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IN THE 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,

v. CASE NO: 79,128

CHARLEY TOPPINO AND SONS, INC., etc.,

Respondent.

---/

BRIEF OF AMICUS CURIAE POLK COUNTY, FLORIDA

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

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INTRODUCTORY STATEMENT

On June 26, 1984, Imperial Polk County, Florida ("Polk County"), contracted with Barton-Malow Company ("Barton Malow"), as general contractor, for construction of Polk County's Judicial Complex ("the Courthouse"), in Bartow, Polk County, Florida. On July 27, 1987, construction was substantially completed, the Certificate of Occupancy was issued and Polk County took possession of the Courthouse. The Courthouse served as the central location for all civil and criminal cases in Florida's Tenth Judicial Circuit.

Beginning in the early months of 1991, numerous county employees working in the Courthouse began complaining of a variety of new illnesses, as well as exacerbation of pre-existing illnesses. These illnesses ranged from allergies and skin disorders to hypersensitivity pneumonitis and other serious respiratory disease.

After extensive testing, the Courthouse was found to have excessive levels of moisture, mildew and mold which caused the development of various airborne fungal organisms. The building was "diagnosed" with what the medical community now commonly refers to as "Sick Building Syndrome". It was determined the Sick Building Syndrome resulted from improper design and/or construction of the building and the climate control system ("HVAC"), which allowed excess moisture to collect in the building and promulgated the growth of mildew and mold.

As a result of the vast number of medical complications resulting from the Sick Building Syndrome, as well as the potential for additional medical complications, the Courthouse was completely evacuated. All of Polk County's judicial functions have now been parcelled out to various locations throughout Bartow. The Courthouse is currently undergoing remedial repairs which are scheduled for completion in July, 1994, at an estimated cost of approximately $18 million, exclusive of re-location costs.

As a direct result of the Sick Building Syndrome, in excess of 250 Courthouse employees have received medical treatment for various illnesses. Over 71 Polk County employees filed a class action lawsuit against Barton-Malow, W. Wade Setliff and AIA & Associates (the Courthouse architects), and Liebtag, Robinson & Wingfield, Inc. (the HVAC designer), seeking damages for personal injury. R. Paul Bauer, et al. vs. Barton-Malow, et al., Case No. GC-G-92-1891, Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida.

Prior to this time, on October 18, 1988, Barton-Malow filed third party claims against Polk County pursuant to an on-going lawsuit Barton-Malow had previously filed against a subcontractor, Hawthorne Electric Corporation and its insurer, Federal Insurance Company. Barton-Malow Company vs. Hawthorne Electric Corporation and Federal Insurance Company, et al., Case No. GC-G-87-2921, Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida. Barton-Malow's third party claims

against Polk County were grounded in breach of warranty and indemnification.

Polk County filed a counterclaim against Barton-Malow, as well as third party claims against various subcontractors. During pendency of the case, this Honorable Court removed the lawsuit to Gainesville, Florida, where it is currently being heard before Circuit Judge Chester Chance.

The subcontractors moved to dismiss Polk County's third party claims for negligence, breach of warranty and breach of contract. The subcontractors moved to dismiss the claims for breach of warranty and breach of contract alleging no privity existed between Polk County and the subcontractors. They moved to dismiss the claim for negligence, alleging there had been no personal injury or damage to property other than the courthouse itself, therefore, application of the economic loss rule precluded Polk County from bringing a negligence action.

Judge Chance granted the subcontractors' Motions to Dismiss Polk County's claims for breach of contract and breach of warranty based on Polk County's lack of privity with the subcontractors. However, Judge Chance denied the subcontractor's Motion to Dismiss Polk County's claims for negligence, relying on the Fourth District Court of Appeals' holding in Latite Roofing Company v. Urbanek, 428 So.2d 1381 at 1383 (Fla. 4th DCA 1988) (where that Court stated that it would not invoke the economic loss rule to preclude recovery where a plaintiff has no alternative theory of recovery against that defendant).

The Fourth District Court's decision in Latite, however, is at odds with the Third District's decision in Casa Clara, and irreconcilable in light of the facts of the Courthouse litigation. An affirmance of Casa Clara by this Court, depending, of course on how this Court's decision is crafted, could well leave Polk County without a remedy against the subcontractors who, as Polk County alleges, negligently constructed the Courthouse rendering it unfit for human habitation and resulting in a repair bill in excess of $18 million to the taxpayers of Polk County.

On receipt of notice that this Honorable Court agreed to hear Casa Clara, Polk County moved for, and was granted, leave to file this Brief of Amicus Curiae in support of the Petitioner in Casa Clara.

SCOPE OF BRIEF

In the interest of brevity and judicial (and taxpayer) economy, this brief will not attempt to reiterate the exhaustive arguments made by the Petitioners in their Brief on the Merits. The Petitioners clearly and accurately present the arguments regarding how the Casa Clara court misapplied the economic loss rule to preclude the Petitioners' claims against Toppino and Sons.

Additionally, Babcock's Brief of Amicus Curiae clearly and succinctly argues how the Casa Clara court misapplied the economic loss rule to prevent a contractor from recovering against a manufacturer for a latent defect. The Babcock brief also quite adequately addresses why the economic loss rule should be narrowly tailored and not applied where a defect creates a real risk of personal injury or property damage. It is that very situation in which Polk County now finds itself.

Accordingly, Polk County's brief will focus not on the arguments made in the briefs previously submitted by the Petitioners and Babcock, but, rather, on the particular situation in which Polk County finds itself as a public entity landowner; a victim of Sick Building Syndrome as a result of the acts of the general contractor and non-privity subcontractors who may well be immune from suit by Polk County, depending on the outcome of the instant case.

STATEMENT OF THE CASE AND FACTS

Polk County, Florida agrees with the statement of the case and of the facts set forth in the Petitioners' brief on the merits.

SUMMARY OF THE ARGUMENT

The taxpayers of Polk County, who have already paid in excess of $37 million for construction of the Courthouse, are now faced with a projected $18 million repair bill. In addition, latent defects are being uncovered daily. This loss is directly attributable to the negligence of the contractor and the subcontractors. However, despite this tremendous loss, Polk County now faces the prospect that it will be without recourse against the subcontractors, who are potentially the most culpable parties. Affirmance of the Casa Clara decision and its strained, narrow construction of the economic loss rule will bring about such a result.

The rationale underlying the economic loss rule is that parties are free to negotiate and allocate economic risks and benefits. The rule presupposes equal bargaining power and the freedom to negotiate each aspect of a contract, especially those levels of risk and benefit which a party is willing to bear.

However, a political subdivision does not have such unfettered freedom to contract. State statutes and administrative regulations impose requirements that substantially alter the contracting process, requirements which are not present in a private contract setting. Thus, application of the economic loss rule can, and in Polk County's situation does, work an undue hardship on political subdivisions faced with economic losses directly attributable to non-privity subcontractors. The price/risk formula inherent in every contract is substantially

altered and does not allow a public construction contract to reflect the freedom of contract contemplated by the economic loss rule.

One of the primary impediments to a public entity's ability to freely contract is the statutory mandate that provides a one year construction bond (in effect, a warranty). Thus, a public entity's risk is established by statute. A public entity has no choice or ability to require a longer bond and greater protection. Additionally, because the public entity must award its contracts to the lowest responsible bidder, the contract price does not reflect such additional risk. A private landowner, however, in addition to being able to contract for a bond of any duration, may also reflect such increased risk in the contract price. This remedy is unavailable to public entities who must select the lowest responsive bid and who have no choice concerning the one year bond. They are unable to negotiate particular issues in the contract. Further, emerging case law indicates the statutory one year time period to file a claim against the contractor's bond may also apply to actions against the contractor itself.

An additional burden placed on public entity landowners is the narrow construction of the terms "other property" and "personal injury" in the economic loss rule. Because of the strict construction of these terms by the Casa Clara court, a public entity may have no real recourse against the party(ies) ultimately responsible for defective construction. This is

especially true if the defects are latent and are not discovered until one year after completion and are caused in whole, or in part, by non-privity subcontractors. This is precisely Polk County's situation. While Polk County is currently able to maintain its actions against the subcontractors pursuant to Latite, an affirmance of Casa Clara could destroy these causes of action.

As a political subdivision, the County may never sustain "personal injury" as contemplated by the economic loss rule, despite the fact that individual county employees may suffer extensive injury compensable by worker's compensation claims.

Additionally, the County may only sustain damage to "other property" if, through some unfortunate occurrence, the deteriorating building damages separate property inside or outside the walls of the building itself. Under Casa Clara, the nine story courthouse could now fall to the ground in a heap and there would be no claim for negligence against the contractor or subcontractors because only the building or "product" itself would be lost, not "other property".

Such a result is repugnant to Florida's system of justice. The burdens imposed on a public entity by statutory and administrative mandate effectively undermine the rationale underlying the economic loss rule. Public entities simply do not enjoy unfettered freedom of contract and the economic loss rule should not apply to them. In addition, the strict construction of the operative terms in the economic loss rule potentially

leaves public entity landowners completely without recourse against non-privity negligent parties when those parties' negligence is latent. Additionally, when only the building itself is damaged the public entity may be left completely without recourse.

ARGUMENT

I. THE ECONOMIC LOSS RULE SHOULD NOT BE APPLIED TO PRECLUDE A PUBLIC ENTITY FROM RECOVERY AGAINST A NON-PRIVITY SUBCONTRACTOR BECAUSE THAT RULE'S JUSTIFICATION IS NOT PRESENT IN THE PUBLIC CONSTRUCTION CONTRACT SETTING.

The fundamental justification for the economic loss rule is that recovery in contract is "more appropriate than tort principals for resolving economic loss without an accompanying physical injury or property damage." See, e.g., Florida Power and Light v. Westinghouse, 510 So.2d 899 at 902 (Fla. 1987). The rationale for the rule is that application "encourages parties to negotiate economic risks through warranty provisions and price." Id. at 901.

However, the above rationale presumes the owner and the contractor are completely free to negotiate all aspects of the contract and take into consideration results of poor workmanship as well as economic losses resulting therefrom. A public entity (e.g., a County) is not afforded such freedoms when negotiating contracts.[1]

In fact, political agencies must follow strict guidelines and procedures when soliciting bids and contracts for construction of public buildings. See, e.g., §255.29, Florida Statutes (1991), and Chapters 6C, et. seq. and 13D et. seq., Florida Administrative Code.

For instance, the specific requirements enunciated in Rule 13D-11.004, Florida Administrative Code, regarding qualification

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[1]An additional example illustrating this portion of the Argument is found, and explained, in Part II. A of this brief.

requirements and procedures for bidding a state project, while purporting to insure a contractor's solvency and fitness, do not allow a public agency the freedom to contract. It is this freedom which underlies the economic loss rule. Rule 13D-11.004 strictly mandates every aspect of the contractor's requirements. If the contractor meets the requirements, he is a qualified bidder.

Rule 13D-11.007, Florida Administrative Code, requires the political subdivision, in most cases, to simply select the lowest contract bidder from the qualified bidder pool. Regardless of the political entity's feelings regarding the bidder, or the bidder's previous performance, the decision is determined by the lowest responsible bid.

While intending to create an unbiased and uniform procedure for selecting contractors in public works cases, the process does not allow for public entities to thoroughly investigate a contractor's choice of subcontractors in order to determine such subcontractors' fitness.[2] Further, while noble and well intended, a mechanical application of the rules regarding public entity bid solicitations and awarding of contracts does not take into account individual issues which arise based on each

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[2]Although §255.0515, Florida Statutes (1991), does forbid bidding contractors from "substituting or replacing subcontractors subsequent to the bid opening," this statute does not apply to all of the State's political subdivisions, nor does it provide a political subdivision the authority to accept or reject the contractor's choice of subcontractors.

contract's unique set of circumstances, including potential risks and benefits.

Simply put, the public bidding process imposed upon Florida's public entities does not allow those entities the contractual freedom to protect themselves from improper construction as contemplated by Florida Power.

Political entities are not free to negotiate warranty provisions and price and often must make construction contract decisions based on political policy which has little to do with insuring against construction defects, whether latent or patent. For example, §255.20, Florida Statutes (1991), requires the use of Florida lumber whenever practical in the bid letting process for all public contracts. Additionally, many political subdivisions have enacted local legislation, pursuant to §235.31(1)(b) and §287.093, Florida Statues (1991), setting aside percentages of their construction and service budgets for Minority Business Enterprises, significantly narrowing the potential pool of contractors. Such requirements are, without question, meritorious. However, such requirements also serve to inhibit the complete freedom to negotiate every aspect of a construction contract as contemplated by Florida Power. While Polk County certainly does not urge abolition of §§235.31(1)(b) and 287.093, these issues must be considered when analyzing a public entity's complete freedom to contract.[3]

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[3]Set aside programs for minority business enterprises are currently being applied piecemeal throughout the State of Florida as a result of the U. S. Supreme Court's decision in City of

The Casa Clara Court's analysis and application of the economic loss rule provides little policy insight. Its narrow view of "other property," which serves to preclude Petitioner's recovery, would also preclude recovery for similarly situated public entities who are somewhat like private homeowners in that their ability to freely contract with building contractors is severely limited. The distinction is, of course, that a public entity's freedom is restricted by statutes and administrative regulations, while a homeowner's is limited by unequal skill and knowledge. See, e.g., Conklin v. Hurley, 428 So.2d 654 at 657, 58 (Fla. 1983) (quoting from DeRoche v. Dame, 75 A.D.2d 384 at 387, "purchaser is not in an equal bargaining position with the builder-vendor of a new dwelling....").

Richmond v. Croson, 488 U.S. 469, 102 L.Ed. 2d 854, 109 S.Ct. 706 (1989). Those set aside programs which are currently being applied have been subject to vigorous legal challenge and have left most political entities confused as to their proper application.

II. THE ECONOMIC LOSS RULE SHOULD NOT BE APPLIED TO PUBLIC ENTITIES TO PRECLUDE RECOVERY FROM NON-PRIVITY SUBCONTRACTORS BECAUSE SUCH APPLICATION CAN LEAVE THE ENTITY WHOLLY WITHOUT A REMEDY WHEN THE DEFECT IS LATENT.

Applying Casa Clara to bar claims against non-privity subcontractors places especially difficult burdens on public entity landowners. The combination of statutory restrictions and Casa Clara's expansive, seemingly all inclusive, application of the economic loss rule, leaves a public entity landowner, who is the victim of latent defects, without recourse.

A. Statutory Limitations on the Entity

As previously mentioned, a major justification for the application of the economic loss rule in construction settings is to encourage an owner and general contractor to freely negotiate risk. The resulting contract would fully represent the manifestation of the parties' intent and, if a construction defect arose, whether patent or latent, the owner could then recover (or not recover) pursuant to the freely negotiated terms of the contract.

Florida Statutes, however, prevent a public entity from contracting in this manner. Section 255.05, Florida Statutes (1991), requires "Any person entering into a formal contract with the state or any county, city, or political subdivision..." to post a performance bond. Presumably, this bond is to protect subcontractors, laborers, and materialmen. Subsection (2) of that statute, however, purports to establish an absolute time limitation for claimants to make a claim on the bond. Subsection (2) provides, in part, that,

> No action shall be instituted against the contractor or the surety on the bond after one year from the performance of the labor or completion of delivery of the materials or supplies.

This provision has been interpreted to bar a cause of action against a bond surety if the claim is not brought within one year of completion, even if the defect is latent. District School Board of Desoto County v. Safeco Insurance Company, 434 So.2d 38 at 39 (Fla. 2d DCA 1983). The Safeco case also contains language that could, if read literally and in connection with §255.05(2), act to bar a claim against the contractor, as well as the bond surety, if the claim is not brought within one year after completion.

> "If the legislature had intended that the existence of latent defects in the building would toll the beginning of that naturally-understood statute of limitations period as to actions against the surety. We must presume that the legislature would have said so as it did in §95.11(3)(c), Florida Statutes 1981, relating to actions on the design, planning or construction of real property." (Emphasis added).

Note that §255.05(2)'s one year statute bars "actions" against "the contractor or the surety on the bond" (emphasis added).

Thus, the Safeco decision could reasonably be read to insulate both the contractor and its surety from damages arising from latent defects which are not discovered until after the one year statute has elapsed.[5]

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[5]One need not look at an expansive interpretation of the Safeco case to reach this result. Florida's Second District Court of Appeal, if that court's language is taken literally, seems to hold that §255.05(2)'s statute of limitations applies to

It is important to note that Polk County does not agree with the holding in Safeco and, in fact, is currently involved in appellate proceedings regarding same. See Note 5, infra. However, at the tie of the writing of this brief, Safeco is the controlling law and Polk County is bound by the decision.

In essence, the Florida Legislature has already crafted a number of substantive contract terms in every public entity construction contract. Therefore, the Florida Legislature has effectively taken from each public entity the ability to freely contract with a general contractor on the issue of warranty for economic loss. This leaves the public entity without recourse against the general contractor and surety for latent defects that

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claims against a prime contractor. Board of County Commissioners of Polk County v. Aetna Casualty & Surety Company, et al., ____ So.2d _____, 17 Florida Law Weekly D1726 (Opinion filed July 9, 1992).

In Aetna, Polk County made a claim on Barton-Malow's surety bond. In upholding a portion of the trial court's dismissal, with prejudice, of that claim, the court stated: "The trial court correctly determined that the one year statute of limitations is applicable when latent defects are the subject of claims against a prime contractor." Citing Safeco (emphasis added).

At the trial court level, Judge Chance dismissed Polk County's claim against Barton-Malow's surety, The Aetna Casualty and Surety Company, with prejudice, based on the statute. Florida's Second DCA reversed the ruling on technical grounds. Board of Commissioners of Polk County v. Aetna, ____ So.2d ____, 17 Florida Law Weekly D1726, (Fla. 2nd DCA 1992, Opinion filed July 9, 1992) (holding there were insufficient allegations in Polk County's claim against Aetna to support a motion to dismiss; the allegations supporting a motion to dismiss must appear in the "four corners" of the plaintiff's claim). Polk County has currently petitioned the court for a rehearing and a rehearing en banc of the first portion of that opinion regarding the applicability of the one year statute of limitations in latent defect cases.

do not manifest themselves within one year. This statutory impediment to unincumbered construction contract negotiations is not present in the private arena.

If the statute is interpreted to bar a claim against the contractor and its bond surety after one year, and the economic loss rule is strictly interpreted to preclude recovery against non-privity subcontractors, then the combination of these two "legal rules" effectively leaves a public entity without any remedy for latent defects.

B. "Other Property" Limitations on the Entity

In addition to the statutory limitations on a public entity's recourse, the strained interpretation of the terms "other property" and "personal injury" as enunciated in Casa Clara, substantially prejudice a public entity's right to pursue a claim for its losses against the culpable parties.

Casa Clara's definition of "other property" would include every discreet piece of construction material placed in Polk County's courthouse, regardless of its function and impact on other materials. As such, the economic loss rule would preclude tort recovery against non-privity subcontractors as a result of their negligent work on that structure.[6] Invariably, the losses an owner suffers as a result of shoddy subcontractor work are

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[6]The Casa Clara court's application of the economic loss rule precludes recovery in tort cases for purely economic damages absent damage to other property or the plaintiff's suffering of personal injury. Casa Clara at 633 citing GAF Corporation v. Zack Company, 445 So.2d 350 (Fla. 3d DCA), review denied, 453 So.2d 45 (Fla. 1984).

economic (i.e., costs of repair, replacement, relocation and diminution in value) and, therefore, may not be recovered under the economic loss rule. However, despite the fact that the subcontractors on Polk County's courthouse have necessitated $18 million in repairs which must be borne by the taxpayers of Polk County, the subcontractors are insulated from responsibility for their negligent actions because Polk County lacks privity with them and there has allegedly been no damage to "other property".

To "force" an owner to pursue an action against the general contractor for all structural damages allegedly caused by negligence of the subcontractor because of a technical "finding" that construction damage to any part of a building is "absorbed" by the entire structure, is manifestly unjust. This is especially true given the fact that the contractor can, as is often the case, simply choose to "roll over" in bankruptcy, leaving the owner completely without recourse. Polk County potentially faces this very scenario.

C. Personal Injury Limitations on the Entity

Finally, the Casa Clara court severely limits the "personal injury" exception to the economic loss rule to encompass only personal injury actually "sustained" by the plaintiff. Id. at 633, citing GAF. Such a limited application obviously removes the real and imminent "risk" of personal injury from consideration. Apparently, the court desires personal tragedy before allowing a tort claim against such non-privity parties.

The Casa Clara court upheld the trial court's dismissal with prejudice of the Petitioners' complaint against Toppino and Sons. Id. at 633. The Petitioners' complaint, however, alleged that Toppino's negligence caused a risk of personal injury. Id. at 633. Hence, the Casa Clara court held, as a matter of law, that an owner/plaintiff has no cause of action in tort if only a risk of personal injury is present, regardless of how substantial or imminent that risk may be.

Further, although Casa Clara is unclear on this point, it seems that in order to avoid the harsh consequences of the economic loss rule, the personal injury, once actually sustained, must be sustained by the plaintiff. Casa Clara at 633 citing GAF at 351. Again the dilemma is clear: A public entity/plaintiff cannot recover against a non-privity subcontractor even though the negligence of the subcontractor has proximately caused personal injuries to a third party. This is true even if the public entity/plaintiff has received notice under §768.28(6), Florida Statutes (1991), of the third party's personal injury claim. Casa Clara leaves no exception for "risk" of personal injury and, additionally, any personal injury must be sustained by "the plaintiff." In a latent construction defect case, the public entity/plaintiff, will never "sustain," a personal injury. Yet it is clearly subjected to potential liability because of the actions of the non-privity subcontractor against whom it has no recourse.

In such a situation, not only does the public entity have no remedy or recourse, but the entity is forced to absorb the losses resulting from the third party's personal injuries.

D. Summary and Policy Rationale Previously Articulated By This Court

The public entity's dilemma becomes quite clear: If the public entity is a "victim" of a latent defect and is

(1) barred from a claim against the contractor's bond surety because of §255.05(2), Florida Statutes (1991);

(2) barred from maintaining an action against the prime contractor because of a broadened and literal interpretation of §255.05(2), Florida Statutes (1991);

(3) unable to recover from the prime contractor because of the contractor's insolvency, bankruptcy or refusal, for any reason, to implead subcontractors[7];

(4) without a warranty or contract claim against the subcontractor because of lack of privity with the subcontractor; and

(5) unable maintain a negligence or strict liability claim against the subcontractor because of the economic loss rule as enunciated in Casa Clara,

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[7]As mentioned in Petitioners Brief on the Merits, (page 32-33 note 55) a general contractor's viability, especially in recent years, is legitimately quite suspect.

the entity is left wholly without recourse for the latent defect.

This is precisely the effect of the Casa Clara holding on public entities which fall victim to latent construction defects, as in the case of Polk County's courthouse.

Without reiterating the arguments made by Petitioners and Babcock in their respective briefs, it is important for this Court to understand that this is not a "products liability" case for the purposes of applying West v. Caterpillar Tractor Company, 336 So.2d 80, (Fla. 1976) (the adoption of strict liability in tort in Florida by this Court). This distinction is crucially important for the survival of the doctrine of no privity breach of implied warranty cases.

In Kramer v. Piper Aircraft Corporation, 520 So.2d 37 at 39, 40 (Fla. 1988), this Court held that the strict liability in tort doctrine enunciated in West "supplants common law implied warranty in the absence of privity of contract in those instances in which a cause of action for strict liability is appropriate." (emphasis added). Affirming Casa Clara would have the effect of rendering meaningless this last and crucial portion of the Kramer holding.

Certainly, it is not the policy of this State, nor the policy of this Court, to leave public entities, or landowners in general, without recourse.

In short, affirming Casa Clara could leave Polk County without recourse. This is disfavored in Florida law and, quite possibly, violative of Florida's constitutionally protected right

of access to courts. Article I, Section 21, Constitution of the State of Florida.

Florida's Fourth DCA correctly recognized the present dilemma that West and Kramer would create and carved a rational and appropriate solution when they held, "Invocation of the rule precluding tort claims for only economic losses applies only when there are alternative theories of recovery better suited to compensate the damaged party for a peculiar kind of loss." Latite at 1383.

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully submitted that the Third District's decision below be reversed for the reasons advanced in this brief. In the alternative, it is respectfully submitted this Court craft its opinion in the instant case so as not to leave potential plaintiffs with no recourse against a defendant with whom they lack privity.

This could be done by expanding the definition of "other property" for the purposes of applying the economic loss rule to include foreseeable defects which arise in construction litigation. This also could be achieved by clarifying whether a substantial "risk" of personal injury is sufficient to satisfy the economic loss rule. In this same vein, the Court should clarify who must sustain the "personal injury" for the purposes of the economic loss rule (i.e., the landowner/plaintiff or third persons). Finally, the Court could simply adopt, with clarification, the holding in Latite.

Taking action on any or all of the above, would clarify the issues facing public entities as they relate to construction contracts.

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