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SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CHARLEY TOPPINO & SONS, INC., etc., et al.,

Respondents.

CASE NO. 79,127

CHRISTOPHER H. CHAPIN, et al.,

Petitioners,

vs.

CHARLEY TOPPINO & SONS, INC., etc., et al.,

Respondents.

CASE NO. 79,128

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

AMICUS CURIAE BRIEF OF PULTE HOME CORPORATION

Original

Stephen Wasinger
Elizabeth Norma McKenna
Robert W. Boos
Florida Bar No. 558079
E. Powell Miller
M. Elizabeth Wall
Florida Bar No. 608378
HONIGMAN MILLER SCHWARTZ AND COHN
2700 Landmark Centre
401 East Jackson Street
Tampa, Florida 33602
(813) 221-6600
Attorneys for
Pulte Home Corporation

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INTRODUCTORY STATEMENT

Pulte Home Corporation (Pulte) is one of the largest home builders in the United States, having constructed thousands of homes in the state of Florida and hundreds of thousands of homes in various areas of the United States.

In early 1989, Pulte determined that fire retardant treated (FRT) plywood which it had incorporated into the roof structures of homes throughout the country was dangerously defective, posing severe risk to the personal safety of the homeowners and to the structural integrity of their homes. Pulte immediately notified 16,000 homeowners, in writing, of the potential danger and warned the homeowners not to go onto the roofs of their homes until Pulte could inspect the homes. Pulte's inspections confirmed Pulte's fears: the FRT plywood had severely degraded and would have to be replaced to protect the structural integrity of the home and, more importantly, to protect the safety of the homeowner and anyone else likely to go onto the roofs.

Pulte demanded that the designers and manufacturers of the dangerous FRT plywood take responsibility for the problem; but they refused. Therefore, Pulte commenced an enormous remedial campaign which has resulted in replacing the roof structures on more than 10,000 townhomes. Because of the complexity and logistical difficulties in this extraordinary effort, Pulte also engaged in temporary repairs to those roofs which were in the most dangerous state of degradation.

Having averted the disaster which was certain to befall its innocent homeowners -- at tremendous cost to itself -- Pulte then commenced lawsuits against those responsible for designing and manufacturing the dangerous FRT plywood. In February 1992, one of those lawsuits went to trial, after three years of discovery involving more than 100 depositions and millions of dollars in attorneys' fees and expenses. It was Pulte v. Osmose Wood Preserving, Inc., United States District Court for the Middle District of Florida (Case No. 89-788-CIV-T-17A).

During the Osmose trial, Pulte proved that Osmose designed a defective and dangerous FRT plywood product; that Osmose knew of the defect and danger but did not advise Pulte and other users of the defect and danger; and that Osmose defrauded Pulte and other users of its FRT plywood. The jury found in favor of Pulte and against Osmose for negligence and fraud. It also awarded punitive damages for Osmose's outrageous behavior. The jury verdict totalled $6,250,000.

Judge Clarence Newcomer, a visiting judge from the Eastern District of Pennsylvania who had tried the case, then vacated the jury verdict because he felt compelled, based on his understanding of Florida law, to dismiss Pulte's tort claims because he believed that they were barred by the economic loss doctrine. Judge Newcomer relied principally upon Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 588 So.2d 631 (Fla. 3d DCA 1991). A

copy of Judge Newcomer's Memorandum Opinion and Order is attached as Appendix A.

Judge Newcomer recognized the injustice of his Order, but he felt he had no other choice. Judge Newcomer stated:

> Plaintiff Pulte, in its oral argument to the Court on Defendant's motion passionately suggested that if the economic loss doctrine would preclude Plaintiff's cause of action then "the law is an ass." While there are times when it is painful to do so, it is nonetheless this Court's duty on these occasions to "saddle up." (Emphasis added.) [Judge Newcomer's Memorandum Opinion and Order at p. 19.]

Contrary to Judge Newcomer's conclusion, the law in Florida is not, and should not become, an "ass." The economic loss doctrine is not, and should not become, a vehicle to allow irresponsible parties who market dangerous products through innocent intermediaries to escape responsibility for their tortious misconduct.

There are no decisions of this Court which compel the conclusion that Judge Newcomer reached or the conclusion that the Court of Appeals reached in Casa Clara. The economic loss doctrine was intended to prevent claims arising out of the performance of a contract, without more, from becoming tort claims. That is what Florida Power & Light v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987), and AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180 (Fla. 1987), decided and that is all that they decided. The economic loss doctrine does not bar tort claims against the

contracting party arising independent of the performance of the contract (such as claims for fraud in the inducement) and it does not bar tort claims against persons with whom one has not contracted (such as fraud, tortious interference or negligence) -- even if the plaintiff might also have a contract remedy against someone else. That is why, in First Florida Bank, N.A. v. Max Mitchell & Co., 558 So.2d 9 (Fla.1990), this court permitted a bank to bring a claim for negligence against an accountant, even though the bank had a contract remedy against its own borrower. See also A.R. Moyer v. Graham, 285 So.2d 397 (Fla. 1973); Bay Manor Condominium Assn. v. James D. Marks Associates, Inc., 576 So.2d 744 (Fla. 3d DCA 1991).

But, based on misreadings of those cases, lower court judges, such as Judge Newcomer and the Court of Appeals in Casa Clara, have reached conclusions which effectively eviscerate tort law in Florida.

Not even the Uniform Commercial Code itself intended such a result. UCC § 1-103 specifically provides that pre-Code fraud law supplements the UCC. Thus, in Tinker v. De Maria Porsche Audi, Inc., 459 So.2d 487 (Fla. 3d DCA 1984), rev. denied, 471 So.2d 43 (Fla. 1985), the court found that the purchaser of a car could sue for fraud and for Code remedies. See also Ohio Savings Bank v. H.L. Vokes Co., 560 N.E.2d 1328 (Ohio 1989); St. Croix Printing Equipment, Inc.

v. Rockwell International Corp., 428 N.W.2d 877 (Minn. 1988); Seminole Peanut Co. v. Goodson, 335 S.E.2d 157 (Ga. 1985).

The economic loss doctrine is founded in theories of contractual allocation of risk. There can, however, be no contractual allocation of risk where there is fraud or where, as in Casa Clara and the Pulte case, a latently defective and dangerous product is sold under conditions where no one would ever purchase the product if they knew of the danger.

But it is not even necessary to reach these issues in this case. No one has ever contended that the economic loss doctrine bars claims based on personal injury or damage to other property. Casa Clara and the Pulte case demonstrate that the imminent threat of personal injury or property damage, by itself, constitutes personal injury or property damage sufficient to permit tort claims. Any other result creates enormous injustice because it permits irresponsible wrongdoers to escape the consequences of their own tortious conduct which endangered life and limb simply because a responsible party, such as Pulte, acted to prevent a catastrophe.

In short, Casa Clara should be reversed because it has created confusion in the minds of some of the judges interpreting Florida law, which has lead to one grossly unjust result that is contrary to the interests of the citizens of Florida and, if not clarified, may lead to more unjust results such as another Pulte FRT plywood case, which

is pending in the United States District Court for the Middle District of Florida, but will also be tried by visiting Judge Newcomer in the Spring of 1993.

This Court has an opportunity to promote justice and the best interests of the citizens of Florida by eliminating the confusion over the economic loss rule. This confusion can be eliminated by confirming the following limits or exceptions to the economic loss rule:

a. the economic loss rule does not apply where a dangerously defective product causes a real and imminent risk of personal injury or death simply because a responsible person acts to prevent the injury or death -- any other rule would tempt persons, such as Pulte, to let dangerous conditions continue because they could not recover the costs of remedial efforts from those truly responsible as a result of a perverse reading of the economic loss doctrine;

b. the economic loss doctrine does not bar claims which are not founded on the performance or non-performance of contract obligations but instead are founded on tortious conduct which induced a contract relationship -- such as fraud in the inducement -- or tortious conduct independent of the contract relationship -- such as the negligence in First Florida Bank and A.R. Moyer;

c. the economic loss doctrine does not bar claims where a contractor or homebuilder is exposed to extra-contractual liability based on an implied warranty of habitability, and then seeks to recover the costs of remedying the breach of the implied warranty from those primarily responsible for the breach;

d. the economic loss doctrine does not shield a remote manufacturer or designer of a latently dangerous building product from tort liability where that product causes substantial damage to other building products in the structure or impairs the structure as a whole.

e. the economic loss doctrine does not bar a suit in fraud against a remote manufacturer or designer merely because the party injured by the manufacturer's or designer's fraud might have a remedy in contract for breach of warranty against a myriad of retailers and wholesalers in the extended chain of distribution who were unwitting sellers of a defective and dangerous product and did not commit fraud.

STATEMENT OF THE CASE AND OF THE FACTS

Pulte adopts the Statement of the Case and of the Facts set forth in the Petitioners' Brief.

SUMMARY OF THE ARGUMENT

The economic loss doctrine is founded upon a distinction between contract law and tort law. Mere breaches of contract should not become torts, as this Court concluded in Florida

Power & Light v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987). However, torts should not be barred simply because there might be a contract remedy against someone, somewhere, somehow. Thus, this Court has long recognized that there can be claims for fraud even though there is an express contract, Besett v. Basnett, 389 So.2d 995, 996-997 (Fla. 1980), and that there can be claims for negligence even though there is a contract remedy against someone else, First Florida Bank, N.A. v. Max Mitchell & Co., 558 So.2d 9 (Fla.1990) (negligence claim against an accountant, even though the bank had a contract remedy against its own borrower), A.R. Moyer v. Graham, 285 So.2d 397 (Fla. 1973) (negligence claim against engineer). And, more importantly, for present purposes, this Court has allowed tort claims, notwithstanding a contract, where a dangerously defective product has caused personal injury or damage to other property. West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976).

Notwithstanding these long-standing principles, lower courts have begun to construe the economic loss doctrine to bar torts which have little, if anything, to do with breaches arising out of the performance of a contract between the plaintiff and the defendant. Casa Clara is such a case. In doing so, the lower courts threaten to eviscerate tort law in Florida and, in effect, reward irresponsibility by wrongdoers, including wrongdoers, such as Osmose, who engage

in fraudulent marketing practices to sell a latently dangerous product, reap the reward of the fraudulent marketing campaign, force someone else to remedy the dangerous condition they have created, and then seek to escape responsibility by invoking the economic loss doctrine.

To avoid such unjust results, this court should make clear that its prior opinions, such as Florida Power, were not intended to eviscerate tort law or make meaningless distinctions based on when "personal injury" or "property damage" occurs which have the effect of permitting tortfeasors from escaping responsibility for their actions.

Where a dangerously defective product has been incorporated into a structure and public safety demands removal of the product before it has actually caused personal injury or serious structural damage, this Court should rule that the real and imminent threat of such injury or damage is sufficient to permit recovery in tort. Such a ruling is consistent with this Court's prior rulings and with rulings by other courts. More importantly, such a ruling is necessary to ensure substantial justice, as the Seventh Circuit recently found in an analogous context.

In Eljer Manufacturing, Inc. v. Liberty Mutual Ins. Co., ___ F.2d __, 1992 W.L. 194823 (7th Cir. Aug. 14, 1992), the court was asked to determine when "personal injury" or "property damage" occurred within the meaning of a standard Comprehensive General Liability insurance policy. The insured had manufactured latently defective plumbing pipe but

the defect would not manifest itself until years later. The insured contended that coverage was triggered when the defective pipe was installed in the structure. The insurer contended that there could be no coverage then because the policy required actual "personal injury" or "property damage." The Seventh Circuit phrased the question in this way:

> The appeal and cross-appeals in this diversity suit bring before us a difficult and important question of insurance law, one that we must decide under Illinois law but that has nationwide significance because it involves the interpretation of language that appears in the industry-wide standard-form policy known as Comprehensive General Liability Insurance. * * * If a manufacturer sells a defective product or component for installation in the real or personal property of the buyer, but the defect does not cause any tangible change in the buyer's property until years later, can the installation itself nonetheless be considered a "physical injury" to that property? The defective product or component in such a case is like a time bomb placed in an airplane luggage compartment: harmless until it explodes. Or like a silicone breast implant that is harmless until it leaks. Or like a defective pacemaker which is working fine now but will stop working in an hour. Is the person or property which the defective product is implanted or installed physically injured at the moment of implantation or installation-in a word, incorporation-or not until the latent harm becomes actual? [Citations omitted. Emphasis added.]

The Seventh Circuit reached the only sensible result: sound policy and common sense dictate that the "personal injury" and "property damage" occur when the risk is real and imminent. The insurer cannot avoid its responsibilities

simply because the manufacturer does not wait until actual personal injury or property damage results.

So too in this case, in the Pulte case, the Babcock case and in other cases involving a dangerously defective product, the economic loss doctrine should not bar claims simply because a party acted responsibly to remedy a dangerous condition rather than allow disaster to occur.

Florida law should encourage the removal of ticking time bombs without penalty. It should not permit the economic loss rule to be construed in a way which would not only discourage such responsible acts but reward irresponsible parties who create dangerous conditions and then sit idly by and wait for the time bomb to explode.

ARGUMENT

I. To Promote The Policies Underlying Tort Law, To Avoid Substantial Injustice And To Encourage Remedial Efforts Before There Is Actual Personal Injury or Serious Property Damage, This Court Should Confirm That An Imminent Threat Of Personal Injury Or Property Damage Is Sufficient To Allow Tort Remedies Against The Person Creating The Danger

It is undisputed that the economic loss rule does not bar a tort claim where the defective product causes personal injury or damage to other property. There is, however, some confusion among the lower courts about whether the economic loss rule bars a tort claim where there is a real and imminent risk of personal injury or property damage.

This Court should clarify that confusion and hold that, where a party acts responsibly to remedy a dangerous

condition before there can be actual personal injury, the economic loss doctrine will not bar tort claims seeking to recover the costs of remedial efforts from those responsible for creating the dangerous condition.

It is sometimes suggested, as did Judge Newcomer in Pulte, that a tort waiting to happen is not a tort and, therefore, contract law, not tort law, should alone provide remedies against those who create dangerous conditions. Such reasoning, however, elevates form over substance and, more importantly, rewards the type of irresponsible conduct which tort law intends to prevent. Tort law is premised on safety; it seeks to prevent conduct which places life and limb in peril. See, e.g., Northridge Co. v. W.R. Grace and Co., 471 N.W.2d 179, 184-185 (Wis. 1991) ("While economic loss is measured by repair costs, replacement costs, loss of profits or diminution in value, the measure of damages does not determine whether the complaint is for physical harm or economic loss. * * * The gist of a strict products liability tort case is that the plaintiff has suffered personal injury or property damage caused by a defective product that posed an unreasonable risk of injury to person or property. Tort law is premised on safety.") [Emphasis added.]

The basic distinction which underlies the "economic loss" doctrine was well stated in an early "economic loss" decision, Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965),

where Justice Traynor explained the need to keep products liability and contract warranty cases discrete:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He 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. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. * * * [403 P.2d at 151. (Citations omitted. Emphasis added.)]

Said another way, tort law, not contract law, imposes a duty on the designee to avoid designing a dangerous product.

In this case, and in the Pulte case, the defendants breached a duty to design and sell a safe product. These cases do not involve warranties affecting the value of goods allocated by contract; they involve latent dangers which could never be allocated by contract because, if their latent dangers were disclosed, no purchaser would have ever bought the dangerous product since it was worthless for its intended purpose. The duty breached was a duty established by tort law, not contract law. And, because tort law protects safety, the policies protected by tort law would be

frustrated, not promoted, if a party could escape tort liability simply because some responsible party remedied the dangerous condition before it caused actual personal injury or property damage.

That is why courts in Florida and elsewhere have permitted recovery in tort where there is a real and imminent risk of personal injury or property damage and a party eliminates the danger instead of waiting for a calamity. See Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515, 519 (Fla. 4th DCA 1981), rev. denied, 417 So.2d 328 (Fla. 1982) ("[a] buyer [should not] have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects [.]"; Counsel Of Co-owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 344 (Md. App. Ct. 1986) (an increasing number of courts "have declined to distinguish between a risk of personal injury or property damage on the one hand and a risk of economic loss on the other" for purposes of determining a party's right to maintain a tort claim); City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 978 (4th Cir. 1987), reh. denied, 840 F.2d 219 (4th Cir. 1988) ("[a] plaintiff such as Greenville should not be required to wait until asbestos-related diseases manifest themselves before maintaining an action for negligence against a manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the

environment."); Barnes v. MacBron & Co., 342 N.E.2d 619, 621 (Ind. 1976) ("If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?); Kennedy v. Columbia Lumber Mfg. Co., 384 S.E.2d 730, 737 (S.C. 1989) ("[a] builder is no less blameworthy where lady luck has smiled upon him and no physical harm has yet occurred."); accord Eljer Manufacturing, Inc. v. Liberty Mutual Ins. Co., ___ F.2d ___, 1992 WL 194823 (7th Cir. 1992) ("personal injury" occurs, within meaning of insurance policy, where dangerous product installed into structure even though the danger has not yet manifested itself but will almost certainly do so in future).

In cases where a dangerous product has been marketed -- especially when it has been fraudulently marketed -- invoking the economic loss doctrine to excuse the designer or manufacturer from liability does violence to both both contract and tort law. There has not been the meaningful contractual risk allocation which contract law promotes; and thus contract law should not excuse liability. And, allowing the designer or manufacturer to escape liability for his conduct, while shifting the costs of his irresponsibility to

others, contradicts the very purpose of tort law. This court established principles of strict liability in West v. Caterpillar Tractor Co., Inc., 336 So.2d 80, 84-92 (Fla. 1976), which recognized the importance of using tort law principles to encourage designers and manufacturers to ensure that their products were safe before they were marketed.

By reversing Casa Clara and adopting the Drexel Properties line of cases, the Court can serve the public interest by encouraging the removal of dangerous conditions and preventing death and personal injury.

II. The Economic Loss Rule Does Not Apply Where There Is No Contract Remedy Or No Meaningful Contractual Risk Allocation

The economic loss doctrine should not bar someone from suing a remote manufacturer or designer of a dangerous and defective product in tort where there is no viable contractual remedy against the manufacturer or designer and the nature of the defect was such that its risk could not be meaningfully allocated as a matter of contract.

The economic loss rule assumes valid contractual relationships and seeks to avoid efforts to disturb contractual risk allocations by invoking tort principles. But what if there are no valid contractual relationships -- such as when the contract was induced by fraud or when the tortfeasor dealt through innocent intermediaries? What if there is no contractual risk allocation -- such as when the bargaining was was based on advertised properties and the

seller did not disclose dangerous conditions which would make the product unsellable? In those cases, it is absurd to invoke the economic loss doctrine to force injured parties to resort to non-existent contract remedies against the wrongdoer. Contract law was never intended to remedy those kinds of wrongs; that is why the law of fraud exists and that is why the law of negligence exists.

This case and the Pulte case demonstrate why the economic loss doctrine makes no sense in these contexts. Pulte could meaningful negotiate about the price of roof sheathing based on disclosed characteristics, such as thickness and durability. Those qualities could be priced. However, the minute someone discloses that there is a dangerous, unpredictable condition, meaningful negotiation about price becomes impossible: no one, especially a homeowner or a home builder, can take the chance that the roof sheathing will self-destruct at some uncertain time thereby endangering the safety of the homeowners and the structural integrity of the house.

One cannot even imagine how Pulte could even dare to sell a house if Pulte knew that the roof sheathing could degrade at any time, endangering the house and its occupants. And, even if Pulte could figure out a way to sell such a house, no responsible building official would allow Pulte to do so. That is why there are stringent building codes, and that is why courts have imposed implied warranties of habitability

and safety. Elizabeth N. v. Riverside Group, 585 So.2d 376 (Fla. 1st DCA), rev. denied, 592 So.2d 680 (Fla. 1991) (builder's liability for implied warranty of habitability and safety).

These situations are exactly like the situations the Seventh Circuit described in Eljer: the breast implant that will leak sometime, and the heart pacemaker that will fail sometime. Neither product could be the subject of meaningful contract risk allocation because, if the real risk were disclosed, neither product could be sold.

When the product is dangerous because of an inherent latent defect, akin to a "ticking time bomb," it is fundamentally not the product that was purchased. No meaningful negotiation, purchase of insurance or allocation of risk of loss can occur because the purchaser could not have anticipated that the product was something other than the product purchased.

Thus, in these cases, the economic loss rule -- which protects contractual risk allocation -- makes no sense. Yet Casa Clara and Pulte not only use the economic loss rule in these contexts, but they actually expand the rule in ways that become nonsensical. For example, Judge Newcomer concluded that Pulte could not recover on its fraud and negligence claims against the designer of a dangerous product because Pulte might have a contract claim against someone else, the intermediary who unwittingly sold a dangerous product.

Read the way Casa Clara and Pulte read the economic loss rule, litigation becomes misdirected. Instead of being able to sue the party responsible for the dangerous product, Pulte is forced to sue a party who has no responsibility for the dangerous product. While, theoretically, imposing the economic burden of defending such a lawsuit on the intermediary could be justified as, perhaps, encouraging vendors to be more careful about the products which they agree to resell, in reality that make no sense because the intermediary has no practical way of knowing whether a product is dangerous unless he engages in testing which, presumably, the designer and manufacturer have already performed.

Privity may have its purposes where there is meaningful contractual risk allocation. It has none in situations where a product could never be sold with full disclosure. In these situations, the economic loss doctrine should not be construed to prevent the party who unwittingly purchased a dangerous product from suing the designer or manufacturer of the dangerous product. That is exactly why this court decided to adopt the rule of strict liability in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976), and that is exactly why this court should reverse Casa Clara.

III. Where A Party Is Exposed To Extra-Contractual Liability, The Economic Loss Rule Should Not Bar Recovery

If Pulte had ignored the dangerous and defective FRT plywood, it would have faced potential liability from

homeowners for breach of the implied warranty of habitability and safety, which is imposed as a matter of law. Judge Newcomer recognized this in his Memorandum Opinion and Order, Exhibit A, at p. 6 n. 1. See also Marcus v. Anderson/Gore Homes, Inc., 498 So. 2d 1051 (Fla. 4th DCA 1986). It would be both anomalous and unjust to conclude that Pulte could be sued in tort as an intermediary who unwittingly supplied a dangerously defective product but that Pulte could not sue the primarily responsible party in tort -- even though Pulte had no contract claim against the designer of the product and even though Pulte had no fraud claim against other unwitting sellers. See Kala Investments, Inc. v. Sklar, 538 So.2d 909 (Fla. 3d DCA), rev. denied 551 So.2d 460 (Fla. 1989).

IV. The Economic Loss Rule Should Not Apply Where A Building Product Causes Substantial Damage To Other Building Products In the Structure Or Impairs The Structure As A Whole

It is well-settled that the economic loss rule does not apply where the product causes damage to property other than the product itself. See Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899, 900 (Fla. 1987); GAF Corp. v. Zack Corp., 445 So.2d 350 (Fla. 3d DCA 1984).

In Casa Clara, the court held, somehow, that the home was the product and, therefore, it did not matter that the dangerous and defective concrete within the home damaged other property within the home. Other Florida courts,

however, recognize the right of building owners and developers to pursue tort remedies against manufacturers and suppliers of defective building materials for the property damage caused by those products. See Kerry's Bromeliad Nursery, Inc. v. Reiling, 561 So.2d 1305 (Fla. 3d DCA 1990) (greenhouse owner could pursue negligence claim against manufacturer for damage to plants in greenhouse); Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA), rev. dismissed, 411 So.2d 380 (1981) (strict liability remedy permitted for suit against a building materials distributor for defective stucco incorporated in homes).

There are numerous cases from other jurisdictions that have reached similar results. See Brief of Amicus Curiae of the Babcock Company, at pp. 28-29. It makes no sense to insulate negligent, reckless or intentional manufacturers or designers of latently defective building products from liability where those products damage other property and pose grave danger of personal injury and death.

V. The Economic Loss Rule Should Not Bar Claims For Fraud

Even if, somehow, the Court concludes that Casa Clara was correctly decided, it should still take the opportunity to confirm that the economic loss rule was never intended to bar fraud claims.

In Pulte, visiting Judge Newcomer regretfully concluded that the economic loss doctrine could be used to vacate a jury verdict which found that the designer of a dangerous product had fraudulently marketed the product by failing to disclose known dangers. Judge Newcomer did so because, as he read it, the economic loss rule meant that claims against the fraudulent designer could not be pursued because the builder might be able to pursue a contract remedy against his immediate seller.

Even assuming that were true, that makes no sense. Indeed, Florida law clearly provides that Pulte could pursue a fraud claim against the seller itself, if there were evidence that the seller fraudulently induced the contract. While Judge Newcomer's decision is absurd, the result is based on the conclusion of some lower courts that the existence of a contract with someone bars tort claims against anyone. In essence, these judges believe that the existence of a contract makes impossible the assertion of a tort claim.

The fact is that fraud makes it impossible to engage in meaningful contract negotiations. That is why one fraudulently induced to contract can either set the contract aside or seek damages for the fraud. In the usual fraud case, it is the buyer who sues the seller for fraud precisely because he could not meaningfully bargain where essential facts were either misrepresented or hidden. In these cases, fraud claims are permitted even though contractual remedies

are also available for breach of contract. See, e.g., Besett v. Basnett, 389 So.2d 995, 389 So.2d at 995-997 (Fla. 1980) (fraud in the sale of land); Tinker v. De Maria Porsche Audi, Inc., 459 So.2d 487, 491 (Fla. 3d DCA 1984), rev. denied, 471 So.2d 43 (Fla. 1985) (fraud in the UCC context); Johnson v. Bokor, 548 So.2d 1185 (Fla. 2d DCA 1989) (fraud in the sale of stock); Palmer v. Santa Fe Healthcare Systems, Inc., 582 So.2d 1234, 1235 (Fla. 1st DCA 1991) (claim for fraud in connection with an employment contract); Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So.2d 306 (Fla. 4th DCA) rev. denied, 581 So.2d 165 (Fla. 1991) (claim for fraud in connection with the purchase of an automobile).

But the defrauded party can also sue others. For example, in First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990), this court permitted the bank to sue an accountant for negligent misrepresentation even though the bank also had a contract claim against its borrower. While First Florida Bank dealt with negligent misrepresentation, it assumed that the bank had a cause of action for intentional misrepresentation.

In First Florida Bank, the Court adopted Restatement (2d) Torts, § 552. In that case, the bank made a loan to a customer. The bank had a contract claim against the customer. The bank also sued the customer's accountant for the exact same damages which the bank could recover from the customer - the amount of the loan which had not been repaid.

Obviously, if the economic loss rule barred fraud claims in this context, this Court would never have been required to reach the question whether the bank could recover against the accountant for negligent misrepresentations. The Florida Supreme Court would have been compelled to find that the bank could not sue the accountant because it had a contract remedy against its customer. This Court allowed the bank to sue the accountant because the bank had no contract with the accountant and, therefore, the bank's only remedy against the accountant was a tort remedy. So important was it to permit the bank to sue the accountant - even though the bank had a contract remedy against the customer - the Court eliminated the bar of privity which had previously precluded suits based on negligent misrepresentation.

While First Florida Bank did not expressly address the "economic loss" doctrine, it clearly held that the tort claim was proper even though the bank sought only "economic losses." That this is the correct reading of First Florida Bank is demonstrated by Bay Garden Manor Condominium Assn, Inc. v. James D. Marks Associates, Inc., 576 So.2d 744 (Fla. 3d DCA 1991). In that case, the court of appeals reversed a summary judgment in favor of an engineer based on the "economic loss" doctrine and held that tort claims against the engineer survived where there was no contractual relationship:

> A summary judgment was entered on the legal conclusion that the plaintiff association

> could not maintain a tort action to recover economic losses absent an independent injury to persons or property. We reverse on the authority of First Florida Bank v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990), which was decided after the judgment on review was entered. 576 So.2d at 745.

It is important to note that Bay Garden was decided by the Third District Court of Appeals, the same court which decided Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 588 So.2d 631 (Fla. 3d DCA 1991).

Florida decisions decided after First Florida Bank also confirm that there can be tort liability even though the plaintiff may have a contract remedy against some other person. For example, in Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, Inc., 581 So.2d 1301, 1303 (Fla. 1991), the court reaffirmed its decision in First Florida Bank while deciding which limitations period barred an action for professional malpractice.

Similarly, in First State Savings Bank v. Albright & Associates, 561 So.2d 1326 (Fla. 5th DCA) rev. denied, 576 So.2d 284 (Fla. 1990), the Court of Appeals found that an appraiser could be liable for negligent misrepresentations which caused a bank to suffer a loss on its loan to a customer. The trial court had granted a directed verdict finding that "there can be no recovery in tort for purely economic damages, as were sought here." 561 So.2d at 1327. Relying on First Florida Bank, the Court of Appeals

reversed. Once again, there can be little doubt but that the bank also had a contract claim against its customer. Nowhere, however, did the Court of Appeals even suggest that the existence of such a contract claim would bar a tort claim against the appraiser with whom there was no contract.

In Interfase Marketing, Inc. v. Pioneer Technologies Group, Inc., 774 F. Supp. 1351, 1354 (M.D. Fla. 1991), after dismissing a breach of warranty claim because there was no contractual relationship between the plaintiff and the defendant, the court stated:

> Interfase does not have a contractual remedy against Pioneer, because no contract exists. Therefore, the exceptions to the 'economic loss rule' must be examined. Several Florida cases have permitted tort recovery when the plaintiff has no alternative means of recovery. . . . (citations omitted) Since Interfase has no contract remedy against Pioneer for the alleged statements made by Pioneer representatives and relied upon by Interfase, the claim of misrepresentation found in Count I of the Amended Complaint must be allowed as an exception to the "economic loss rule."

See also Interfase Marketing, Inc. v. Pioneer Technologies Group, Inc., 774 F.Supp. 1355, 1358-1359 (M.D. Fla. 1991).

Similarly, in Action Orthopedics, Inc. v. Techmedica, Inc., 759 F.Supp. 1566 (M.D.Fla. 1991), the court concluded that the "economic loss" rule did not bar tort claims even though there was a contract between the plaintiff and the defendant. After quoting extensively from her opinion in Serina v. Albertson's, Inc., 744 F.Supp. 1113 (M.D.Fla.

1990), which held that the "economic loss" doctrine would bar a tort claim alleging fraudulent performance of a contract, Judge Kovachevich concluded:

> The present case differs from Serina in one very important respect. In Serina, both the contract claim and the tort claim involved the same parties, i.e., the plaintiff and the same defendant. However, the tort claim in the present action involves not only the defendant named in both the contract claims, but also additional defendants. To particularize, the contract claims involve only Defendant Techmedica, whereas the tort claim involves Defendant Techmedica and Defendants Distin and Fiebiger. An application of this Court's holding in Serina, therefore, does not preclude the separate tort action brought in the case at bar. The facts surrounding the breach of contract and the separate and distinct tort are not interlaced and do not fall within the parameters of Serina. 759 F.Supp. at 1571-1572.

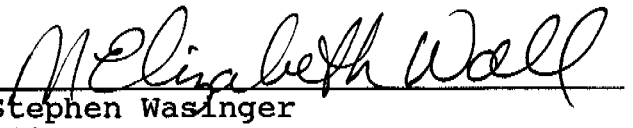
Similarly, in Amerifirst Bank v. Bomar, 757 F.Supp. 1365, 1377-1378 (S.D.Fla. 1991), Judge Hoeveler was asked to dismiss a tort claim brought against a corporate officer who had breached his employment contract, based on the "economic loss" doctrine. He refused to do so because the officer not only breached his contract but also breached "a duty of loyalty to his corporation which is independent of his contractual obligations arising out of the employment contract."

Each of these cases recognize the obvious: the economic loss rule makes no sense where there was no contract or where contractual risk allocation was impossible because of a fraud.

CONCLUSION

For all the above reasons, Pulte respectfully requests that the Court reverse the decision of the lower court.

HONIGMAN MILLER SCHWARTZ AND COHN
Attorneys for Pulte Home Corporation

By: 

Stephen Wasinger
Elizabeth Norma McKenna
Robert W. Boos
Florida Bar No. 558079
E. Powell Miller
M. Elizabeth Wall
Florida Bar No. 608378
2700 Landmark Centre
401 East Jackson Street
Tampa, Florida 33602
(813) 221-6600

B6056e
T6096d

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131; Lynn E. Wagner and Richard A. Solomon of Cabaniss, Burke & Wagner, P.A., P.O. Box 2513, Orlando, Florida 32802-2513; H. Hugh McConnell and Steven M. Siegfried, 201 Alhambra Circle, Suite 1102, Coral Gables, Florida 33134; Daniel S. Pearson of Holland & Knight, P.O. Box 15441, Miami, Florida 33131; Susan E. Trench of Goldstein & Tanen, P.A., One Biscayne Tower, Suite 3250, Two S. Biscayne Blvd., Miami, Florida 33131; Mark Hicks of Hicks, Anderson & Blum, New World Tower, Suite 2402, 100 N. Biscayne Blvd., Miami, Florida 33132; Donald M. Kaplan of McCarter & English, 2255 Glades Road, Suite 319A, Boca Raton, Florida 33431; Andrew J. Toland of Patton, Boggs & Blow, 250 W. Pratt Street, Suite 1100, Baltimore, Maryland 21201; and Edward T. O'Donnell of Herzfeld and Rubin, 801 Brickell Avenue, Suite 1501, Miami, Florida 33131, this 24th day of September, 1992.

M. Elizabeth Wall

T6100d

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PULTE HOME CORPORATION, INC.
Plaintiff,

v. Case No. 89-788-CIV-T-17A

OSMOSE WOOD PRESERVING, INC.
GEORGIA PACIFIC CORP., LOWE'S
COMPANIES, INC. and LOWE'S
INVESTMENT CORPORATION,
Defendants.
_____/

Order
Motion in Limine

Newcomer, J. March // , 1992

M E M O R A N D U M

Before the court are Defendant Osmose Wood Preserving, Inc.'s, ("Osmose") Motion To Dismiss this cause of action for lack of subject matter jurisdiction, and Motion For Judgment. The motions will be addressed ad seriatim.

I. Factual Background:

Plaintiff Pulte Home Corporation, Inc. ("Pulte") is a builder of multi-family housing units. Osmose is the manufacturer of a chemical used to treat plywood in order to make it fire retardant ("FRT plywood"). Pulte installed the FRT plywood in the roofs of over one thousand homes. In its Complaint against Osmose, Pulte avers that the FRT plywood has begun or will begin to deteriorate, resulting in a compromise of the structural integrity of these homes. Pulte, having

discovered the deterioration in these roofs, undertook and is in the process of undertaking a remedial effort to repair and replace the deteriorating roof sheathing. The claims remaining in this action are in negligence, strict products liability, and fraudulent misrepresentation. Plaintiff is seeking, among other things, the costs of remedying the structural problems allegedly caused by the Osmose chemical.

II. Motion to Dismiss - Issues Presented:

Defendant's motion raises two questions to the court in its motion to dismiss:

(1) whether Pulte has satisfied the "case or controversy" requirement set forth in Article III of the United States constitution -- whether Pulte has suffered a real or actual injury; and

(2) whether Pulte has satisfied the $50,000 amount in controversy requirement set forth in 28 U.S.C. § 1332.

A. Motion to Dismiss - Standard of Review:

For purposes of a motion to dismiss, the court must take all allegations of material facts as true and construe them in the light most favorable to the plaintiff. Powell v. U.S., 945 F.2d 374, 375 (11th Cir. 1991) citing Hishon v. King & Spalding, 467 U.S. 69, 73, 59 (1984); see also Wright v. Newsome, 795 F.2d 964, 967 (11th Cir.1986). With this standard in mind the court now turns to the merits of defendant's motion.

B. Standing - "Case or Controversy" Requirement:

In order to satisfy the Article III "case or controversy" requirement, the plaintiff must, at a minimum, satisfy a tripartite test:

(1) "that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 ,99 (1979); and

(2) "that the injury 'fairly can be traced to the challenged action,'" Valley Forge, 454 U.S. at 472 citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976); and

(3) "that the injury is likely to be redressed by a favorable decision." Valley Forge, 454 U.S. at 472 citing Eastern Kentucky Welfare, 426 U.S. at 41.

a. Actual or threatened injury:

Pulte clearly suffered actual injury as a result of the alleged negligence or wrongful conduct of defendant. Pulte incurred substantial costs in remedying the allegedly defective roof sheathing containing the FRT plywood, i.e. -- suffered the distinct and palpable injury of the costs incurred in remedying the defect.

b. Relation of Injury to Challenged Action:

Moreover, there is a direct relationship between the injury suffered by plaintiff and the defendant's alleged actions

and\or failure to act. Plaintiff contends, inter alia, that defendant marketed a defective product -- a fire retardant chemical -- to be used on plywood intended for roof construction which was not fit for its intended use. Pulte, in reliance on Osmose' representations about its product, not knowing of the latent product defect, purchased and installed plywood treated with the defective Osmose chemical formula. The defective nature of the Osmose chemical directly caused the deterioration of the wood in the units, which, in turn compromised the integrity of the roof sheathing\building structure. The costs incurred as a result of the remedial measures employed by Pulte therefore bear a direct relationship to the harm caused by Osmose's allegedly defective product.

c. Likelihood of Redress by a Favorable Decision:

Additionally, the damages recoverable by Pulte will fully redress the harm Pulte has suffered. That is, Pulte will be able to recover the costs of remediation that it incurred as a direct result of the negligence of the defendant, the defective nature of the product, or the harm suffered as a result of any fraudulent misrepresentations made by Osmose to plaintiff.

C. Amount in Controversy Requirement:

Having satisfied the case or controversy requirement, the court next turns the issue of whether Pulte or the homeowners are the real parties in interest in this case, and, if plaintiff is in fact the real party in interest here, whether Pulte has met

the amount in controversy requirement set forth in 28 U.S.C. § 1322.

Defendant Osmose contends that Pulte was not the "real party in interest" in this case, as, at the time Pulte embarked on its roof repair\replacement remedial program, Pulte no longer owned the units in question. Because Pulte no longer owned these units, the argument continues, Pulte suffered no palpable injury as a result of any defect in Osmose's chemical formula. Osmose concedes that because many of the homeowners have assigned their claims to Pulte, Pulte may stand in their shoes for purposes of bringing this lawsuit. Osmose contends further, however, that as an assignee Pulte has only the rights of its assignors -- and since the roof repair costs of the individual units were far less than $50,000, Pulte has failed to meet the amount in controversy requirement set forth in 28 U.S.C. § 1332. In support of its contentions Osmose relies on the case of Herlihy v. Ply-Gem Indus., Inc., 752 F. Supp. 1282 (D.Md. 1990). Herlihy was instituted by individual homeowners against fire retardant plywood manufacturers alleging that the products were defective. Presented with a variety of motions to dismiss the action, the court dismissed the case on the grounds that plaintiffs had failed to meet the amount in controversy requirement set forth in 28 U.S.C. 1332(a), and that the plaintiffs did not have standing to pursue a class action against the defendant manufacturers. In Herlihy, however, the court was dealing with individual parties, who, while each had an injury caused by the manufacturer of the

product with regard to their individual homes, had no claims against the manufacturer with regard to the homes that they did not in fact live in or own. The homeowners in the Herlihy case did not have a common and undivided interest that could be redressed by a finding of liability in their product liability action. Instead, each homeowner had a separate and distinct action for which it had standing to sue and was entitled only to recovery for the injuries that he suffered as a result of the installation of the defendant's products in his individual home. The aggregation of separate claims, however, is insufficient to confer subject matter jurisdiction in a diversity case. Snyder v. Harris, 394 U.S. 332, 339-40 (1969). To allow such aggregation of individual claims would be to undercut the purpose of the jurisdictional amount requirement. Id. at 340.

In the instant case, however, Pulte is the real party in interest as it incurred costs as a result of its own subjection by Osmose for liability for the defective product. Pulte incurred real costs as a result of the deterioration of the roof sheathing in the Pulte-built housing units. To protect itself from liability in potentially astronomical figures for the damage caused to and by the FRT plywood, Pulte was forced to spend millions of dollars on remediation efforts.[1] Moreover,

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1. Osmose suggests further that Pulte's remediation efforts were merely gratuitous and that Pulte therefore "created" its own injury in going out and repairing and replacing the defective roofs. This suggestion is patently ridiculous. Once the roofs began to deteriorate, Pulte was subject to liability for breach of warranty of habitability claims. See Gable v. Silver, 264 (continued...)

all of the homes at issue in this lawsuit were damaged by Osmose's product. Clearly, the individual homeowner's damages are limited to recovery for damages they suffered individually. Pulte's damages, however, are for every home that it had to repair as a result of the deterioration of the defective FRT plywood containing chemicals manufactured by Osmose. Pulte, therefore, as the party in interest in this case, has suffered injuries in an amount sufficient to meet the amount in controversy requirement of § 1332.

In light of the foregoing, it is clear to the court that plaintiff has standing to sue for the damages it has suffered. The question the court must next turn to, however, is whether plaintiff has sued the proper party under the proper theory.

III. Motion To Enter Judgment:

In its Motion To Enter Judgment, Defendant contends that plaintiff has chosen to pursue a party - Osmose, against whom plaintiff has no cause of action. Osmose argues further that plaintiff has only suffered "economic loss," and is therefore barred, under Florida law, from recovery for actions in

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1. (...continued)
So.2d 418 (Fla. 1972); Hesson v. Walmsley Const. Co., 422 So.2d 943 (Fla. App. 2 Dist. 1982). Clearly, a stable roof is essential to the habitability of a structure. Moreover, the compromise of the structural integrity of over one thousand Pulte-constructed homes subjected plaintiff to extreme pressures from municipal authorities to correct the problems caused by the defective plywood. Finally, a failure to repair the deteriorating roof structures would also have subjected plaintiff to claims for punitive damages if the plaintiff had not corrected the problem at the time the plaintiff discovered it.

tort. Because plaintiff's only remaining claims are in tort,[2] Osmose argues, plaintiff, as a matter of law, is not entitled to recover its damages.

A. Motion For Judgment - Standard:

Rule 50 of the Federal Rules of Civil Procedure provides:

> If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue , the court may grant a motion for judgment as a matter of law against that party on any claim . . . that cannot under the controlling law be maintained without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1). This version of Rule 50 became effective on December 1, 1991, but it has not changed the existing standard-for entry of judgment as a matter of law. Advisory Committee Notes on Rules, 1991 Amendment. Under the existing standard, a "trial judge must direct a verdict, if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). With that standard in mind, the court now turns to the merits of defendant's motion.

B. Economic Loss Doctrine:

The "economic loss" doctrine precludes recovery in tort for purely economic damages. Casa Clara Condo. v. Charley Toppino, 588 So.2d 631, 633 (Fla. App. 3 Dist. 1991).

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2. Plaintiffs only remaining claims are in products liability, negligence and fraud.

Specifically, "if the plaintiff has not sustained any personal injury or property damage, he cannot recover." Casa Clara, 588 So.2d at 633; citing GAF Corp. v. Zack Co., 445 So.2d 350 (Fla. App. 3 Dist. 1984). In this instance, plaintiff has suffered neither personal injury nor injury to property as a result of Osmose' allegedly defective chemical formulation and will therefore be precluded from pursuing its claims in tort.

1. Personal Injury:

Plaintiff Pulte presented no evidence of personal injury for which it might otherwise recover in tort. Pulte did produce evidence that at least one person had fallen through the roof of a Pulte constructed home as a result of the deterioration of roof sheathing made up of wood treated with an Osmose chemical. ("FRT Plywood"). However, even if a personal injury has in fact occurred as a result of the deterioration of the roof sheathing, the damages resulting from that injury could not be part of plaintiff's claim. If injury was suffered by a homeowner or a guest of a homeowner, the injured party would have standing to sue Osmose in tort. Pulte, however, is a complete stranger to any such claim of personal harm. Indeed, Pulte has not even presented any evidence with regard to the damages, if any, resulting from such personal injury.

2. Property Damage:

Plaintiff, moreover, has sustained no "property" damage for which it may recover in tort. Pulte no longer owns the damaged units in question. Accordingly, Pulte cannot be said to

have suffered damage to its property. However, even assuming that Pulte did "own" the homes in question -- or that Pulte might assert standing as an assignee of the claims of the owners of these homes, Pulte would still be unable to prove that Pulte had suffered "property" damage of the sort required by the economic loss doctrine.[3]

In the context of actions in tort, in determining whether a party has suffered "property damage," the question for the court is whether property other than the defective property itself, or property other than that which the defective property is an integral part of has been damaged. Aetna Life & Casualty

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3. If Pulte wishes to proceed as an assignee of the homeowners this court must dismiss this case for lack of subject matter jurisdiction, as the assignors, the homeowners, do not have individual claims sufficient to meet the amount in controversy requirement for diversity jurisdiction set forth in 28 U.S.C. 1332(a). The costs of repairing and replacing the roofs on each of the housing units was far less than $50,000. See Herlihy v. Ply-Gem Indus., Inc., 752 F. Supp. 1282 (D. Md. 1990); see also infra. pp. 5-6 (Discussion of Herlihy - in context of standing).

Herlihy was instituted by a group of individual homeowners against fire retardant plywood manufacturers alleging that the manufacturers' products were defective. The court dismissed the case on grounds that plaintiffs had failed to meet the amount in controversy requirement. The court concluded that the homeowners did not have a common and undivided interest that could be redressed by a finding of liability on their products liability action. Instead, each homeowner had a separate and distinct action for which he had standing to sue and was entitled to recovery only for the injuries that he suffered as a result of the installation of the defendants' products in his individual home -- no individual plaintiff had the right to sue for damages to any other homeowner.

It is axiomatic that an assignee stands in the shoes of its assignor and is limited to the rights and causes of action available to the assignor. Gardner v. Surnamer, 608 F. Supp. 1385, 1391 (E.D. Pa. 1985). Therefore, Pulte, as an assignee of the homeowner's claims, could no more aggregate those claims than could the homeowners in Herlihy.

Co. v. Therm-O-Disc, Inc., 511 So.2d 992 (Fla. 1987). This rule of liability is based on the premise that "[s]ince all but the very simplest of machines have component parts, '[a contrary]' holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability." East River Steamship Corp., 476 U.S. at 866. quoting Northern Power & Engineering Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 330 (Alaska 1981).

The Florida courts have consistently applied this narrow definition of injury to "other property" in determining whether a party may recover in tort. For example, in Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So.2d 992, defendant Therm-O-Disc,Inc. manufactured defective switches which were then purchased and incorporated by another company into heat transfer units. When the switches failed to operate properly, the water in the units froze causing substantial damage to the units. Id. at 993. Despite the fact that the failure of the switches resulted not only in damage to the switches themselves but to other parts of the heating units, the Florida Supreme Court concluded that no damage to "other property" had been suffered by the heating unit owners -- the only damage suffered was economic loss. Id. at 993. Thus, the court ruled, defendant had not committed a tort. Id. at 993; followed by Casa Clara Condo v. Charley Toppino, 558 F.2d at 633 (where plaintiffs brought a tort claim against supplier of allegedly defective concrete used in

home construction, the court concluded that "the structures, the homes and the buildings, not [just] the concrete, are the 'property' for purposes of applying the economic loss doctrine."). See also, American Universal Insurance Group v. General Motors Corporation, 578 So.2d 451, 453 (Fla. App. 1 Dist. 1991) (where defective replacement oil pump caused engine to burn, court concluded that oil pump was an integral or component part of engine and that damage to engine did not, therefore, constitute damage to "other property").

Application of Florida's definition of "other property" for purposes of applying the economic loss doctrine mandates the conclusion that the damages suffered in this case constitute purely economic loss. Pulte has presented no evidence that any personal property contained in the defective units was damaged in any way, nor has Pulte presented evidence that its own tools or equipment have been damaged as a result of the defective nature of the FRT plywood installed in the roof sheathing. The only damages claimed to have been caused by the deterioration of the FRT plywood are the costs of the repair and replacement of the roofs containing the FRT plywood and repair of structural damages. Pulte presented only evidence regarding damages suffered as a result of the costs it incurred in inspecting, repairing and replacing the defective roofs. "Losses due to repair, replacement and diminution in value [,however,] are not recoverable in tort." Casa Clara Condo. v. Charley Toppino, 588 So.2d 631, 633 citing East River Steamship Corp. v. Transamerica

Delaval, Inc., 476 U.S. 858 (1986); Florida Power & Light Co. v. McGraw Edison, Co., 696 F. Supp. 617 (S.D. Fla. 1988) aff'd 875 F.2d 873 (11th Cir. 1989). Consistent with the analysis set forth in Aetna and Casa Clara, once the roofs were installed, they became an integral part of the housing units. Accordingly, any costs incurred as a result of damage to those roofs, or as a result of damages to the structure of the units, would not fall within the ambit of damages recoverable in tort.[4]

3. Threat of Harm:

Plaintiff contends that even if Pulte did not actually suffer personal injury or injury to property, it is still entitled to recover in tort.[5] Plaintiff argues further that in

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4. In its Memorandum In Opposition To Osmose' Rule 50 Motion For Judgment, Pulte contends that it has suffered injury to "property" other than the product sold, because the Osmose manufactured chemical caused the FRT plywood that Pulte purchased to deteriorate. Pulte argues further that the "product" sold by Osmose was the chemical used on the FRT plywood, and therefore the damage to the plywood constitutes damage to other property. Plaintiff's contention while creative, is inconsistent with the facts. Pulte did not purchase the Osmose chemical product in its pure form -- it purchased FRT plywood. The chemical treatment clearly is an integral part of the FRT plywood and is inseparable from the product.

5. Plaintiff also argues that the threat of harm created by defendant's defective product to persons and property was and is imminent, and this threat constitutes a basis for a cause of action in tort. A tort waiting to happen, however, is not necessarily a tort. Indeed, the Florida courts have implicitly rejected Plaintiff's argument in Florida Power & Light v. Westinghouse, 510 So.2d 899 (Fla. 1987) in which the Florida Supreme Court adopted the reasoning set forth in Eastern River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858 (1986). (where the Supreme Court rejected the line of cases allowing recovery for purely economic loss where the users of the 2 defective products were "endangered" rather than merely "disappointed.)" Id. at 869. Indeed, Florida courts have also (continued...)

the interest of public policy, plaintiff's tort claims should be permitted to stand.

Essentially, plaintiff's public policy argument is that a party should not have to wait until a person is injured or killed in order to recover for the tortious conduct of another. Consistent with this reasoning, plaintiff argues further that it is illogical and unfair to permit a party who, by mere chance, discovers a defect only after the defect causes harm to recover in tort, while a party who discovers a defect and makes every attempt to insure that no one is injured and that property is preserved, is barred from recovery in tort. At first glance, this reasoning has some appeal. The Florida Supreme Court,

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5. (...continued)
rejected plaintiffs argument in cases similar to this case. In Casa Clara, one of Florida's intermediate appellate courts was implicitly confronted with the question of whether the threat of harm was sufficient to bring a case into the spectrum of liability in tort where the threat of harm was potentially disastrous. In Casa Clara the plaintiff homeowners sued a supplier of allegedly defective concrete for damage caused to their Condominiums. Plaintiffs alleged that the concrete contained an excessive chloride content which caused the reinforcing steel structure of the homes to rust and expand. Id. at 632. The expanding steel caused and was continuing to cause the structural components to crack and pieces of concrete to fall off of the property. Clearly such a condition could present imminent harm to passers-by and unit owners entering and exiting the building. Moreover, the deterioration process in the Clara case also caused a substantial loss of the structural integrity in the homes and buildings requiring vast repair work to, or replacement of, the buildings. Despite the nature and extent of the damages to the plaintiffs, the court dismissed with prejudice plaintiffs' negligence and strict products liability counts on the ground that recovery on those counts was precluded by the economic loss doctrine. See also GAF Corporation v. Zack Company, 445 So.2d 350 (Fla. App. 3 Dist. 1984). (where manufacturer developed and sold defective roofing material, court concluded that economic loss doctrine barred recovery in tort).

however, has rejected this reasoning in explaining the reasoning behind the economic loss doctrine:

> [t]he distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He 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. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer is limited to damages for physical injuries and there is no recovery for economic loss alone.

Fla. Power & Light v. Westinghouse Elec., 510 So.2d 899, 900-01 (Fla. 1987) quoting Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965).

Thus, the economic loss doctrine is rooted in a theory of allocation of risk. In adopting the Seely rationale, the Florida Supreme Court has determined that risk of purely economic loss, such as lost profits or costs of remedying a defective product, can and should be allocated by agreement. The rationale behind this rule is that the commercial purchaser of a product is in a position to negotiate warranties for the products it

purchases or to negotiate a reduction in price and bear the risk that the product will not perform to its expectations or the expectations of its customers. The buyer of goods is, moreover, in a good position to calculate probability that the loss will occur and amount of loss that the buyer will bear in the event the purchased product damages itself or if that product does not perform to the buyer's expectations.

By comparison, the probability of suffering the losses associated with personal injury or damage to other property and the amount of such losses is not as easily calculated, and thus is not capable of being allocated by bargaining among contracting parties.[6] Liability in tort rests on the notion that as between an individual who suffers injury to person or property as a result of a manufacturer's defective product, the manufacturer is in the best position to insure against the risk of such losses. "[T]he cost of an injury and the loss of time or health may be 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." Seely v. White Motor Co., 403 P.2d at 151 quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, (concurring opinion).

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6. The injured person or the owner of the other property damaged, 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. Moreover, the injured party is often an innocent bystander whose injuries are the result of a another's use of the defective product.

Thus, tort law protects against the exposure of a plaintiff, through the negligence or hazardous product of another, to an unreasonable risk of injury to his person or property. Contract law, on the other hand, protects bargained-for expectation interests, and therefore provides the most appropriate standard when a product fails to meet expected standards of a purely economic nature. To extend the reach of tort recovery to claims that a product failed to meet buyer requirements or expectations to actions for recovery in tort would create potentially unlimited liability against which manufacturers could not properly guard. See Chicago Heights Venture v. Dynamit Nobel of America, 782 F.2d 723, 729 (7th Cir. 1986) quoting Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978) (emphasis in original). ("Where mere deterioration or loss of bargain is claimed, the concern is with a failure to meet some standard of quality. This standard of quality must be defined by reference to that which the parties agreed upon.)."

In the commercial context, an "acceptable" good can be defined by the warranty of the manufacturer or can be negotiated by the purchaser. Once that definition is established the manufacturer who fails to meet the defined standard is liable in contract for supplying defective goods. A commercial purchaser of goods is in the best position to assess its own needs and expectations and a manufacturer is the best position to assess its products' capabilities. The buyer of goods can either bargain for protection against economic losses resulting from the

failure of goods to meet the negotiated, or warranted specifications, or can negotiate for a reduction in price and bear the risk of economic loss.

The contractual relationship between buyer and seller, therefore, provides adequate opportunity for negotiated guarantees of fitness for use. Accordingly, where, as here, a plaintiff seeks damages for purely economic loss, the matter is most appropriately remedied in a contract action against the seller of the "defective" product.

4. Available Remedies:

Moreover, in addition to any warranty a buyer may seek to enforce, the buyer of defective goods has a variety of remedies against the seller of a defective product which it may pursue under the Uniform Commercial Code. See Florida Power & Light v. Westinghouse Elec., 510 So.2d at 102. (noting that "the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law . . . ."). The rule precluding recovery in tort for purely economic loss, does not, therefore, leave the plaintiff without a remedy. The rule suggests instead that the appropriate remedy is one in contract, not in tort.

Even in cases such as this one where the purchaser of a product does not have a contractual relationship with the manufacturer -- does not purchase directly from the manufacturer -- but instead purchases from a distributor of the manufacturer's product, the purchaser has a remedy against that distributor\

seller in contract.[7] The distributors, in turn, have a cause of action against the manufacturer. Thus, the manufacturer does not escape liability for its defective products, and the buyer is not left without a remedy.[8]

Plaintiff Pulte, in its oral argument to the court on defendant's motion passionately suggested that if the economic loss doctrine would preclude plaintiff's cause of action then "the law is an ass." While there are times when it is painful to do so, it is nonetheless this court's duty on those occasions to "saddle up." As a federal court sitting in diversity, this court is bound to apply Florida law. See Pulte Home Corp. v. Osmose Wood Preserving, Inc., Civ. No. 89-788, p. 5 (February 21, 1992) (Kovachevich, J). The cases in Florida clearly provide that the economic loss rule bars plaintiff's recovery in negligence.

Thus, it is clear to the court that the jury's verdict in favor of plaintiff on plaintiff's negligence action, cannot stand.

Recovery for Fraud distinguished:

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7. Indeed, Pulte sued two suppliers of the FRT plywood, Georgia Pacific Corp., Inc. and Lowes Companies, Inc., in this original action. Plaintiff has, however, settled its claims against those parties.

8. This court expresses no opinion as to whether plaintiff could in fact have properly pursued a breach of warranty in this case, as plaintiff voluntarily dismissed its claim for breach of warranty against Osmose. Cf. American Universal Insurance Group v. General Motors Corporation, 578 So.2d 451, 453-54 (Fla. App. 1 Dist. 1991) (preclusion of plaintiff proceeding on warranty claim because of lack of privity does not justify extension of products liability -- court noted that plaintiff was not left without a remedy as there were contract actions pending against the seller of property).

Plaintiff argues, however, that even if the economic loss doctrine would bar recovery on plaintiff's products liability and negligence claims, Florida law would permit recovery for economic loss on plaintiff's fraud claims. In support of its contention, plaintiff cites First Florida Bank v. Max Mitchell & Company, 558 So.2d 9 (Fla. 1990). In First Florida, the Florida Supreme Court answered the following certified question from the second district of the Florida courts of appeal:

> WHEN AN ACCOUNTANT FAILS TO EXERCISE REASONABLE AND ORDINARY CARE IN PREPARING THE FINANCIAL STATEMENTS OF HIS CLIENT, AND WHERE THAT ACCOUNTANT PERSONALLY DELIVERS AND PRESENTS THE STATEMENTS TO A THIRD PARTY TO INDUCE THAT THIRD PARTY TO LOAN TO OR INVEST IN THE CLIENT, KNOWING THAT THE STATEMENTS WILL BE RELIED UPON BY THE THIRD PARTY IN LOANING TO OR INVESTING IN THE CLIENT, IS THE ACCOUNTANT LIABLE TO THE THIRD PARTY IN NEGLIGENCE FOR THE DAMAGES THE THIRD PARTY SUFFERS AS A RESULT OF THE ACCOUNTANT'S FAILURE TO USE REASONABLE AND ORDINARY CARE IN PREPARING THE FINANCIAL STATEMENTS, DESPITE THE LACK OF PRIVITY BETWEEN THE ACCOUNTANT AND THE THIRD PARTY?

Id. at 10.

The Florida Supreme Court, in answering the question, concluded that privity between the accountant and the third party was not required, and adopted section 552 of the Restatement (Second) of Torts as the appropriate standard for determining liability in instances such as the one above.

Section 552 of the Restatement (Second) of Torts provides:

> § 552. Information Negligently Supplied for the Guidance of Others

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

§ 552 Restatement (Second) of Torts.

While Florida's adoption of section 552 of the Restatement (Second) of Torts did away with the privity requirement in actions for recovery in fraud, it did not do away with the economic loss doctrine. Indeed, the Florida Supreme Court has concluded that the economic loss doctrine bars recovery for purely pecuniary losses where there is a sufficient remedy in contract.

Under Florida law, the test in determining whether an action for fraud survives where plaintiff may instead have a

claim in contract is whether the plaintiff "sustained compensatory damages based on a theory of fraud which were in any way separate or distinguishable from [its] compensatory damages based on the contract compensatory and punitive damages based on fraud. See Kee v. National Reserve Life Ins. Co., 951 F.2d 1538, 1543 (11th Cir. 1990) citing Rolls v. Bliss & Nitray, Inc., 408 So.2d 229, 237 (Fla. Dist. Ct. App. 1981) but see Burton v. Linotype Co., 556 So.2d 1126, 1128 (Fla. Dist. Ct. App. 1989) (reversing summary judgment in favor of defendant on a fraud claim where it appeared possible that the "loss of business suffered as a result of the alleged fraud is different from the loss of business occasioned by the failure of the machinery to work properly" which had been the basis of the plaintiff's breach of warranty claim). "Indeed, "[w]here the compensatory damages requested in a count for tort are identical to the compensatory damages sought in a count for breach of contract, compensatory damages and punitive damages for the tort are not recoverable." Kee v. National Reserve Life Ins. Co., 918 F.2d 1538 (11th Cir. 1990) quoting Rosen v. Marlin, 486 So.2d 623, 626 (Fla. Dist. Ct. App. 1986).

In light of the statement of Florida law set forth in Rosen and Rolls, this court concludes that Florida would not permit recovery for fraud in this cause of action. The damages which plaintiff claims to have flowed from any fraud perpetrated

in this case[9] are the same damages that would flow from a warrantee claim against the seller. Accordingly, this court finds that the economic loss rule applies to recovery for fraud in this action and will enter judgment in favor of plaintiff on this claim.

DONE AND ORDERED, in Tampa, Florida on this 11th day of March, 1992.

Clarence C. Newcomer, J.
(sitting by designation,
Eastern District of
Pennsylvania)

9. See § 552B (1)(b) Restatement (Second) Torts -- which defines the damages recoverable as the pecuniary loss suffered as a consequence of the plaintiff's reliance upon the misrepresentation.