045

FILED
SID J. WHITE
JAN 16 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASA CLARA CONDOMINIUM ASSOCIATION, INC., ETC., ET. AL.,

Petitioner,

v. CASE NO. 79, 127

CHARLEY TOPPINO & SONS, INC., ETC., ET. AL.,

Respondent.

CHRISTOPHER H. CHAPIN, ET. AL.,

Petitioner,

v. CASE NO. 79, 128

CHARLEY TOPPINO & SONS, INC., ETC., ET. AL.

Respondent.

RESPONDENTS' BRIEF ON JURISDICTION

Lynn E. Wagner, Esquire
Florida Bar No. 144515
Richard A. Solomon, Esquire
Florida Bar No. 656739
Cabaniss, Burke & Wagner, P.A.
800 N. Magnolia Ave., #1800
P.O. Box 2513
Orlando, FL 32802-2513
(407) 246-1800
Attorneys for Charley Toppino & Sons, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Petitioners filed virtually identical complaints against the Respondent, Charley Toppino & Sons, Inc., a dissolved Florida corporation (hereafter "Toppino"), sounding in breach of the implied warranties of fitness and merchantability, negligence, strict liability, and violation of the Florida Building Codes Act, Sections 553.70-553.895, Florida Statutes (1987). The gravamen of their complaints was that concrete manufactured and supplied by Toppino and used in the construction of their structures allegedly contained excessive levels of chloride, which caused steel reinforcement bars imbedded in the concrete to corrode, and expand volumetrically. This, in turn, allegedly caused the concrete itself to crack and spall.

The complaints did not allege the concrete caused Petitioners actual physical injury or property damage other than to the concrete in their structures and the reinforcing steel imbedded therein. Rather, the complaints prayed for awards of purely economic damages consisting of the cost of repair or replacement of the structures and for the diminution in their value.

The complaints also alleged the Petitioners did not purchase the concrete used in construction of their structures from Toppino. Instead, they contracted with various developers, general contractors and/or design professionals for the purchase, design and/or construction of their completed structures. It was the general contractors that contracted with Toppino for the purchase of the concrete.

The trial court dismissed the breach of implied warranty counts of the complaints because Petitioners were not in privity of contract with Toppino, dismissed the negligence and strict liability counts pursuant to the economic loss doctrine, and dismissed the building code counts because, as material supplier only, Toppino was not under a duty to comply with state or local building codes.

The Third District Court of Appeal affirmed the trial court's orders, relying principally on this Court's decisions in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987) and *Aetna Life & Casualty Co. v. Therm-O-Disc, Inc.*, 511 So.2d 992 (Fla. 1987), its own decisions in *GAF Corp. v. Zack Co.*, 445 So.2d 350 (Fla. 3d DCA 1984), *rev. den.*, 453 So.2d 45 (Fla. 1984) and *Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc.*, 444 So.2d 1068 (Fla. 3d DCA 1984) and the United States Supreme Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.E.2d 864 (1986). *See Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 588 So.2d 631 (Fla. 3d DCA 1991). Thereafter, the Petitioners filed their petition requesting this Court review that part of the District Court of Appeal's decision affirming the trial court's dismissal of the negligence and strict liability counts of the complaints.

SUMMARY OF ARGUMENT

The Third District Court of Appeal's holding that Petitioners cannot sue in tort for purely economic damages is in conformance

with this Court's decisions in *Florida Power & Light* and *Aetna*, the United States Supreme Court's decision in *East River,* (adopted by this Court in *Florida Power & Light*) and the Third District Court of Appeal's decisions in *Belle Plaza Condominium Association v. B.C.E. Development, Inc.*, 543 So.2d 239 (Fla. 3d DCA 1989) *rev. den.*, 551 So.2d 460, (Fla. 1989), *GAF Corp.*, (adopted in *Florida Power & Light* and *Aetna*), and *Cedars of Lebanon,* (adopted in *Florida Power & Light*).

Contrary to Petitioners' contention, the *Casa Clara* decision does not expressly and directly conflict with the Fourth District Court of Appeal's decisions in *Adobe Building Centers, Inc. v. Reynolds,* 403 So.2d 1033 (Fla. 4th DCA 1981) and *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. 4th DCA 1981). Both *Adobe* and *Drexel* were decided six years before this Court's decisions in *Florida Power & Light* and *Aetna*. To the extent those cases can be construed as allowing recovery in tort of purely economic damages, they are effectively overruled by this Court's more recent decisions in *Florida Power & Light* and *Aetna* and cannot serve as a basis for asserting an express and direct conflict with *Casa Clara* within the meaning of Article V, Section 3(b)(3), Florida Constitution or Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

Nor does the *Casa Clara* decision, as Petitioners contend, expressly and directly conflict with either *A.R. Moyer, Inc. v. Graham,* 285 So.2d 397 (Fla. 1973) or *Latite Roofing Co., Inc. v. Urbanek,* 528 So.2d 1381 (Fla. 4th DCA 1988). Both *Moyer* and *Latite*

stand only for the proposition the economic loss doctrine does not apply: (1) in the services context; and (2) if the litigant has no alternative means to recover from any other party in the chain of construction. *Casa Clara* is not a services case, as the complaints alleged Toppino supplied a defective product. Moreover, unlike in *Moyer* and *Latite*, the Petitioners had alternative remedies against other parties with whom they were in privity. They had the ability to proceed in contract or under the Florida Building Codes Act, Section 553.70-553.895, Florida Statutes (1987),[3] against their developer, general contractor or architect.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN *CASA CLARA* DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FOURTH DISTRICT COURT OF APPEAL'S DECISIONS IN *ADOBE* OR *DREXEL* BECAUSE BOTH *ADOBE* AND *DREXEL* WERE EFFECTIVELY OVERRULED BY SUBSEQUENT DECISIONS OF THIS COURT

The Third District Court of Appeal's decision in *Casa Clara* does not expressly and directly conflict with the Fourth District Court of Appeal's decisions in *Adobe* or *Drexel* because both were effectively overruled by this Court's decisions in *Florida Power & Light* and *Aetna*.

A. *Adobe* was Effectively Overruled by This Court's Decisions in *Florida Power & Light* and *Aetna*

In *Adobe*, a developer, general contractor and seller of residential structures sued a distributor of construction materials used to produce stucco, *inter alia*, in strict liability. The

---

[3]In fact, most of the Petitioners currently are litigating against the parties with whom they are in privity of contract for the sale, construction or design of their structures in the Sixteenth Judicial Circuit, In and For Monroe County, Florida.

plaintiffs had been compelled to repair the defective stucco pursuant to express warranties they had granted to the purchasers of the residences. 403 So.2d at 1033. The Fourth District Court of Appeal held the distributor could be sued in strict liability notwithstanding the fact the plaintiffs had sustained purely economic damages. *Id.* at 1034-35. *Adobe* was effectively overruled by this Court's subsequent decisions in *Florida Power & Light* and *Aetna,* however, which hold precisely the opposite, and cannot serve as a basis for establishing a direct and express conflict with *Casa Clara*.[4]

It follows that *Adobe* does not expressly and directly conflict with *Casa Clara* within the meaning of Article V, Section 3(b)(3), Florida Constitution or Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

B. *Drexel* also was Effectively Overruled by This Court's Decisions in *Florida Power & Light* and *Aetna*

In *Drexel*, a class of condominium unit owners sued a developer for breach of implied warranty and in negligence to recover purely economic damages to the common elements of the condominium structures. 406 So.2d at 516. The Fourth District Court of Appeal

---

[4]Even if the defective stucco in *Adobe* caused damage to other components of the structures in question as Petitioners contend, this Court in *Aetna* and the United States Supreme Court in *East River* unequivocally concluded that damage caused by one component of an assembled product to other components thereof or to the assembled product itself does not constitute damage to "other property" within the meaning of the economic loss doctrine. *Aetna*, 511 So.2d at 994; *East River*, 476 U.S. at 867-868. Since Petitioners allege only that the allegedly defective concrete damaged other components of their structures or the structure themselves, the Petitioners' complaints do not fall within the "other property" exception to the economic loss doctrine. *Id.*

held the unit owners could recover such losses in negligence notwithstanding the fact they had sustained neither actual personal injury or damage to property other than the structures. *Id.* at 519. Thus, *Drexel* was effectively overruled by this Court's decisions in *Florida Power & Light* and *Aetna*, and cannot serve as a basis for establishing an express and direct conflict with *Casa Clara*.

Similarly without merit is Petitioners' reliance on *Drexel* for the proposition that purely economic losses may be recovered in tort where a risk of personal injury, as opposed to actual personal injury, is present. *See* Petitioners' Brief on jurisdiction at page 6-7. Petitioners concede they have not sustained actual personal injury. This concession is fatal because the United State Supreme Court in *East River*, adopted by this Court in *Florida Power & Light*, 510 So.2d at 900-902, unequivocally held risk of personal injury, as opposed to actual personal injury, is insufficient to remove a case from the economic loss doctrine. 476 U.S. at 870. It follows that under this Court's review of the economic loss doctrine mere risk of personal injury does not defeat application of the economic loss doctrine. *Id.* *See also Aetna*, 511 So.2d at 994; *American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 451 (Fla. 1st DCA 1991); *GAF Corp.*, 445 So.2d at 351-352; *Cedars of Lebanon*, 444 So.2d at 1071, all of which establish actual personal injury is necessary to defeat application of the economic

loss doctrine.[5] In short, *Drexel*, like *Adobe*, does not expressly and directly conflict with *Casa Clara* because it no longer is good law after *Florida Power & Light* and *Aetna* within the meaning of Article V, Section 3(b)(3), Florida Constitution or Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

II. THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN *CASA CLARA* DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN *A.R. MOYER, INC. V. GRAHAM* OR THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN *LATITE ROOFING CO. V. URBANEK*

Neither this Court's decision in *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973) nor the Fourth District Court of Appeal's decision in *Latite Roofing Co., Inc. v. Urbanek*, 528 So.2d 1381 (Fla. 4th DCA 1988) expressly and directly conflict with the Third District Court of Appeal's decision in *Casa Clara*.

A. *Casa Clara* Does Not Conflict With *Moyer*

In *Moyer*, decided 14 years before this Court's adoption of the economic loss doctrine in *Florida Power & Light*, a general contractor sued a supervisory architect, *inter alia*, in negligence to recover damages the general contractor allegedly incurred as a result of the supervising architect's negligent performance of its

---

[5]Petitioners' attempt to seek solace from this Court's reliance in *Florida Power & Light* on Justice Traynor's reasoning in *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 43 P.2d 145 (1965) is misplaced as even under Justice Traynor's analysis, a manufacturer's liability, if any, is "limited to damages for physical injuries and there is no recovery for economic loss alone". 510 So.2d at 901. Thus, even under Justice Traynor's analysis, actual injury, as opposed to risk of injury, is necessary to defeat application of the economic loss doctrine. *Aetna*, 511 So.2d at 994; *Florida Power & Light*, 510 So.2d at 900-902; *East River*, 476 U.S. at 868-871; *GAF Corp.*, 445 So.2d at 351-352; *Cedars of Lebanon*, 444 So.2d at 1070-1071.

supervisory responsibilities. 285 So.2d at 398-399. In concluding the general contractor could sue the supervisory architect in negligence, notwithstanding the lack of privity between the parties, this Court reasoned:

> Considerations of reason and policy impel the conclusion that the position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner . . . The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor.

Id. at 401.

Subsequently, this Court reconciled *Moyer* with *Florida Power & Light* in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180, 181 (Fla. 1987). In limiting *Moyer* to its unique facts, this Court concluded:

> In [*Moyer*], we did approve a recovery for economic losses where there was no personal injury or property damage upon a negligent tort theory. What distinguishes *Moyer* from the above cases, however, is that the plaintiff was not the beneficiary, either directly or as a third-party beneficiary, of the underlying contract. . . . We based our decision on the fact that the supervisory responsibilities vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract. . . . 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, 515 So.2d at 181. *See also McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Electric, Inc.*, 582 So.2d 47 (Fla. 2d DCA 1991) (*Moyer* is limited to its unique facts).

Unlike the general contractor in *Moyer*, Petitioners had viable causes of action in contract and under the Florida Building Codes

Act against their developers, general contractors and design professionals to recover their alleged economic losses. Thus, *Casa Clara* does not expressly and directly conflict with *Moyer* within the meaning of Article V, Section 3(b)(3), Florida Constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

B. *Casa Clara* Does Not Conflict with *Latite*

In *Latite,* the plaintiffs purchased a shopping center after the roof had been installed but while construction was only partially completed. 528 So.2d at 1382. Thereafter, they sued the roofing contractor with whom they were not in privity (it had contracted with the previous owner) in negligence to recover purely economic damages. *Id.*

The Fourth District Court of Appeal, relying on *Moyer,* concluded the plaintiffs' negligence action against the roofing contractor was not barred by the economic loss doctrine because they had no alternative means to recover their economic losses from anyone else, noting:

> [I]nvocation 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 particular kind of loss.

Latite, 528 So.2d at 1383.

Latite, like *Moyer*, stands only for the proposition that a plaintiff may sue in tort to recover purely economic damages in the unusual circumstances where it has no alternative means to recover such losses from anyone else. The Petitioners, however, had viable causes of action in contract and under the Florida Building Codes

Act against their developers, general contractors or design professionals.

In view of the alternative theories of recovery available to Petitioners, *Casa Clara* does not expressly and directly conflict with *Latite* within the meaning of Article V, Section 3(b)(3), Florida Constitution, or Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

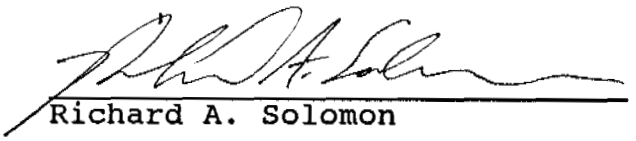
CONCLUSION

Since the *Casa Clara* decision does not expressly and directly conflict with *Adobe*, *Drexel*, *Moyer* or *Latite*, this Court lacks jurisdiction to hear Petitioners' appeal under Article V, Section 3(b)(3), Florida Constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. For this reason, their petition for review should be denied.

Lynn E. Wagner, Esquire
Florida Bar No. 144515
Richard A. Solomon, Esquire
Florida Bar No. 656739
Cabaniss, Burke & Wagner, P.A.
P.O. Box 2513
Orlando, FL 32802-2513
(407) 246-1800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 14th day of January, 1992 to H. Hugh McConnell, Esquire and Steven M. Siegfried, Esquire, 201 Alhambra Circle, Suite 1102, Coral Gables, FL 33134 and Daniel S. Pearson, Esquire, Holland & Knight, 1200 Brickell Avenue, P.O. Box 015441, Miami, FL 33101.



Richard A. Solomon