard
Miami, Florida 33131
Attorneys for ORIXGP INTRACOSTAL

Kimberly A. Ashby, Esquire
Maguire, Voorhis & Wells, P.A.
Two South Orange Plaza
2 South Orange Avenue
Orlanda, Florida 32801

Edward T. O'Donnell, Esquire
Herzfeld and Rubin
801 Brickell Avenue
Suite 1501
Miami, Florida 33131

G. William Bissett, Esquire
Preddy, Kutner, et al.
501 Northeast First Avenue
Miami, Florida 33132

Andrew White, III

f:\bl\ajt\osmose\casaclara\amicus.brf