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SUPREME COURT OF FLORIDA

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

Petitioners,

vs. CASE NO. 79,127

CHARLEY TOPPINO AND SONS, INC., ETC.,

Respondent.
_____/

CHRISTOPHER H. CHAPIN, ET. AL.,

Petitioners,

vs. CASE NO. 79,128

CHARLEY TOPPINO AND SONS, INC., ETC.,

Respondent.
_____/

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Introduction

The petitioners[1] are Florida homeowners who face the inevitable destruction of their homes. The party responsible for this certain destruction is the respondent, Charley Toppino and Sons, Inc., ("Toppino"), who mixed and delivered the concrete used in the construction of the homes. The concrete supplied by Toppino was made from an aggregate of rock and sand, mined from the sea and laden with impermissible and dangerously high quantities of chlorides. The chlorides are causing all of the structural components of the homes to be destroyed. Total ruin is only a matter of time.

The petitioners sued Toppino for damages. Their complaints were dismissed as a matter of law. They were denied recovery in warranty because they were said to lack privity with Toppino. They were denied recovery in tort when the trial court, applying the "economic loss" doctrine, held that they had not suffered damage to their property. They were denied recovery under the Florida Building Codes Act,[2] because the court held that Toppino did not have to comply with the Standard Building Code.[3] The District

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[1] We will refer to Casa Clara Condominium Association, Inc., 642053 Ontario, Inc., Christopher H. Chapin, Lloyd Roper, Wilburn Johnson, Arnold Blatt and Andrew J. Wolszczak and Patricia Wolszczak collectively as "petitioners" or "homeowners", although separate reference to their cases will be to "Casa Clara", "Ontario", "Chapin", etc., respectively. The Records on Appeal for Casa Clara and Ontario were consolidated below and will be referred to as "Casa Clara/Ontario R. __". The Records on Appeal for Chapin, Roper, Johnson, Blatt, and Wolszczak were not consolidated below and will therefore be referred to separately, as in "Chapin R.__", "Roper R. __", etc.

[2] Section 553.70, et. seq., Florida Statutes.

[3] Toppino also contends that purchasers of its concrete disclaimed all warranty rights. See, e.g., disclaimer on the typical Toppino delivery ticket attached to the Second Amended Complaint in Chapin. Chapin R. 381. In related cases still pending in the trial court below, and in the U.S. District Court, Southern District of Florida, several other plaintiffs who purchased directly from

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Court of Appeal for the Third District affirmed the dismissals and this Court has granted review of the Third District's decisions in this consolidated case.

Reinforced Concrete[4]

Toppino's concrete was used to build the "reinforced concrete" structural frames of the petitioners' homes. When concrete is used in a structural component of a building (a column, beam, slab or shear wall), it must be reinforced with steel. Concrete itself has poor "tensile" strength -- it can be pulled apart easily. However, it has excellent "compressive" strength -- it will resist being crushed. Because structural components of a building must resist all kinds of forces (including tensile and compressive), the use of concrete and steel together creates a building member that satisfies strength requirements efficiently and economically.[5] Reinforced concrete members are built on site by building wooden forms in the shape of the desired component. Steel reinforcing rods or bars ("rebars") are located within the forms, and concrete is then poured into the form and allowed to harden or "cure."

The Preparation of Concrete

Concrete is prepared by suppliers, like Toppino, by mixing portland cement, water and "aggregate" (sand and pieces of rock of variable sizes). Portland cement is itself a manufactured

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Toppino and thus have contractual privity, have been confronted with the disclaimer of warranty, the validity of which has yet to be tested in court.

[4] For a general discussion of concrete, see J. Feld, "Concrete Failures", 19 Am. Jur. Proof of Facts at 455-545.

[5] Concrete can also be used without reinforcing where little tensile strength is required, e.g. concrete blocks which are used in a non-load bearing fashion, and sidewalks.

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product which can be made anywhere, stored for long periods of time, and shipped to distant locations for actual use.[6] When portland cement is combined with water it undergoes a chemical reaction that results in its hardening.[7] The initial hardening occurs quickly, requiring placement of the wet concrete in its final form within approximately 90 minutes from the mixing of its ingredients.[8] Thus, having virtually no "shelf-life," concrete must be mixed either at the building site or in trucks as it is being delivered to the site by local suppliers like Toppino (so-called "ready-mixed" concrete).

Concrete is prepared in varying strengths (usually a function of the proportion of cement in the mix) depending upon the particular load requirements of different parts of the building. Ready-mixed concrete is therefore ordered on a truck-by-truck basis as it is needed on the job.

The manufacture of concrete is, then, inherently a local process, fundamentally different from the manufacture and distribution of other building products. Concrete cannot be maintained in inventory or stored centrally, and it cannot be sold through regional distribution networks. A concrete supplier tailors each batch to the particular job, thus contributing a "service" to the construction process in addition to the "products" (cement, rock and water) that go into its concrete. Functionally

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[6] "Portland" cement derives its name from portland stone, from which better cements were made at the time its inventor, Joseph S. Aspdin, first produced it in 1824. See Feld, op. cit. at 459.

[7] Depending upon the size and nature of the ingredients with which it is combined, the resulting product may be mortar (sand), stucco (sand and lime) or concrete (rock and sand).

[8] Toppino's typical delivery ticket states: "We are not responsible for concrete left in the mixer for over 90 minutes...." Chapin R. 381.

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a concrete manufacturer is as much a building subcontractor as a material supplier.

The Problem with Chlorides

Normally concrete and reinforcing steel do not react to one another. The presence of chlorides in the concrete, however, will cause the reinforcing steel to rust. When steel rusts it expands, and does so with such force that it causes the concrete, with its low tensile strength, to crack and break off chips, scales or slabs, a process called "spalling".[9] The steel itself loses its strength by rusting and disintegrating. This problem has been recognized in the concrete industry since at least the early 1950s. The American Concrete Institute ("ACI"), the organization responsible for research and development of standards and specifications for the concrete industry, has placed limits on chlorides in the standards it promulgates to the industry.[10] The ACI standards have been adopted as part of local building codes, including the Standard Building Code and the South Florida Building Code, which govern construction in many parts of Florida.[11]

Toppino's Chloride-Filled Concrete

Toppino, the dominant concrete supplier to the middle and lower Florida Keys, dredged most of the aggregate used in its concrete from its ocean pits at Rockland Key, near Key West. It is common knowledge that sea water contains salt and that salts (for example, sodium chloride and calcium chloride) contain chlorides.

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[9] "See, e.g., Preliminary Report of Engineering Analytics, Inc., at Casa Clara/Ontario R. 770-811.

[10] See, e.g., "Building Code Requirements for Reinforced Concrete (ACI 318-77)" at Casa Clara/Ontario R. 603-620.

[11] The Standard Building Code has been adopted in Monroe County.

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Although Toppino was aware as early as the 1950s of the importance of reducing the content of chloride in concrete,[12] was aware of the development of specifications prohibiting salt in the 1970s,[13] and had in fact been sued for the damage caused to buildings by its excessively salt-contaminated concrete,[14] Toppino continued to supply concrete made from its salt water aggregate through the 1970s and early 1980s, when the petitioners' homes were built.

The inevitable consequence of using Toppino-prepared concrete in the petitioners' homes was the wholesale deterioration of every structural component where the concrete came in contact with reinforcing steel. The resulting cracking and spalling places persons inside their homes and beneath balconies outside at risk of serious personal injury. Moreover, the structural integrity of the buildings is being progressively reduced: the rusted steel continues to lose its tensile strength, the affected concrete continues to lose its compressive strength, and, as more cracks and spalls appear, rainwater can leak into the structure to cause more rust, further accelerating the destruction. According to Engineering Analytics, Inc., describing the destruction of the home in Ontario (which is typical of all cases):

> The findings of these visual inspections indicated that structural deterioration in the form of concrete cracking, concrete spalling and corrosion of the reinforcing steel, all of which results in a loss of structural capacity, a loss of effective service life and

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[12] See portion of deposition of Donald E. Brassington, August 19, 1987, in prior case, Hawks Nest Condominium, Inc. v. Charlie Toppino & Sons, Inc., Dade County Circuit Court Case No. 82-18593, appearing at Casa Clara/Ontario R. 339-345.

[13] Id.

[14] See Memorandum of Law in Opposition to Defendant, Charley Toppino and Sons, Inc.'s Motion to Dismiss and attachments thereto at Casa Clara/Ontario R. 307-350.

> a hazard to building occupants, was occurring and is continuing to occur in the majority of the structural columns, beams and slabs.
>
> Results of tests conducted by Construction Technology Laboratories indicate high soluble chloride content in the concrete. In the opinion of the writer, the high chloride content is the cause of damage and deterioration throughout the structure. In the presence of oxygen and moisture the high chloride content of the concrete causes corrosion of the embedded reinforcing steel. This corrosion activity results in cracking and spalling of the concrete covering the reinforcing bars and in the deterioration of the reinforcing bars themselves.

Casa Clara/Ontario R. 812.

While concrete is ordinarily tested by contractors for such characteristics as consistency when delivered and compressive strength after hardening, it is rarely tested for the presence of chlorides or other chemical substances. The cracking and spalling due to chlorides in reinforced concrete takes several years to appear. Therefore, the presence of chlorides in concrete is a latent defect that would not be discovered until years after construction of the home.

The Petitioners

The petitioners in Chapin, Ontario, Blatt, and Roper hired general contractors to improve their realty by building homes on their land. The unit owners of petitioner Casa Clara Condominium Association, Inc. purchased their homes[15] from either the original developer, the subsequent developer,[16] or previous purchasers. Two of the homeowners, the Wolszczaks and Wilburn Johnson, purchased their homes from owner-builders (neither of whom was a commercial

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[15] These homes are condominium parcels, which consist of individual apartment units together with undivided interests in the common elements.

[16] After the project failed, lenders assumed the role of subsequent developer.

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builder). Johnson had been involved in earlier litigation concerning other defects (before his discovery of the latently defective concrete sued on here) and had given that owner-builder a general release. In none of these situations was any homeowner in direct contractual privity with Toppino, who prepared the concrete and delivered it directly to the building sites upon the orders of those responsible for building the structures.

Rulings by the Trial Court

The homeowners brought their separate damage actions against Toppino in circuit court in Monroe County, pleading, inter alia, negligence and strict liability.[17] The trial court dismissed those counts, ruling that destruction of the homes, clearly caused by Toppino's concrete, was not damage to property other than the concrete itself, and that neither the destruction nor the hazardous condition it created constituted damage recoverable in tort.[18] Petitioners also sued Toppino for breach of implied warranty and for violation of the Florida Building Codes Act, Section 553.70, et seq., Florida Statutes, which in Section 553.84 creates a right of action for persons damaged by such violations. The trial court

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[17] The defective conditions were described similarly in the several complaints below. The pleadings dismissed were the Amended Complaint in Casa Clara (Casa Clara/Ontario R. 1201-1217), the Second Amended Complaint in Ontario, (Casa Clara/Ontario R. 450-477), and the Amended Complaints in Chapin, Roper, Johnson, Blatt, and Wolszczak (respectively, Chapin R. 363-383; Roper R. 427-459; Johnson 550-562; Blatt R. 397-414; and Wolszczak R. 304-377.)

[18] In Ontario the petitioner sought to file a Third Amended Complaint, better to establish, through allegations reflecting property damage and the hazardous nature of the conditions created by the defective concrete, the basis for tort recovery. Casa Clara/Ontario R. 770-813. The motion for leave to amend the complaint was made ore tenus and denied by the trial court. Casa Clara/Ontario R. 766-767. Petitioner moved for reconsideration, attaching the proposed Third Amended Complaint with the reports of Construction Technologies Laboratories, Inc. and Engineering Analytics, Inc. included as exhibits, Casa Clara/Ontario R. 770-811, but the trial court denied that motion as well. Casa Clara/Ontario R. 1071-1073.

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dismissed the warranty counts because of the lack of privity. It dismissed the Section 553.84 counts because it decided that a person or entity labeled as a material supplier is not governed by the building code and therefore cannot be sued for committing building code violations.

Affirmance by the District Court of Appeal

On consolidated appeal to the District Court of Appeal for the Third District, the homeowners contended that they should be allowed to recover in tort because the concrete is "a product in a defective condition unreasonably dangerous to the user or consumer or to his property,"[19] 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 also contended that the progressive destruction of their homes and the persistent risk of injury from falling concrete or structural collapse bring their claims within the safety-related sphere of tort law and outside the scope of the economic loss rule. Finally they argued that if they had no other viable remedy against Toppino, Florida law must provide them a remedy in tort.

The district court, however, rejected the homeowners' argument with respect to the tort counts:

> [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.

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

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Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 588 So.2d 631, 633-634 (Fla. 3d DCA 1991).[20] The district court also agreed with the trial court that, "as a material supplier, Toppino is not charged with a duty of compliance of the State Minimum Building Codes," and that therefore no cause of action lay for violating Section 553.84, Florida Statutes. Id. at 634. Finally, the district court rejected sub silentio the homeowners' alternative argument that, assuming they have no other remedy against Toppino for the defective concrete,[21] Florida law must provide them a remedy in tort.

Thus, the state of the law as now declared in the Third District is that a concrete supplier is immune from liability to third parties, even where its defective product demolishes homes.

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[20] The district court adopted its decision in Casa Clara in the companion appeal, Chapin v. Charley Toppino & Sons, Inc., 588 So.2d 634 (Fla. 3d DCA 1991).

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

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SUMMARY OF THE ARGUMENT

These homeowners have suffered damage to their property resulting from defective concrete. They were denied recovery in warranty because they were said to lack privity with Toppino. They were denied recovery in tort because the district court, applying the economic loss doctrine, held that they had not suffered damage to "other property." That ruling necessarily rested on the premise that homes are products.

But homes are not products, and homes do not "damage themselves" when destroyed by the concrete used to construct them. The fundamental distinction between real property and goods prevents mechanical application of the economic loss doctrine to cases where building products damage realty.

Where the damage to property also results in a growing hazard to the occupants, the economic loss rule is even less applicable. Tort law is intended to remedy damages arising from personal injury, and it makes no sense to wait for injury to occur before using tort remedies to prevent future harm.

The economic loss rule is premised upon contracting parties having bargaining power, warranties, and insurance to allocate the risk of loss. But as Florida has often recognized homeowners do not have equal bargaining power when dealing with builders of homes. Moreover, any UCC warranties given by sellers of products are not passed on to homeowners by vendors of homes or construction contractors. Also, typical homeowners' insurance does not cover loss from defective construction, whereas material suppliers, like Toppino in this case, commonly purchase product liability insurance against losses arising from the sale of defective products.

Therefore Florida, like most other jurisdictions, treats homeowners differently from commercial entities and provides them remedies for just such losses as these homeowners are now suffering.

Florida courts have rejected a blanket application of the economic loss rule, carving out an exception where a relationship of knowing reliance among the parties rationally limits liability. Construction projects by their nature bring together contracting parties in relationships of mutual interdependence and reliance. This unique set of interrelationships makes the economic loss rule an unwarranted impediment to recovery by parties bound together in the construction process. There was never a question that the owners of the homes relied upon all contractors and material suppliers to act with care and to supply products that were not unreasonably dangerous to their homes. And no purpose is served now by immunizing Toppino from liability for its defective concrete.

Finally, because the local building code regulated the manufacture of ready-mixed concrete, Toppino had a duty to comply with the code. The label "materialman" without more should not shield Toppino from violations of the code, especially when no other party in the construction process could possibly have been intended to comply.

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ARGUMENT

POINT I

THE ECONOMIC LOSS RULE DOES NOT BAR THE CLAIMS MADE BY THE PETITIONERS AGAINST TOPPINO IN THIS CASE

A. THE ECONOMIC LOSS RULE DOES NOT BAR CLAIMS FOR DAMAGE TO REAL PROPERTY CAUSED BY DEFECTIVE CONCRETE

Under review by this Court is a decision that declares that the total destruction of the petitioners' homes by defective concrete does not constitute damage to property cognizable in tort. The decision extends the economic loss doctrine beyond the scope intended by this Court.

The "Economic Loss" Rule and Damage to Other Property

Where a defective product causes personal injury or damage to property other than the product itself, Florida law allows recovery in tort, including the cost of repairing the product itself. Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987). Where, however, no claim is made for personal injury or damage to property other than the product itself, the "economic loss" rule may limit a plaintiff to contract remedies for the recovery of any economic loss.

"Economic loss" generally arises where a "product has not met the customer's expectations, or, in other words, [where] the customer has received 'insufficient product value.'"[22] It has been defined as "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits -- without any claim of personal injury or damage to other property

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[22] Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d at 901, citing East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).

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. . . as well as the diminution of the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold."[23]

Under the economic loss rule, damage to property must be to "other" property, that is, property distinguishable from the product that causes damage. Thus, one may not recover in tort "where a product injures only itself." Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d at 901.

In this case, the "product" that has destroyed the petitioners' homes is Toppino's concrete. The "other property" of the petitioners that has been damaged consists of the individual building components that, with the concrete, comprise the homes, such as reinforcing steel, exterior stucco and paint, interior walls, tile, plumbing and electrical systems, and virtually every other building component of the homes, and the structures themselves.[24] Also, the homeowners' respective interests in their real property have been substantially reduced in value and are thus damaged. The homeowners must, of course, disclose the existence of the defective concrete to prospective purchasers, Johnson v. Davis, 480 So.2d 625 (Fla. 1985), with the result that the marketability of their properties has been dramatically reduced, virtually to land value alone.

Notwithstanding the devastating loss to the homeowners, the

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[23] Moorman v. National Tank Co., 435 N.E.2d 443, 449 (Ill. 1982), citing Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966) and Comment, Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages - Tort or Contract?, 114 U. Pa. L. Rev. 539, 541 (1966).

[24] Buildings can be viewed as having structural integrity and architectural identities greater than the sum of their individual components.

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district court refused to recognize the destruction of the petitioners' homes as property damage. The district court failed to distinguish between the homes and realty that were damaged and the concrete that caused the damage. It announced in effect that the petitioners bought one "product", their home, and only that one product was damaged. By equating the petitioners' real property and its improvements to a product and its components, the court reached a result that is factually insupportable and legally impossible.[25] Essentially the district court held that a building product can never cause damage cognizable in tort to other building components or to the real property into which the product is incorporated. That holding necessarily rests upon the fiction that the petitioners' homes are "products", which axiomatically cannot be.

Realty Versus Products

Florida law distinguishes between real property and goods used to improve it. Goods that are incorporated into real property become realty. Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA), adopted, 264 So.2d 418 (1972).[26] Nonetheless, this Court has recognized that a claim for strict liability might lie where a defective product used to improve realty causes damage to the real property. Edward M. Chadbourne, Inc. v. Vaughn, 491 So.2d 551, 553

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[25] As we have said, the petitioners did not purchase the concrete; they either purchased interests in real property or contracted to improve real property they already owned.

[26] In Gable v. Silver, the court adhered to the traditional distinction between real property law and the law of goods by declaring flatly that: (1) improved real property is not a good; (2) a product (an air conditioning system) becomes realty when affixed to real property (thereby shedding any UCC warranties); and (3) a seller of improved realty does not therefore give UCC warranties to the buyer. In order to maintain the historical division -- yet at the same time afford a new home purchaser a remedy for defective construction -- the court created common law implied warranties of fitness and merchantability for new homes.

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n.1 (Fla. 1986); accord Craft v. Wet 'n Wild, Inc., 489 So.2d 1221 (Fla. 5th DCA 1986). Although incorporated into realty, goods do not lose their identity where distinct damage can be traced from them and liability assigned to them.

The ruling below, that the realty -- the homes -- effectively "became" the concrete stands on its head the fundamental principle that an improvement becomes real property. By this ruling the district court immunized Toppino from liability and deprived the petitioners of their previously recognized tort remedies for property damage. Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA), rev. dismissed, 411 So.2d 380 (1981) (defective stucco causing "pop-outs" in surface of wall basis for strict liability in tort); Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978) (non-privity contractor liable in negligence for water rot and termite infestation due to faulty construction); see also Conklin v. Hurley, 428 So.2d 654 (Fla. 1983) (purchaser of lot has action in negligence against non-privity builder of collapsed seawall).

The fiction created by the district court that a "home is a product" rests on the improper analogy of a building to a machine. We do not question that where a machine fails as a result of a defective component no action in tort may lie, because that is merely a case of a "product injur[ing] only itself." Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d at 901. But although both improved real property and machines can each be said to have components that does not mean that a home is a good, Gable v. Silver, 258 So.2d 11, or that real property is a product,

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Edward M. Chadbourne, Inc. v. Vaughn, 491 So.2d 551.[27] There is a fundamental distinction between the way homes are constructed and sold and the way products are manufactured and distributed. Because of that fundamental distinction, reliance on cases involving machines[28] is simply misplaced.

Services versus Products

As we have said, in Casa Clara, Johnson, and Wolszczak, the petitioners acquired an interest in land with improvements; there was no purchase of a "product" and, of course, no UCC warranty was given. Gable v. Silver, 258 So.2d 11. In Ontario, Chapin, Blatt, and Roper the petitioners contracted for construction on land already owned by them, and thus for the services of the general contractor who in turn incorporated building materials ("products") into the improvements. The great variety of materials, components and fixtures needed to build a home is often obtained from different manufacturers and suppliers chosen based upon architectural or financial considerations.

Because a contractor provides services and does not sell goods, a contractor does not give UCC warranties when improving real property. Jackson v. L.A.W. Contracting Corp., 481 So.2d 1290 (Fla. 5th DCA 1986); Arvida Corp. v. A.J. Industries, Inc., 370

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[27] The historical distinction in the law between goods or chattels and real property is well grounded in the physical differences between them. Goods (toasters, televisions, automobiles, and the like) are fungible and intended to have a limited useful life. Real property is unique, and a home is intended to last a lifetime and be passed on from one generation to another. As we have discussed, homes are built one at a time, not mass-produced and distributed to an anonymous market.

[28] See, e.g., Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (electrical generator); Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So.2d 992 (Fla. 1987) (heat transfer unit); East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) (ship turbine); Florida Power & Light Co. v. McGraw Edison Co., 696 F. Supp. 617 (S.D. Fla. 1988), aff'd, 875 F.2d 873 (11th Cir.1989) (electrical transformer).

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So.2d 809 (Fla. 4th DCA 1979). While the suppliers of building products may give UCC warranties to the contractor, those warranties do not get passed on to the owner.[29] The warranty "chain", from manufacturer through its distributors and suppliers to the contractor, is thus broken upon incorporation of the product into the realty. Therefore, in neither the case of the purchase of a home nor the contracting for the construction of a home does the homeowner come into privity with a "seller" of the building products such that any UCC warranties or other contractual rights come into play.

The unique nature of real property is also evident from the manner in which real property rights are conveyed. The conveyance of real estate contemplates the sale of certain "interests" in the land, which may or may not include improvements. Moreover, the various legal interests composing real property are infinitely severable: among others, one may purchase the entire fee, the underlying land alone, the buildings alone, air rights alone, a life estate, a possessory interest alone, easements of access or light and air, subsurface rights, or an apartment without the walls, ceiling and floors (a condominium).

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[29] Providers of services are not required by law to warrant the results of their efforts, and their performance can only be judged by those standards of care exercised by other members of their trade or profession. See Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc., 168 So.2d 333, 335 (Fla. 2d DCA 1964), cert. denied, 173 So.2d 146 (1965) (design engineer does not "warrant" his service or the tangible evidence of his skill to be "merchantable" or "fit for an intended use."); Lee County v. Southern Water Contractors, Inc., 298 So.2d 518, 520, n. 1 (Fla. 2d DCA 1974) (supervising engineer not a "guarantor" of result). The court in Arvida Corporation v. A.J. Industries, Inc., 370 So.2d at 810, n. 5 observed:

> [T]he introduction of implied warranties in service transactions would impose standards on human beings rather than their artifacts. Conceivably all sorts of personal performances for hire could be subjected to judicial testing as to whether they met the implied warranty of "merchantability" or whatever else it is that is impliedly warranted.

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The physical attributes of real property may evolve or change over time as it is "improved", unlike a product, the nature of which is fixed when it leaves the manufacturer and is marketed through its distribution system. Although a good (product) affixed to a realty becomes part of the realty, Gable v. Silver, 258 So.2d 11, many products (for example, mechanical, plumbing and electrical components) can at any time be removed from the realty and subsequently sold again as goods. Such products thus retain their identities, although every time such an improvement is made the definition of the realty is changed.

Damage to Real Property

In short, the simple device by which the district court concluded that the petitioners did not suffer damage to their property -- equating the product (concrete) with the realty -- defies both long-standing legal principles and the realities of home construction. The defective concrete is a product that retains a distinct identity, which is not destroyed by virtue of its incorporation into the realty. Likewise all other products used to improve the property, whether or not incorporated at the same time as the concrete, retain their identities. The damage caused by the concrete to the other building products as well as to the realty as a whole constitutes damage to property other than the concrete itself.[30]

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[30] If defective new wiring is incorporated into an existing building, causing a fire, there is clearly damage to property other than the wiring itself. Likewise, where latently defective materials used in the construction of an existing building (say Toppino's concrete) damage a newly-added component (say stucco, paint, tile, or windows) there is damage to other property. In the case of a new building, each stage of construction (structure, roof, mechanical, electrical, finishes) progressively changes the realty, and in the event of harm caused by any one component to an earlier- or later-added stage must be considered damage to "other property".

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This kind of damage, caused by a "product in a defective condition unreasonably dangerous to the user or consumer or to his property," establishes the basis for recovery under strict tort liability under Restatement (Second) of Torts § 402A. Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033. In Adobe the wholesale seller of defective stucco that caused walls to deteriorate was held strictly liable for the resulting damage to the building.[31] Adobe has never been overruled or criticized by this Court and in fact was earlier recognized by the Third District itself as being a case where "[s]trict liability may be imposed for damages to property. . . ." Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc., 444 So.2d 1068, 1070 (Fla. 3d DCA 1984).

The principle that damage to a building caused by a defective building material is damage to "other property" has been recognized in other jurisdictions as well. In Adcor Realty Corp. v. Mellon Stuart Co., 450 F. Supp. 769 (N.D. Ohio 1978), the court articulated the rationale:

> The brick in issue, being permanently incorporated into the building itself, became affixed to realty and was therefore real property . . . . Plaintiffs' action is thus a products liability action for injury to real property grounded in tort. [Citations omitted.]

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

> There is no doubt that the bricks in issue were personalty until such time as they were incorporated into the building. * * *

Id. at 770. In Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc., 312 A.2d 322 (Del. Super. Ct.), aff'd on other grounds, 336 A.2d 211 (1975) the court considered the property damage caused by a defective product an "accident"[32] because it was not caused by "normal wear and tear," and declared the action to be "a case of physical injury to property and not mere economic loss." Id. at 329.[33]

In effect, by ruling as it did the Third District improperly carved out an exception to strict product liability in Florida as a matter of law. But Section 402A does not create an exception with respect to building products incorporated into structures. Moreover, there is no precedent in Florida decisional law for treating building products differently from other products that damage property. Although the district court of appeal expressly rejected Adobe as inapplicable on the basis of Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 ("FPL"),[34] FPL does not stand for a change in the rule allowing

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[32] The product, a polyester resin, applied as a lining to chemical storage tanks, caused premature peeling of the lining, and rusting to the surfaces of the tanks.

[33] See also U.S. Home Corp. v. Geo. W. Kennedy Construction Co., Inc., 565 F. Supp. 67 (N.D. Ill. 1983) (defective pipe damaging other segments of sewer); Capitol Builders, Inc. v. Shipley, 439 N.E.2d 217 (Ind. App. 1982), rev'd on other grounds, 455 N.E.2d 1135 (1982) (installation of defective bricks causing injury to real property); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979) (defective steel joists resulting in roof collapse causing "physical harm to plaintiff and its property" recoverable under § 402A strict liability); and Hovenden v. Tenbush, 529 S.W.2d 302 (Tex. Ct. App. 1975) (deterioration of wall caused by defective bricks' "shedding" mortar recoverable under § 402A strict liability).

[34] See Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 588 So.2d at 634, n.2.

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tort recovery for damage to real property. Rather, this Court explicitly held the opposite:

> [W]e 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.

Id. at 902. The district court thus misapplied FPL to avoid conflict with Adobe.[35]

B. THE ECONOMIC LOSS RULE DOES NOT BAR CLAIMS TO CORRECT HAZARDOUS CONDITIONS CAUSED BY DEFECTIVE BUILDING PRODUCTS

The damage to the petitioners' homes also carries with it a risk of personal injury from the loss of structural integrity of each building as a whole and from the danger of pieces of concrete and steel falling from the structural components of the buildings. These ever-present risks bring the petitioners' claims even more tightly into the sphere of tort law, the central concern of which is safety. The signal decision in Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965), widely cited to explain the economic loss rule,[36] emphasized focusing on "risk of physical injury" as opposed to "risk that the product will not match . . . expectations" in analyzing whether recovery for a defective product lies in tort.[37]

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[35] 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. FPL did not involve the destruction of a home by a latently defective product furnished by a non-privity supplier. There were no allegations in FPL of damage to property other than the product itself, or of a hazardous condition.

[36] East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. at 867-868; Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d at 900-901.

[37] As stated in Seely:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard

While the present cases do not involve actual personal injury, they do involve the risk of personal injury attendant upon the type of physical damage that has actually occurred. There is no compelling reason why tort law should not be used prophylactically even as it is used to compensate for injury after the fact.

This exact analysis has been employed in several non-Florida cases also dealing with defective building products incorporated into building walls. In Philadelphia National Bank v. Dow Chemical Co., 605 F. Supp. 60 (E.D. Pa. 1985), the federal court rejected application of the "economic loss" rule and found that under Pennsylvania law strict liability would apply to a claim arising out of the use of "Sarabond", a Dow product mixed into the mortar used to apply brick panels to exterior walls of the bank building.[38] The court noted:

> PNB has come forward with evidence that "other property" has in fact been injured - the brick panels and steel infrastructure of the building. Furthermore, it has presented evidence that a very real risk of injury to persons, by way of crumbling mortar and falling bricks, is present.

> of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

403 P.2d at 151.

[38] The claim of the bank was that "Sarabond has caused corrosion of metals embedded in the mortar and brick panels of its building and cracking of the masonry on the exterior of the building." 605 F.Supp at 61.

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The court concluded that Pennsylvania law

> would permit recovery in tort where an allegedly defective construction product causes injury to other components used in construction and creates a real, unspeculative risk of harm to passers-by on the street below. Under the circumstances here presented I believe that the safety-related policies behind tort law are implicated.

Id. at 63-64.

Likewise, in Trustees of Columbia University v. Mitchell/ Giurgola Associates, 492 N.Y.S.2d 371, 373 (App. Div. 1985), the New York court rejected application of the "economic loss" rule and found the supplier of concrete panels and tiles strictly liable for damage to the curtain wall in which they were installed:

> [We] hold that plaintiff's claim against Exposaic set forth a viable cause of action for property damage to its building arising from the allegedly defective materials supplied by Exposaic, which materials were to be installed as part of a building wall located on a crowded university campus and thus constituted an unduly dangerous product for which damages under a strict liability theory may be maintained.[39]

Even where there has been no actual property damage, but where building materials incorporated into a structure create a hazardous condition, courts have rejected the economic loss rule. For example, in City of Manchester v. National Gypsum Co., 637 F. Supp.

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[39] 492 N.Y.S.2d at 376. The court noted that the case was "far different from [a situation] which merely involved a piece of equipment that did not function properly for which the owner incurred costs of repair," and more akin to a case where

> the damages which resulted to a crane when it collapsed due to defects in certain of its bolts constituted "physical injuries to the crane incurred in an accident caused by the defective parts" and were compensable under the doctrine of strict products liability. The extensive injuries to the instant wall were similarly incurred in an accident caused by defective parts - i.e., the pre-cast concrete panels and tiles fabricated by Exposaic. That a wall rendered defective and in imminent danger of collapse by improperly fabricated materials constitutes the type of dangerous product for which the manufacturer owes a duty to the ultimate user under the doctrine of strict product liability bespeaks itself.

Id. at 376-377.

646 (D.R.I. 1986), the plaintiff City had used National Gypsum's plaster products containing high levels of asbestos in numerous schools and other public buildings. Notwithstanding the absence of damage to "other property", the court found the economic loss rule inapplicable where the "asbestos products ... posed an imminent and serious health danger" and the "contamination ... made the buildings unsafe, thereby damaging the buildings and requiring the costly removal of the asbestos so as to restore the structures to their prior safe condition." 637 F. Supp. at 647-48. See also City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987) (health risk from asbestos fireproofing not the type of risk normally allocated by contract).[40]

Similar reasoning underlies the Florida decision in Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 51 (Fla. 4th DCA 1981), rev. denied, 417 So.2d 328 (1982), which held that negligence was available to recover economic losses stemming from safety-related construction defects presenting a risk of personal injury to the plaintiffs:[41]

> 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. As the Indiana Supreme Court in Barnes v. Mac Brown and Co., 342 N.E.2d 619, 621 (Ind. 1976) stated:

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[40] And see Pearl v. Allied Corp., 566 F. Supp. 400 (E.D. Pa. 1983) (urea-formaldehyde insulation in homes presented risk of injury to persons and property, permitting recovery in tort).

[41] The defects in Drexel were both violations of the South Florida Building Code: a ceiling roof assembly not capable of a one-hour fire resistive rating, and bedroom awning windows incapable of providing a sufficiently clear opening for egress in the event of fire.

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> If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?

See also Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336 (Md. 1986) (citing with approval Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.).

Although in the present case the Third District acknowledged that the homeowners' complaints alleged "risk of personal injury,"[42] the court rejected without comment the principle that tort law should prevent future, as well as compensate for past, personal injuries. The decision below therefore conflicts with the better-reasoned decision of the Fourth District in Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc. and numerous other non-Florida decisions which recognize that the broad safety-policy considerations of tort law should not be abridged by a formulaic application of the economic loss doctrine. Either property damage or actual or threatened personal injury should be sufficient to afford plaintiffs remedies in tort.[43] A fortiori, where, as here, more than one of them is present there should be no

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[42] Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 588 So.2d at 633.

[43] See Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (property damage only); cf. Monsanto Agricultural Products Co. v. Edenfield, 426 So.2d 574 (Fla. 1st DCA 1982) (property damage only, where the damage is directly caused by product); Drexel Properties, Inc., 406 So.2d 51 (safety risk only).

doubt that tort remedies are appropriate.[44]

C. THE ECONOMIC LOSS RULE SHOULD NOT BE USED TO DENY HOMEOWNERS THE RIGHT TO RECOVER FOR DAMAGE TO THEIR HOMES CAUSED BY DEFECTIVE CONCRETE

By ruling that the destruction of buildings by a single building product is not property damage and that a hazardous condition is not remediable in tort, the district court expanded the economic loss rule. It denied the homeowners their right to recover for shoddy construction of their homes by applying a doctrine intended to govern commercial transactions.[45]

The economic loss rule is plainly rooted in the world of business; this Court has applied the rule to define remedies among profit-making entities involved in commercial transactions.[46] The policy behind the economic loss rule is to encourage parties "to negotiate economic risks through warranty provisions and price." Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d

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[44] In Ontario, assuming arguendo that the allegations regarding the safety risk were insufficient to state a cause of action in tort, the trial court also erred in denying petitioner's motion to amend further for the purpose of setting forth the safety aspects of the defect with greater specificity. In that case, the district court should have reversed the trial court and allowed the petitioner to proceed on its proposed Third Amended Complaint.

[45] Likewise, in narrowly construing the Minimum Building Codes Act to exclude concrete manufacturers, the district court arbitrarily, and again without precedent, limited the reach of consumer-oriented legislation clearly designed to protect the public at large, of which homeowners constitute a significant portion. See discussion under Point V, infra. The intent of the Florida Building Codes Act is to have a far-reaching palliative effect:

> **§ 553.72 Intent.** - The purpose and intent of this act is to provide a mechanism for the promulgation, adoption, and enforcement of state minimum building codes which contains standards flexible enough to cover all phases of construction and which will allow reasonable protection for public safety, health, and general welfare for all people of Florida at the most reasonable cost to the consumer. [Emphasis supplied.]

[46] See, e.g., Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899; Aetna Life & Casualty Co. v. Therm-O-Disc, Inc., 511 So.2d 992; AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180 (Fla. 1987); see also East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).

at 901. This policy is based upon the implied assumption that purchasers can effectively protect their own interests. Id. at 902 ("further, the purchaser . . . can protect his interests by negotiation and contractual bargaining or insurance . . . ."); American Universal Insurance Group v. General Motors Corp., 578 So.2d 451, 455 (Fla. 1st DCA 1991) ("relegating parties to contract remedies . . . allows parties to freely contract and allocate the risks of a defective product as they wish . . . .").

Unequal Bargaining Power

But Florida courts have recognized that purchasers of homes are in an unequal bargaining position with builders and developers. Conklin v. Hurley, 428 So.2d at 657-658 (". . . purchaser of a home is not in an equal bargaining position with the builder-vendor . . . and is forced to rely upon the skill and knowledge of the builder-vendor with respect to the materials and workmanship of an adequately constructed house"[47]); Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA), adopted, 264 So.2d 418 (1972) ("To apply the rule of caveat emptor . . . in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice"[48]).

Accordingly, Florida has recognized that purchasers of homes should be treated differently from purchasers of commercial property. Compare Gable v. Silver (implied warranties of fitness and merchantability extended to purchase of new condominiums) with Conklin v. Hurley (no implied warranties extended to purchase of

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[47] Quoting DeRoche v. Dame, 430 N.Y.S.2d 390 (App. Div.), appeal dismissed, 413 N.E.2d 366 (N.Y. 1980).

[48] Quoting Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966).

undeveloped lots by land investors); compare Johnson v. Davis, 480 So.2d 625 (Fla. 1985) (seller of home has duty to disclose latent defects), with Futura Realty v. Lone Star Building Centers, 578 So.2d 363 (Fla. 3d DCA), rev. denied, 591 So.2d 181 (1991) (seller of commercial property has no duty to disclose concealed pollution).

Lack of UCC Warranties

The premise of the economic loss rule that the parties can "negotiate economic risks through warranty provisions and price," Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d at 901, is based upon the assumption that parties are in contractual privity or, at least, have the benefit of UCC warranties flowing from the manufacturer to the end-user. But as we have said, any UCC warranties originating with manufacturers of building products run to the contractor not the purchaser of a home. Jackson v. L.A.W. Contracting Corp., 481 So.2d 1290; Arvida Corp. v. A.J. Industries, Inc., 370 So.2d 809. Thus, homeowners are legally excluded from the panoply of commercial rights and remedies used to justify the economic loss rule in business transactions.

Lack of Insurance to Cover Loss

While a purchaser of a product "can protect his interests . . . by insurance," Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d at 902, homeowners do not ordinarily have insurance to protect themselves against latent defects in construction. A typical homeowner's "all-risk" insurance policy does not cover losses caused by latent defects. See Butki v. United Services Automobile Association, 274 Cal. Rptr. 909 (Ct. App. 1990)

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(latent construction defects excluded under homeowner's "all-risk" policy); Rock v. Allstate Insurance Co., 500 N.Y.S.2d 460 (Ct.Cl. 1985) (same); Luttenberger v. Allstate Insurance Co., 470 N.Y.S.2d 988 (Dist. Ct. 1984) (same). We suggest that the average homeowner would not anticipate the occurrence of latent defects, be aware of the limitations of the typical homeowner's policy, or know to contract for additional insurance protection against that type of loss.[49]

On the other hand, insurance covering product liability is commonplace for material suppliers.[50] Property damage to structures caused by defective materials would, of course, be more easily anticipated by the manufacturer or supplier, who, like Toppino in the present case, could obtain insurance to offset the risk of liability.[51] Obviously the cost of this coverage can be built into the supplier's price structure and passed along to purchasers of the product and ultimately to the homeowner. Thus material suppliers, unlike homeowners, can easily shift the risk of this kind of loss through insurance and pass the cost on to the end-user of the product.

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[49] See Michael D. Lieder, Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase, 66 Wash. L. Rev. 937, 977 (1991); and see Insurance Services Office, Inc., Form HO (1984), 1 Miller's Standard Insurance Policies Annotated, 200-218 (1988), a typical homeowner's policy, which excludes, inter alia, loss from "[f]aulty, inadequate or defective * * * materials used in repair, construction, renovation or remodeling . . . ."

[50] See generally the following Florida cases discussing comprehensive general liability insurance: Centex Homes Corp. v. Prestressed Systems, Inc., 444 So.2d 66 (Fla. 4th DCA 1983); Commercial Union Insurance Co. v. R.H. Barto Co., 440 So.2d 383 (Fla. 4th DCA 1983), rev. denied, 451 So.2d 850 (1984); and Tucker Construction Co. v. Michigan Mutual Insurance Co., 423 So.2d 525 (Fla. 5th DCA 1982); and see Maryland Casualty Co. v. Reeder, 270 Cal. Rptr. 719 (Ct.App. 1990).

[51] As alleged by the petitioners in their pleadings, Toppino did in fact protect itself against liability by purchasing product liability insurance. See, e.g., original complaint in Chapin, at paragraphs 6-13, Chapin R. 2-3.

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The Economic Loss Rule Should not Apply to Homeowners

The contract, warranty and insurance protections used to rationalize imposition of the economic loss rule in commercial transactions are not present in the purchase of homes. Without the ability to protect themselves contractually from latently defective building materials, homeowners occupy a vastly different position from that of commercial entities and are especially vulnerable. To treat them the same as businesses by applying the economic loss rule to deprive them of tort remedies is illogical and unfair.

Equating a homeowner with a commercial enterprise also contravenes Florida's long-standing policy recognizing homeowners as deserving of special consideration and giving them protection against defective construction practices. In Gable v. Silver, the Court rejected the rule of caveat emptor and extended implied warranties of fitness and merchantability to the purchase of new condominiums from builders. That decision and others[52] occasioned the court in David v. B & J Holding Corp. 349 So.2d 676, 678 (Fla. 3d DCA 1977), to describe Florida as "[b]eing a progressive state particularly in the area of condominium law with respect to protection of purchasers of such units."

In Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978), the First District approved an action in negligence as a remedy for the buyer of a used home against a contractor for a latently defective condition. The court there expressed the philosophy underlying all Florida decisions that have expanded the rights of home buyers as consumers:

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[52] Burger v. Hector, 278 So.2d 636 (Fla. 1st DCA 1973); Forte Towers South, Inc. v. Hill York Sales Corp., 312 So.2d 512 (Fla. 3d DCA 1975).

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> 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 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. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence. In our judgment, building contractors should be held to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence.

Id. at 143.

In Johnson v. Davis, 480 So.2d 625, this Court further restricted caveat emptor in the sale of both new and used homes, imposing upon the seller a duty to disclose to the buyer all "facts materially affecting the value of the property which are not readily observable and are not known to the buyer." Compare Futura Realty v. Lone Star Building Centers, 578 So.2d 363 (duty to disclose not extended to sellers of commercial property).

All of these decisions and numerous others involving the sale of homes,[53] clearly demonstrate that the purchaser of a home occupies a special position under Florida law. Where home buyers have been injured by shoddy construction, Florida courts have regularly created remedies if none existed.

No Alternative Remedy

Florida courts are generally loathe to deprive any injured party, whether a homeowner or not, of at least some remedy against

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[53] See, e.g., Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 51; Navajo Circle, Inc. v. Development Concepts Corp., 373 So.2d 689 (Fla. 2d DCA 1979); Strathmore Riverside v. Paver Development Corp., 369 So.2d 971 (Fla. 2d DCA), cert. denied, 379 So.2d 210 (1979); Parliament Towers Condominium v. Parliament House Realty, Inc., 377 So.2d 976 (Fla. 4th DCA 1979).

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a wrongdoer, notwithstanding the proscription of the economic loss rule. A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973); Latite Roofing Co., Inc. v. Urbanek, 528 So.2d 1381 (Fla. 4th DCA 1988). These cases 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 negligence claim for defective construction where negligence appeared to be "[plaintiff] Urbanek's sole theory upon which recovery [could] be had against [defendant] Latite."[54]

If contractors on building projects are assured remedies in tort when no other remedies exist, A.R. Moyer, Inc. v. Graham, 285 So.2d 397, it would be unfair if homeowners, who are far less able to protect themselves, were deprived of any remedies for the damage to their homes caused by defective products. Moreover, restricting homeowners' remedies to those they might have against the contractor by requiring them to proceed up the chain of privity, leaves their fate in the hands of chance. The home construction industry is highly cyclical, notoriously unstable and characterized

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[54] Latite Roofing Co., Inc. v. Urbanek, 528 So.2d at 1383; and see Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (strict liability remained the "only viable alternative" for some appellees); see also Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991); Interfase, Inc. v. Pioneer Technologies Group, 774 F. Supp. 1351 (M.D. Fla. 1991); and Interfase, Inc. v. Pioneer Technologies Group, 774 F. Supp. 1355 (M.D. Fla. 1991).

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by small, inadequately financed contractors and subcontractors.[55]

Other Jurisdictions Also Protect Homeowners

Florida is not alone. Courts in other jurisdictions have overwhelmingly acted to assure that homeowners have adequate protection from loss from defectively built homes, sweeping aside traditional legal impediments where necessary to create a remedy. For example, the Supreme Court of South Carolina recently rejected application of the economic loss rule in a homeowner's construction defect case on the simple basis that justice must override the technical considerations in fashioning consumer remedies. In Kennedy v. Columbia Lumber & Mfg. Co., Inc., 384 S.E.2d 730 (S.C. 1989) the court, as if speaking for Florida, announced its view:

> 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.[56]

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[55] As noted by one observer:

> The ability of a party suffering economic loss to recover down an unbroken chain of warranties to the original source of the defect is greatly impeded in construction cases by the high number of insolvencies, bankruptcies, and business failures in the industry. Economic loss cases make frequent reference to insolvent parties. Practical experience in the volatile world of contractors, subcontractors, and material suppliers confirms that reaching a responsible party down an unbroken warranty chain is an inefficient way to recover, even in those instances where each player to the project remains subject to effective service of process. According to Dun and Bradstreet, the construction industry reports an overall failure rate exceeded only by the category of "business services."

Janis K. Cheezem, Economic Loss in the Construction Setting: Toward an Appropriate Definition of "Other Property", The Construction Lawyer, April 1992, at 21, 23.

[56] 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. Ct. App. 1988), overruled, 384 S.E.2d 730, 734 (S.C. 1989), which, as in this case, ruled that the economic loss doctrine denied homeowner recovery.

If the Third District's opinion is allowed to stand as the law of that district or, worse, if it is adopted as the law of Florida, homeowners will suffer a severe setback, being joined with the homeowners of Virginia, which as far as our research discloses is the only jurisdiction in this country which provides no remedy for this type of loss against non-privity builders and suppliers.[57] Surely what is so repugnant to the overwhelming majority of the courts of this country should not become the law of Florida.

D. THE ECONOMIC LOSS RULE IS UNNECESSARY AND INAPPROPRIATE IN THE CONSTRUCTION SETTING WHERE PARTIES KNOWINGLY RELY ON EACH OTHER FOR PROPER PERFORMANCE OF SERVICES

Florida courts have created a clear exception to the economic loss rule in cases where the close relationship of parties not in privity creates among them a particular duty of reasonable care.

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[57] 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. Ct. 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. Ct. App. 1982); Council of Co-Owners 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).

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Thus, where professionals know that the plaintiff is relying upon them for proper performance of their duties, the professional may be held liable for the negligent performance of services. See A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (architect); First American Title Insurance Co. v. First Title Service Co. of the Florida Keys, 457 So.2d 467 (Fla. 1984) (abstracter); First Florida Bank, N.A. v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990) (accountant).[58]

The special relationship characterizing these decisions obviates the need for imposing the economic loss rule because the risk of unlimited liability that the economic loss rule is intended to deter does not exist. The same close relationship among non-privity parties exists particularly in the construction process, where all of the participants provide services toward the common goal of completing the project. This unique set of interrelationships makes the economic loss rule an unwarranted impediment to recovery by participants in the process, who are known to be relying upon each other for the proper performance of their contractual duties. See, e.g., A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (supervisory duties vest in architect concurrent duty toward contractor); Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc., 168 So.2d 333 (designer of trusses has duty to known users or consumers). As we will show below, a local supplier of concrete specially manufactured for each construction project is as intertwined in the scheme of cross-contractual reliance as any other participant and should be equally liable for

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[58] See also Bay Garden Manor Condominium Association, Inc. v. James D. Marks Associates, Inc., 576 So.2d 744 (Fla. 3d DCA 1991) (engineer); First State Sav. Bank v. Albright & Assocs., Inc., 561 So.2d 1326 (Fla. 5th DCA), rev. denied, 576 So.2d 284 (1990) (appraiser); Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc., 168 So.2d 333 (architect).

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economic losses resulting from its breach of duty.

The Purpose of the Economic Loss Rule

The United States Supreme Court in East River Steamship Corp. v. Transamerica Delaval, Inc., summarized the rationale behind the economic loss rule:

> In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. * * * Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product.

476 U.S. at 874. In other words, because products are widely distributed, a simple Palsgraf[59] analysis of foreseeability as a basis for tort liability for economic loss is dangerously overbroad. If a product manufacturer were liable to the entire universe of persons who may be foreseeably injured for intangible economic damages (such as lost profits, delays, opportunity costs, and inefficiencies) there would be chilling effect on the business of manufacturing. Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899.

Likewise, the provider of business services to a broad market could be exposed to an inhibiting risk of loss from its ordinary operations if foreseeability were the only device to measure liability. Thus, in AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180, this Court applied the economic loss rule to bar tort recovery from Southern Bell where an incorrect yellow pages listing compounded by reassignment of the plaintiff customer's number to another customer disrupted the customer's business.

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[59] Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).

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Reliance on Professional Services

But as this Court's decisions in the professional services cases demonstrate, the economic loss rule can and should be relaxed where some definable measure short of mere foreseeability is available to assess the scope of liability for economic damages. Professional services by their nature do not involve the same selling into a broad, anonymous market that characterizes the manufacture of products or the providing of services on a generalized basis, such as communications or advertising. Rather, professional services are usually rendered on a one-to-one basis, with the product of the work being received by a party in privity with the professional. Often, however, a non-privity party may be directly benefitted or affected by the professional's services, and in those instances Florida courts will overlook the strictures of privity to allow tort recovery for economic losses attributable to professional negligence.

Mutual Reliance within the Construction Process

Construction projects possess attributes which effectively and uniquely delimit the scope of foreseeable harm and make application of the economic loss rule unnecessary. A building is inherently "local" and, unlike a chattel, is not sold into a vast, fluid market in which the ultimate consumer is unknown. Rather, a building is constructed through the efforts of contractors, who provide their services in selecting, furnishing and installing materials according to a specific design.[60] While some building

[60] A building, unlike most chattels, constitutes a major and infrequent purchase by an end-user, such as a home buyer, and therefore buildings are not sold in great volume to numerous purchasers (and potential claimants). Additionally, buildings do not as a rule change hands quickly, which further reduces the potential number of end-user claimants and foreseeably injured parties.

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components are fungible, many, like concrete, are specially manufactured for the particular job. Such components are prepared according to shop drawings or, in the case of reinforced concrete, a "design mix".

The participants in the construction process (owner, prime contractor, subcontractors, and the like) are generally known to each other, as are the respective roles each will play toward the common goal of completing the project. They are part of what has been called the "chain of construction". E.C. Goldman, Inc. v. A/R/C Associates, Inc., 543 So.2d 1268 (Fla. 5th DCA), rev. denied, 551 So.2d 461 (1989). The duty of each person providing materials or services for the project is easily defined, and the persons who may be foreseeably injured by a failure to perform are identifiable in advance. Thus, project participants are in roles of mutual reliance or dependence[61] and occupy the middle ground between privity and unlimited foreseeability that characterize Moyer, First American Title, Max Mitchell, and other cases where the interdependence of the parties creates duties of care notwithstanding the lack of privity.

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[61] This notion of mutual dependence has been described as the "common enterprise" theory, which has been suggested as a basis for permitting actions for economic loss between non-privity participants in a construction setting. See Miles J. Zaremski and Paul Cottrell, Risk Shifting Devices and Third-Party Practice: The Impact of Skinner and Alvis, 14 Loy. U. Chi. L.J. 467, 480 (1983). Under the "common enterprise" theory the owner, contractor and architect "are all parties to an interlocking set of contracts which contain explicit provisions regarding the architect's duties to administer the contract between the owner and the contractor impartially and for the benefit of both parties." Steven G.M. Stein, Paul Cottrell and Mark C. Friedlander, A Blueprint for the Duties and Liabilities of Design Professionals, 60 Chi.-Kent L. Rev. 163, 180 (1984). See also George Anthony Smith, The Continuing Decline of the "Economic Loss Rule" in Construction Litigation, The Construction Lawyer, November 1990, at 1.

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Accordingly, within the construction setting Florida has long recognized an action for negligent performance of contractual duties, running not only to parties in privity but to third parties foreseeably injured by the failure of the contracting party to use reasonable care in the performance of its duty. See Conklin v. Hurley, 428 So.2d 654, 659; Biscayne Roofing Co. v. Palmetto Fairway Condominium Association, Inc., 418 So.2d 1109 (Fla. 3d DCA 1982); Navajo Circle, Inc. v. Development Concepts Corp., 373 So.2d 689 (Fla. 2d DCA 1979); Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515; Simmons v. Owens, 363 So.2d 14.[62]

The utility of the chain of construction as a test for the application of the economic loss rule is addressed in E.C. Goldman, Inc. v. A/R/C Associates, Inc., 543 So.2d 1268. There the court viewed Moyer, Audlane and the other construction cases as "extend[ing] product liability law to economic losses" where "the defendants had a close nexus to the product which caused the injury and loss to the plaintiffs, either through design, manufacture or distribution of the product or the direct supervision of its construction." Id. at 1270. Consistent with this view the A/R/C

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[62] The theory of the action was described by the court in Navajo Circle, Inc. v. Development Concepts Corp., as follows:

> The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract. Existence of a contract may uncontrovertibly establish that the parties owed a duty to each other to use reasonable care in performance of the contract, but it is not an exclusive test of the existence of that duty. Whether a defendant's duty to use reasonable care extends to a plaintiff not a party to the contract is determined by whether that plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff.

372 So.2d at 691.

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court refused to allow recovery against an independent consultant hired by an owner to evaluate the work of a roofing subcontractor, because the defendant, unlike the defendants in the Moyer and Audlane line of cases, "had no connection whatsoever with [the] project," Id. at 1268, and was therefore "outside the 'chain of construction.'" Id. at 1272. In other words, being in the chain of construction sufficiently limits foreseeability to create a duty to others in the chain, notwithstanding the lack of privity.

Manufacturers of generic building products, not manufactured for specific projects, do not provide services, are not aware of the ultimate end-use of their products and do not participate in the relationships of mutual dependence that characterize the construction process. They stand outside the chain of construction and continue to be protected by the economic loss rule. Where only economic damages are sought, the manufacturer of such a fungible product, who sells to a member of the chain, is liable only in contract and only to the particular member of the chain with whom it is in privity. See, e.g., GAF Corporation v. Zack Co., 445 So.2d 350 (Fla. 3d DCA), rev. denied, 453 So.2d 45 (1984).[63] Thus the protective benefit fostered by the economic loss rule is preserved.

A Concrete Supplier Participates in the Construction Process

Concrete for reinforced concrete structures (unlike the portland cement that goes into it) is not a generic, manufactured

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[63] In GAF Corporation v. Zack, GAF was a roofing manufacturer whose product was sold by a local supplier for installation in a roofing project. The "chain of construction" in that case was (1) the owners, (2) the roofing contractor, Zack, and (3) the local supplier. GAF was not in the chain because it did not manufacture or sell its materials with the particular roofing job in mind, nor did it have knowledge, constructive or otherwise, of any members of the chain other than the supplier with whom it was in privity. On that basis, no liability for economic loss could be imposed against GAF other than in contract.

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product. A supplier of reinforced concrete, like Toppino, partakes in the construction process in the same manner as a contractor or design professional. The furnishing of concrete involves the provision of services as well as the sale of products, performed on a job-by-job basis. Because of its lack of "shelf life" concrete is necessarily "local" and specific in nature.

Toppino was not merely the manufacturer of a product sold into the general stream of commerce, as was, for example the roofing manufacturer in GAF Corporation v. Zack Co., 445 So.2d 350. Toppino batched and sold its concrete for each particular job, knowing that it would be incorporated into a particular building.[64] As is customary in the industry, each batch of concrete was prepared according to a specific design mix, requiring specific strength characteristics for the various structural components of the buildings.[65]

In contrast with other building products[66] the concrete was not sold to a supply house or lumber yard to be maintained in inventory until purchased at a later time for a previously unknown

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[64] For example, as alleged in the Amended Complaint in Chapin:

> 36. 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 being that same would be utilized in constructing the structural components of the Structure in an oceanside environment.
> 37. 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.

Chapin R. 372.

[65] See, e.g., the invoices attached as exhibits to the Ontario Second Amended Complaint (Casa Clara R. 450-477), which identify the address of the building into which the concrete was to be incorporated (#105 Duck Key) and the strength of particular mix (3000 psi).

[66] For example, roofing materials, plywood, plumbing pipes, as well as the portland cement sold to concrete suppliers like Toppino.

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project. Upon delivery to the project Toppino continued to mix the concrete to keep it workable at the site, helped the contractor place the concrete in forms and, as necessary, lift it to higher floors. Toppino's preparation of the specifically manufactured concrete and involvement with each project thus constituted the providing of services, a role far different from that of a typical manufacturer.

Moreover, Toppino's place within the chain of construction was clearly established by virtue of its having lien rights against the subject properties, based upon Toppino's close involvement with the construction.[67] The anomalous result of the district court's decision below is to give Toppino an enforceable lien against the non-privity owners in the event of non-payment by the contractors, while stripping these very owners of any remedy for the damage done to their properties by Toppino's concrete.[68]

In the cases before the Court the potentially injured parties -- the general contractors and the owners of the properties -- were thus easily foreseeable. Moreover, in each case it was alleged as a basis for the recovery of punitive damages in negligence that Toppino had specific knowledge of the defective nature of the

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[67] The Construction Lien Law, Chapter 713, Part I, Florida Statutes (1991), provides a rational way of defining those foreseeable parties participating in the chain of construction. In general, any person having standing to file a mechanic's lien on a project, or who is subject to the effects of the lien (an owner), could be considered to be a part of the chain of construction and able to sue or be sued in negligence for economic losses. See § 713.01(14), Fla. Stat., which includes in the definition of "Lienor ...(e) A materialman who contracts with the owner, a contractor, a subcontractor or a sub-subcontractor," but which would, for example, exclude an ordinary manufacturer (such as the roofing manufacturer in GAF Corporation v. Zack Co., 445 So.2d 350), which merely manufacturers building products for wholesale distribution, but does not, necessarily, contract to deliver its product to a particular construction site. A "materialman", on the other hand, to come within the statutory definition, must "furnish materials . . . on the site of the improvement . . . or for direct delivery to the site. . . ." § 713.01(16), Fla. Stat.

[68] See Cheezem, op. cit. at 23.

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concrete and knowledge of the likelihood that the damage complained of would occur if the concrete were incorporated into the homes.[69] Such knowledge accentuates the element of foreseeability in the negligence claims, making predictable the identity of the injured parties as well as the type and degree of harm.

POINT II

A CONCRETE SUPPLIER MUST COMPLY WITH THE BUILDING CODE AND THEREFORE MAY BE LIABLE UNDER THE FLORIDA BUILDING CODES ACT

The Third District's decision affirmed dismissal of the petitioners' claims against Toppino for violations of the Standard Building Code[70] brought pursuant to Section 553.84 of the Florida Building Codes Act (the "Act"),[71] based upon the ruling that an entity bearing the label "material supplier" does not have a duty to comply with the building code.[72]

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[69] For example, as alleged in the Amended Complaint in Chapin:

> 39. 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 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.

Chapin R. 372-373.

[70] The Standard Building Code (formerly the "Southern Standard Building Code") governs construction in Monroe County.

[71] Section 553.70, et seq., Florida Statutes.

[72] This Court has jurisdiction to consider all points passed on by the district court, including those not giving rise to its jurisdiction. Bould v. Touchette, 349 So.2d 1181 (Fla. 1977)

Section 553.84 provides a broad remedy against any person who commits a violation of an applicable building code:

> Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the State Minimum Building Codes, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation. [Emphasis supplied.]

The intent of the Act is to "cover all phases of construction."[73] Consistent with that intent, Section 553.84 does not by its terms limit the scope of persons who may be sued by an injured party. The only operative requirement is that the person actively "commit" the violation. Section 553.84 is thus not directed toward persons occupying any particular status, but instead toward persons "committing" violations of the building code. Sierra v. Allied Stores Corp., 538 So.2d 943, 944 (Fla. 3d DCA 1989).

The focus, then, should properly be on what Toppino is alleged to have done with respect to this project, rather than on its label or status such as "material supplier". The complaints allege inter alia that Toppino "manufactured and supplied the concrete"[74] which alone makes Toppino more than simply a supplier and creates an issue of fact to be left for determination at trial.

Toppino's duty to comply with the Code is founded in part upon American Concrete Institute ("ACI") publication 318, which is incorporated by reference in the Standard Building Code[75] in

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[73] Section 553.72, Florida Statutes (1974).

[74] For example see Amended Complaint in Casa Clara, paragraph 14. (Casa Clara/Ontario R. 1204).

[75] Standard Building Code, 1976 Edition. See Casa Clara/Ontario R. 581. Earlier and later editions contain comparable language.

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Section 1601, as follows:

> All structures of reinforced concrete, including prestressed concrete, shall be designed and constructed in accordance with the provisions of "Building Code Requirements for Reinforced Concrete, ACI 318", as amended by the "1974 Supplement to Building Code Requirements for Reinforced Concrete, ACI 318".

ACI 318[76] contains numerous requirements for the design and construction of reinforced concrete buildings, including strength requirements, reinforcement, and forming. Many of the requirements are of direct concern to architects and engineers involved in the design process; others are of concern to contractors actually performing construction on the site.

Other requirements of ACI 318 affect the storage of aggregates and the mixing and delivery of concrete, which could be directed only to persons involved in the manufacture of concrete. By way of example, Section 3.7,[77] regarding the storage of materials, provides:

> Storage of materials
>
> Cement and aggregates shall be stored in such a manner as to prevent their deterioration or the intrusion of foreign matter. Any material which has deteriorated or which has been contaminated shall not be used for concrete.

And Section 3.4.1 states:

> Water used in mixing concrete shall be clean and free from injurious amounts of . . . salts . . . or other substances that may be deleterious to concrete or steel. In addition, the mixing water for pre-stressed concrete or for concrete which will contain aluminum embedments, including that portion of the mixing water contributed in

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[76] The most recent edition of ACI 318 published as of the 1979 revision of the Standard Building Code was ACI 318-77.

[77] References are to ACI 318-71 (the 1971 revision), appearing at Casa Clara/Ontario R. 588-602. Earlier and later editions of ACI 318 generally contain the same or comparable provisions. See, e.g., ACI 318-77 (Casa Clara/Ontario R. 603-620).

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> the form of free moisture on the aggregates, shall not contain deleterious amounts of chloride ion.

Section 5.2.3 further provides:

> Ready-mixed concrete shall be mixed and delivered in accordance with the requirements set forth in "Specification for Ready-Mixed Concrete" (ASTM C94).

Only a person involved in the storing, mixing and delivering of concrete components - namely a concrete supplier - could have a duty to comply with such requirements. Since Monroe County saw fit to adopt the Standard Building Code incorporating ACI 318, it follows that the County's purpose was to regulate not only the way concrete is used in building, but the way concrete is manufactured. Since ready-mixed concrete is always manufactured in batching plants and transported to the construction site, the code provisions regarding storage of aggregates and the manufacture and delivery of concrete must be intended to govern manufacturers of concrete as well as end users (here, owners and general contractors).[78]

Clearly then, a concrete supplier such as Toppino, furnishing concrete for construction subject to the Standard Building Code, has a duty to comply with the provisions regulating concrete. Just as clearly, a breach of those provisions should subject a supplier to liability under Section 553.84 for "committing" a violation of the Code. Sierra v. Allied Stores Corp., 538 So.2d 943. The

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[78] The inappropriateness, or perhaps inaccuracy, of the label "materialman" applied to concrete can be seen by the following example. Suppose a temporary concrete batching plant had been set up on the site, with the concrete ingredients stored and mixed on site for use as needed. It would be difficult to argue that the person manufacturing the concrete, whether the owner, a general contractor or a subcontractor, was not involved in the actual "construction" of the building, and hence governed by ACI 318. The location of the batching plant, and indeed the title of the person actually manufacturing the concrete, would be immaterial to the applicability of the SSBC. "On-site" versus "off-site" and "subcontractor" versus "materialman" are distinctions without a difference.

district court therefore erred in affirming the dismissal of the homeowners' claims under Section 553.84.

CONCLUSION

We ask this Court to quash the district court's opinion which affirms dismissal of the homeowners' complaints, and to remand this case to the district court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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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; and to Mark Hicks, Esq., Hicks, Anderson & Blum, P.A., Suite 2402, New World Tower, 100 North Biscayne Blvd., Miami, Florida 33132, counsel for amicus curiae The Babcock Company, on this 31st day of July, 1992.

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