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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' REPLY BRIEF

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# ARGUMENT

## Introduction

The fundamental issue before this Court is not whether the label "property damage" or "economic loss"[1] can be affixed to the petitioners' injuries, but whether Florida law provides or will provide a remedy -- under tort, warranty, or any other theory -- against the person at fault for the kind of damages the petitioners have sustained or most certainly will sustain. The respondents[2] authoritatively declare that this Court has already decided that persons situated similarly to the petitioners have no remedy and that to allow our clients to recover against Toppino would be cataclysmic. If the respondents are correct -- and happily they are not -- then the entrenched law of this State astonishingly protects manufacturers of defective products at the expense of injured parties, rather than the other way around. Fortunately the law is not in such a sorry state.

If there is a cataclysm to be found in this case, it is the Third District's decision, itself a radical departure from established principles of Florida law. That decision, based upon a misapprehension of the reach of this Court's recent holdings, has

[1] The term "economic loss" is misleading because when not used as a term of art it can be understood to include all injuries for which monetary compensation is sought. Tort law treats all injuries -- whether to person, property or financial well-being -- as economic losses remedied by the transfer of money. The fact that money is sought does not necessarily lead to the conclusion that only an "economic loss" has been sustained. See, e.g., Richard A. Posner, Economic Analysis of Law (3d ed. 1986) at 177-185, §§ 6.11-6.12 (discussing damage awards for lost earning capacity and wrongful death).

[2] We refer collectively to the respondent, Charley Toppino & Sons, Inc., ("Toppino") and the amici curiae who have filed briefs in support of Toppino's position as "respondents", unless we note otherwise.

the effect of destroying a right of recovery that Florida citizens have always had, leaving them injured parties with no remedy against the wrongdoer.

Contrary to the respondents' fear-evoking argument that dire economic and social consequences will surely follow if Florida forces manufacturers to be responsible for damages caused by defective building products, in neither Florida (before today) nor in any state has a decision or statute which makes manufacturers directly accountable for their defective products produced the consequences the respondents predict.

The Third District's focus on the economic loss doctrine in isolation, without any analysis of the application of that doctrine in the broader context of the remedies Florida affords its citizens, has led to its anomalous result. The law of Florida is instead that "the anomaly of fault without liability and wrong without a remedy [is] contrary not only to our sense of justice but directly conflicting with the express mandate of the Florida Constitution, Declaration of Rights, Section 4, F.S.A., that 'every person for any injury done him * * * shall have a remedy * * * .'" Slavin v. Kay, 108 So. 2d 462, 467 (Fla. 1958).[3]

**Lack of Remedy in Warranty**

The respondents' position that it is tolerable to deny the

[3] The 1968 revision of the Florida Constitution moved Section 4 of the Declaration of Rights to Section 21, which reads:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Art. I, § 21, Fla. Const.

petitioners a remedy in tort is bottomed on the unfounded premise that Florida law presently provides adequate warranty remedies against suppliers of defective materials, either in common law or by statute. As we will show, that is not the case.

Where a property owner contracts to improve property, the common law does not give the owner a remedy in warranty against any participant in the construction process for latently defective building products. And unless the defect is design-related (for example, specification of an incorrect material), the owner has no cause of action against an architect or engineer. Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., 168 So. 2d 333 (Fla. 2d DCA 1964), cert. denied, 173 So. 2d 146 (1965).[4]

Nor is there liability against a contractor, which does not ordinarily warrant the quality of materials other than that they are new, are from reputable sources, and have no obvious defects. Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., 235 So. 2d 548 (Fla. 1st DCA 1970) (subcontractor not liable for latent defect in bricks not discernible by the exercise of care and skill in inspection and present through no fault or knowledge of subcontractor).[5] Thus a contractor warrants its work and not the

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[4] As stated in Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., 168 So. 2d at 335:

> An engineer, or any other professional, does not "warrant" his service or the tangible evidence of his skill to be "merchantable" or "fit for an intended use." These terms are uniquely applicable to goods. Rather, in the preparation of design and specifications as the basis of construction, the engineer or architect "warrants" that he will or has exercised his skill according to a certain standard of care that he acted reasonably and without neglect.

[5] As stated in Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., the "general rule" relating to latently defective materials is:

(continued...)

materials, and, of course, a contractor does not give UCC warranties in the performance of its work. Arvida Corp. v. A.J. Industries, Inc., 370 So. 2d 809 (Fla. 4th DCA 1979).

## Statutory/UCC Warranties

Unlike many other jurisdictions, Florida's version of the UCC does not have warranties that run from manufacturers or sellers to third parties. But if these petitioners were fortunate enough to live, for example, in Delaware, Virginia or Minnesota -- the states whose decisions Toppino most fervently invokes as models for this Court to follow[6] -- they would have available to them direct warranty actions against Toppino for the damages caused by its defective concrete. Each of those states, unlike Florida, has extended UCC product warranties to remote purchasers. See Del. Code Ann. Tit. 6 § 2-318; Va. Code Ann. § 8.2-318; Minn. Stat. Ann. § 336.2-318; compare § 672.318, Fla. Stat.[7] It should then be

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[5](...continued)

> [I]f there is a latent defect in bricks sold, caused by unfit clay, and not discoverable by the exercise of care and skill in inspecting them after they are manufactured, and a contractor in good faith and without knowledge of the defect buys the bricks and uses them in constructing a building which is accepted by the owner, the contractor is without fault though the defect in the bricks is subsequently developed by their exposure to the weather, and he is not answerable to the owner for the latent defect or liable for the amount of damage to the building caused by such defect.

235 So. 2d at 551.

[6] Toppino relies on Danforth v. Acorn Structures, Inc., 608 A.2d 1194 (Del. 1992), Sensenbrenner v. Rust, Orling & Neale Architects, Inc., 374 S.E.2d 55 (Va. 1988), and Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc., 354 N.W.2d 816 (Minn. 1984), as reflecting proper application of the economic loss rule.

[7] Delaware Code Annotated, Title 6, Section 2-318 provides:

> A seller's warranty whether express or implied extends to any natural

(continued...)

little comfort to this Court to learn from the respondents' brief that the courts of Delaware, Virginia and Minnesota (whose state legislatures have adopted versions of the UCC which do extend warranties to third-party end-users) construe the economic loss rule in a way that would deny relief to the petitioners in tort.[8]

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[7](...continued)

> person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

Code of Virginia Annotated, Section 8.2-318 provides:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; ...

Minnesota Statutes Annotated, Section 336.2-318 provides:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

While the above provisions extend to all third parties reasonably expected to be affected by the goods, Section 672.318, Florida Statutes, by contrast, is limited to persons in the household or employ of the buyer. It provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer, who is a guest in his home or who is an employee, servant or agent of his buyer if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

[8] The Delaware decision, Danforth v. Acorn Structures, Inc., 608 A.2d 1194, does not, as Toppino contends, "supersede" 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 (Del. 1975). Resp. Ans. Br. on the Merits at 29. Oliver B. Cannon held that deteriorated tank linings were "physical injury to property and not mere economic loss," 312 A.2d at 329, whereas Danforth found that the type of damage claimed -- inadequately ventilated home due to defective design -- was economic loss, not property damage. As the Court recognizes in Danforth, the two cases are clearly distinguishable on their facts. 608 A.2d at 1199.

But in Florida these UCC remedies are not available to parties not in privity and, as Toppino itself concedes, "homeowners do not have available to them a direct warranty from suppliers under the Uniform Commercial Code." Resp. Ans. Br. on the Merits at 11. Thus when this Court decided in Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987), to impose the economic loss rule, it did so only in a case where the parties were in privity and had available to them UCC remedies:

> The lack of a tort remedy does not mean that the purchaser is unable to protect himself from loss. We note the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view.

Id. at 902. But this rationale for the economic loss rule disappears where the injured party and the party at fault are not in privity and there is no potential recovery under a UCC warranty theory. The respondents' simplistic insistence that Florida Power & Light swept out all prior decisional law regarding homeowner rights[9] ignores a key distinction between Florida Power & Light and the cases now before the Court.

Similarly, for the respondents to say that other states have adopted the economic loss rule is to say nothing of importance, because that does not tell us what remedies are available to citizens of those states notwithstanding the adoption of the rule. As Delaware, Virginia and Minnesota show, each state develops its own scheme of common law and statutory remedies differently and shapes its application of the economic loss rule accordingly. We

[9] See, e.g., Resp. Ans. Br. on the Merits at 17-19.

have previously noted, without challenge by the respondents, that every other state provides a remedy for remote homeowners to recover for latent construction defects.[10]

Reliance on other jurisdictions to guide Florida's application of the economic loss rule therefore has very limited utility. The danger of transplanting to Florida another state's use of the economic loss rule is that other remedies which mitigate the harshness of the rule in the donor state may not be available in Florida. In determining the scope of the economic loss rule and the circumstances in which it should bar tort recovery, the availability vel non of non-tort remedies must ultimately govern or else injustice will surely result.

In view of the legal remedies available to homeowners in every other jurisdiction, the respondents' dramatic description of economic disruption -- excessive insurance premiums and exorbitant prices for manufactured goods -- rings hollow. Concrete suppliers and other manufacturers do business in Delaware, Virginia, Minnesota and all other states extending UCC warranties or other remedies to remote parties, and the republic has not fallen. Life goes on everywhere else in the United States and the price of goods and homes is merely adjusted marginally upward to cover additional insurance costs,[11] while the quality of products is improved to

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[10] See Pet. Br. on the Merits at 34 n. 57. We earlier said that Virginia was the sole exception to the rule. We were wrong: Virginia does provide at least a statutory remedy through its adoption of UCC warranty provisions under which a manufacturer of latently defective materials may be found liable to end-users notwithstanding the lack of privity. Va. Code Ann. § 8.2-318.

[11] As we noted earlier, Toppino was protected with product liability insurance, Pet. Br. on the Merits at 29 n. 51, and it can therefore be assumed that the cost of insurance coverage had been factored into the cost of the concrete supplied for the construction of the petitioners' homes.

reduce risk of loss.

## Lack of Common Law Remedies

The decision of the Third District to apply the economic loss rule without considering the lack of other available remedies has left these homeowners without any remedy against the wrongdoer for the damages they have sustained. Yet before this Court's adoption of strict product liability in tort under Restatement (Second) of Torts § 402 A in West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976), warranties for defective products routinely extended to third parties. Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); Manheim v. Ford Motor Co., 201 So. 2d 440 (Fla. 1967). No distinction was made between "liability flowing from implied warranty for personal injuries" and liability "for lack of fitness or suitability of the product itself," Manheim at 442, and it was thus the law of Florida that third parties could recover economic damages, regardless of privity.[12]

The effect of West was to supplant third-party warranty claims with recovery in tort under Section 402 A.[13] Thereafter in Florida

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[12] Thus this Court quoted approvingly from Ford Motor Co. v. Lonon, 398 S.W.2d 240, 246 (Tenn. 1966), that "where the manufacturer had stated that the product would meet the purchaser's expectations, it could be fairly charged with this economic loss, even though the manufacturer was not party to the contract." Manheim v. Ford Motor Co., 201 So. 2d at 443.

[13] As described in Affiliates for Evaluation and Therapy, Inc. v. Viasyn Corp., 500 So. 2d 688, 692 (Fla. 3d DCA 1987):

> The West court fundamentally altered product liability law in Florida by creating a new products liability tort action - strict liability in tort - out of the prior breach of implied warranty cases which had done away with privity of contract. In so doing, West necessarily swept away such no-privity, breach of implied warranty cases, because it was, in effect, created out of these cases. This ground-breaking

(continued...)

Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, this Court barred the recovery of economic loss in tort. While neither West nor Florida Power & Light concerned damage to real property by defective products, the Third District determined below that it was this Court's intent to bar third parties from recovering in either tort or warranty for such damage.

Ironically, then, although this Court said that West constituted "no great new departure from present law" and simply accomplished "a change of nomenclature," 336 So. 2d at 86, and said that Florida Power & Light was not meant to "change any decision of this Court or modify any past principles of law," 510 So. 2d at 900, these decisions have now been used by the Third District to abolish the remedies available to homeowners or other consumers. If the Third District's decision is allowed to stand, no longer will third parties have any remedy for damage caused by a manufacturer's marketing a defective product, as once before they had, Hoskins v. Jackson Grain Co., 63 So. 2d 514; Manheim v. Ford Motor Co., 201 So. 2d 440, and indeed Florida will become a safe haven for manufacturers to market defective building products with impunity. Surely that cannot be the intent of this Court, which has recognized privity as merely "a theoretical device of the common law" the sharpness of which "blurs when brought into contact with modern concepts of tort liability." A.R. Moyer v. Graham, 285 So. 2d 397, 399 (Fla. 1973).

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[13](...continued)

holding, however, did not result in the demise of the contract action of breach of implied warranty, as that action remains, said the West court, where privity of contract is shown.

Thus, although the respondents conjure visions of chaos in the marketplace should the petitioners be allowed to recover against a "remote" manufacturer for economic losses, in fact such recovery has always been the rule in Florida. Even assuming arguendo that the damages here sustained are "economic" and not, as we maintain, damage to property, Adobe Bldg. Ctrs., Inc. v. Reynolds, 403 So. 2d 1033 (Fla. 4th DCA 1981), rev. dismissed, 411 So. 2d 380 (1981), the effect of allowing recovery in tort would be only to reaffirm the essential rights of injured third parties as they have stood since Hoskins v. Jackson Grain Co. and Manheim v. Ford Motor Co., notwithstanding the "change of nomenclature" upon the adoption of Section 402 A. West v. Caterpillar Tractor Co., Inc., 336 So. 2d at 86.

**Insufficiency of Private Contract Protection**

The respondents try to plug with private contracts the hole in the law created by the Third District. Implicit in their position is the fanciful notion that whenever there is a transaction each party has an adequate remedy in contract, conditioned only upon the party's having been careful enough to negotiate such a remedy. Thus, according to the respondents, if owners contracting to build homes neglect to require their contractor to secure an assignment of warranties from others in the chain of construction, they have only themselves to blame. Likewise, the respondents suggest that if home purchasers fail to determine the financial viability of all subcontractors and materialmen with whom their builder may have dealt, it is the homeowners who have been remiss and the law will not come to their aid.

The obvious fallacy of this argument is that it unrealistically assumes that owners have sufficient control in the marketplace and ultimately leaves their ability to recover against unseen, non-privity parties to chance. Moreover, it begs the question of what remedy the law provides except to say that the law allows parties whatever remedies they are able to negotiate, which is to say, in many cases, none.

Nor is it sufficient to rely upon the dubious availability of homeowner's insurance to fill the gap in the law. Assuming homeowner's insurance covers the type of damage the petitioners have sustained -- which in the typical case it does not[14] -- exclusive reliance upon private contractual arrangements does not adequately replace the function of the law to provide remedies to compensate for wrongdoing. In effect the respondents are contending that, while the laws of other states provide remote homeowners remedies for defective construction, Florida's failure to do so is cured by the fact that homeowners can always buy insurance. Taken to its extreme that notion would obviate the need for tort law in its entirety.

**Recognition of a Remedy**

If the decision of the Third District is allowed to stand, these petitioners and others similarly situated will have no statutory or common law remedy against Toppino, and this Court will have endorsed "fault without liability and wrong without a remedy," the very thing it condemned in Slavin v. Kay, 108 So. 2d at 467.

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[14] See Pet. Br. on the Merits at 29, n. 49.

We do not ask for a result inconsistent with principles that form the bedrock of our constitutional and common law. There is hardly anything radical about holding a manufacturer liable to remote purchasers. Hoskins v. Jackson Grain Co., 63 So. 2d 514; Manheim v. Ford Motor Co., 201 So. 2d 440. Nor does the recovery of economic loss in tort constitute an earth-shattering assault on our basic precepts. A.R. Moyer v. Graham, 285 So. 2d 397; accord Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983).[15] We simply ask this Court to confirm that manufacturers of defective products are not immune from liability to remote homeowners whose property is damaged by those products. Surely the adoption of Section 402 A was not intended to lessen the ability of persons to recover against the manufacturer of defective products, especially where those products cause physical damage to a person's home. And surely this Court did not intend to restrict recovery in tort by non-privity homeowners when it decided to impose the economic loss rule in actions between commercial entities in privity with each other. Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899.

To fulfill the constitutional promise that the "courts shall be open . . . for redress of any injury . . .", Art. I, § 21, Fla.

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[15] Respondents rely heavily on Conklin v. Hurley for the notion that warranties should not be extended to remote purchasers, Resp. Ans. Br. on the Merits at 22-23, but in so doing they miss the essential lesson of that case. Although the land purchasers in Conklin were denied a remedy in warranty, this Court, agreeing with the Fourth District, expressly recognized that the purchasers had a remedy in tort against the non-privity general contractor for the deteriorated seawall. Only two conclusions can be drawn: either the deteriorated seawall constituted damage to property caused by the contractor's negligence, accord Adobe Bldg. Ctrs., Inc. v. Reynolds, 403 So. 2d 1033; or the lack of a remedy in contract against the person at fault necessitated the availability of a remedy in tort. Accord A.R. Moyer v. Graham, 285 So. 2d 397.

Const., this Court has before it several means, none of which will violate existing precepts. It may recognize that the petitioners have sustained property damage recoverable in tort and bypass the reach of the economic loss rule altogether. Adobe Bldg. Ctrs., Inc. v. Reynolds, 403 So. 2d 1033. It may decide that the safety-related function of tort law compels imposition of tort liability as a means of preventing personal injury as well as compensating for it. Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So. 2d 515 (Fla. 4th DCA 1981), rev. denied, 417 So. 2d 328 (1982).[16] It may find that a concrete supplier is so intertwined in the construction process that a duty founded upon reliance is thereby created toward other participants in the process. A.R. Moyer v. Graham, 285 So. 2d 397; First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990); Bay Garden Manor Condominium Association, Inc. v. James D. Marks Associates, Inc., 576 So. 2d 744 (Fla. 3d DCA 1991). Finally, this Court can limit the reach of the economic loss rule to actions between parties in contractual privity with each other, restricting their remedies to those they have expressly negotiated and those provided by the law, while at the same time assuring that non-privity parties have available to them appropriate remedies in tort. A.R. Moyer v. Graham, 285 So. 2d 397; Latite Roofing Co., Inc. v.

[16] Toppino argues that recovery of damages to repair hazardous defective conditions violates the prohibition against "speculative damages". Res. Ans. Br. on the Merits at 37-38. It is not the cost of repair that is speculative, however, but the manner, degree and damages of the potential personal injury which the repair is intended to prevent. The costs of repair are, of course, easily calculated and commonplace in construction defect cases. See, e.g., Grossman Holdings Ltd. v. Hourihan, 414 So. 2d 1037 (Fla. 1982).

Urbanek, 528 So. 2d 1381 (Fla. 4th DCA 1988).[17]

While we maintain that we are not asking this Court to do anything revolutionary, if what we seek means change it is well within the historical role of the Court, which has recognized its function to "modernize traditional principles of . . . law when . . . necessary 'to ensure that the law remains both fair and realistic as society and technology change.'" Conley v. Boyle Drug Co., 570 So. 2d 275, 284 (Fla. 1990) (citation omitted). This Court has never shied from finding a remedy where existing law has failed to meet the requirements of justice. See Gable v. Silver, 258 So. 2d 11 (Fla. 4th DCA), adopted, 264 So. 2d 418 (Fla. 1972) (creating implied warranties of merchantability and fitness of new homes); A.R. Moyer, Inc. v. Graham, 285 So. 2d 397 (imposing liability in negligence to recover economic loss where no other remedy exists); Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (restricting caveat emptor to allow recovery in fraud in sale of used home). We are confident it will find a remedy here.

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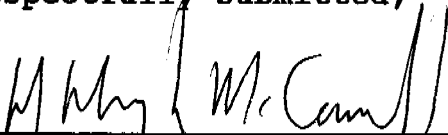
[17] This Court may also, as some states have done, expand contract law by extending warranties to remote homeowners, see, e.g., Redarowicz v. Ohlendorf, 441 N.E.2d 324 (Ill. 1982); Richards v. Powercraft Homes, Inc., 678 P.2d 427 (Ariz. 1984), or by holding that implied warranties are automatically assigned to homeowners. Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. 1983). While these cases involve warranties from home builders to subsequent owners, the same mechanism could be used with respect to warranties from material manufacturers. Or this Court could hold that homeowners are third-party beneficiaries of all contracts involving the sale of building products incorporated into homes. In fact, all of the complaints in the present case contain alternative theories of tort (negligence and strict product liability) and implied warranty. In addition, 642053 Ontario, Inc. pled that it was a third party beneficiary.

## CONCLUSION

The district court's opinion which affirms dismissal of the petitioners' complaints should be quashed and this case should be remanded to the district court for further proceedings.

Respectfully submitted,



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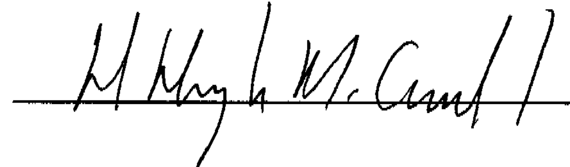
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to all counsel on the attached service list on this 13th day of November, 1992.



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