OA 1-8-93

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO.: 79,127
CASE NO.: 79,128

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

Petitioners,

vs.

CHARLEY TOPPINO AND SONS, INC., ETC.,

Respondents.

_____/

CHRISTOPHER H. CHAPIN, et al.,

Petitioners,

vs.

CHARLEY TOPPINO AND SONS, INC., ETC.,

Respondent.

_____/

AMICUS BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

(AMENDED)

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STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. (henceforth "PLAC") is a tort reform group, composed of defense lawyers from Florida and other states across the country and, also, national manufacturers. Some of the corporate members make building products. Others produce automotive, industrial, farm and mining equipment.

All are concerned by the impact on commercial life which would follow were the Court to change the economic loss rule as the plaintiffs propose.*

* We will reference plaintiffs' brief as "PB page number(s)".

STATEMENT OF FACTS

To avoid repetition, PLAC adopts the facts stated in the brief for the defendant, Toppino.

SUMMARY OF ARGUMENT

The defendant and other amici will go deeply into the facts of the case and the basic precedent. Rather than waste the Court's time by going over the same ground, PLAC's brief will focus primarily on inconsistencies in the plaintiffs' analysis and broader questions of policy.

(a) The practical effect of the plaintiffs' demands would be "exceptions" that would reduce the scope of the economic loss rule drastically, if not nullify it. A host of everyday contracts or bargains would become the subject of lawsuits based upon tort theory, a radically different body of law. Those new claims would overlap and confuse the warranty rights which purchasers already have and subject ordinary commercial agreement to juries' decisions, years after the fact, as to what might seem to have been "fair" in the light of relative "bargaining power".

(b) Although their brief advances a number of different theories, the plaintiffs fail to identify any practical need strong enough to make such a step necessary.

They have not identified any "unfair" disadvantage to condominium buyers which the Court or the Legislature have not dealt with already by measures such as the creation of the implied warranty of habitability. Nor do they offer any analysis of the

effects these changes would have on the construction industry, much less on other businesses and the general public.

The trial courts, moreover, would have to hear and decide all of these cases and the complex third-party controversies they will generate.

(c) Florida Power & Light Co. v. Westinghouse Elec., 510 So.2d 899 (Fla. 1987) shows that the Court already has rejected the plaintiffs' argument that the mere possibility of accidents which might lead to personal injuries justifies an exception to the rule.

(d) Imperfect as it may be, the existing law and the commercial system which has grown up under it seem to work. A contract price based on the completed product permits consumers to obtain goods at a reasonable price and without complexity and delay. That approach - basic to our commercial system - also permits producers, particularly small business, to gauge the risk of a particular transaction, at least in a rough way, and to set a price which reflects that risk.

The plaintiffs, however, propose a new system which depends upon a vast increase in the number of tort lawsuits for "economic loss". The Court has no way to know whether that approach would be as efficient as the existing system or whether it would work at all.

(e) At the least, the changes the plaintiffs propose would have a significant social and economic impact. For that reason, it would be appropriate for the Court to leave it to the Legislature to decide whether to make them. The plaintiffs' analysis, however,

must lead the Court into conflict with the elected branch. Their arguments dwindle away to assertions that manufacturers could escape the harm by buying product liability insurance. The Court could not take that approach, unless it chose to ignore - or defy - the Tort Reform and Insurance Act of 1986, Ch. 86-160, Laws of Fla. and the Legislature's findings that product liability insurance already is too expensive and, often, not even available.

ARGUMENT

Introduction:

The plaintiffs would have the Court replace traditional contract law with a different system in which tort suits would permit the judiciary to exercise benevolent - but retroactive - oversight over each stage of the production of complex articles.

At the outset, PLAC suggests that (1) the burden should be on the proponent to show that there is a need for change and (2) the plaintiffs have not met that burden.

I. THE PLAINTIFFS' VARIOUS PROPOSALS AND RATIONALES ARE VAGUE AND INCONSISTENT

(a) *Westinghouse* was not decided on the basis of favor for "individuals" or "home buyers" as the plaintiffs claim

Only five years ago, the Court rejected proposals almost identical to those the plaintiffs now make. They suggest, however, that Florida Power & Light Company v. Westinghouse Elec., 510 So.2d 899 (Fla. 1987), was limited to transactions between commercial enterprises (PB - 26) and that the Court did not intend that the economic loss rule should apply to a case brought by an individual.

The most direct answer is that this is not what Westinghouse

said. On the contrary, the Court considered East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), Seely v. White Motor Company, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965), and a number of other leading decisions which analyze the issue in terms of the superiority of commercial law to tort principles for the enforcement of that duty. That reasoning is fully as applicable to a case brought by an individual as it would be to a case brought by another corporation.

The Court did remark that bargaining over price and warranty is "particularly appropriate" where corporations are involved. But, in context, that statement only added emphasis to the Court's rejection of Florida Power & Light's attempt to escape from the requirements of basic contract law. The dicta did not say anything about the different situation of an individual. Still less did the Court say that individuals no longer were to be bound by contract law and, instead, could resort to the looser principles of tort in disputes arising from allegations of product failure.[1] The plaintiffs are only able to leap to that conclusion by ignoring everything else that the court said in FP&L v. Westinghouse.

In any event, the suggestion that the Court could frame a rule which would apply only to a case brought by an individual is illusory.

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[1]To the extent that the Court was concerned with the differences between the position of an individual and a commercial enterprise when it decided Westinghouse the Court already has met those needs by other measures, notably the creation of the implied warranty of habitability.

That idea depends upon the plaintiffs' assumption that there is a rule "for the world of business (PB 26) and, by inference, a different rule for those who buy the things which business produces. That artificial distinction could not last.

When an individual plaintiff obtained a tort verdict against a supplier or builder or manufacturer that defendant, in turn, would demand contribution or indemnity from others in the chain of distribution. Thus the lawsuit inevitably would lead to a dispute between the commercial enterprises.

Furthermore, virtually every manufactured article is resold by some corporate middle-man or, at least, incorporated into a more complex product. Thus a flaw could have adverse consequences for some unknown "ultimate" consumer - as the United States Supreme Court observed in East River. But, as the Court also recognized, to treat that as a sufficient basis for tort liability would make the economic loss rule a practical nullity.

The plaintiffs themselves give up on this approach and shift to a claim that the Court should decide this case on the basis of traditional favor toward "the purchasers of homes." (PB - 27, 30)

That argument, too, has no basis in authority. The cases the plaintiffs cite involve individuals who have been misled in some fashion by developer or the like. But the cases now before the Court do not pit an individual against a developer. Indeed, the plaintiffs' own brief recites (PB - 6) that some of the claimants had enough power to buy their own land and to hire a general

contractor. Others dealt with individuals in the resale market or individual "owner-builders", not developers.

More important, the Supreme Court has never singled out "homeowners" or any other group - as such - to receive favored treatment across the board. The point, even of the cases the plaintiffs cite, has been, instead, that the circumstances of the individual case made it just that the Court reach a particular result. But, as stated, the plaintiffs' contention would mean courts must find for householders in lawsuits against anyone else - regardless of the facts or law[2].

Moreover, even if their premise were acceptable in theory, it does not provide a test which trial courts could apply.

The "bargaining power" of "homeowners" varies with an infinity of circumstances and there is no basis for a paternalistic assumption that the courts always should intervene in their transactions[3]. In one of cases now before the Court, for example, the plaintiff is a doctor who contracted with a builder and architect for the design and construction of a single home. There

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[2]The plaintiffs themselves say the mere label of "materialman" should not excuse a defendant from liability (PB - 11). By the same token, the mere label of "homeowner" should not be a substitute for analysis.

[3]True, the purchase of a house is often the largest investment in the ordinary person's lifetime (PB -3). But it is equally true that everyone knows that and, as a result, buying a house is the single occasion in a life time that the ordinary person is most likely to have a lawyer represent his or her interests. Furthermore, the lawyer can do that work at relatively low cost because it is customary in nature and the issues well settled. But if the Court were to rule for the plaintiffs in this case, that certainty would vanish.

is no reason to assume he was not sophisticated or wealthy enough to have those skilled representatives seek comparative bids, or to bargain for a better deal from materials supplier. Indeed, Doctor Wolszczak's complaint asserts that the contracts he negotiated gave him a right to attorneys' fees in the event of a breach - hardly the mark of a "helpless" consumer.

The lack of reality in plaintiffs' talk of "home owners" runs still deeper. This controversy is, in many respects, an onslaught by major corporate builders against the manufacturers of building products. Consider the amicus briefs from Babcock and Pulte. Each is a subsidiary of a huge corporation and each characterizes itself as a major, even national, builder. Other major corporate developers, such as Hovnanian, Ryan, Ryland, are fighting it out in other states.

Corporate builders have every right to plead their cases. But they cannot expect the Court to decide these issues on the basis of a fiction that the "little guy" is up against a "big corporation."

(b) Relative bargaining power is not a workable test or even one element of the economic loss rule

The plaintiffs go on to still broader assertions: that the favored status of "homeowners" arises from a disparity in bargaining power and that the Court can and should correct the imbalance. (PB - 27) But, in fact, authority the plaintiffs

themselves invoke says the economic loss rule does not assume equality of bargaining power.[4]

Indeed, their suggestion that the law can be changed where there is a difference in bargaining power is not a legal test at all, but only a label for the desired result. It is difficult to imagine any case in which a corporation or seller would not have greater "bargaining power" than the buyer.[5]

For that matter, the plaintiffs beg the question when they assume that it is the function of the Court to change the balance of bargaining power in routine transactions.

In a free enterprise system, bargaining power is something that the citizen possesses by merit - or luck. The government may

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[4]In one of the leading cases, the California Supreme Court wrote:

> The law of warranty is not limited to parties in a somewhat equal bargaining position. Such a limitation is not supported by the language and history of the sales act and is unworkable. Moreover, it finds no support in Greenman. The rationale of that case does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action. It rests rather on the proposition that 'the cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business . . . that rationale in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers.
>
> Seely v. White Motor Company,
> 63 Cal.2d 9, 45, Rpt 17
> 403 P.2d 145 (1965)

[5]See Owen Rethinking the Policies of Strict Product Liability, 33 Vanderbilt L. Rev., 681 (1980) for a penetrating criticism of the "one-directional" nature of other arguments which frequently are offered in support of plaintiff - oriented proposals for changes in product liability law.

intervene to change that balance but it does so only occasionally, and in extreme cases. Further, in a democracy, the public usually takes that step by having the Legislature pass a statute such as the Workers' Compensation Act, rather than by judicial decree. The action is social or political rather than classically "legal."

There are exceptions to be sure. Contract law permits the courts to intervene in limited instances, such as the unconscionable bargain. But the courts traditionally are cautious and restrained in the exercise of that power. Atlantic Coastline R. Co. v. Beazley, 54 Fla. 311, 45 So. 761 (1907); Russell v. Martin, 88 So.2d 315 (Fla. 1956).

We add that the dynamics of the adversary system mean that the plaintiffs' argument could not be restricted to a case involving an individual or even a group of home owners.

Small businesses lack bargaining power too, the argument soon would go. Nor would it be long before the trial courts heard an argument, like that in the brief for amicus Pulte, that while each litigant in a particular case happened to have been a large corporation, one had concealed information and resorted to fraud so that the other had suffered the same "lack of bargaining power".[6]

As this erosion went on, the makers of products would have to guess whether, in the future, a court might decide that the buyer,

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[6]Pulte's amicus brief argues extensively regarding application of the economic loss rule to claims of fraud. No such issues are presented on the present record. It is apparent that Pulte is rearguing the case of its own which it already has lost in federal court, not analyzing Casa Clara.

or someone else to whom the product might pass had lacked "bargaining power" - making limitations on warranties, waiver and other contractual provisions unenforceable.

Manufacturers could not function under that uncertainty. Instead, they would have to raise prices to guard against the likelihood that some large portion of their assets would be the subject of tort claims.

The economic dislocation would be devastating for small business.

The failure of an expensive product which contained a number of components would subject the suppliers of each of those components to potentially ruinous liability. They would not be able to rely on the warranties or limitations of remedies which they had negotiated in good faith.

(c) The plaintiffs ignore the role of the intermediary buyer

The plaintiffs eventually hint that the parties to these cases did not have the opportunity to allocate the risks by contract.

When a product includes components which were made by a variety of suppliers, it is inevitable that not every buyer can have an opportunity to negotiate with seller of each component. But, the plaintiffs ignore the fact that the buyer of a house or any multi-component product does have an opportunity to bargain with the seller for the price and warranty.

Moreover, at each intermediate stage, the seller of materials deals with commercial parties - contractors, wholesale distributors, manufacturers, etc. Those intermediate buyers have

the expertise to bargain and each knows that it may be liable to purchasers later in the chain of distribution if the goods it incorporates into the final product should fail. In a sense, those intermediaries represent the interests of the buyer of the final product, since each had an incentive to seek the best materials available for the price.[7]

Again, that system may not be perfect but it is self-regulating; and it has worked over the years.

As one example, the plaintiffs have pleaded claims against the builder and general contractor or architect in every one of the cases now before the Court. They do not tell the Court why those suits - each permissible under existing law - would not give them reasonable compensation for whatever losses they may have suffered.

It seems fair to ask how those who do claim to have other remedies - albeit against different links in the distribution chain - can have standing to enforce the supposed rights of other persons who might not have such alternatives available to them. At least, the Court should consider waiting for a case which presents the actual situation.

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[7]Some may choose to pay more for a good warranty, others may sacrifice warranty to get a lower price. "The purchaser has the choice to forego warranty protection in order to obtain a lower price." Florida Power & Light Co., 510 So.2d at 902. Further, those judgments often would demand upon technical factors. A judge or a jury often would have no basis to say that such a decision was right or wrong without the expenditure of a disproportionate amount of trial time.

It is true the intermediaries might hope to keep the benefit of the bargain themselves rather than pass it on to the home buyer. But that question is the subject of the negotiations between "homeowners" and "developers" over price, warranty and quality.

The practical consequences of the changes the plaintiffs demand are too great for hypotheticals offered as debater's points.

II. THE MERE ABSENCE OF PRIVITY, DOES NOT CONSTITUTE AN AFFIRMATIVE BASIS FOR TORT LIABILITY

The plaintiffs contend, still later, that the Court should create an exception to the economic loss rule for the instance where the would - be claimant was not in privity with the proposed defendant (PB - 31). Once again, the plaintiffs' assertion is too all-encompassing to be workable. It would apply to any situation in which any party had not bargained for a contractual right.[8]

Their arguments have no basis in the Supreme Court's language or in its reasoning. Indeed, one of the law review articles the plaintiffs themselves cite (PB - 38), rejects their assertion for just that reason:

> "There is no logical reason why the existence of a cause of action in tort should depend on whether or not a contract or warranty remedy also exists. Such a philosophy amounts ultimately to nothing more than a fashioning of remedies to fit the individual circumstances of each plaintiff - providing tort remedies only where there are inadequate contract remedies - and is inappropriate in a court system which relies upon rules applied uniformly in all situations. "
>
> Stein, et al., A Blueprint for the Duties and Liabilities of Design Professionals, 60 Chicago Kent L. Rev. 163 (1984)

FP&L v. Westinghouse did not say the economic loss rule was not to apply where the parties were not in privity. On the contrary, the Court based its holding, in significant part, on the

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[8]See Owen, Rethinking the Policies of Strict Liability, Vanderbilt Law Review.

reasoning of Court of Appeal decisions which had dealt with the situation where the parties were not in privity and which had applied the rule.

In GAF Corp. v. Zack Co., 445 So.2d 350 (Fla. 3d DCA 1984), a roofing contractor was barred by the economic loss doctrine from recovering on a tort theory against the manufacturer of allegedly defective roofing materials which had been purchased through a supply company.

The Supreme Court also quoted from Monsanto Agricultural Products Co. v. Edenfield, 426 So.2d 574 (Fla. 1st DCA 1982). There a farmer brought a negligence action against the manufacturer of a herbicide which he had purchased through a local farm supply dealer. There was no privity of contract between plaintiff and defendant. Nevertheless, the court held that the economic loss doctrine barred plaintiff from recovering on a negligence theory. Id. at 576.[9]

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[9]The District Court of Appeal, for the most part, have followed the same rules since Westinghouse. Thus in American Universal Ins. Group v. General Motors Corp., 578 So.2d 451 (Fla. 1st DCA 1991), the court concluded that the economic loss rule does not apply to defendants not in privity with the plaintiff:

> [Plaintiff] contends there is no alternative theory of recovery against General Motors in this case because there is no privity between its subrogee (Cook) and General Motors and thus an action based upon implied warranty is precluded and there is no basis for recovery absent this tort claim.
>
> This argument overlooks that a contract action remains pending against the seller of the allegedly defective product (Diesel Parts). Moreover, the end result of the East River and the Florida Power & Light decisions is that

Another opinion which the Court cited with approval was Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc., 444 So.2d 1068, 1071 (Fla. 3d DCA 1984). That case had affirmed the dismissal of a strict liability count pursuant to the economic loss doctrine even though there was no privity between plaintiff and defendant manufacturer.

Ignoring this weight of authority, the plaintiff discusses Latite Roofing Co. v. Urbank, 528 So.2d 1301 (Fla. 4th DCA 1988),[10] without regard for its conflict with FP&L v. Westinghouse.

> regulating parties to contract remedies in cases such as this allows parties to freely contract and allocate the risks of the defective product as they wish. A buyer may bargain for a warranty or opt to forego the warranty in order to pay a lower purchase price . . .
>
> American Universal, 578 So.2d at 454-455 (emphasis added)

[10]The Fourth District Court of Appeals has apparently had a difficult time accepting the economic loss rule. Before Florida Power & Light, that court twice allowed recovery of surety, economic loss on strict liability or negligence. See Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033, 1034 (4th DCA 1981); Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515, 519 (4th DCA 1981).

Since Florida Power & Light, that District has chosen to nullify the rule by concluding it "applies only when there are alternative theories of recovery better suited to compensate the damaged party for a particular kind of loss. Latite Roofing Co. v. Urbanek, 520 So.2d 1381, 1383 (4th DCA 1988) (emphasis added).

These three decisions, Adobe, Drexel, and Latite are all inconsistent with Florida Power & Light. Yet plaintiffs here and in other jurisdictions rely on those cases in challenging the economic loss rule. PLAC suggests that it would be appropriate for the Supreme Court to take the opportunity presented by the pending case to overrule those decisions.

On the merits, the plaintiffs' proposal contradicts the Court's reasoning.

(a) The exception for "destruction" of "other property" requires proof or at least allegations in the pleadings, not just appellate afterthoughts

The plaintiffs' statement of facts and much of their argument is filled with theatrical language: bad concrete "destroys" homes and causes "total" ruin (PB - 1, 5) and threatens to kill or maim citizens, etc. This sets the stage for still an other suggestion. Now the plaintiffs would have the Court adopt the minority view that "sudden, catastrophic failures" (PB - 8) are an exception to the economic loss rule. But, stripped of the melodramatic phrases, the pleadings do not support that argument.

In particular, there is no allegation that any building fell down; or that anyone has been hit by falling concrete; or even that there has been a near miss. Nor is there any allegation that anyone has ever abandoned any of the houses in question.[11].

Thus the question is not even properly before the Court.

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[11]Judge Posner has observed that physical injury can have the fortuitous result of allowing recovery which otherwise would be barred. Nevertheless a plaintiff cannot "recast" a case "as if one of the corroded wall panels had fallen and broken his foot." Miller v. United States Steel Corp., 902 F. 2d 57, 574 (7th Cir. 1990) (an economic loss case involving building materials). Similarly, in Council of Co-Owners v. Whiting-Turner. The Maryland Supreme Court imposed tort liability on the developer and architect of a building because negligent design and construction had created a fire hazard. The Court, however, took care to limit that precedent, cautioning that "conditions that present a risk to general health, welfare, or comfort but fall short of presenting a clear danger of death or personal injury will not suffice" to avoid the economic loss rule. 517 308 Md.18; 517 A.2d 336 at 343 (emphasis added).

III. THE PLAINTIFFS' ATTEMPTS TO EXPAND THE EXCEPTION FOR INJURY TO "OTHER PROPERTY" HAS NO BASIS OTHER THAN RHETORIC AND ISOLATED DICTA

(a) The plaintiffs do not offer any explanation as to how this change in the law would foster safety

Struggling on, the plaintiffs suggest that they should be given the right to sue in tort because that would advance the cause of safety (PB - 24). That argument, in turn, is based on the assertion that existing law does not give property owners reason to repair dangerous conditions before an accident occurs.

The premise is dubious in theory and unsupported by the record.

As one example, Babcock and Pulte - amici who support plaintiffs in these very cases - say that they repaired roofs for purchasers before seeking legal remedies further back up the distribution chain. There is no reason to suppose that others would not do the same.

(b) So long as a product does not cause actual "physical injury or property damage", the law of Florida will not inquire as to whether the product was negligently manufactured or unreasonably dangerous"

In refusing to allow suits for economic losses under strict liability theories, this Court has already recognized implicitly that the mere threat or risk of injury provides "no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding costs burden on the public." Florida Power & Light, 510 So.2d at 902.[12]

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[12]Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899, 902 (Fla. 1987) ("strict liability should be reserved for those cases where there are personal injuries or damage to

The bright line test of Florida Power & Light and East River is designed to protect "the freedom of bargaining and negotiation" from being replaced by a duty of care that this Court has already found "particularly unsuited to the vagaries of individual purchasers' product expectations."

In East River, the United States Supreme Court discussed and expressly rejected the "risk of injury" line of cases. It termed those decisions an "intermediate" position between accepting or rejecting the economic loss doctrine.

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

East River, 476 U.S. at 870. That modification would create the very mischief this Court sought to avoid by adopting the economic loss rule.

Plaintiffs and their amici provide excellent examples of the arguments courts and manufacturers would hear if the "risk of injury" exception were adopted. Resourceful plaintiffs' lawyers would have no difficulty conjuring up scenarios in which chipped concrete or sagging plywood becomes menacing dangers. If an unsightly roof deck satisfies the exception, it seems six leaking steam generators in a nuclear power plant might also do so. Compare Florida Power & Light, 510 So.2d at 900, with Pulte's amicus brief at p.1.

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other property only") Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So.2d 992, 994 (Fla. 1987); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180, 181 (Fla. 1987).

In short, the Court already has rejected the plaintiffs' reasoning. To reverse course now and adopt the exception would create exactly commercial uncertainty which that this Court as said would be unacceptable.

As authority, plaintiffs seek to resurrect the moribund Drexel Properties, Inc. v. Bay Colony Club Condominiums, Inc., 406 So.2d 515 (4th DCA 1981). While not overruled by name, Drexel was totally discredited by Florida Power & Light. The holding in Drexel was:

> We reject the contention by appellant that there can be no recovery in negligence absent proof of personal injury or property damage. We hold there can be recovery for economic loss.
>
> Drexel, 406 So.2d at 519 (Emphasis added.)

This Courts' later ruling was precisely the opposite. Florida Power & Light, 510 So.2d at 899-900.

The rationale offered in Drexel to support this erroneous result is quoted in plaintiffs' brief. But there is an answer to the question: "Why should a buyer have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects? Drexel, 406 So.2d at 519. As a matter of sound economic public policy, 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 & Light, 510 So.2d at 900, quoting Seely v. White Motor Co., 63 Cal.2d 9, 19, 403 P.2d 145, 151 (1965). Moreover, a rational buyer will not wait for someone to suffer an

injury before taking remedial action. The uncertainty of a recovery against the manufacturer or seller would make that too dangerous. In Bellevue South Assoc. v. HRH Construction Corp., 78 N.Y. 282, 295, 574 N.Y. S.2d 165, 171 (1991), the New York Court of Appeals addressed a factual situation closely analogous to Casa Clara; indeed, there was actual evidence of personal injuries having occurred. The conclusion it reached was that under either the "restrictive approach" of East River and Florida Power & Light, or the intermediate approach, plaintiff's remedy would lie exclusively in contract law and not in tort. Id. 78 N.Y. 2d at 294-5, 574 N.Y. S.2d at 170. It was simply a case of "economic disappointment" that the floor tiles[13] did not last the life of the building, not the type of "undiscovered hazard bound to produce a catastrophic accident" which is the prerequisite to allow tort recovery under the intermediate approach.

In contrast to the artificial and improbable nature of the plaintiffs' arguments, the majority view is straightforward.

Most courts have concluded that when the problem is to draw a line between the "property" which has not met economic expectations and other property which has been injured. Thus, they define the product as being the thing that the claimant bought.

That approach makes good sense in this context as well.

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[13]Three residents had fallen on floor tiles lacking 100% adhesive coverage, although plaintiff did not claim it had been held responsible for any personal injury. Id. 78 N.Y. 2d at 294, 574 N.Y. S.2d at 170.

When a person buys a condominium or a house, he or she buys concrete, steel and all the other components which, together, make up the structure. They become a single, inseparable unit.[14] Conversely, no one but a scrap dealer would buy the concrete or the steel or the stucco or the shingles, etc. once they had been incorporated into a house.

It also is established law that the costs of repairing damage which occurs because the inter-action between a defective component and other parts of the structure are a part of the risk which the buyer of the product assumes. As a result he or she cannot expect to recover those expenses. The abundant precedent reflects a rough judgment that the buyer is in a better position than the seller to estimate the consequences of a failure under the circumstances of his or her individual situation.

The plaintiffs do not offer any authority - or logic - to refute that settled law.

(c) <u>The plaintiffs' use of real property dicta is inconsistent with their own theory of the case</u>

The plaintiffs offer still another alternative rationalization. They attempt to string dicta from real estate cases and other legal jargon together into contentions (a) that the concrete Toppino supplied remained is either separate from the rest of the house as a matter of law or (b) that the economic loss rule

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[14]That, in fact, may be what the plaintiffs themselves mean when they say (PB - 13, Note 13) the building has a value as a "structure" above and beyond that of the individual components.

cannot apply to a dwelling place because a "house" is not a "product".

The defendant's brief demonstrates that the holdings and basic reasoning of the cases do not lead to either conclusion.

We add that the plaintiffs rely heavily on an unsupported assertion that while concrete becomes one with the steel, the house still can retain a separate "character" as a "structure," distinct from the concrete, steel etc. which go into it. Yet they do not support this by any legal authority. The statement seems to be a philosophical, even metaphysical, assertion rather than legal analysis.

It also is paradoxical that the plaintiffs use supposed precedent as the basis for an argument that the Court should ignore precedent and overthrow FP & L v. Westinghouse and the long recognized limits on claims for injury to "other property."

The plaintiffs insistence on an historical distinction in the law between "goods" and "realty" (PB - 18, 20) is even more puzzling. It would seem to point towards the conclusion that the law would not permit the Court to blend real estate law with the far different concepts of tort. Yet that is exactly what the plaintiffs want the Court to do in these cases.

Their discussion of specifics is just as inconsistent. Now they say, repeatedly, that a house cannot be a "product." (PB - 10) Yet the thrust of their own brief is that the Court should apply product liability concepts such as strict liability and negligence to their claim (PB - 7). They do not explain how they

can make that demand as they do if a house or building is not a "product" for these purposes.

(d) The plaintiffs try to inflate limited exceptions for cases involving accountants and architects into the practical abolition of the economic loss rule

The courts have created a limited exception for the work of certain unique "knowledge" professions such as architects, accountants and title abstractors, See, A. R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973).

Even though the plaintiffs in the present cases bought houses and not advice, they attempt to transform the narrow exception into a broad rule applicable to physical objects. (PB - 35)

This part of their argument begins with references to the "professional" role of architects and accountants. (PB - 37) But mixing cement is not one of the traditional professions. More important, that work also does not share the characteristics the plaintiffs' authorities stress.[15]

The cases which impose this liability speak of "interdependence" and control. Architects, for example, may have the power to stop the work on a project; and legal liability goes with that power. Conversely, when the architect does not have that power, the exception does not apply. AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180, 181 (Fla. 1987) (limiting Moyer);

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[15]Plaintiffs make a vague reference to the importance of the "design mix of the concrete" but there is no indication that this is an abstruse science. In any event, the maker of every product makes design choices and judgments. That can't be enough to identify an exception.

McEly, Jenewein, Stefany, Howard, Inc. v. Arlington Electric, Inc., 582 So.2d 47, 48 (2d DCA 1991). The seller of concrete or shingles or any other commodity does not have that power either. There is nothing in the record of these cases, for example, to contradict the assumption that if Toppino had refused to sell concrete to the builder, the builder would have bought it from someone else. Nor did the contract give Toppino any supervisory authority.

Similarly, the plaintiffs cite (PB - 35) law journal articles for what they call a "common enterprise" theory. This, they say, means owner, contractor and architect:

> "are all parties to an interacting set of contracts which contain explicit provisions regarding architect's duty to administer the contract between the owner of the contractor impartially and for the benefit of both parties."

Valid or not, the point is not relevant to this case. Taken on its own terms that proposal is one for a special rule, tailored to the unusual relationship among a few specific participants in a building project - architects, owners, and general contractors. Furthermore, that view arises from the nature of their professional work and it governs the obligations those persons owe to each other, rather than to the world at large. None of this has anything to do with the obligations of a seller of materials such as Charley Toppino and Sons, Inc. to the ultimate buyer of a house.

The plaintiffs' brief speaks as though the material supplier was one of those who participated in the unique "web" of relationships but that is not what their authorities say.

Neither the vendor nor the ultimate buyer are among the group the commentators single out. Indeed, their situation is significantly different. Contrary to the assertion of plaintiffs' brief, the concrete vendor does sell into the "vast, fluid market in which the ultimate consumer is unknown." (PB - 37)

As a matter of fact, the article on which the plaintiffs place their primary reliance -- 60 Chicago Kent L. Rev., supra at 163 reaches a conclusion directly opposed to those the plaintiffs urge on the Court. The authors refer, in passing, to the "interlocking contracts" theory. But they do so in the course of arguing that the economic loss rule should apply to all professionals and non-professionals without exception.[16] Far from supporting a new "rule" for concrete vendors, this would do away even with the exception some Florida cases make for a limited number of professional groups.

To evade these realities, the plaintiffs suggest that the homeowner would have "relied" on Toppino to supply good concrete even though the buyer had never contracted with the defendant (or as far as the record goes, even heard of it). But that does not

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[16]This is the author's reasoning:

> "This would eliminate the need for courts to attempt to draw artificial distinctions among occupations and activities regarding whether or not they are to be considered 'professional.' There would be need to justify carving a professional malpractice area of tort law in which the Moorman distinction between contract and tort is not applicable . . .
>
> 60 Chicago Kent L.Rev. at p.188

distinguish this case or establish any meaningful boundary for the proposal. Anyone who buys any product - or any other item - which includes components or elements provided by vendors or sub-contractors "relies" on those suppliers to provide good materials. Once again, a supposedly limited "exception" would obliterate the economic loss rule.

The plaintiff's related discussion of liens (PB - 42) does not fill the gap in their reasoning. The Construction Lien Law Chapter 713, Part I, Fla.Stat. 1991) is designed to protect the rights of a small business or individual to payment for the sale of goods or services. They do not point to anything to suggest the Legislature intended to expand the warranty rights of buyers, a matter the Uniform Commercial Code already covers. Indeed, it would be hard to reconcile the legislative concern for small business with the plaintiffs' demand that the courts subject the same small businesses to unlimited tort liability.

III. THE NEW EXPANSION OF TORT LAW WHICH THE PLAINTIFFS ADVOCATE WOULD IMPOSE SEVERE BURDENS ON THE JUDICIARY AND THE PUBLIC IN GENERAL

In Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d. 843 (Fla. 1984), the Court refused to abandon traditional limits on collateral estoppel. Although there were arguable reasons of "efficiency" to support that proposed change, it would have subjected trial and appellate courts to new complexities, "robbing Peter to pay Paul." This is another such instance.

(a) The proposed changes in the law would burden the trial courts

The plaintiffs quote a University of Pennsylvania Comment to support their general definition of economic loss (PB - 13). But this is the author's conclusion as to the broader issue:

> "the tort rationale of risk distribution and the doctrine of assumption of risk, while appropriate in personal injury cases, seem wholly inappropriate when the injury is only the loss of the value of the purchaser's bargain.
>
> Comment, Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages - Tort or Contract?, 114 U.Pa.L.Rev. 539 (1966)

It is not difficult to see the dangers the scholar has in mind when he goes on to say that:

> It would indeed be ironic if the tort doctrine which was evolved to rescue the personal injury area from the 'intricacies of the law of sales' were to imprison the economic loss area with inapposite tort concepts.
>
> (Id. 549).

The plaintiffs claim that the economic loss rule should be the subject of ad hoc exceptions which vary with the characteristics of a particular business or economic relationship, i.e., the sale of concrete, the special status of "homeowners", etc. Consider the burden that would place on the trial bench.

A number of disputes would require more court time as plaintiffs presented testimony to establish the "unique nature" of each business.

Moreover, if the trial court decided that a particular transaction was "unique", it would face a cascade of new complexities.

The concepts of causation are both more expansive and less well-defined in tort law than in contract. Prosser TORTS (4th Ed. Sections 42,92). The two bodies of law have different statutes of limitations, different concepts of defect and different measures of damage. There also would be disputes whether particular controversies should be governed by negligence or strict liability and as to how the jury should be instructed. Hill v. Ford, 404 So.2d 1049 (1981).

Equally important, many of these cases would become still more intricate and time consuming as suppliers, builders, architects, etc. filed third-party claims against each other for contribution or indemnity.

The impact on the trials courts would be compounded by the tendency for the plaintiffs' proposals to transform general commercial life into an arena for new tort actions.

We add that this brief is written, newspapers and lawyers' periodicals suggest that Hurricane Andrew will produce a vast number of lawsuits, large and small, making an already serious backlog worse. This is a uniquely inappropriate time to change the legal framework of the construction industry and many others, or to confront the trial courts with a whole array of new burdens.

(b) The plaintiffs do not discuss the consequences of the higher prices they contemplate

The plaintiffs say, eventually, that they should be allowed to sue in tort because the cost can be passed on to other consumers through higher prices. (PB - 29) But if that were all there were

to it, every product liability controversy would be decided in favor of a plaintiff - it is always easy to hypothesize "higher prices."

It is a serious matter, moreover, for the plaintiffs to take it for granted that prices could increase without adverse consequences to the public.

The Court already has indicated its disapproval of similar reasoning. Westinghouse, supra.

Higher prices are not a public benefit.

For one thing, when prices go up, fewer people can buy; the material supplier must restrict its production and lay off workers.

The question, in fact, is whether the Court would be doing even "home buyers" - as a group - any favor by increasing the prices of building materials.

Is it desirable to exclude those who would not have enough money for a larger down payment, or a higher monthly payment on a mortgage, from the possibility of buying a home?

Is it fair to take such a step to give Dr. Wolszczak a tort remedy, in addition to the contract rights he has already?

The closest the plaintiffs come to discussing such practical questions is the assertion that companies in the construction industry tend to go out of business (PB - 33). Even as to this, they offer no empirical data. They rely instead on a subjective and anecdotal observation, by a lawyer who represents builders. That is not an adequate basis for any new rule of law, particularly

one which would force some businesses to guarantee the continued existence of others.

For that matter, the plaintiffs never explain how subjecting vendors, sub-contractors and other small businesses to the peril of a new tort liability would make them more stable and so reduce the turn-over in the construction industry.

On the contrary, this is another instance where tort litigation is not the logical solution even if one assumes that there is a problem. If, arguendo, there are a disproportionate number of such failures in the construction industry, the State could deal with the situation by increasing bond requirements or other statutory reform, focused on the specific problem. That would be more effective and, also, less disruptive than a sweeping change in general law which would subject virtually every major product or commercial transaction to the delays and high costs of contingent fee litigation.

IV. IN PRACTICE, THE PLAINTIFFS' NEW RULE COULD NOT BE RESTRICTED TO THE SALE OF CONCRETE

The plaintiffs know quite well that the Court will be reluctant to grant demands which would have such sweeping consequences on the public. That is why they try so hard to suggest that the decision in these cases somehow would only have limited effect.

They give the impression, for example, that the exception they demand would be limited to the sale and delivery of prepared concrete at construction sites (PB - 3, 40-41), a "unique" quasi -

service. The implication is that the Court need not worry about broader ramifications for the more routine transaction.

That is a fantasy.

To begin, when the Court looks for record citations to support the plaintiffs' characterization of concrete sales as "unique" and "fundamentally different from the manufacture and distribution of other building products" (PB - 3), it will find nothing. The argument rests on the lawyers' speculative opinions, nothing more.

Consider, also, its implications. The seller of concrete would be liable to anyone who buys a house. Yet the seller of plywood, or electrical wiring, or any of the building's other components would not be subject to such tort claims. A rule of law which would produce different outcomes in such similar transactions could not be either fair or logical.

Further, if it were valid in theory, that approach would be self-defeating in practice. A ruling for these plaintiffs must encourage other lawyers to characterize each part of the work on a building as either the sale of a unique article, or a service.[17] Indeed, in the present cases, the buyer of a commercial building (ORIXGP); a public authority (Polk County); and large commercial builders (Pulte and Bancroft) all claim the supposedly limited "exception" would apply to their claims as well as to those of condominium buyers who brought the original actions.

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[17]The plaintiffs also contend in passing that the contractors work in mixing the concrete took the matter beyond a "sale" and into the realm of "service".

The lower courts soon would be subjected to similar arguments. Any product which required installation, or adjustment, or assembly by the seller would be said to call for just one more "narrow exception."

V. IT IS MORE APPROPRIATE THAT THE LEGISLATURE CONSIDER PROPOSALS WHICH WOULD HAVE SUCH SIGNIFICANT GREAT ECONOMIC AND SOCIAL IMPACT

(a) The Court has no data on which to make the legislative judgments the plaintiffs demand

The plaintiffs' brief does not provide the Court with any estimates of the costs of their proposals or their economic impact. Nor, to be frank, do we see how it could. That is not the function of appellate argument or even of the normal lawsuit.

On the other hand, obtaining data and expert opinions as to technical and economic factors is the function of a legislative staff. That is one major reason why legislative proposals are accompanied by a statement of economic impact and, more generally, why the courts regard controversies such as this as falling within the constitutional problems of the legislative branch. See, Smith v. Department of Insurance, 507 So.2d 1084 (Fla. 1987).

(b) The mere possibility of insurance is no basis for the expansion of tort liability to a new field

Insurance considerations sometimes are a legitimate part of appellate analysis, but the plaintiffs have misused them in these cases.

They suggest that the law could be changed as they ask without imposing hardship on anyone, because of the supposed availability and low cost of product liability insurance. (PB - 29) It is true

that similar language sometimes appears in the older product liability cases but it does not provide any answers in this different context.

The courts have assured manufacturers and other defendants, a thousand times, that they are not subjected to insurance liability. Royal v. Black & Decker, Inc., 205 So.2d 307, 309 (Fla. 3d DCA 1967). But that familiar language would become a mockery if the Supreme Court of Florida now were to create a new spectrum of liabilities on the basis - and no other - that defendants could buy insurance.[18]

Here again, the plaintiffs' argument lacks factual support. They resort to a casual assurance that "typical" homeowners policies have certain characteristics, (PB - 10). But they do not support that assertion with any authority from the record or even academic materials.[19]

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[18]There is a strong potential for unfairness. As one example, the effect might be to subject insurers to a new form of liability, long after they had negotiated their rates and the state had approved them - an obvious injustice. See Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., supra. See Owen, Vanderbilt L. Rev. for a thorough demonstration of the inadequacy of the more general assumption that the expansion of tort liability can be based upon the availability of insurance.

[19]To compound the impropriety, one of the plaintiffs' amici cites that language from the plaintiffs' brief as the factual basis for the same argument.

The Court is well aware of the potential complexities of insurance legislation and litigation. See Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation, (Sept. 3, 1992 F.L.W. 579)

More important, they ignore recent insights into insurance.

Challenging the easy assumptions which underlie the plaintiffs' contentions, Professor Priest has observed[20] that increases in tort liability make the insurance process less workable:

> The expansion of modern tort law, as described earlier, greatly hampers this insurance effort because it affects all corporate operations and, thus, correlates (reduces the independence of) the risks even within different industries . . .

He goes on to explain (Yale L.J. supra at 1589) that insurance rates are set by predictions of future losses; and that the nature of the effect of increased tort liability is to force low risk participants out of the insurance pool, gradually driving the cost of insurance higher and making some activities uninsurable.

The burden, moreover, falls disproportionately on the poor. They receive less benefit through litigation. Conversely, the increases in prices which are necessary to accomplish the insurance function have a severe impact on them.[21]

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[20]Priest, The Current Insurance Crisis In Modern Tort Law, 96 Yale L.J. 1521 (1987).

[21]Who has suffered most from these developments? It is clear in my mind that the greatest harm from the expansion of tort liability and the consequences shift from the first to third party toward insurance coverage has been suffered by poor and low income within the consuming population. The increase in market insurance (itself insurance costs) leads to increases in the price level of virtually all commodities. In some cases, these increases will effectively low income consumers out of the market for the product all together. Increases in product prices shrink the purchasing dollar and, in proportionate terms, shrink it more severely for the poor.

Priest, Ibid at p.1585

As have many other commentators, Priest also deplores the high cost of tort litigation, as a means to accomplish the insurance, compensatory or regulatory functions Id at p.1589.

(b) the plaintiffs defy the legislature's specific findings as to the scarcity and high cost of product liability insurance

The flaw in the plaintiffs' approach to the insurance aspects of this matter is still more fundamental.

The Legislature had rolled back rates and set up a system for future rate regulations and observation of future developments. The promise that the Legislature and the courts would not expand tort liability drastically was implicit in that change. Cf. Dimmitt Chevrolet, supra at 17 F.L.W. S581; Smith v. Dept. of Insurance. The plaintiffs, however, would have the Court do just that in these cases.

Even more important, they urge the Court to take important steps on the basis that insurance is cheap and readily available. Yet the Tort Reform and Insurance Act of 1986 was based upon explicit findings that insurance has become too expensive, or even unavailable.[22]

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[22]The Court itself has commented on the precision and depth of those findings:

> The Legislature set forth, in the preamble of the act, detailed legislative findings, including the following: (1) "that there is in Florida a financial crisis in the liability insurance industry, causing a serious lack of availability of many lines of commercial liability insurance"; (2) "that professionals, business, and governmental entities are faced with dramatic increases in the cost of insurance coverage"; (3) "the absence of

In Smith v. Department of Insurance, the Court treated those findings as the basis for the holding that the extensive reforms of the insurance system were within the constitutional prerogative of the Legislature.

In sum, the plaintiffs' views concerning insurance are diametrically opposed to those of the Legislature as to what would be fair, or even possible.

CONCLUSION

The plaintiffs want the Court to subject a large number of ordinary commercial disputes to product liability law in spite of the wide open nature of those principles and the tendency for such a change to increase the number of lawsuits.

They do not offer any factual basis to support their assertions that there is a need for such a change.

Ultimately, they fall back on the assertion that it would not do any harm because the product liability insurance would cushion the blow. That suggestion must drag the Court into a pointless conflict.

> insurance is seriously adverse to many sectors of Florida's economy"; (4) "that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses."
>
> Smith v. Dept. of Ins., supra at p.1084.

The Legislature has concluded that this state already is in the midst of an insurance crisis and that product liability insurance is expensive and, often, not available contrary to the plaintiffs' critical assumptions.

To create a host of new, complex tort cases would compound that problem.

Therefore amicus PLAC urges that the trial court and the District Court of Appeal were correct in terms of precedent, logic and policy and that they deserve to be affirmed.

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By 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of October, 1992, to: Mark Hicks, Esq., Hicks, Anderson & Blum, P.A., Ste. 2402, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132; Steven Siegfried, Esq., Siegfried, Kipnis, et al., Suite 1102, 201 Alhambra Circle, Coral Gables, FL 33134; and Daniel S. Pearson, Esq., Holland & Knight, P.A., P.O. Box 015441, Miami, FL 33101.

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