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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case No.: 79,127

CASA CLARA CONDOMINIUM ASSOCIATION, INC., a not for profit corporation of the State of Florida, and 642053 ONTARIO, INC., a Florida corporation,

Petitioners,

vs.

CHARLEY TOPPINO AND SONS, INC., a dissolved Florida corporation, and JAN GRIFFEN and JOHN NIVENS, as Trustees for Charley Toppino and Sons, Inc., a dissolved Florida corporation,

Respondents.
_____/

PETITIONERS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

SIEGFRIED, KIPNIS, RIVERA, LERNER, DE LA TORRE & MOCARSKI, P.A., ATTORNEYS AT LAW

SUITE 1102, 201 ALHAMBRA CIRCLE, PHONE (305) 442-3334 CORAL GABLES, FLORIDA 33134

TABLE OF CITATIONS
CASES

Pages

SIEGFRIED, KIPNIS, RIVERA, LERNER, DE LA TORRE & MOCARSKI, P.A., ATTORNEYS AT LAW

SUITE 1102, 201 ALHAMBRA CIRCLE, PHONE (305) 442-3334 CORAL GABLES, FLORIDA 33134

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FLORIDA CONSTITUTION, STATUTES, AND RULES OF COURT

OTHER AUTHORITIES

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STATEMENT OF THE CASE

Petitioners are owners of homes, which are being progressively destroyed by defective concrete manufactured and supplied by the respondent, Toppino.[1] The destruction is characterized by cracking and spalling, with sizable pieces of concrete and rusted steel falling from the columns, beams and undersides of slabs and balconies. The petitioners and their families are endangered both by these falling pieces and the possibility of a wholesale structural collapse.

Petitioners brought their separate damage actions against Toppino in Circuit Court in Monroe County, pleading, inter alia, negligence and strict liability.[2] The trial court dismissed those counts, ruling that destruction of the building was not damage to property other than the concrete itself and that neither the destruction nor the hazardous condition it creates constitute damages recoverable in tort. App. 038-045.[3]

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[1] Petitioners, 642053 Ontario, Inc. and Casa Clara Condominium Association, Inc., will be referred to generically herein as "petitioners", although separate reference to their cases will be to "Ontario" and "Casa Clara", respectively. Respondent, Charley Toppino and Sons, Inc., will be referred to as "Toppino".

These petitioners are not alone. We have this date filed a separate petition on behalf of five other homeowners, whose homes are similarly being destroyed and whose claims nevertheless met the same fate at the hands of the Monroe County Circuit Court and the Third District Court of Appeal. See Christopher H. Chapin, etc. et al. v. Charley Toppino and Sons, Inc., Supreme Court of Florida, Case No. _____. We have also moved to consolidate the present petition with the petition filed in Chapin.

[2] As alleged, Toppino's concrete was defective because it contained high quantities of chlorides, which caused the steel reinforcing bars in the building to rust, resulting in progressive destruction of the buildings. Because the appeal arose from orders dismissing the complaints, all allegations are taken as true. Connolly v. Sebeco, Inc., 89 So.2d 482 (Fla. 1956). The pleadings dismissed are the Amended Complaint in Casa Clara and the Second Amended Complaint in Ontario (the "complaints"). Those pleadings, with unnecessary exhibits omitted, are appended hereto at App. 008-024 and App. 025-037.

We use "App. __" followed by a number to indicate a page number of the Appendix to Petitioners Brief on Jurisdiction. Page numbers of the Appendix are Bates-stamped in the lower right corner "001", "002", etc.

[3] The petitioners were not in privity with Toppino. In Casa Clara the petitioners purchased condominium units from a condominium developer; in Ontario petitioner contracted with a general contractor, who in turn purchased the concrete from Toppino. Petitioners also sued Toppino for breach of implied warranty and for violation of the Florida Building Codes Act, Section 553.70, et seq., Florida (continued...)

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On consolidated appeal to the District Court of Appeal for the Third District, petitioners argued that tort law applies, because the concrete is "a product in a defective condition unreasonably dangerous to the user or consumer or to his property,"[4] and the damage to their homes and other products incorporated into their homes during construction constitutes damage to property other than the concrete itself. They argued that the destruction of their homes and the persistent risk of injury from falling concrete or even structural collapse bring their claims within the safety-related sphere of tort law and outside the scope of the economic loss rule.

The district court, however, rejected petitioners' argument, opining that:

> [petitioners'] structures, the homes and buildings, not the concrete, are the "property" for purposes of applying the economic loss doctrine. Since the homeowners only allege damage to the structures and the components thereof and do not allege any personal injury or damage to other property ... they cannot maintain a cause of action against Toppino in tort.

Slip opinion, App. 005-006. In so ruling, the district court created the fiction that the concrete was not a "product" capable of damaging petitioners' homes, and that the petitioners' real property, in effect, became a product. Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA), cert. discharged, 264 So.2d 418 (1972).

The district court also rejected sub silentio the petitioners' alternative argument that, assuming they have no contract or

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[3](...continued)
Statutes. In each case the trial court dismissed the counts based upon those theories as well, although the present petition is not grounded upon any conflict involving those counts.

[4] Restatement (Second) of Torts § 402 A.

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statutory remedy against Toppino for the defective concrete,[5] Florida law must provide them a remedy in tort. A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973).

SUMMARY OF THE ARGUMENT

Purchasing a home in the Third District of Florida carries substantially greater risks, both personal and financial, than it does in the Fourth District. Under the decision from which we seek review, the disintegration of the petitioners' homes caused by defective concrete is not deemed to be "property damage" such as to allow the petitioners to recover in tort. Likewise, the decision does not deem the hazard created by pieces of concrete and steel literally falling from the building as an "unreasonably dangerous" condition, cognizable in tort.

By contrast, in the Fourth District a defective product which causes a building to deteriorate triggers strict liability under Section 402 A of the Restatement (Second) of Torts, Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA), rev. dismissed, 411 So.2d 380 (1981), and a construction defect which threatens personal injury if not corrected supports recovery in negligence. Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515 (Fla. 4th DCA 1981), rev. denied, 417 So.2d 328 (1982).

Not only does the Third District's decision flatly contradict Adobe Building Centers, Inc. v. Reynolds and Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., it also directly conflicts with this Court's decision in A.R. Moyer, Inc. v. Graham,

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[5] Lack of another remedy against Toppino was effectively confirmed by the trial court's having dismissed the petitioners' other counts for breach of warranty and for violation of the Florida Building Codes Act.

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285 So.2d 397 (Fla. 1973), and the Fourth District's in Latite Roofing Co., Inc. v. Urbanek, 528 So.2d 1381 (Fla. 4th DCA 1988), which hold that the economic loss rule does not bar recovery where a claimant has no alternative remedy against the wrongdoer.

The effect of the present decision is to allow a person's home to be destroyed by a defective product with no remedy against the wrongdoer. But homeowners occupy a special place in Florida law. The economic loss rule could not possibly be intended to prevent them from recovering when their most important investment is destroyed by faulty materials. Nor could it be that the law would force them to live at constant risk of personal harm, simply because a legal technicality bars them from recovering enough to correct a hazard before injury.

The different results between the present Third District case on one hand and those of this Court and the Fourth District on the other are "wholly irreconcilable," Williams v. Duggan, 153 So.2d 726, 727 (Fla. 1963), creating the conflict necessary for the petitioners to invoke the discretionary jurisdiction of this Court. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

I. THE DECISION CONFLICTS WITH ADOBE BUILDING CENTERS, INC. V. REYNOLDS IN THAT IT FAILS TO ALLOW TORT RECOVERY FOR DAMAGE TO PROPERTY.

By holding that a building product cannot cause damage cognizable in tort to the real property into which it is incorporated, the present decision directly and expressly conflicts with Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 ("Adobe"). Adobe holds that a building product (stucco) that causes walls to deteriorate results in damage to property other than the product itself, for which there can be recovery in strict

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tort liability under Restatement (Second) of Torts § 402 A.[6] Adobe has never been overruled or criticized by this Court.

We do not here quarrel with the rule that one may not recover in tort "where a product injures only itself." Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899, 901 (Fla. 1987). However, by refusing to recognize that Toppino's concrete could damage petitioners' homes, the district court ruled in effect that the petitioners' real property is a product, which axiomatically cannot be. Florida law distinguishes between real property and goods used to improve it. See Gable v. Silver, 258 So.2d 11 (goods affixed to real property becomes realty, not vice versa); Edward M. Chadbourne, Inc. v. Vaughn, 491 So.2d 551, 553 n.1 (Fla. 1986) (improvement to realty not a product for strict liability purposes, but strict liability possible where defective product damages realty); and cf. Conklin v. Hurley, 428 So.2d 654 (Fla. 1983) (collapse of improvement to realty may be the basis for tort liability of contractor, notwithstanding the only property damage is the collapse of the improvement itself).

The district court expressly rejected Adobe as inapplicable on the basis of Florida Power & Light Co. v. Westinghouse Electric Corp. ("FPL"). See slip opinion at footnote 2, App. 006. But FPL could only control if it was intended to reach beyond the commercial setting of contracts for the sale of goods and into the realm of individual homeownership, not, as was the case in FPL, the sale of goods between two large commercial entities in privity.

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[6] The recognition that property damage had occurred satisfied a necessary element of Restatement (Second) of Torts § 402 A and thus took the claim in Adobe outside the reach of the economic loss rule. Section 402 A was adopted as the law of Florida in West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976). Section 402 A provides in part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property....

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FPL did not involve the destruction of a home by a latently defective product furnished by a non-privity supplier. Nor were there allegations in FPL of damage to property other than the product itself, or allegations of a hazardous condition. FPL does not stand for a change in the rule allowing tort recovery for damage to real property. Rather, this Court explicitly held the opposite:

> ...we hold the economic loss rule approved in this opinion is not a new principle of law in Florida and has not changed or modified any decisions of this Court.

The district court thus misapplied FPL to avoid conflict with Adobe.[7]

II. THE DECISION CONFLICTS WITH DREXEL PROPERTIES, INC. V. BAY COLONY CLUB CONDOMINIUM, INC. IN THAT IT FAILS TO PROVIDE A TORT REMEDY TO CORRECT A HAZARDOUS CONDITION.

The present decision also directly conflicts with Drexel, 406 So.2d 515, which holds that a property owner may recover economic damages in tort, where defective construction creates a risk of personal injury, notwithstanding that no injury has yet occurred:

> We hold that there can be recovery for economic loss. Why should a buyer have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects? In the final analysis, the cost to the developer for a resulting tragedy could be far greater than the cost of remedying the condition.

Id. at 519. Like Adobe, Drexel has never been overruled or criticized by this Court, nor has this Court addressed the issue of whether an actual injury must have occurred before a homeowner can sue in tort to correct a hazardous building condition. To the

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[7] The district court also grounded its decision upon Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So.2d 992 (Fla. 1987), which is equally inapplicable. Like FPL, Aetna involved the sale of goods, not the improvement of real property. The parties to that transaction were commercial entities, in privity with each other, having all remedies available to them in contract and under the Uniform Commercial Code. By contrast, the petitioners here were not in privity with Toppino and had no contract or UCC remedies against Toppino. All arguments concerning FPL pertain equally to Aetna.

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contrary, FPL suggests that preventing injury is as much the policy behind tort law in Florida as compensating for it after the fact:

> [A manufacturer] 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....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.

510 So.2d at 900 (emphasis supplied). Courts in other jurisdictions have reached the same conclusion on similar facts.[8]

III. THE DECISION CONFLICTS WITH A.R. MOYER, INC. V. GRAHAM AND LATITE ROOFING CO. V. URBANEK IN THAT IT FAILS TO PROVIDE A REMEDY AGAINST THE WRONGDOER.

Finally, the present decision conflicts with A.R. Moyer, Inc. v. Graham, 285 So.2d 397 ("Moyer"), and Latite Roofing Co., Inc. v. Urbanek, 528 So.2d 1381 ("Latite"), which stand for the principle that:

> ...invocation of the rule precluding tort claims for only economic losses applies only when there are alternative theories of recovery better suited to compensate the damaged party for a peculiar kind of loss.

Latite, 528 So.2d at 1383. This Court read its decision in Moyer as allowing a contractor to recover against an architect with whom he was not in privity:

> Since there was no contract under which the general contractor could recover his loss, we concluded he did have a cause of action in tort.

AFM Corp. v. Southern Bell Telephone and Telegraph Co., 515 So.2d 180, 181 (Fla. 1987). In Latite the Fourth District affirmed a

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[8] See, e.g., Philadelphia National Bank v. Dow Chemical Co., 605 F.Supp. 60 (E.D. Pa. 1985) (defective mortar damaged "other property", the brick panels and steel infrastructure of building, and presented very real risk of injury to persons by crumbling mortar and falling bricks); Trustees of Columbia University v. Mitchell/Giurgola Associates, 492 N.Y.S.2d 371 (A.D.1 Dept. 1985) (defective concrete panels and tiles caused damage to the curtain wall and were unduly dangerous to passersby); and City of Manchester v. National Gypsum Co., 637 F.Supp. 646 (D.R.I. 1986) (asbestos in walls posed an imminent and serious health danger, made buildings unsafe, thereby damaging the buildings).

negligence claim for defective construction, where negligence appeared to be "[plaintiff] Urbanek's sole theory upon which recovery can be had against [defendant] Latite."[9]

In the present case the petitioners (unlike the plaintiff in FPL) were not in privity with Toppino and thus have no other remedy against Toppino for the damages suffered as a result of Toppino's defective concrete. The affirmance of the dismissal of petitioners' claims thus directly conflicts with Moyer and Latite.

IV. SETTLEMENT OF THE CONFLICTS CREATED BY THE DECISION IS OF GREAT IMPORTANCE TO THE PUBLIC.

The "real and embarrassing conflict[s] of opinion and authority" created by the decision below involve principles, "the settlement of which is of importance to the public." Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958).

The effect of the present decision is to halt the trend in Florida law that has increasingly protected homeowners by assuring that they have remedies for damages from shoddy construction.[10] The policy underlying the trend is expressed in Simmons v. Owens, 363 So.2d 142, 143 (Fla. 1st DCA 1978):

> We must be realistic. The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill

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[9] Latite Roofing Co., Inc. v. Urbanek, 528 So.2d at 1383; see also Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991); Interfase, Inc. v. Pioneer Technologies Group, 5 FLW Fed. D463 (M.D. Fla. Sept. 12, 1991); and Interfase, Inc. v. Pioneer Technologies Group, 5 FLW Fed. D525 (M.D. Fla. Sept. 27, 1991).

[10] See, e.g., Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA 1972), cert. discharged, 264 So.2d 418 (1972) (rejected caveat emptor and extended implied warranties to purchasers of new homes); David v. B & J Holding Corp., 349 So.2d 676, 678 (Fla. 3d DCA 1977) (Florida described as "a progressive state particularly in the area of condominium law with respect to protection of purchasers of such units."; Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978) (recognized tort recovery where contractor's negligence caused damage to home); Johnson v. Davis, 480 So.2d 625 (Fla. 1985) (recognized cause of action for fraud against seller of home who fails to disclose latent defects).

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> afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy or recourse.

The present decision encroaches upon the special rights of homeowners by preventing recovery when, as in this case, a single defect completely destroys their homes.

The policy reason for approving the rules of Adobe, Drexel and Latite (and affirming Moyer) and for rejecting the decision in the present case, is simple justice: where the damage incurred is so flagrant, and the fault so clearly placed, the wrongdoer should not escape liability through an antiquated loophole like privity. The Supreme Court of South Carolina recently reached exactly that conclusion when it flatly rejected application of the economic loss rule in a homeowner's construction defect case, Kennedy v. Columbia Lumber & Mfg. Co., Inc., 384 S.E.2d 730 (S.C. 1989). The Kennedy Court summarized what should be the policy in Florida, if it is not already:

> While the Court of Appeals' reasoning in Carolina Winds appears to be a seamless web of proper legal analysis, the opinion reaches a result which is repugnant to the South Carolina policy of protecting the new home buyer. The result is that a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions.

Id. at 734-735.[11] Surely what is repugnant to South Carolina is not the law of Florida.

If the view of the Third District is allowed to continue as the law of that district, homeowners there will suffer a severe setback, and one part of Florida will be aligned with an isolated state, which does not allow homeowners recovery against non-privity

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[11] The Kennedy court was rejecting the conclusions drawn in Carolina Winds Owners' Association, Inc. v. Joe Harden Builder, Inc., 374 S.E.2d 897 (S.C.App. 1988), which, as in this case, ruled that the economic loss doctrine denied homeowner recovery.

contractors.[12]

CONCLUSION

We ask this Court to quash that portion of the district court's opinion which affirms dismissal of the tort counts, and to remand this case to the district court with directions to order the trial court to reinstate petitioners' claims.

Respectfully submitted,

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[12] Our research has uncovered only one jurisdiction, the Commonwealth of Virginia, that denies to a remote home purchaser any theory of recovery for latent defects. Sensenbrenner v. Rust, Orling & Neale Architects, Inc., 374 S.E.2d 55 (Va. 1988).

Like South Carolina, numerous jurisdictions allow homeowners to recover from builders for defects in the absence of privity, either by way of a warranty theory or by way of tort. Several jurisdictions that have rejected tort recovery of economic losses nevertheless provide to homeowners an alternate remedy sounding in contract. Thus, Illinois, although disapproving tort recovery, extends the implied warranty of habitability to remote purchasers. Redarowicz v. Ohlendorf, 441 N.E.2d 324 (Ill. 1982). Texas, which recognizes the economic loss rule, Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617 (Tex. 1986), finds that an implied warranty of habitability is automatically assigned to subsequent purchasers. Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. 1983). Similarly, Arizona denies tort recovery, Colberg v. Rellinger, 770 P.2d 346 (Ariz. App. 1988), but extends implied warranties of workmanship and habitability to remote purchasers. Richards v. Powercraft Homes, Inc., 678 P.2d 427 (Ariz. 1984).

For other jurisdictions which afford a remote purchaser a cause of action for damages against the contractor and/or subcontractors, see: Lempke v. Dagenais, 547 A.2d 290 (N.H. 1988); Blagg v. Fred Hunt Co., Inc., 612 S.W.2d 321 (Ark. 1981); Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983); Coburn v. Lenox Homes, Inc., 378 A.2d 599 (Conn. 1977); Barnes v. Mac Brown & Co., Inc., 342 N.E.2d 619 (Ind. 1976); Kristek v. Catron, 644 P.2d 480 (Kan.App. 1982); Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336 (Md. 1986); McDonough v. Whalen, 313 N.E.2d 435 (Mass. 1974); Keyes v. Guy Bailey Homes, Inc., 439 So.2d 670 (Miss. 1983); Aronsohn v. Mandara, 484 A.2d 675 (N.J. 1984); Oates v. Jag, Inc., 333 S.E.2d 222 (N.C. 1985); Elden v. Simmons, 631 P.2d 739 (Okla. 1981); Newman v. Tualatin Development Co., Inc., 597 P.2d 800 (Ore. 1979); Sewell v. Gregory, 371 S.E.2d 82 (W.Va.1988); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wy. 1979).

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case No.: _____

CASA CLARA CONDOMINIUM ASSOCIATION, INC., a not for profit corporation of the State of Florida, and 642053 ONTARIO, INC., a Florida corporation,

Petitioners,

vs.

CHARLEY TOPPINO AND SONS, INC., a dissolved Florida corporation, and JAN GRIFFEN and JOHN NIVENS, as Trustees for Charley Toppino and Sons, Inc., a dissolved Florida corporation,

Respondents.
_____/

APPENDIX
TO
PETITIONERS' BRIEF ON JURISDICTION

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APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1991

CASA CLARA CONDOMINIUM ASSOCIATION, INC., a not for profit corporation of the State of Florida, **

Appellant, **

vs. ** CASE NO. 90-160

CHARLEY TOPPINO & SONS, INC., a dissolved Florida corporation, and JAN GRIFFIN and JOHN NIVENS, as Trustees for Charley Toppino and Sons, Inc., a dissolved corporation, **

Appellees. **

_____/

642053 ONTARIO, Inc., **

Appellant, **

vs. ** CASE NO. 90-159

CHARLEY TOPPINO & SONS, INC., a dissolved Florida corporation, **
and JAN GRIFFIN and JOHN NIVENS, as Trustees for Charley Toppino **
and Sons, Inc., a dissolved Florida corporation, **

Appellees.

_____/

Opinion filed October 15, 1991.

An Appeal from the Circuit Court of Monroe County, J. Jefferson Overby, Judge.

Siegfried, Kipnis, Rivera, Lerner, De La Torre & Mocarski and H. Hugh McConnell, for appellants.

Rumberger Kirk Caldwell Cabaniss Burke & Wechsler and Lynn E. Wagner and Richard A. Solomon, for appellees.

John F. Tolson, Jr., for Florida Concrete and Products Association, Inc., as amicus curiae.

Becker, Poliakoff & Streitfeld, Alan S. Becker and Michele G. Miles for I-95 Custom Home Builders, Inc., Homes Of South Florida, Inc. and The Southeast Chapter Of The Community Associations Institute, as amicus curiae.

Before HUBBART, GERSTEN and GODERICH, JJ.

PER CURIAM.

The appellants are the unit owners of Casa Clara Condominium and 642053 Ontario, Inc. [hereinafter referred to as "Casa Clara" and "Ontario", respectively, and collectively referred to as "the homeowners"]. These consolidated appeals arise from the dismissal of claims for damages for the sale of defective concrete by the defendant, Charley Toppino & Sons, Inc. [hereinafter referred to as Toppino]. We affirm.

The homeowners allege that they have been damaged by the alleged use of defective concrete used to build their homes. The alleged defect is the excessive content of chlorides in the concrete which caused the reinforcing steel to rust and expand. This expanding steel, in turn, caused (and continues to cause)

the structural components of the building to crack and pieces of the concrete to fall off the building. The result of this deterioration process is a substantial loss of structural integrity in the homes and buildings requiring vast repair work to or replacement of the homes and buildings.

In the Casa Clara case, the homeowners sued Toppino, the general contractor and numerous defendants associated with the development of the condominium. While in the Ontario case, the homeowners sued Toppino and the general contractor which built the structures and purchased the concrete from Toppino. In both cases, the homeowners filed an amended complaint which included the claims against Toppino for breach of common law implied warranty, for negligence, for product liability, and for violation of the Florida Building Code.

In both cases, the trial court dismissed all counts against Toppino. The trial court dismissed with prejudice the following counts: the count for the common law implied warranty because of lack of privity; the negligence and strict product liability counts under the economic loss doctrine;[1] and the count for

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[1] In announcing its ruling, the trial court stated:

> There is no doubt in the court's mind that the case law in the State of Florida as developed allows for the Economic Loss Rule. There has not been personal injury established. The concrete and the steel rebarb [sic] are so -- have become a part of one another and the remedy in this case lies in contract law not in negligence. That would entitle of course the plaintiffs to costs of replacement and repair, the difference in value, loss of use, profits et cetera, but those are the established standards. There is not an action in tort here available to you

violation of the building code based upon the ruling that a materialman is not governed by the building code and, therefore, is not subject to liability when its materials fail to comply with the building code.

A plaintiff cannot recover tort damages for purely economic damages. GAF Corp. v. Zack Co., 445 So.2d 350 (Fla. 3d DCA), review denied, 453 So.2d 45 (Fla. 1984); Cedars of Lebanon Hosp. Corp. v. European X-ray Distribs. of Am. Inc., 444 So.2d 1068 (Fla. 3d DCA 1984). Losses due to repair, replacement and diminution in value are not recoverable in tort. East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 864 (1986); Florida Power & Light Co. v. McGraw Edison Co., 696 F.Supp. 617 (S.D. Fla. 1988), affirmed, 875 F.2d 873 (11th Cir. 1989). This court has stated that if the plaintiff has not sustained any personal injury or property damage he cannot recover. See GAF, 445 So.2d at 351-52.

The homeowners contend that the trial court erred in dismissing the tort claims under the economic loss doctrine where the complaints alleges damage to property caused by the defective concrete and risk of personal injury. The homeowners maintain that their cases fall within the "other property" exception to the economic loss doctrine. They argue that the concrete damaged "other property", the steel reinforcing bars embedded in the concrete and the buildings themselves. We disagree.

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and; therefore, I am able to dismiss those counts with prejudice.

In Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So.2d 992 (Fla. 1987), the defendant manufactured switches which were purchased by another company which incorporated the switches into heat transfer units. The switches failed to operate properly and caused damage to the transfer units. Id. Relying on GAF Corp. v. Zack Co., 445 So.2d 350 (Fla. 3d DCA), review denied, 453 So.2d 45 (Fla. 1985)(court held contractor seeking to recover purely economic loss caused by defective roofing materials could not maintain tort action against material manufacturer where no one was personally injured and no one's property was damaged) and on Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So.2d 899 (Fla. 1987)(court held purchaser of nuclear generator could not maintain tort action against seller for defects in generators where claim was based on damage to product only and there was no allegation of harm to persons or other property), the Florida Supreme Court held that the switch manufacturer could not be sued in tort even though its switches allegedly caused substantial damage to the heat transfer units. Id.

In the instant case, Toppino supplied a component which became an integral part of the homeowners' structures. The homeowners allege that the concrete was defective and damaged other components of their structures and their structures themselves. Viewing their claims in light of Aetna, we find that their structures, the homes and buildings, not the concrete, are the "property" for purposes of applying the economic loss doctrine. Since the homeowners only allege damage to the

structures and the components thereof and do not allege any personal injury or damage to other property, Aetna mandates that they cannot maintain a cause of action against Toppino in tort.[2]

Next, the homeowners contend that the trial court erred in dismissing claims for violation of the building code because a concrete supplier must comply with the building code. We disagree. Monroe County has adopted the Standard Building Code as the applicable State Minimum Building Code. See Monroe County Code art II, §6-16. Section 553.73(2)(d), Florida Statutes (1987) states that the State Minimum Building Codes adopted by each local government "shall govern the construction, erection, alteration, repair, or demolition of any building." The complaints allege that Toppino supplied concrete to the general contractor which used the concrete in the construction of the structures. It is not alleged that Toppino performed any construction, erection, alteration, repair or demolition of the structures. Therefore, as a material supplier, Toppino is not charged with a duty of compliance of the State Minimum Building Codes. Absent a duty under the code, the homeowners cannot bring an action against Toppino for violating the code.

In conclusion, we affirm the trial court's dismissal of the counts in each of the complaints alleging a cause of action for negligence and strict product liability against Toppino and of

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[2] The homeowners' reliance on Adobe Bldg. Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA), review dismissed, 411 So.2d 380 (Fla. 1981) is misplaced where the Florida Supreme Court has addressed the issue in Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So.2d 899 (Fla. 1987).

the claims for violation of the building codes. We find that the homeowners' remaining contentions on appeal lack merit.

Affirmed.

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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 89-10002 CA 03

CASA CLARA CONDOMINIUM ASSOCIATION, INC., a not-for-profit corporation of the State of Florida,

Plaintiff,

vs.

ARBOR, LTD., an Illinois limited partnership whose General Partners are RUDOLPH R. MELCHIORRE, CLARA MELCHIORRE, JOHN MELCHIORRE, ANTHONY DADDANO, VICTOR S. FARACI, VIRGINIA FARACI, DOMINICK FARACI, VICTOR D. FARACI, DAVID BENECKE, MICHAEL FORMENTO, ROBERT WOJCIK, JOSEPH NUCCIO, FRANK J. NUCCIO, RICHARD SCHORN, and RICHEY V. GRAHAM, d/b/a KEY COLONY BEACH EAST INVESTMENTS, individually and in their partnership capacity; CITY NATIONAL BANK OF MIAMI, GEORGE STABOLITO; VAL VILLANY-HAUSNER, P.E.; RICHARD M. BENNETT, A.I.A.; GENE McKIE GENERAL CONTRACTOR, INC.; a Georgia corporation; CHARLEY TOPPINO & SONS, INC., a dissolved Florida corporation; JOHN NIVENS and JAN GRIFFIN, as Trustees of Charley Toppino & Sons, Inc., pursuant to Chapter 607, Florida Statutes; THIRD NATIONAL BANK OF NASHVILLE, TENNESSEE, a Tennessee corporation; MARINE MIDLAND BANK OF NEW YORK CITY, a New York corporation; and INTERNATIONAL MARINE BANKING CO.;

Defendants.
_____/

AMENDED COMPLAINT
(Florida Bar No. 208851)

Plaintiff CASA CLARA CONDOMINIUM ASSOCIATION, INC., by and through its undersigned counsel, sues Defendants ARBOR, LTD., an Illinois limited partnership; RUDOLPH R. MELCHIORRE, CLARA MELCHIORRE, JOHN MELCHIORRE, ANTHONY DADDANO, VICTOR S. FARACI, VIRGINIA FARACI, DOMINICK FARACI, VICTOR D. FARACI, DAVID BENECKE, MICHAEL FORMENTO, ROBERT WOJCIK, JOSEPH NUCCIO, FRANK J. NUCCIO, RICHARD SHCORN, and RICHEY V. GRAHAM d/b/a KEY COLONY BEACH EAST INVESTMENTS, individually and in their partnership capacity; CITY NATIONAL BANK OF MIAMI, a national banking corporation organized under the laws of the United States and n/k/a City National Bank of Florida; GEORGE STABOLITO, VAL VILLANY-HAUSNER, P.E., an indivi-

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dual; RICHARD M. BENNETT, A.I.A., an individual; GENE McKIE GENERAL CONTRACTOR, INC., a Georgia corporation; CHARLEY TOPPINO & SONS, INC., a dissolved Florida corporation; JOHN NIVENS and JAN GRIFFIN, as Trustees of Charley Toppino & Sons, Inc., pursuant to Chapters 607, Florida Statutes; THIRD NATIONAL BANK OF NASHVILLE, TENNESSEE, a Tennessee corporation; MARINE MIDLAND BANK OF NEW YORK CITY, a New York corporation; and INTERNATIONAL MARINE BANKING CO., a wholly owned subsidiary of Marine Midland Bank; and alleges:

GENERAL ALLEGATIONS

1. This is an action for damages in excess of Five Thousand Dollars ($5,000.00), exclusive of interest and costs.

2. The property involved in each cause of action is located in Key Colony, Monroe County, Florida.

3. As owners of the aforesaid property, the Defendants named in paragraphs 9 and 10 below (the "DEVELOPERS") submitted same to condominium ownership under the name Casa Clara, a Condominium, by a Declaration of Condominium recorded in Book 602, Pages 378 to 525, of the Official Records of Monroe County, State of Florida, which property is referred to elsewhere in this Complaint as the "Condominium", and, along with the successor, developers mentioned in paragraphs 15 and 16, proceeded to offer parcels in the Condominium for sale to the public in the usual course of business.

4. CASA CLARA CONDOMINIUM ASSOCIATION, INC. (hereinafter "ASSOCIATION"), is a Florida corporation, not-for-profit, and is a condominium association organized pursuant to the provisions of Chapter 718, Florida Statutes (hereinafter referred to as the "Condominium Act"). The ASSOCIATION is the entity responsible for the operation and maintenance of the Condominium.

5. The Condominium consists of the real property described in the aforesaid Declaration of Condominium and all improvements thereto. These improvements, constructed between 1974 and 1977, inclusive, consist of three residential buildings (the "Structures") and all appurtenances thereto. The Structures cumulatively contain 83 individual parcels or "units".

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6. The ASSOCIATION brings this action pursuant to Section 718.111(2), Florida Statutes, and Florida Rule of Civil Procedure 1.221 in its own right and as the lawful representative of the class of owners of the parcels or units comprising the Condominium (hereinafter "Unit Owners"). All Unit Owners are members of the ASSOCIATION.

7. All causes of action concern matters of common interest to the ASSOCIATION's Unit Owner members, which matters include the Condominium's common elements, title to which is appurtenant to each unit and represented by that unit's fractional interest in the entire Condominium.

8. Upon information and belief, the ASSOCIATION has been controlled by Unit Owners other than the Condominium's DEVELOPERS (as that term is hereinafter defined) since 1977 (the exact date has not been determined as yet) when the DEVELOPERS turned over control of the ASSOCIATION to the Unit Owners.

9. Upon information and belief, Defendants RUDOLPH R. MELCHIORRE, CLARA MELCHIORRE, JOHN MELCHIORRE, ANTHONY DADDANO, VICTOR S. FARACI, VIRGINIA FARACI, DOMINICK FARACI, VICTOR D. FARACI, DAVID BENECKE, MICHAEL FORMENTO, ROBERT WOJCIK, RICHARD SCHORN, and RICHEY V. GRAHAM are residents of Illinois, and Defendants JOSEPH NUCCIO and FRANK J. NUCCIO are residents of Florida. They did business in Monroe County, Marathon, Florida, with respect to the Condominium, individually and as ARBOR, LTD. and KEY COLONY BEACH EAST INVESTMENTS. They are named in this Amended Complaint individually and in their capacity as partners of each other and of ARBOR, LTD. and KEY COLONY BEACH EAST INVESTMENTS. (Hereinafter, the Defendants named in this paragraph will be collectively referred to as "PARTNERSHIP DEVELOPER".)

10. PARTNERSHIP DEVELOPER and Defendant CITY NATIONAL BANK OF MIAMI (hereinafter referred to as "CITY NATIONAL") were the beneficial and legal title holders, respectively, and owners of the real property described in paragraphs 3 and 5 above. By virtue of their conduct in developing the property as a condominium, by preparing

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and filing the Declaration of Condominium and other relevant documents, by using "Arbor, Ltd." and "Key Colony Beach East Investments" as a named "Developer" knowing that said entity was a shell, with no legal or equitable interest in the Condominium property, by entering into contracts for sale and selling units of the Condominium in the ordinary course of business, and by holding themselves out as "Developers" to the public, PARTNERSHIP DEVELOPER and CITY NATIONAL were Developers of Casa Clara Condominium within the purview of the Condominium Act.

11. Defendants VAL VILLANY-HAUSNER, P.E. and GEORGE STABOLITO, individuals and Florida residents, were at all times material construction of the structural elements of the Condominium Structures. (Hereinafter they will be referred to as "ENGINEERS".)

12. Defendant RICHARD A. BENNETT, an individual and Florida resident (hereinafter "BENNETT"), was at all times material hereto the architect who designed and supervised the construction of the Structures and appurtenances thereto.

13. Defendant GENE McKIE GENERAL CONTRACTOR, INC., a Georgia corporation (hereinafter "McKIE"), is and was at all times material hereto the general contractor which contracted with PARTNERSHIP DEVELOPER and CITY NATIONAL and, thereafter, the successor developers named in paragraphs 15 and 16 to perform the overall construction of the Structures.

14. Defendants CHARLEY TOPPINO & SONS, INC., a dissolved Florida corporation, and JOHN NIVENS and JAN GRIFFIN, as trustees of Charley Toppino & Sons, Inc. (hereinafter collectively "TOPPINO"), at all times material hereto manufactured and supplied all the concrete utilized in the construction of the Structures.

15. Defendant THIRD NATIONAL BANK OF NASHVILLE, TENNESSEE (hereinafter "NASHVILLE BANK") is a banking corporation duly organized and existing under and by virtue of the laws of the State of Tennessee with its principal place of business in Nashville, Tennessee.

16. Defendants MARINE MIDLAND BANK OF NEW YORK CITY and

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INTERNATIONAL MARINE BANKING CO., a wholly owned subsidiary of MARINE MIDLAND BANK OF NEW YORK CITY ((hereinafter "MIDLAND") are banking corporations duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business in New York City, New York.

17. On a date unknown to Plaintiff but prior to completion of the Condominium, Defendants NASHVILLE BANK and MIDLAND entered into an agreement with PARTNERSHIP DEVELOPER and CITY NATIONAL whereby NASHVILLE BANK in its own right and on behalf of MIDLAND received assignments, took title, and became the successor of PARTNERSHIP DEVELOPER and continued, along with CITY NATIONAL, as the Developers of Casa Clara Condominium.

18. After NASHVILLE BANK and MIDLAND succeeded PARTNERSHIP DEVELOPER as developers, they, along with CITY NATIONAL, took control of the Condominium, participated in construction, completed construction, made extensive repairs to the common elements, and offered for sale and sold to the public condominium units in the Condominium. Said Defendants, in general and by virtue of the Declaration of Condominium for Casa Clara Condominium, held themselves out to the public and unit owners at Casa Clara Condominium as the developers.

19. NASHVILLE BANK and MIDLAND are successors and/or assignees of the PARTNERSHIP DEVELOPER, and by virtue of their aforesaid involvement in the Casa Clara Condominium project, became "Developers" of same within the contemplation of the Condominium Act.

20. PARTNERSHIP DEVELOPER, CITY NATIONAL, NASHVILLE BANK, and MIDLAND (hereinafter collectively referred to as "DEVELOPERS") performed inspections of the Condominium building for the purpose of ensuring that it was constructed in accordance with generally accepted building practices and was free from all defects and deficiencies, in accordance with all implied warranties of construction including implied warranties of merchantability and fitness for the use intended, in compliance with the filed and recorded plans and specifications, and in accordance with all applicable building

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codes.

21. All conditions precedent to the filing of this action have been performed, have occurred, have been waived, or have been excused.

COUNT I

BREACH OF STATUTORY IMPLIED WARRANTY
BY THE DEVELOPERS, McKIE, and TOPPINO

Plaintiff realleges paragraphs 1 through 21 above, inclusive, as if fully set forth herein.

22. The DEVELOPERS are the developers of the Condominium within the purview of Section 718.203(1), Florida Statutes, in that they held themselves out as Developers, built and offered for sale, and did sell to the public, condominium units in the Condominium in the ordinary course of business.

23. Defendants McKIE and TOPPINO are the contractor and a manufacturer/supplier of concrete, respectively, on the Condominium construction project within the purview of Section 713.203(2).

24. The DEVELOPERS, McKIE, and TOPPINO, granted, pursuant to Sections 718.203(1) and (2), Florida Statutes, to the original unit owners as well as all successor owners, implied warranties of fitness and merchantability for the purposes or uses intended as respects the Condominium Structures.

25. The DEVELOPERS, McKIE, and TOPPINO breached these warranties by failing, in designing, constructing, and supplying building materials, in particular concrete, for the construction of the Condominium Structures, to comply with the requirements of applicable national, state, and local building codes; by failing to construct same in accordance with the filed and approved construction plans and specifications; and by designing, engineering, and constructing the Structures with defects and deficiencies in the plumbing, electrical, mechanical, structural, and material finishes of the structure. The problem with the concrete is more fully described on the attached Exhibit "A".

26. The existence or causes of the aforesaid defects and defi-

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ciencies are not readily recognizable by persons who lack special knowledge or training, or they are hidden by components or finishes, and they are latent defects or deficiencies which the unit Owners and the ASSOCIATION, in the exercise of reasonable diligence, did not discover the existence or cause of until after the purchase and occupancy of the Condominium units and/or were led to believe by the DEVELOPERS that all said defects and deficiencies would be or had been corrected. At all times material hereto, the ASSOCIATION performed routine maintenance on the Condominium Structures.

27. As a direct and proximate result of the aforesaid breaches of warranty, the ASSOCIATION, through assessment of its members, has been or will be required to expend large sums of money for the repair, maintenance, and replacement of the Structures. Moreover, the monetary value of the units to each of the Unit Owners has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against Defendants ARBOR, LTD., NASHVILLE BANK, MIDLAND, McKIE, and TOPPINO for damages in excess of Five Thousand Dollars ($5,000.00), plus interest and the costs of bringing this action.

COUNT II

BREACH OF COMMON LAW IMPLIED WARRANTY BY THE DEVELOPERS

Plaintiff realleges paragraphs 1 through 21, 22, 25, and 26 above as if fully set forth herein.

28. The DEVELOPERS of the Condominium granted to the original purchasers of Condominium units implied warranties of fitness and merchantability for the purposes or uses intended as respects the Condominium Structures and appurtenances thereto.

29. The DEVELOPERS performed general developer duties to coordinate the design and construction of the Condominium and to ensure that same was performed in accordance with applicable building codes, the approved plans and specifications, proper design and building practices and all other express and implied warranties of

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merchantability and fitness for the uses intended. Additionally, they offered for sale in the regular course of business residential units, thus giving implied warranties of habitality, fitness, and merchantability. The DEVELOPERS breached these warranties as indicated herein.

30. As a direct and proximate result of the aforesaid breaches of warranty, the ASSOCIATION, through assessment of its members, has been or will be required to expend large sums of money for the repair, maintenance, and replacement of the Condominium Structures. Moreover, the monetary value of the units to each of the Unit Owners has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against DEVELOPERS for damages in excess of Five Thousand Dollars ($5,000.00), plus interest and the costs of bringing this action.

COUNT III

BREACH OF COMMON LAW IMPLIED WARRANTY
BY McKIE AND TOPPINO

Plaintiff hereby realleges paragraphs 1 through 21, 25, and 26 above.

31. Defendant TOPPINO manufactured and supplied the concrete which McKIE incorporated into the construction of the Structures with the defects indicated on Exhibit "A".

32. TOPPINO and McKIE impliedly warranted to Plaintiff that the concrete utilized in construction was merchantable and otherwise fit for the ordinary purposes for which such goods are used. Additionally, McKIE impliedly warranted to Plaintiff that the Structures it constructed were merchantable.

33. TOPPINO and McKIE also impliedly warranted that the concrete incorporated into the Structures was fit for its particular purpose. At the time of contracting for sale of the concrete, TOPPINO and McKIE had reason to know the particular purpose for which the concrete was being used, that being that same would be utilized in constructing the structural components of the Structures in an oceanside environment.

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34. Plaintiff relied upon TOPPINO's and McKIE's skill and judgment in the expectation that said parties would furnish concrete suitable for the construction of the Structures in such an environment.

35. TOPPINO breached its warranties of merchantability and fitness for a particular purpose by manufacturing and supplying defective concrete as described in Exhibit "A" hereto. Similarly, McKIE breached the subject warranties by incorporating the defective concrete into the structural components of the Structures, all of which is more fully set forth in Exhibit "A" hereto.

36. As a direct and proximate result of the aforesaid breaches of warranty by TOPPINO and McKIE, the Plaintiff has been required to expend large sums of money for the repair of the Structures and will similarly be required to expend money for their future repair or replacement. Additionally, the monetary value of the units to each of the Unit Owners has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against TOPPINO and McKIE for damages in excess of $5,000.00 plus interest and the costs of bringing this action.

COUNT IV

NEGLIGENCE BY DEVELOPERS AND McKIE

Plaintiff hereby realleges paragraphs 1 through 21, 22, 25, 26, 29, and 31 above as if fully set forth herein.

37. Between 1974 and 1977, Defendant McKIE constructed the Condominium Structures. As a result, the DEVELOPERS and McKIE undertook a duty to perform construction in a good and workmanlike manner and in strict compliance with approved plans and specifications and all applicable building codes or regulations. The referenced duty was owed to the ASSOCIATION and the Unit Owners as the future occupants of the Structures.

38. The DEVELOPERS and McKIE breached this duty by carelessly and negligently constructing various structural components of the Structures, i.e., beams, columns and slabs, with defective concrete

as set forth in Exhibit "A" hereto. The deficiencies as noted herein and in particular in the concrete, including, without limitation, excessive chloride content and porosity properties, have caused corrosion of the imbedded reinforcing steel within the aforesaid structural components resulting in spalling, cracking and weakening of same and the general stuctural deterioration of the Structures since the date of the first concrete pour to the present. Said damage is expected to continue in the future. Additionally, the DEVELOPERS and McKIE breached their duty by negligently constructing the Structures with the aforesaid defects in violation of applicable building codes.

39. As a direct and proximate result of the aforesaid negligence by the DEVELOPERS and McKIE, Plaintiff has been required to expend large sums of money for the repair of the Structures and will similarly be required to expend money for its future repair or replacement. Additionally, the monetary value of the units to each of the Unit Owners has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against the DEVELOPERS and McKIE for damages in excess of $5,000.00, plus interest and the costs of bringing this action.

COUNT V

NEGLIGENCE BY TOPPINO

Plaintiff realleges paragraphs 1 through 21, 25, 26, 31, 37, and 38 above as if fully set forth herein.

40. McKIE, in performing its construction function pursuant to its contract with the the DEVELOPERS, purchased the concrete utilized in constructing the Structures from Defendant TOPPINO. Plaintiff is informed and believes that said purchases occurred on or about 1974 and continued through 1977 when construction of the last of the three buildings comprising the Structures was completed. Plaintiff does not presently possess copies of the delivery tickets and associated invoices for the subject concrete sales but believes that TOPPINO and/or McKIE or others possess such

documentation.

41. At the time of said sales of concrete, TOPPINO had reason to know the particular purpose for which the concrete was being purchased by the general contractor, McKIE; that being that same would be utilized in constructing the structural components of the Structures in an oceanside environment.

42. At all times material hereto, TOPPINO was under a duty to use reasonable care in the manufacture and supply of the concrete utilized in the construction of the Structure. This duty was owed to the ASSOCIATION and the Unit Owners as the future occupants of the Structures.

43. TOPPINO breached its duty of care and was otherwise careless and negligent in the manufacture and supply of the concrete as same was manufactured, sold and delivered to McKIE with the deficiencies identified in Exhibit "A" hereto, which defective concrete was ultimately incorporated into the structural elements of the Structures.

44. Various principals of the TOPPINO corporation, including, without limitation, Frank Toppino and Donald Brassington, President and Vice President of TOPPINO, respectively, knew that the concrete they were manufacturing and supplying for this and other construction projects in the Florida Keys possessed chloride content far in excess of industry standards, building code requirements, and those amounts necessary for corrosion to occur. Moreover, TOPPINO was aware of the likelihood that its failure to manufacture, prepare and supply the concrete free of the defects alleged herein would cause the complained of damage to Plaintiff's Structures. Notwithstanding the above, TOPPINO willfully proceeded with the manufacture, sale, and supply of the defective concrete without undertaking any measures to correct these known deficiencies or to warn prospective users of its dangers and hazards. Such intentional misconduct and reckless or wanton indifference for the consequences of its acts and the rights of others, including Plaintiff, justify or warrant an award of punitive damages so as to both punish

TOPPINO and deter similar conduct by it and others in the future.

45. As a direct and proximate result of the aforesaid negligence by TOPPINO, Plaintiff has been required to expend large sums of money for the repair of the Structures and will similarly be required to expend money for their future repair or replacement. Additionally, the monetary value of the units to each of the Unit Owners has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against TOPPINO for damages in excess of $5,000.00, plus interest and the costs of bringing this action. Plaintiff also demands judgment against TOPPINO for punitive damages.

COUNT VI

PRODUCT LIABILITY OF TOPPINO

Plaintiff hereby realleges paragraphs 1 through 21, 25, 26, 31, 40, 41, 43, and 44 above as if fully set forth herein.

46. At all times material hereto, Defendant TOPPINO was engaged in the business of manufacture and sale of concrete to building contractors and other consumers for use in the construction of buildings and improvements to real estate.

47. TOPPINO manufactured, sold and supplied concrete to the contractor, McKIE, in the ordinary course of its business, and said concrete was intended to be and was in fact incorporated into the columns, slabs, beams and other structural components of the Structures.

48. The concrete was expected to and did in fact reach the Plaintiff without inspection for latent defects and without substantial change in the condition in which it was originally sold by TOPPINO to McKIE for construction of the Structures, except for such hardening and curing as concrete normally undergoes in the process of being incorporated into buildings of this type.

49. The concrete was defective in that it contained, among other things, excessive chloride levels and porosity properties

and, consequently, was unreasonably dangerous to the property and person of the various Unit Owners and others in that it has caused the reinforcing steel in the structural components of the Structures to corrode and the concrete covering said reinforcing steel to crack and spall, which damage and deterioration to the Structures is continuing at a progressive rate since the date of the first concrete pour to the present. Said damage is expected to continue in the future.

50. As a direct and proximate result of the conduct of TOPPINO as aforesaid, the Plaintiff has been required to spend large sums of money for the repair of the Structures and will similarly be required to expend sums for their repair or replacement in the future. Additionally, the monetary value of the units to each of the Unit Owners has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against TOPPINO for damages in excess of $5,000.00, plus interest and the costs of bringing this action. Plaintiff also demands judgment against TOPPINO for punitive damages.

COUNT VII

NEGLIGENCE BY ENGINEERS AND BENNETT

Plaintiff realleges paragraphs 1 through 21, 25, and 26 above as if fully set forth herein.

51. Plaintiff is informed and believes that the DEVELOPERS, or the project architect, BENNETT, contracted with ENGINEERS to perform structural engineering services in the design and supervision of construction of the Structures.

52. At all times material hereto, ENGINEERS and BENNETT undertook a duty to the ASSOCIATION and the Unit Owners, as the foreseeable future occupants of the Structures, to design and supervise the construction of the structural components of same in accordance with proper design, architectural, engineering and construction practices, including, but not limited to, the use of products which were properly manufactured and reasonably fit for

the purposes intended.

53. At all times material hereto, ENGINEERS and BENNETT breached the aforesaid duty by designing and supervising the construction of the structural components of the Structures with those deficiencies cited in the attached Exhibit "A" including, without limitation, the failure to prohibit and detect the use of defective concrete.

54. As a direct and proximate result of the aforesaid negligence, the Structures were designed, constructed and sold to the Unit Owners with the subject deficiencies and the ASSOCIATION, through assessment of its members/Unit Owners, has been and will be required to expend large sums of money for the repair, maintenance or replacement of said Structures. Moreover, the monetary value of the units to each of the Unit Owners has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against ENGINEERS and BENNETT for compensatory damages in excess of Five Thousand Dollars ($5,000.00), plus interest and the costs of bringing this action.

COUNT X

VIOLATION OF STATE MINIMUM BUILDING CODES ACT
BY DEVELOPERS, McKIE, TOPPINO, ENGINEERS, AND BENNETT

Plaintiff realleges paragraphs 1 through 21, 22, 25, 26, 37, 38, 40, 43, 44, 47, 49, 51, 52, and 53 above as if fully set forth herein.

55. Section 553.84, Florida Statutes, expressly creates a statutory cause of action on behalf of any person damaged as a result of a violation of the State Minimum Building Codes Act (§553.70, et seq., Fla. Stats.) (hereinafter "the Building Codes Act") against the party committing the violations(s).

56. The Building Codes Act thus creates a duty owed by each of the aforesaid participants in the design, supervision and construction of the Structures, to wit, the DEVELOPERS, McKIE, TOPPINO, ENGINEERS, and BENNETT to design and construct same in

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compliance with all applicable national, state and local building codes and regulations. The subject duty was owed by these Defendants to the Unit Owner members of the ASSOCIATION as the forseeable and actual owners and occupants of the Structures.

57. Each of the Defendants breached the aforesaid duty by failing to comply with all applicable building codes and regulations as required by the Building Codes Act in performance of their respective functions on the project as set forth above and in the attached Exhibit "A".

58. As a direct and proximate result of the aforesaid acts of negligence/violations of the Building Codes Act, the ASSOCIATION, through assessment of its Unit Owner members, has been and will be required to expend large sums of money for the repair, maintenance or replacement of the Structures. Moreover, the monetary value of the units to each Unit Owner has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against the DEVELOPERS, McKIE, TOPPINO, ENGINEERS, and BENNETT for damages in excess of Five Thousand Dollars ($5,000.00), plus interest and the costs of bringing this action and for punitive damages against the Defendant TOPPINO.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury of all facts, issues, and causes of action so triable in this action and for which Plaintiff is entitled to a jury trial as a matter of right.

DATED this 10th day of March, 1989.

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Co-counsel for Plaintiff
1570 Madruga Avenue, Suite 300
Coral Gables, FL 33146
Telephone: (305) 661-3334

By: _____
STEVEN M. SIEGFRIED, ESQ.

EXHIBIT "A"

I. STRUCTURAL DETERIORATION:

The Structures were improperly constructed in that the columns, slabs, beams, and other structural components of same contain defective concrete which has significantly reduced the useful life of the Structures in the following respects:

A. Defective Concrete: The concrete utilized to construct the conventional steel-reinforced columns and beams and the elevated floor/ceiling slabs is defective in that it contains, among other things, excessive levels of chlorides, excessive porosity properties, and a lack of air entrainment. These deficiencies which constitute violations of the Southern Standard Building Code, the American Concrete Institute Code and possibly other controlling building codes and regulations as well as standards of proper design, engineering, and construction practices, have caused corrosion and deterioration of the reinforcing steel which, in turn, has caused substantial spalling and cracking of the concrete covering these steel elements. The result of this corrosion/deterioration process is a substantial loss of structural integrity in the Structures requiring vast repair work to or replacement of same.

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SERVICE LIST

CASA CLARA CONDOMINIUM ASSOCIATION, INC.
V. ARBOR, LTD, ETC.
16th Judicial Circuit Court Case No. 89-10002 CA 03

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IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT, IN AND FOR MONROE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 88-10190 CA 11

642053 ONTARIO, INC.,

Plaintiff,

vs.

GRABER, INC., CHARLEY TOPPINO AND SONS, INC., a dissolved Florida corporation, JAN GRIFFEN and JOHN NIVENS,

Defendants.

_____/

SECOND AMENDED COMPLAINT
(Fla. Bar No: 208851)

Plaintiff, 642053 ONTARIO, INC. ("ONTARIO, INC."), sues the Defendants, GRABER, INC. ("GRABER") and JAN GRIFFEN ("GRIFFEN") and JOHN NIVENS ("NIVENS") as officers and directors of CHARLEY TOPPINO AND SONS, INC., a dissolved Florida corporation, and CHARLEY TOPPINO AND SONS, INC., a dissolved Florida corporation, ("TOPPINO"), and alleges:

GENERAL ALLEGATIONS

1. This is an action for damages in excess of $5,000.00, exclusive of interest and costs.

2. The property involved in each cause of action is located at 308 Sabal Street, Duck Key, Monroe County, Florida (hereinafter "the Property"). The Property consists of the land and all improvements thereon, including a three bedroom, four bathroom residential home (hereinafter referred to as "the Structure").

3. The Plaintiff, ONTARIO, INC., is a Canadian corporation registered in the State of Florida. ONTARIO, INC. is the owner

of the Property having received an assignment of title and all other contractual and proprietary interests in said Property from Jerry Van ("Van") as hereafter alleged.

4. The Defendant, GRABER, is a Florida corporation licensed to and doing business as a general contractor in Monroe County, Florida. GRABER originally contracted with Van to construct the Structure, which construction constitutes the subject matter of this action.

5. The Defendant, TOPPINO, is a dissolved Florida corporation which manufactured and supplied the concrete utilized by GRABER in the construction of the Structure. This concrete was incorporated into the Structure on or about January, February and March of 1981 as evidenced by TOPPINO's invoices for concrete sold to GRABER, copies of which invoices are attached hereto as Composite Exhibit "A".

6. The Defendants, GRIFFEN and NIVENS, are officers and directors of CHARLEY TOPPINO AND SONS, INC., a dissolved Florida corporation. GRIFFEN and NIVENS are trustees of TOPPINO under Section 607.301, Florida Statutes.

7. All conditions precedent necessary to the filing and maintenance of this suit have been performed, excused or waived.

COUNT I
BREACH OF CONTRACT BY GRABER

8. The Plaintiff hereby realleges paragraphs 1 through 7 above as if fully set forth herein.

9. On or about November 4, 1980, the Defendant, GRABER, contracted with ONTARIO, INC.'s predecessor in interest, Jerry Van, for the construction of the Structure. A copy of said contract is attached hereto as Exhibit "B".

10. Subsequent to its execution, Van assigned the contract to ONTARIO, INC. as set forth in paragraph 3 above.

11. The contract expressly provided that GRABER would perform construction in a good and workmanlike manner and in strict compliance with approved plans and specifications and all appli-

cable building codes or regulations.

12. GRABER breached the subject contract by failing to construct the Structure in a good and workmanlike manner and in strict compliance with approved plans and specifications and all applicable building codes or regulations. Specifically, GRABER constructed various structural components of the Structure, i.e., beams, columns and slabs, with defective concrete. The deficiencies in the concrete, including, without limitation, excessive chloride content and porosity properties, have caused corrosion of embedded reinforcing steel within the aforesaid structural components resulting in spalling, cracking and general structural deterioration of the Structure since the date of the first concrete pour to the present. Said damage is expected to continue in the future.

13. The existence or causes of the alleged deficiencies in the concrete are not readily recognizable by persons who lack special knowledge or training, or they are hidden by components or finishes and thus are latent defects which the Plaintiff, in the exercise of reasonable diligence, did not discover the existence of or cause of until after its purchase and occupancy of the Structure.

14. As a direct and proximate result of the aforesaid breach of contract by GRABER, the Plaintiff has been required to expend large sums of money for the repair of the Structure and will similarly be required to expend money for its future repair or replacement. Additionally, the monetary value of the Structure has been greatly reduced.

15. Plaintiff has complied with all conditions precedent to the bringing of this action, or they have been waived or excused.

16. The subject contract expressly provides for the recovery of court costs and reasonable attorneys' fees by the prevailing party in the event litigation is commenced respecting any of the terms of said contract.

WHEREFORE, Plaintiff demands judgment against GRABER for damages in excess of $5,000.00 plus interest, attorneys' fees and the costs of bringing this action.

COUNT II
BREACH OF EXPRESS WARRANTY BY GRABER

17. The Plaintiff hereby realleges paragraphs 1 through 7, 9, 10 and 13 above as if fully set forth herein.

18. GRABER expressly warranted in its contract with Van that it would construct the Structure in a good and workmanlike manner and in strict compliance with approved plans and specifications and all applicable building codes or regulations.

19. GRABER breached this warranty by failing to perform construction in a good and workmanlike manner and in strict compliance with approved plans and specifications and all applicable building codes or regulations. Specifically, GRABER constructed various structural components of the Structure, i.e., beams, columns and slabs, with defective concrete. The deficiencies in the concrete, including, without limitation, excessive chloride content and porosity properties, have caused corrosion of embedded reinforcing steel within the aforesaid structural components resulting in spalling, cracking and general structural deterioration of the Structure since the date of the first concrete pour to the present. Said damage is expected to continue in the future.

20. As a direct and proximate result of the aforesaid breach of warranty by GRABER, the Plaintiff has been required to expend large sums of money for the repair of the Structure and will similarly be required to expend money for its future repair or replacement. Additionally, the monetary value of the Structure has been greatly reduced.

21. Plaintiff has complied with all conditions precedent to the bringing of this action, or they have been waived or excused.

WHEREFORE, Plaintiff demands judgment against GRABER for damages in excess of $5,000.00 plus interest and the costs of bringing this action.

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COUNT III
BREACH OF IMPLIED WARRANTY
BY GRABER AND TOPPINO

22. The Plaintiff hereby realleges paragraphs 1 through 7, 9, 10, 13 and 19 above.

23. On a date unknown to Plaintiff, GRABER entered into an agreement with TOPPINO wherein TOPPINO agreed to supply concrete for incorporation into the Structure.

24. The intent of the agreement between GRABER and Van was to make all agreements for the supply of labor and materials to the Structure for the direct and substantial benefit of Van, and subsequently, ONTARIO. Therefore, ONTARIO, as Van's successor in interest, is the intended third party beneficiary of the agreement (and oral modifications thereto) between GRABER and TOPPINO.

25. The Defendant, TOPPINO, manufactured and supplied the concrete which GRABER incorporated into the Structure.

26. GRABER impliedly warranted to Plaintiff that the concrete was merchantable and otherwise fit for the ordinary purposes for which such goods are used. TOPPINO impliedly warranted to GRABER and, by virtue of the agreement between GRABER and TOPPINO as indicated in paragraph 24 herein, to Van and ONTARIO as third party beneficiaries, that the concrete was merchantable and otherwise fit for the ordinary purposes for which such goods are used.

27. TOPPINO and GRABER also impliedly warranted that the concrete incorporated into the Structure was fit for its intended purpose. At the time of contracting for sale of the concrete, TOPPINO and GRABER had reason to know the particular purpose for which the concrete was being used, that being that same would be utilized in constructing the structural components of the Structure in an oceanside environment.

28. All conditions precedent, including notification to GRABER and TOPPINO of their breaches of implied warranty, have

been performed, excused or waived.

29. Plaintiff relied upon TOPPINO's and GRABER's skill and judgment in the expectation that said parties would furnish concrete suitable for the construction of the Structure in such an environment.

30. TOPPINO breached its warranties of merchantability and fitness for a particular purpose by manufacturing and supplying defective concrete as described in paragraph 19 above. Similarly, GRABER breached the subject warranties by incorporating the defective concrete into the structural components of the Structure also as set forth in paragraph 19 above.

31. As a direct and proximate result of the aforesaid breach of warranty by TOPPINO and GRABER, the Plaintiff has been required to expend large sums of money for the repair of the building and will similarly be required to expend money for its future repair or replacement. Additionally, the monetary value of the Structure has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against TOPPINO, GRABER GRIFFEN and NIVENS for damages in excess of $5,000.00 plus interest and the costs of bringing this action.

COUNT IV
NEGLIGENCE BY GRABER

32. The Plaintiff hereby realleges paragraphs 1 through 7 and 13 above as if fully set forth herein.

33. On or about November 4, 1980, the Defendant, GRABER, contracted with ONTARIO, INC.'s predecessor in interest (Jerry Van) for the construction of the Structure. As a result, GRABER undertook a duty to perform construction in a good and workmanlike manner and in strict compliance with approved plans and specifications and all applicable building codes or regulations. The referenced duty was owed to ONTARIO, INC., a foreseeable plaintiff and assignee of all proprietary interests in the Structure.

34. GRABER breached its duty by carelessly and negligent

building various structural components of the Structure, i.e., beams, columns and slabs with defective concrete. The deficiencies in the concrete, including, without limitation, excessive chloride content and porosity properties, have caused corrosion of imbedded reinforcing steel within the aforesaid structural components resulting in spalling, cracking and general structural deterioration of the Structure since the date of the first concrete pour to the present. Said damage is expected to continue in the future.

35. As a direct and proximate result of the aforesaid negligence by GRABER, the Plaintiff has been required to expend large sums of money for the repair of the Structure and will similarly be required to expend money for its future repair or replacement. Additionally, the monetary value of the Structure has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against GRABER for damages in excess of $5,000.00, plus interest and the costs of bringing this action.

COUNT V
NEGLIGENCE BY TOPPINO

36. The Plaintiff realleges paragraphs 1 through 7, 13, 33 and 34 above as if fully set forth herein.

37. GRABER, in performing its construction function pursuant to its contract with Plaintiff's predecessor in interest, purchased the concrete utilized in constructing the Structure from the Defendant, TOPPINO. Plaintiff is informed and believes that said purchases occurred on or about January, February and March of 1981 as reflected in the invoices attached hereto as Composite Exhibit "A".

38. At the time of said sales of concrete, TOPPINO had reason to know the particular purpose for which the concrete was being purchased by the general contractor, GRABER, that purpose being that same would be utilized in constructing the structural com-

ponents of the Structure in an oceanside environment.

39. At all times material hereto, TOPPINO was under a duty to use reasonable care in the manufacture and supply of the concrete utilized in the construction of the Structure.

40. TOPPINO breached its duty of care and was otherwise careless and negligent in the manufacture and supply of the concrete as same was manufactured, sold and delivered to GRABER with the deficiencies identified in paragraph 34 above, which defective concrete was ultimately incorporated into the structural elements of the Structure.

41. Various principals of the TOPPINO corporation, including, without limitation, Frank Toppino and Donald Brassington, knew that the concrete they were manufacturing and supplying for this and other construction projects in the Florida Keys possessed chloride content far in excess of industry standards and building code requirements. Moreover, TOPPINO was aware of the likelihood that its failure to manufacture, prepare and supply the concrete free of the defects alleged herein would cause the complained of damage to Plaintiff's Structure. Notwithstanding the above, TOPPINO wilfully proceeded with the manufacture, sale and supply of the defective concrete without undertaking any measures to correct these known deficiencies. Such intentional misconduct and reckless or wanton indifference for the consequences of its acts and the rights of others, including ONTARIO, justify or warrant an award of punitive damages so as to both punish TOPPINO and deter similar conduct by it and others in the future.

42. As a direct and proximate result of the aforesaid negligence by TOPPINO, ONTARIO has been required to expend large sums of money for the repair of the Structure and will similarly be required to expend money for its future repair or replacement. Additionally, the monetary value of the Structure has been greatly reduced.

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WHEREFORE, ONTARIO demands judgment against TOPPINO, GRIFFEN and NIVENS for damages in excess of $5,000.00, plus interest and the costs of bringing this action. ONTARIO also demands judgment against TOPPINO for punitive damages.

COUNT VI
PRODUCT LIABILITY OF TOPPINO

43. The Plaintiff hereby realleges paragraphs 1 through 7, 13, 34, 40 and 41 above as if fully set forth herein.

44. At all times material hereto, the Defendant, TOPPINO, was engaged in the business of manufacture and sale of concrete to building contractors for use in the construction of buildings and improvements to real estate.

45. TOPPINO manufactured, sold and supplied concrete to the contractor, GRABER, in the ordinary course of its business, and said concrete was intended to be and was in fact incorporated into the columns, slabs, beams and other structural components of the Structure.

46. The concrete was expected to and did in fact reach the Plaintiff's predecessor in interest without inspection for latent defects and without substantial change in the condition in which it was originally sold by TOPPINO to GRABER for construction of the Structure, except for such hardening and curing as concrete normally undergoes in the process of being incorporated into a building of this type.

47. The concrete was defective in that it contained, among other things, excessive chloride levels and porosity properties and, consequently, was unreasonably dangerous to the Property and person of the Plaintiff and others in that it has caused the reinforcing steel in the structural components of the Structure to corrode and the concrete covering said reinforcing steel to crack and spall, which damage and deterioration to the Structure is continuing at a progressive rate since the date of the first concrete pour to the present. Said damage is expected to con-

tinue in the future.

48. As a direct and proximate result of the conduct of TOPPINO as aforesaid, the Plaintiff has been required to spend large sums of money for the repair of the Structure and will similarly be required to expend sums for its repair or replacement in the future. Additionally, the monetary value of the Structure has been greatly reduced.

WHEREFORE, Plaintiff demands judgment against TOPPINO, GRIFFEN and NIVENS for damages in excess of $5,000.00, plus interest and the costs of bringing this action. Plaintiff also demands judgment against TOPPINO for punitive damages.

COUNT VII
VIOLATION OF STATE MINIMUM
BUILDING CODES ACT BY
GRABER AND TOPPINO

49. The Plaintiff hereby realleges paragraphs 1 through 7, 9, 13, 33, 37, and 41 above as if fully set forth herein.

50. Pursuant to Section 553.79, Florida Statutes, Monroe County Code adopted as its state minimum building code the 1979 Standard Building Code. (See Sections 6-16, Monroe County Code).

51. The Standard Building Code specifically controls building, manufacture and use of certain products including concrete, and its purpose is to protect the public health and welfare. The 1979 Standard Building Code, in Sections 1601 and 1602, specifically and descriptively incorporated and demanded compliance with ACI-318. Said incorporation by reference was proper and was not in conflict with organic law or enabling statutes.

52. ACI-318 specifically prohibits, among other things, the use of injurious salts in concrete or aggregates used for construction of structures such as Plaintiff's home. The purpose for such restriction, which was well known to TOPPINO and GRABER, was to prevent corrosion of the reinforcing steel in structures.

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TOPPINO and GRABER recognized that this provision controlled TOPPINO's manufacture of concrete at the time TOPPINO was supplying concrete for incorporation into the Structure and that allowing injurious amounts of salts in the concrete would violate ACI-318, the 1979 Standard Building Code and therefore, the Monroe County Code.

53. Because GRABER and TOPPINO knew that the materials were manufactured and supplied for the construction of a home, which construction was governed by the 1979 Standard Building Code, GRABER and TOPPINO knew they had a duty to comply with the Standard Building Code and all other codes specifically incorporated therein.

54. GRABER and TOPPINO breached their statutory duty under Section 553.84, Florida Statutes, by failing to comply with the requirements of the Monroe County Code and codes properly incorporated therein.

55. TOPPINO and GRABER breached this duty in that they respectively manufactured and utilized defective concrete in the construction of the Structure as set forth in paragraphs 40, 46 and 47 above. Specifically, by manufacturing such defective concrete for incorporation into the Structure, TOPPINO and GRABER violated, without limitation, the Monroe County Code, the Standard Building Code and American Concrete Institute Code provisions respecting injurious amounts of salts in concrete and aggregates. Such conduct constitutes a violation of Section 553.84, Florida Statutes.

56. The defective concrete has caused the structural components of the Structure to corrode and the concrete therein to crack and spall resulting in the general deterioration of the Structure from the date of the first concrete pour to the present. Moreover, said damage is expected to continue in the future.

57. As a result of GRABER's and TOPPINO's breach of their

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statutory duty under Section 553.84, Florida Statutes, ONTARIO has suffered damages in excess of $5,000.00.

WHEREFORE, Plaintiff demands judgment against GRABER, TOPPINO, GRIFFIN and NIVENS for damages in excess of $5,000.00, plus interest and the costs of bringing this action. Additionally, Plaintiff demands judgment against TOPPINO for punitive damages.

JURY TRIAL DEMAND

Plaintiff demands trial by jury of all issues so triable.

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 6th day of April, 1989 to all parties on the attached List of Counsel.

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and

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(Florida Bar #208851)
H. HUGH McCONNELL
(Florida Bar # 206828)
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Coral Gables, Florida 33146
Telephone: (305) 661-3334

Re: 64203 Ontario, Inc., v. Graber, Inc. and Charley Toppino & Sons, Inc., et al.,
Monroe County Circuit Court Case No: 88-1-190 CA 11
Our File No: 8800009

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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 89-10002-CA-03

CASA CLARA CONDOMINIUM ASSOCIATION, INC., a not-for-profit corporation of the State of Florida,

Plaintiff,

vs.

ARBOR, LTD., et al.,

Defendants.

ORDER ON DEFENDANTS TOPPINO, THIRD NATIONAL BANK OF NASHVILLE, TENNESSEE AND VAL VILLANYI-HAUSNER'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

This cause came to be heard November 30, 1989 on Defendants, Jan Griffen and John Nivens, as officers and directors of Charley Toppino & Sons, Inc., a dissolved Florida corporation ("Toppino"), Third National Bank of Nashville, Tennessee and Val Villanyi-Hausner's motions to dismiss plaintiff's amended complaint. After considering the motions, the memoranda of law submitted by the parties and the arguments of counsel, and being otherwise fully advised in the premises, the Court granted Defendant Toppino's motion to dismiss Counts III, V, VI and X with prejudice and Count I without prejudice, granted Third National Bank of Nashville, Tennessee's motion to dismiss Count IV with prejudice and Counts I, II, and X without prejudice and granted Val Villanyi-Hausner's motion to dismiss Counts VII and X without prejudice. It is therefore

ORDERED AND ADJUDGED that:

1. Counts III, V, VI and X of plaintiff's amended complaint are dismissed with prejudice as to Defendant Toppino.

2. Count I of the amended complaint is dismissed without prejudice as to Defendant Toppino, and plaintiff shall have twenty days from December 1, 1989 to amend said

count to allege the date(s) certificates of occupancy were issued, when the alleged defect(s) became manifest and the specific building code(s) plaintiff contends were violated.

3. Count IV of plaintiff's amended complaint is dismissed with prejudice as to Defendant Third National Bank of Nashville, Tennessee.

4. Counts I, II and X of plaintiff's amended complaint is dismissed without prejudice as to Defendant Third National Bank of Nashville, Tennessee. Plaintiff shall have twenty days from December 1, 1989 to amend Count I in accordance with paragraph 2 of this order, to amend Count II in view of its failure to allege privity of contract and/or the existence of an original owner and to amend Count X by setting forth the specific building code(s) plaintiff contends were violated.

5. Counts VII and X of plaintiff's amended complaint are dismissed without prejudice as to Defendant Val Villanyi-Hausner, and plaintiff shall have twenty days from December 1, 1989 to amend count VII by clarifying the language of paragraph 11 of the amended complaint and by eliminating the commingling of the architect and engineer defendants in said count and to amend Count X by alleging the specific building code(s) plaintiff contends were violated.

DONE AND ORDERED in Chambers, at Tavernier, Monroe County, Florida, this 26th day of Dec, 1989.

CIRCUIT JUDGE

Conformed Copies to:

Terry McConnell, Esquire
Michael Krietzer, Esquire
James L. Roberts, Esquire
William E. Shockett, Esquire
Gerald J. Houlihan, Esquire
Mitchell L. Lundeen, Esquire
Rick Rumrell, Esquire
Nathan Eden, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record by U.S. Mail this 21st day of Dec., 1989.

Sheila Schmadeke /c
Judicial Assistant

C 10

IN THE CIRCUIT COURT OF THE
SIXTEENTH JUDICIAL CIRCUIT IN
AND FOR MONROE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 88-10190-CA-11

642053 ONTARIO, INC.,

Plaintiff,

vs.

GRABER, INC., et al.,

Defendants.

Entered Date 6/23/89

ORDER ON DEFENDANT TOPPINO'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

This cause came to be heard on June 9, 1989, on the motion of Defendants, Jan Griffen and John Nivens, as officers and directors of Charley Toppino & Sons, Inc., a dissolved Florida corporation (hereinafter "Toppino") to dismiss counts III, IV, V and VII of the second amended complaint on the ground they fail to state a cause of action against Toppino. After considering the motion, the memoranda of law submitted by the parties and amicus curiae, and the arguments of counsel and being otherwise fully advised in the premises, the Court granted Defendant Toppino's motion and dismissed Count III, IV and V with prejudice and Court VII without prejudice. It is therefore

ORDERED AND ADJUDGED that:

1. Counts III, V and VI of the second amended complaint are dismissed with prejudice as to Defendant Toppino.

2. Count VII of the second amended complaint is dismissed without prejudice as to Defendant Toppino, and plaintiff shall have 20 days from the date of this order to amend said count.

DONE AND ORDERED in Chambers, at Marathon, Monroe County, Florida, this 22nd day of June, 1989.

J. Jefferson Overby
CIRCUIT JUDGE

C-11

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to all counsel of record by U.S. Mail this 23rd day of June, 1989.

Rosemary M. Peterson
Judicial Assistant

Copies furnished to:

Lynn E. Wagner, Esquire
James J. Dorl, Esquire
Nathan Eden, Esquire
Steven M. Siegfried, Esquire

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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT, IN AND FOR MONROE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 88-10190-CA-11

642053 ONTARIO, INC.,

Plaintiff,

vs.

GRABER, INC., et al.,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION OF RULING ON ORE TENUS MOTION TO AMEND COMPLAINT, PLAINTIFF'S MOTION FOR RECONSIDERATION OF DISMISSAL OF COUNTS V AND VI, TOPPINO'S MOTION TO STRIKE LETTERS AND REPORTS OF PURPORTED EXPERTS ATTACHED TO PROPOSED THIRD AMENDED COMPLAINT, AND TOPPINO'S MOTION TO DISMISS COUNT VII OF PLAINTIFF'S THIRD AMENDED COMPLAINT

This cause came to be heard November 30, 1989 on Plaintiff's motion for reconsideration of a ruling on ore tenus motion to amend second amended complaint, Plaintiff's motion for reconsideration of dismissal of Counts V and VI of second amended complaint, Defendants Jan Griffen and John Nivens', as officers and directors of Charley Toppino & Sons, Inc., a dissolved Florida corporation (hereafter "Toppino") motion to strike letters and reports of purported experts attached to third amended complaint, and Toppino's motion to dismiss and strike Count VII of third amended complaint. After considering the motion, the memoranda of law submitted by the parties and the arguments of counsel and being otherwise fully advised in the premises, the Court denied Plaintiff's motion for reconsideration of ruling on ore tenus motion to amend, denied Plaintiff's motion for reconsideration of dismissal of Counts V and VI, granted Defendant Toppino's motion to strike reports and letters of purported experts and dismissed Count VII of Plaintiff's third amended complaint with prejudice. It is therefore

ORDERED AND ADJUDGED that:

1. Plaintiff's motion for reconsideration of ruling on ore tenus motion to amend is denied.

2. Plaintiff's motion for reconsideration of dismissal of Counts V and VI of second amended complaint is denied and, therefore, said counts remain dismissed with prejudice as to Defendant Toppino.

3. Count VII of Plaintiff's third amended complaint is dismissed with prejudice as to Defendant Toppino.

4. Toppino's motion to strike reports and letters of purported experts attached to third amended complaint is granted as follows:

a. The last paragraph of Exhibit "C" to the third amended complaint (beginning, "The above-described conditions . . .") be and is hereby stricken.

b. The report of Construction Technology Laboratories, Inc. and all appendices attached thereto and the report of Engineering Analytics, Inc. be and are hereby stricken.

DONE AND ORDERED in Chambers, at Tavernier, Monroe County, Florida, this 21st day of Dec., 1989.

CIRCUIT JUDGE

Conformed Copies to:

Terry McConnell, Esquire
Franklin D. Greenman, Esquire
James J. Dorl, Esquire
Nathan E. Eden, Esquire
Richard G. Rumrell, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record by U.S. Mail this 7th day of Dec., 1989.

Sheila Schmadeke
Judicial Assistant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Lynn E. Wagner, Esq., Cabaniss, Burke & Wagner, P.A., One South Orange Avenue, Suite 500, Post Office Box 2513, Orlando, Florida 32802-2513, counsel for respondents, Charley Toppino & Sons, Inc., Jan Griffen and John Nivens, on this 20th day of December, 1991.

H. Hugh McConnell