ORIGINAL

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

POLYGARD, INC., ETC., Petitioner/Cross-Respondent, vs. JARMCO, INC., ETC., Respondent/Cross-Petitioner.	CASE NO. 87,638 District Court of Appeal, 4th District - No. 95-0427

Amended

AMICUS CURIAE BRIEF OF THE FLORIDA CONCRETE & PRODUCTS ASSOCIATION

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INTRODUCTION

This Court has issued three landmark decisions construing Florida's economic loss rule in the products liability context in the last nine years. *See Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995); *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993); and *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987). In each case, the Court unequivocally reaffirmed that "contract principles [are] more appropriate than tort principles" for resolving claims seeking purely economic losses. *Prevost*, 660 So.2d at 630; *Casa Clara*, 620 So.2d at 1247; *Florida Power & Light*, 510 So.2d at 902.

In all three cases, the Court rejected efforts by the Plaintiffs' Bar to create broad "exceptions" to the Rule, recognizing that each proposed exception had the potential to render the Rule meaningless in nearly all cases, threatening the stability of commerce in this State and the viability of contract law in the process. The Court also recognized that any departure from a broad and forceful application of the Rule in favor of those consumers who fail to protect their own economic interests through contractual negotiation or insurance necessarily would impose an unwarranted financial burden on the rest of society in the form of higher prices for all goods and services.

The Florida Concrete & Products Association (hereafter "the Association"), which represents approximately eighty percent of the ready-mix concrete, cement and related product manufacturers and suppliers in Florida, participated as *amicus curiae* in both *Casa Clara* and *Prevost* because its members have relied on the economic loss rule in the course of negotiating their contracts, pricing their products, and assessing their insurance needs. In both appeals, the Association described the negative and socially undesirable economic consequences that its members and the consuming public as a whole would suffer if the Court departed from a broad application of the Rule and allowed the recovery of purely economic losses in tort. In each appeal, these negative consequences were expressly acknowledged by the Court as a basis for reaffirming its strict adherence to the Rule and its underlying policies.

Unfortunately, the Rule has come under attack again, this time by the Respondent/Cross-Petitioner (hereafter "Respondent"). It contends that it should be entitled to recover its purely economic losses in tort because it has suffered damage to "other" property within the meaning of that exception to the Rule.[1] The arguments it advances in favor of this contention, however, were rejected by this Court in *Casa Clara* and must be

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[1] The Association will not address the fraud issues presented in this Appeal.

rejected again to preserve the sanctity of contract law and the Uniform Commercial Code.

If they are not, the Association's members will again be exposed to many millions, if not billions, of dollars of unanticipated and clearly unwarranted tort liability, in turn imposing an unwarranted financial burden on the rest of society in the form of higher prices for all goods and services. As result, the Association respectfully joins in this appeal for the purpose of explaining why the Court should once again resist these efforts to undermine the Rule in order to preserve the law of contracts and the stability of our economy.

STATEMENT OF THE CASE AND FACTS

For purposes of Respondent's cross-petition, the relevant facts are as follows: Respondent purchased resin for use in the construction of a boat. It contends the resin was defective and caused damage to the boat during its construction, placing its tort claims within the "other" property exception to the Rule. The sole issue presented for consideration by the cross-petition, therefore, is whether damage caused by the resin to the boat constitutes damage to "other" property under the Rule.

SUMMARY OF THE ARGUMENT

In *Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995); *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993), and *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987), this Court reaffirmed that the economic loss rule is an immutable principle of Florida law and must be applied broadly and forcefully to preserve the law of contracts and the Uniform Commercial Code. By preventing the recovery of purely economic losses in tort, the Rule serves as the "fundamental boundary" between contract law and the law of torts, thereby encouraging parties to protect their economic interests through contractual negotiations or insurance.

Notwithstanding this Court's firm adherence to the Rule in *Casa Clara*, *Prevost*, and *Florida Power & Light*, the Respondent contends it should be permitted to recover its purely economic losses in tort, thereby avoiding the ramifications of its own failure to protect its economic interests through contract or insurance, because the resin it purchased damaged "other" property by damaging the boat to which it was applied. As the Fourth District correctly noted below, however, an identical argument was rejected by this Court in *Casa Clara* and, therefore, must be rejected again.

Like the concrete in *Casa Clara*, the resin was purchased with the intent that it would be used as a component in

the assembly of another "finished product", in this case, a boat. Like the concrete in *Casa Clara*, the resin was not the object of the bargain when it was purchased, since it had no intrinsic use or value as a "finished" product apart from its use in the construction of the boat. Rather, the object of the bargain was the boat itself, and the use of the resin in the construction of that boat.

Thus, while it may be true that the resin caused damage to another piece of property in a literal or technical sense, that damage does not constitute damage to "other" property under *Casa Clara* because the concrete in that case also damaged "other" property in a literal sense when it damaged the steel reinforcing bars embedded within it, other components used to construct the plaintiffs' homes, and the homes themselves. Under *Casa Clara*, therefore, the focus for assessing whether "other" property has been damaged cannot be on the product sold by the defendant. Rather, the focus must be on the nature and character of the plaintiff's losses and on the object of its bargain when the target product was purchased. Since the resin was purchased for the exclusive purpose of using it to construct the boat it allegedly damaged, damage to that boat does not constitute damage to "other" property under the Rule.

Another, equally compelling reason why the Respondent's interpretation of the "other" property exception cannot be harmonized with *Casa Clara* becomes apparent when the Respondent's

relative position in the chain of distribution is compared to that of the general contractors in *Casa Clara*. Like the Respondent and boat builder in this case, the general contractors in *Casa Clara* purchased concrete, steel, and other components for the purpose of constructing the plaintiffs' homes. Since each of those components are no less a "finished" product then the resin in this case, it necessarily would follow under Respondent's interpretation of the "other" property exception that the general contractors in *Casa Clara* could sue the concrete manufacturer in tort and contract, since the concrete literally damaged "other" property, even though the homeowners themselves were barred from suing the manufacturer in tort or contract.

Surely this Court did not intend such an anomaly. Rather, the core lesson of *Casa Clara* was that all parties in the chain of contracts must seek redress for their purely economic losses in contract or under the Uniform Commercial Code, not through the law of torts. There is no justification for barring the homeowners from suing the concrete manufacturer in tort or contract but allow their general contractors to sue that manufacturer in <u>tort and contract</u>. Such a conclusion would render a final death blow to the law of contracts.

The Association's members and product manufacturers in general have relied on the principles of law reaffirmed in *Casa Clara* in allocating their liability exposure through contract, in pricing their products, and in assessing their insurance needs.

Any finding that general contractors or others in the chain of construction can sue the Association's members in tort despite *Casa Clara* would eviscerate their contracts with those contractors and expose the Association's members to unlimited and unanticipated tort liability. Not only would this deny them the benefit of their bargains, including their allocations of risk, it potentially could jeopardize the very existence of some material manufacturers and suppliers and other businesses.

Moreover, such a departure from these established principles will directly and very negatively impact all product consumers in Florida in the form of higher prices for all goods and services. The Association's members and other product manufacturers faced with this unanticipated tort liability will have no choice but to increase the price of their goods and services to offset the enhanced tort risk. In the construction industry, the inevitable result will be significantly higher prices for concrete, concrete construction, and construction generally, potentially preventing many citizens, and particularly those at the lower end of the income scale, from fulfilling their dream of purchasing a new home or other products.

In the final analysis, the controlling issue becomes whether society as a whole should be forced to bear this economic burden because a few consumers like the Respondent failed to protect their own economic interest through contract or

insurance. As this Court held in *Casa Clara*, the answer to that question must be a resounding "No!".

ARGUMENT

I. THE ECONOMIC LOSS RULE BARS THE RESPONDENT'S TORT CLAIMS

A. The Policy Foundation Underlying the Rule

No meaningful analysis of the "other" property exception can be undertaken without first examining the policy considerations that led this Court to formally adopt the Rule in *Florida Power & Light*. This is necessary because application of the Rule does not turn on technical, definition-driven analysis. Rather, its application turns on an understanding of its underlying goal: preservation of contract law and the Uniform Commercial Code.

This Court has often quoted Justice Traynor's seminal decision in *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), and the United States Supreme Court's unanimous decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), to explain the Rule's underlying premise. In *Seely*, for example, Justice Traynor stated:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a

> manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. 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.

63 Cal.2d at 18, 45 Cal.Rptr. at 23, 403 P.2d at 151 (citations omitted).

The United States Supreme Court adopted the same rationale in *East River*, noting that "[w]hen a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong. . . . The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified." *East River*, 476 U.S. at 871-872. Ultimately this Court agreed with the reasoning in *Seely* and *East River*, holding:

> We . . . find no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public. We hold contract principles more appropriate than tort principles for

> resolving economic loss without an accompanying physical injury or property damage. The lack of 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. Further, the purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.

Florida Power & Light, 510 So.2d at 902.

It is clear from these passages of *Seely*, *East River*, and *Florida Power & Light* that the economic loss rule is founded on a recognition that contract law and the law of torts are designed to protect different interests. Contract law, on the one hand, is designed to protect the expectancy interests of parties to private, bargained-for agreements. It seeks to hold contracting parties to their promises and is rooted in the concept of ensuring that each party receives the benefit of its bargain. The duties implicated by the law of contracts, therefore, arise exclusively from the terms and conditions of the contractual agreements between parties.

The law of torts, on the other hand, is rooted in the concept of protecting society as a whole from physical harm. A duty of care in tort differs significantly from those duties

assumed voluntarily by contract because the tort-based duty of care is imposed by law to protect society as a whole from physical injury. Moreover, such a tort duty does not depend on, and generally cannot be limited by, private, bargained-for agreements.

Thus, tort law imposes liability for injury-causing products on the manufacturers and sellers of those products because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market" and cause actual physical harm. *East River*, 476 U.S. at 866 (*quoting Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944) (Traynor, J., concurring)). The basic function of tort law, therefore, is to shift the burden of loss from the injured party to the party responsible for that injury, the latter of which is presumed to be better suited to prevent the injury in the first place and to bear the burden of any losses for which it is responsible. *Casa Clara*, 620 So.2d at 1246.

The common thread running through these cases is a recognition that tort-based duties are not implicated or appropriately imposed in the absence of actual physical injury to persons or other property. This bright-line recognition that actual injury must occur before tort law is triggered is grounded on an understanding that the cost of tort protection ultimately is borne by society as a whole in the form of higher prices for

all goods and services. This is true because manufacturers faced with tort liability for purely economic losses necessarily "must raise prices on every contract to cover the enhanced risk." *Florida Power & Light*, 510 So.2d at 901.

While the imposition of such a cost burden on the consuming public is justified when a product or service causes actual physical injury to persons or unrelated property, the issue when only economic losses are involved becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies" or purchase insurance. *Casa Clara*, 620 So.2d at 1247 (*quoting* Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L. Rev. 891, 933 (1989)). This Court answered that question in the negative in *Casa Clara* and should do so again in this case.

In the end, the economic loss rule is designed to preserve the law of contracts by limiting the application of tort law to cases involving actual physical injury to persons or "other" property. The Rule performs this critical function by serving as "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." *Casa Clara*, 620 So.2d at 1246 (*quoting* Barrett, *supra*, at 933).

By serving as this "fundamental boundary," the Rule preserves the core principle on which commerce in this country has been based for over 200 years - freedom of contract.

The lessons of *Prevost*, *Casa Clara*, and *Florida Power & Light*, therefore, are clear: parties who purchase products or other services are encouraged to negotiate for warranty protection or to purchase insurance to protect their economic interests. This is less expensive and burdensome to society than forcing the consuming public to bear the cost of purely economic losses sustained by those who fail to protect their own economic interests.

Under these guiding principles, the Respondent was encouraged when it purchased the resin at issue in this case to negotiate with the Petitioner for warranty protection or to purchase insurance to protect itself in the event the resin proved defective and caused the very economic losses of which it now complains. *Florida Power & Light*, 510 So.2d at 901-902; *Casa Clara*, 620 So.2d at 1246-1247. It was free, of course, to forego such protection (which it did) in exchange for a lower price.

Its election not to bargain for greater warranty protection or to purchase insurance to protect its economic interests was an economic risk that it alone must bear. There is no justification for permitting the Respondent to avoid the ramifications of its own bargain, benefit from the lower price it paid for the resin in exchange for no warranty or insurance

protection, and then sue in tort to recover its purely economic losses. If that were the law of Florida, the citizens of this state would pay dearly in the form of higher prices for all goods and services.

Indeed, if that were the law of Florida, the very antithesis of the Rule's bedrock policy foundation will be achieved: parties would be encouraged to **never** bargain for warranty protection or purchase insurance because they could save the cost of both and, instead, rely on tort law for their free "warranty" protection. Such a result would render it impossible for manufacturers to allocate their liability exposure through contract, exposing them to tort liability "in an indeterminate amount, for an indeterminate time to an indeterminate class." *See Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 179-780, 174 N.E. 441, 444 (1931). The law of contracts and the Uniform Commercial Code would crumble into a heap of meaningless principles.

Viewed in this light, it becomes readily apparent that Respondent's purported interpretation of the "other" property exception must be carefully scrutinized and ultimately rejected. Adoption of its arguments would allow it to escape the ramifications of its own failure to protect its economic interests through contractual negotiation or insurance.

The citizens of Florida do not deserve the higher costs for goods and services that inevitably will follow. Rather, the

citizens of Florida need this Court to stand by its prior decisions in *Casa Clara*, *Prevost* and *Florida Power & Light* to assure the stability of commerce in this state.

B. Respondent has not Suffered Damage to "Other" Property Within the Meaning of the Economic Loss Rule Because that Exception Applies Only to Property Unrelated or Unconnected to the Product Sold

The "other property" exception has, perhaps, spawned more debate and confusion than any other issue concerning the economic loss rule. This debate, and the ensuing confusion and conflict it has caused, stems primarily from the opinions of some courts that the exception must be applied "literally" without regard for the Rule's underlying policy foundation. Under this approach to the Rule, the "other" property exception is said to apply if the target product causes damage to any other tangible item or property, even if the target product and the damaged property are components or elements of a second, larger product.[2] Because the homeowners in *Casa Clara* also attempted to advance

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[2] The Florida case most often cited for this proposition is *Adobe Building Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA 1981), *rev. dismissed*, 411 So.2d 380 (Fla. 1981). *Adobe*, of course, was disapproved and rejected by this Court in *Casa Clara*. 620 So.2d at 1248 n.9. For examples of other cases following this approach, *see, e.g., Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. Ct.) aff'd on other grounds, 336 A.2d 211 (1975); *Mike BaJalia, Inc. v. Amos Construction Co.*, 235 S.E. 2d 664 (Ga. App. Ct. 1977); *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 492 N.Y.S.2d 371 (N.Y. App. Div. 1985).

this "literalist" approach, resolution of the Respondent's identical argument must begin and end with *Casa Clara*.

In that case, the homeowners alleged that concrete manufactured and supplied by the defendant was contaminated with excessive amounts of salt. 620 So.2d at 1245. The high salt content, in turn, allegedly destroyed the reinforcing steel embedded in the concrete by causing it to rust, which, in turn, caused the concrete itself to crack and fall to the ground. The inevitable result, alleged the homeowners, was the destruction of their homes. *Id.*

The homeowners argued that because the concrete damaged the reinforcing steel embedded within it and damaged other components and the homes themselves, the concrete caused damage to "other property" within the meaning of the Rule. This Court rejected that argument, however, even though the concrete literally had caused damage to the reinforcing steel and other components because the focus for applying the "other" property exception must be on the "character" of a plaintiff's losses and the object of its bargain, not the product sold by the defendant. *Id.* at 1247. Since the object of the homeowners' bargains were their homes, they did not suffer damage to "other" property when the concrete damaged other components of the homes and the homes themselves. *Id.*

It is clear under *Casa Clara*, therefore, that the Respondent did not suffer damage to "other" property when the

resin damaged the boat in question. This is true because the object of the bargain when the resin was purchased was not the resin itself, which had no intrinsic value or use as a "finished" product apart from its use in the construction of the boat. Rather, the object of that bargain was the boat itself, and the resin's use as a component of that boat.

The Respondent had no more interest in the resin as a "finished" product than the homeowners or their general contractors had in the concrete or steel in *Casa Clara*. In each case, the product alleged to be contaminated or defective became an integral component of another product (a home or boat) and allegedly harmed the finished product in which it was incorporated or to which it had been applied. Like the concrete in *Casa Clara*, the resin was purchased with the commercial expectation that it could be incorporated into, assembled as a part of, or applied in conjunction with other components to build another "finished" product - in this case, a boat. When the resin failed, Respondent suffered "disappointed economic expectations" and nothing more.

Thus, while it may be true that the resin caused damage in a literal sense to another object - the boat, the same came be said of the concrete in *Casa Clara*. The flaw in Respondent's argument is its misguided focus on the "finished" product it purchased rather than on the object of its bargain. Since the object of the bargain was the construction of a boat, damage to

that boat cannot constitute damage to "other" property under *Casa Clara*.

Unfortunately, Respondent insists that its "finished" product and "literalist" approach to the "other" property exception must follow from that portion of *Casa Clara* which provides: "[t]he character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant". It claims this Court intended for that passage of *Casa Clara* to represent a bright-line definition of what constitutes "other property" under the Rule.[3] Since the product purchased by the Respondent (resin) caused damage to another tangible thing (the boat), Respondent insists *Casa Clara* compels a finding that "other" property has been damaged because it purchased resin, not the boat.

This distorted view of *Casa Clara* lacks merit for several reasons. First, it ignores that second half of the same sentence, which provides that one may **not** look to the product sold by the defendant to determine the character of a plaintiff's loss. Thus, if one cannot look to the resin Respondent purchased to determine whether "other" property has been damaged, Respondent's argument must fail. In short, that passage of *Casa Clara* could not have been intended to represent a bright-line

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[3] It also draws support from the discussion following that passage concerning the fact the homeowners did not bargain for the concrete or other components used to build their homes.

definition of "other" property because it will always lead to conflicting results in cases like the instant case in which the product purchased by the plaintiff and the product sold by the defendant are the same.

Instead, as the Fourth District correctly concluded below, that passage of *Casa Clara* was not intended to define "other" property. Rather, the import of that passage was this Court's statement that the nature of a plaintiff's losses and the object of its bargain control whether it has suffered damage to "other" property. When a plaintiff has suffered nothing more than "disappointed economic expectations," like the Respondent, it is limited to a cause of action in contract and may not sue in tort.

Moreover, if that passage of *Casa Clara* meant what the Respondent suggests it does, the general contractors who purchased the concrete in *Casa Clara* would necessarily be permitted to sue the concrete manufacturer in tort and contract even though the homeowners could not sue that manufacturer in tort or contract. This result would be compelled under Respondent's argument because the concrete purchased by the contractors literally caused damage to "other" property, the steel and homes. This Court could not have intended such an absurd and anomalous result. Such a result would ignore the core lesson of *Casa Clara* that all parties in the chain of construction must pursue their claims for purely economic losses in

contract, not tort. If the contrary were true, this Court's analysis of the economic loss rule and the policies underlying that Rule would have no meaning. The law of contracts and the Uniform Commercial Code would serve no purpose.

If anything, the economic loss rule should apply with even greater force to parties like the Respondent and the general contractors in *Casa Clara* because they were in direct privity of contract with the target defendant and were free to negotiate their economic risks through warranty provisions and price. Of course, they also were free to forego such warranty protection or insurance in exchange for a lower price. Certainly, those who purchase a product and are in a position to protect themselves contractually or through insurance should be the very last to be afforded tort remedies, not the first.

If the contrary were true, the underlying policy goals of the Rule would never be achieved because general contractors and parties like the Respondent would never "bargain" for warranty or insurance protection. Instead, they would always buy the product for the lowest possible price and rely on tort law for their free "warranty" protection, denying their seller the benefit of its bargained-for allocations of risk. This is <u>not</u> what *Casa Clara* or the policies underlying the Rule sought to achieve. If they did, it would be impossible for manufacturers to maintain realistic limitations on damages and would force them to pass the high cost of insuring against every conceivable risk

onto all other consumers, potentially pricing some consumers out of the market and, in turn, jeopardizing the existence of many businesses.

There is no logical or rational basis for affording tort relief to parties like the Respondent or the contractors in *Casa Clara*, but deny such relief to persons further down the chain of contracts like the homeowners in *Casa Clara*. If this were the case, the lessons of *Prevost*, *Florida Power & Light* and *Casa Clara* would be lost in a cloud of subterfuge and "mischief". *Casa Clara*, 620 So.2d at 1247.

Numerous other decisions in Florida also compel the rejection of Respondent's argument that one must look to the product purchased by a plantiff in a vacuum to determine whether it has suffered damage to "other" property. For example, in *Aetna Life & Casualty Co. v. Therm-O-Disc*, 511 So.2d 992 (Fla. 1987), this Court held that a purchaser of switches used in the construction of heat transfer units could not sue the manufacturer of those switches in tort even though the switches failed and caused the destruction of the heat transfer units themselves. This conclusion was reached despite the fact the switches <u>were</u> the "product purchased by the plaintiff" and caused damage to "other" property in a literal sense.

Similarly, in *GAF Corp. v. Zack Co.*, 445 So.2d 350 (Fla. 3d DCA), *rev. den.*, 453 So.2d 45 (Fla. 1994), which this Court repeatedly has cited with approval, a roofing contractor,

who has been sued for installing defective roofs, filed tort claims against the manufacturer of the roofing materials used to construct the roofs on the theory that the defective roofing materials had damaged the roofs or, in other words, damaged "other" property. The court held, however, that the general contractor could not sue the manufacturer in tort to recover its purely economic losses even though the "product purchased" by the contractor - the roofing materials - caused damage to other property in a literal sense.

The holding in *GAF Corp.* is critical for another important reason: the general contractor in *GAF Corp.* occupied the exact same position in the chain of contracts the general contractors occupied in *Casa Clara*. Since this Court repeatedly has approved *GAF Corp.* as a correct application of the Rule, *GAF Corp.* bridges the gap left open by *Casa Clara* by confirming that this Court would not allow the general contractors in *Casa Clara* to sue the concrete manufacturer in tort even though the "product purchased" by the general contractors literally damaged other property in the form of the steel reinforcing bars and other components used to construct the plaintiffs' homes.

Finally, in *American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 451 (Fla. 1st DCA 1991), the First District correctly rejected the argument that a replacement oil pump "purchased by [the] plaintiff" damaged "other" property

when it failed, causing the destruction of the engine within which it was incorporated. As the court reasoned:

> Here the object of the bargain was a repaired engine, not just a replacement oil pump. The oil pump furnished essential lubrication and heat protection to the engine - this is the part of the "bargain" purchased, not just the metal and parts making up the oil pump. The pump became an integral part of the repaired engine and when it damaged itself, and the engine parts, this was not damage to "other property". . . . [T]he "character of the loss" is not just a useless pump - it is an engine deprived of a substance that is essential to its operation.

578 So.2d at 454.

Thus, the rationale underlying *Casa Clara*, *Aetna*, *American Universal*, and *GAF Corp.*, can be summarized as follows:

> Injury to the product itself cannot be completely divorced from possible injury to other property because poor product performance "will necessarily cause" injury to other property. . . . Obviously, a material factor enunciated by the courts in determining whether other property has been injured is whether the defect was such a risk as would be encompassed in a commercial transaction as contemplated by the Uniform Commercial Code. . . . [L]oss to property belonging to the plaintiff flowing from a product or service within the contract's contemplation and reasonably foreseeable as a result should the product or service prove defective will not support recovery in tort because injury to such property is contemplated, or should have been, by the parties to the agreement. As a corollary, therefore, the term "other property" appears to be subject to the construction that it is property belonging to the plaintiff the risk to which is outside the reasonable contemplation of the contract.

Myrtle Beach Pipeline Corp. v. Emerson Electric Co., 843 F.Supp. 1027, 1058-60 (D.S.C. 1993), *aff'd* 46 F.3d 1125 (4th Cir. 1995).

In short, the Respondent's "literalist" version of the other property exception cannot be reconciled with *Casa Clara*, *Aetna*, *American Universal*, *GAF Corp.*, *Myrtle Beach*, or the overwhelming majority of decisions addressing this issue. As the Fourth District correctly concluded below:

> [The] same analysis of the product purchased could quite as well have been made by the court in *Casa Clara*: the defective cement contaminated by salt damaged the steel support rods that it had been poured around, and therefore it could be said that the concrete damaged "other" property. But the court did not engage in that analysis. Its failure to do so suggests that the "other" property exception to the ELR must be limited to property that is unrelated and unconnected to the product sold and there is no privity between the owner of the property damaged and the distribution chain for the product causing the damage.

Jarmco, Inc. v. Polygard, Inc., 668 So.2d 300, 303 (Fla. 4th DCA 1996).

This Court should clarify once and for all that "other property" means just that: property unrelated and unconnected in any way to the focal product sold by the defendant. Since the object of the Respondent's bargain when it purchased the resin was a constructed boat, damage to that boat does not constitute damage to "other" property" as a matter of law.

C. The Second District's Decision in *Finks Farms* Also Conflicts with *Casa Clara* and Must be Disapproved to Prevent Future Conflict and Confusion

Unfortunately, the distorted, "literalist" interpretation of the "other property" discussion in *Casa Clara* was adopted by the Second District in *E. I. DuPont de Nemours & Co. v. Finks Farms*, 656 So.2d 171 (Fla. 2d DCA 1995). Indeed, the Respondent bases virtually its entire argument on that case. However, as the Fourth District correctly concluded below, *Finks Farms* is in direct conflict with *Casa Clara* and must be disapproved.

In that case, a commercial farmer purchased an agricultural chemical designed to prevent plant diseases from injuring or otherwise destroying his tomato crop. When the chemical allegedly failed and damaged his crop, the farmer sued the chemical manufacturer in tort to recover his purely economic losses.

The chemical manufacturer argued the farmer's tort claims were barred by the economic loss rule because the farmer suffered only disappointed economic expectations in the form of lost profits. Like the oil pump in *American Universal* and the concrete in *Casa Clara*, the object of the farmer's bargain was not the chemical itself, but a healthy tomato crop. Since the farmer only suffered damage to the tomato crop and concomitant lost profits, it followed his claims were barred by the Rule.

The farmer countered by arguing that under *Casa Clara*, "the product purchased by the plaintiff" dictates whether it has suffered damage to "other property". Since he purchased the agricultural chemical, and not the tomato crop, he necessarily suffered damage to "other property" when the chemical allegedly harmed his crop even though he purchased the chemical for the exclusive purpose of applying it to his crop.

The Second District, unfortunately, agreed with this "literalist" reading of *Casa Clara*. In purporting to reconcile its holding with *Casa Clara* and *American Universal*, the court reasoned:

> In contrast to the facts in *Casa Clara* and *American Universal*, the appellee in the instant case bargained for Benlate as a finished product, and the finished product, not just a component of it, damaged other property. The other property consisted of the tomato plants and/or the land upon which the Benlate was sprayed.

656 So.2d at 172.[4]

It should be plain to the Court that *Finks Farms* cannot be reconciled with *Casa Clara* and must be disapproved for the reasons discussed above. The object of the farmer's bargain when he purchased the chemical was a healthy tomato crop, not the

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[4] Contrary to the implication of the foregoing quote, the farmer did not seek damages for injury to his land. *See* page 1 of the Appellant's Reply Brief in *Finks Farms*, which is set forth in the accompanying Appendix at Tab 1.

chemical. He lost the benefit of that bargain when the chemical allegedly failed, causing harm to his crop.

Like the general contractors in *Casa Clara* and *GAF Corp.*, the farmer in *Finks Farms* purchased a series of components (seed, water, fertilizer, soil, pesticides, etc.) in commercial, arms-length transactions governed by the Uniform Commercial Code with one goal in mind - the production of tomatoes for resale in the open market for the highest possible profit. The farmer had no more interest in the agricultural chemical than the homeowners or general contractors had in the concrete or steel in *Casa Clara*. In both cases, the allegedly defective product was designed to become and became "an integral part of [another] finished product" (a home in *Casa Clara* and a tomato plant in *Finks Farms*). In both cases, the product allegedly injured the product in which it was incorporated, causing the plaintiff to suffer "disappointed economic expectations". *Casa Clara*, 620 So.2d at 1246.

In addition, the farmer in *Finks Farms* occupied the same position in the chain of distribution shared by the general contractors in *Casa Clara* and *GAF Corp.* Since it is clear from the foregoing discussion that the general contractors could not sue their privies in tort to recover their purely economic losses, it follows the farmer's tort claims in *Finks Farms* also should have been barred by the Rule.

Moreover, this Court has never held that farmers are exempt from the Rule. Indeed, this Court implicitly approved application of the Rule to farmers by favorably citing *Monsanto Agricultural Products v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982) in *Casa Clara* and *Florida Power & Light* and by relying on *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988) in *Casa Clara*. Since farmers deserve no better treatment than homeowners or general contractors, it follows that *Finks Farms* must be disapproved to prevent future confusion and conflict over this issue.

If it is not disapproved, farmers and general contractors and other "middlemen" (like Respondent) who combine products or components to create other finished products will continue to seek economic losses in tort and will be encouraged to never bargain for warranty protection or purchase insurance. Why would they? Under *Finks Farms* they can rely on tort law for this protection. Obviously, this Court did not intend such a result when it issued its decision in *Casa Clara*.

It should come as no surprise, therefore, that the majority of courts which have analyzed cases like *Finks Farms* disagree with the conclusion reached in that case. In *King v. Hilton-Davis*, for example, a farmer purchased seed potatoes that had been treated with an agricultural chemical designed to prevent the seed potatoes from sprouting during the off-season. The sprout suppressant worked better than expected; it killed

two-thirds of the seed potatoes to which it had been applied and severely injured the remaining one-third, resulting in a total crop loss. The farmer sued in tort to recover his lost profits. 955 F.2d at 1047-1051.

The Third Circuit held in an opinion approved by this Court that damage caused to the seed potatoes by the sprout suppressant did not constitute damage to "other property". *Id.* at 1051. In reaching this conclusion, the court focused on the farmer's bargained-for expectations in purchasing the treated seed potatoes. This expectation, which the court called "the end result", was

> intended to be a single product - in this case a disease-free, pest-free seed potato that is capable of producing healthy plants. The Kings lost the expected performance of the seed potatoes, no more and no less.

855 F.2d at 1052.

Like the farmer in *King v. Hilton-Davis*, the farmer in *Finks Farms* applied the agricultural chemical to its plants with the expectation of producing live, disease-free plants to maximize his profits. The chemical became an integral part of the plants and when it allegedly injured them (like the sprout suppressant in *King* and the concrete in *Casa Clara*), the farmer suffered "disappointed economic expectations," the core concern of contract law.

In *Monsanto*, which, like *King*, was cited with approval by this Court in *Florida Power & Light* and *Casa Clara*, a farmer

purchased a herbicide designed to kill weeds because the weeds threatened to smother and destroy his vegetable crop. *Monsanto*, 426 So.2d at 575-577. The object of the farmer's bargain when he purchased that chemical was not the chemical itself, but rather the enhancement of his crop so that he could maximize his profits. Unfortunately, the herbicide failed to kill the weeds, which, as anticipated, destroyed his crop. The First District, in one of the earliest applications of the economic loss rule in Florida, agreed that the farmer's tort claims were barred because "tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers".

In a strained effort to distinguish *Monsanto*, the court in *Finks Farms* relied on dictum in *Monsanto* implying that the *Monsanto* court might have reached a different conclusion if the herbicide had caused direct damage to the crop instead of indirect harm by failing to kill the weeds. *Finks Farms*, 656 So.2d at 173. This "direct/indirect" distinction, however, is legally unsound and was rejected in *Casa Clara* because the concrete in that case caused <u>direct</u> and devastating damage to the steel reinforcing bars and other components of the plaintiffs' homes. Thus, to the extent *Monsanto* sanctioned a distinction between indirect and direct damage for purposes of applying the Rule, that distinction has never been embraced by this Court and was rejected in *Casa Clara*.

Moreover, the complained-of losses in *Finks Farms* and *Monsanto* were identical; lost profits arising from a lost crop. There is no logical or rational basis to justify a conclusion that the farmer in *Finks Farms* may sue in tort because the agricultural chemical applied to his crop directly damaged that crop, while the farmer in *Monsanto* may not sue in tort because the agricultural chemical in that case indirectly damaged his crop. In each case, the crop was lost due to a failure of the chemical to perform as expected.

The Sixth Circuit reached the same conclusion in *Bailey Farms, Inc. v. Nor-Am Chemical Co.*, 27 F.3d 188 (6th Cir. 1994). There, a commercial farmer filed tort claims against a manufacturer of a soil fumigant designed and purchased to kill weeds. The fumigant, instead, destroyed his watermelon crop. Despite recognizing the truism that the plaintiff's watermelon crop "literally" was property "other" than the chemical purchased by the plaintiff, the Sixth Circuit refused to allow the tort claims because the object of the farmer's bargain when he purchased the chemical was a healthy watermelon crop. When he lost that crop, he suffered purely economic losses, not damage to "other" property. *Id.* at 189-90.

This point is further made by *Ringer v. Agway, Inc.*, 13 U.C.C. Rep. Serv. 2d 114, 1990 W.L. 112091 (E.D. Pa. 1990).[5]

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[5] Although *Ringer* is an unpublished opinion, it has been cited with approval by numerous courts. *See, e.g., Wellsboro* (continued...)

In that case, the plaintiff operated a small potato farm which experienced impaired yields because seed potatoes it purchased were infected with a bacterial ring rot. Damages were claimed not only for the loss of the seed potatoes purchased, but also for damage the ring rot caused to other, previously healthy potatoes, and for an "extensive eradication program to clear the pathogen from [the farmer's] machinery, facilities and land in order to protect future crops". *Id.* at 119-120. Relying, like this Court in *Casa Clara*, on *King v. Hilton-Davis*, the court held the "other property" exception did not apply became all losses incurred by the farmer were

> an ordinary commercial risk of a transaction in the potato industry. Other courts have consistently held that those aspects of damage which involve items or facilities obviously involving the bargain between the parties is not damage to "other property".

Id. at 120.

That is, damage to the seed potatoes and damage attributable to eliminating the ring rot infection from machinery, buildings and soil were not damage to other property under the economic loss rule because such losses were nothing more than an outgrowth of the purchase of an unsatisfactory product, resulting in disappointed commercial expectations. In

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[5](...continued)
Hotel Co. v. Prins, 894 F.Supp. 170, 175 (M.D. Pa. 1995); *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F.Supp. 1027, 1060 (D.S.C. 1993). A copy of *Ringer* is included in the Appendix accompanying this brief at Tab 2.

short, they were classic "economic losses" resulting from failed contractual expectations; damages which represent the "failure of the purchaser to receive the benefit of its bargain - traditionally the core concern of contract law". *East River*, 476 U.S. at 870.

Once again, the lesson to be learned from these cases is that the damages complained of by the farmer in *Finks Farms* and the Respondent in this case are nothing more than "disappointed economic expectations", not damage to "other property." This is not to say that the farmer in *Finks Farms* or the Respondent have no remedy. To the contrary, they were sophisticated commercial entities and were free to negotiate their economic risks through warranty provisions and price or to purchase insurance to protect their economic interests. They were also free to sue (and sued) the party from whom they purchased the defective product in contract pursuant to the terms and conditions of their contracts. "These protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses". *Casa Clara*, 620 So.2d at 1244.

CONCLUSION

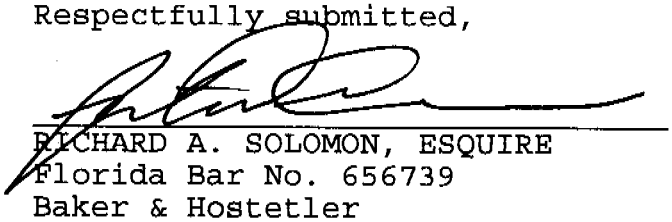
The Respondent cannot escape the fact that it seeks to recover purely economic losses in tort. It does so because it failed to protect its own economic interests through contract or

insurance. In effect, it requests this Court to assist it in avoiding the ramifications of its own bad bargain because it no longer likes that bargain.

This Court should refrain from injecting itself into the private, bargained-for agreement between the parties to this appeal. Neither the citizens of Florida nor product manufacturers should be forced to bear the cost of the Respondent's economic losses because it failed to protect itself. If the contrary were true, the law of contracts would "drown in a sea of tort", taking the Uniform Commercial Code with it to a watery grave. *Casa Clara*, 620 So.2d at 1247 (*quoting East River*, 476 U.S. at 866).

For these reasons, the Florida Concrete & Products Association respectfully requests the Court to end all future debate about the "other" property exception by approving the decision of the Fourth District below and by formally disapproving the unsound and conflicting decision of the Second District in *Finks Farms*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief of the Florida Concrete & Products Association was furnished by U.S. Mail this 18th day of June, 1996 to **Enola T. Brown**, Esq., P.O. Box 3433, Tampa, FL 33601; **William E. Guy, Jr.**, Esq., 55 East Ocean Boulevard, P.O. Box 3386, Stuart, FL 34995-3386; **Jane Kreusler-Walsh**, Esq., Suite 503, Flagler Center, 501 S. Flagler Drive, West Palm Beach, FL 33401; **David J. Chesnut**, Esq., 215 S. Federal Highway, Suite 200, Stuart, FL 34994; and **G. William Bissett, Esq.**, Hardy, Bissett & Lipton, P.A., 501 Northeast First Avenue, Miami, FL 33132.

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IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 94-00174

E. I. Du PONT DE NEMOURS & COMPANY,
VIGORO INDUSTRIES, INC.; TERRA INTERNATIONAL, INC.;
and IMMOKALEE FARMERS SUPPLY, INC.

Appellants,

v.

FINKS FARMS, INC.

Appellee.

REPLY BRIEF OF APPELLANTS E. I. Du PONT DE NEMOURS & COMPANY, VIGORO INDUSTRIES, INC. and IMMOKALEE FARMERS SUPPLY, INC.

On Appeal from a Final Judgment entered in the
Twentieth Judicial Circuit in and for Hendry County, Florida

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Statement of the Facts

In their initial brief, defendants stated that the lawsuit brought against them by Finks sought only to recover the net loss suffered by Finks from the sale of its spring 1991 tomato crop, based on a reduction in the yield of that crop from the level that would have been realized had Benlate not been applied to the crop.[1/] In both the Statement of the Case and the Statement of the Facts contained in its answer brief, Finks has verified that the only recovery it sought was that net crop loss which the defendants had described.[2/]

The Finks' claim *only* for net crop loss is a key fact in this appeal. It bears critically on the references, repeated throughout Finks' brief, suggesting that there was evidence before the jury of damage to the *land* on which the spring 1991 tomato crop was grown, and that there was residual *soil* damage after the spring 1991 crop was sold. (*See, e.g.*, Answer brief at pp. 22, 32).

1/ Initial brief at p. 3.

2/ In its Statement of the Case, Finks declares:

> The Complaint sought money damages from the Defendants for actual physical injury to the Finks' 1991 tomato crop.

(Answer brief at p. 1). In its Statement of the Facts, Finks states:

> Finks expressed to the jury the elements that led him to believe Benlate was involved in the demise of his Spring, 1991, crop . . . .

(Answer brief at pp. 5-6).

Argument

I. The economic loss doctrine bars a recovery of damages for the Finks Farms' crop loss.

The court will note that there is agreement between the parties that the economic loss doctrine applicable in Florida has been defined in two decisions of the Florida Supreme Court -- *Florida Power & Light v. Westinghouse Electric Corp.*, 510 So. 2d 899 (Fla. 1987) (*FP&L*), and *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993) -- and has been applied in numerous district court decisions. The only point of disagreement between the parties is whether the doctrine applies at all in the negligence and strict liability lawsuit brought against the defendants by Finks.

The argument *against* application of the economic loss doctrine by Finks is grounded on a notion that any injury to its 1991 tomato crop from an application of Benlate is identical in legal effect to an injury to a person.

> [T]he destruction of healthy crops by defective fungicides -- like the destruction of human life by unreasonably dangerous products -- is precisely the type of harm the law of tort is intended to protect.[3/]

This view of the doctrine, defendants submit, is completely at odds with the jurisprudence of this state, and with the majority of other states which have considered and adopted the doctrine. The fundamental concept underlying the doctrine is *precisely* the opposite of what Finks' suggests: it is, rather, that injury to a person caused by a defective product is best allocated to the manufacturer by society, whereas injury to *property* is appropriately a risk of loss *not* transferred in tort from purchaser to

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3/ Answer brief at p. 28.

manufacturer. *Seely v. White Motor Corp.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965), *FP&L*, 510 So. 2d at 900-901; *Casa Clara*, 620 So. 2d at 1245-46.[4/]

From its faulty foundation, Finks makes the more particularized argument that injury to its plants was injury to "other property" -- a recognized exception to the economic loss doctrine -- because the Benlate it purchased was the "finished product" rather than the object of a commercial contract of purchase and sale.[5/]

If the court were to accept Finks' analysis, it would reflect disagreement with Florida precedents which have recognized that the purchase of a component or ingredient product from a manufacturer, for integration into or use with other products, produces only a commercial expectation which may be remedied in contract, and does not authorize a tort remedy.[6/] A brief description of the most compelling of those cases will illustrate how Finks' analysis cannot coexist with current Florida law, after which defendants will explain why Finks' analysis is flawed.

[4/] Finks appears to recognize the sociological underpinnings for the doctrine. (Answer brief at pp. 30-31). This recognition is hard to match with its position on the outcome of this case.

[5/] Answer brief at p. 26.

[6/] *GAF Corp. v. Zack Co.*, 445 So. 2d 350 (Fla. 3d DCA), *review denied*, 453 So. 2d 45 (1984), provides a meaningful analogy here, based on the similarity of situations between the plaintiff there and Finks. In *GAF*, a roofing contractor, who had incurred damages resulting from an adverse judgment against it for the installation of a defective roof, brought suit in tort against the manufacturer of the roofing materials he had used. The Third District applied the economic loss doctrine to bar the tort claim of the contractor, reasoning that "no personal injury or property damage was sustained by the [contractor] as a result of its purchase and installation of the defective roofing materials manufactured by . . . GAF." *Id.* at 351-52. Finks, as a tomato wholesaler, occupies the same position as the roofing contractor in *GAF*. Each purchased a product with the precise commercial objective to utilize it in conjunction with other materials to fashion a merchantable end product.

In *Aetna Life & Casualty Co. v. Therm-O-Disc*, 511 So. 2d 992 (Fla. 1987), the court held that no tort action was available against the manufacturer of a switch for damage to heat transfer units when the switch was incorporated into those heat transfer units. The "switch" was every sense a "finished product" in its own right, but it was purchased with the object of operating as a integral part of a heat transfer unit and not independently as a finished, free-standing item of purchase.

In *American Universal Insurance Group v. General Motors Corp.*, 578 So. 2d 451 (Fla. 1st DCA 1991), a replacement oil pump was purchased with the intention that it be installed as a component of the engine on a boat, in order to keep the engine operational. The oil pump was surely a "finished product" in its own right, but when the pump failed no tort claim was permitted against the pump manufacturer for destruction of the boat's engine.

The Finks' "finished product" theory is flatly and facially incompatible with these decisions. These cases are acutely correct in their application of the economic loss doctrine. A so-called "finished product" is often purchased, as here, with the intent that it will be incorporated into, assembled as part of, or applied as an ingredient of a property or larger product line which the purchaser uses or markets commercially.

The economic loss doctrine requires evaluation of the "object of the bargain" in order to determine whether "other property" has been implicated. *American Universal*, 578 So. 2d at 454. The same analysis -- looking to the objective of a purchase to determine whether "other" property has been effected -- was the foundation for the

decisions in *Bailey Farms Inc. v. Nor-Am Chem. Co.*, 27 F.3d 188 (6th Cir. 1994), *Ringer v. Agway, Inc.*, 13 U.C.C. Rep.Serv.2d 114, 1990 WL 112091 (E.D. Pa. 1990), *Neibarger v. Universal Coops., Inc.*, 439 Mich. 512, 486 N.W.2d 612 (Mich. 1992) and *Theuerkauf v. United Vaccines Div. of Harlan Sprague Dawley, Inc.*, 821 F. Supp. 1238 (W.D. Mich. 1993). Finks does not distinguish these cases, every one of which establishes that plants (and even soil) to which Benlate was applied do not constitute "other property."[2/]

Finks has approached the doctrine -- although recognizing its fundamental, doctrinal underpinnings -- with the most superficial of assessments: that Finks simply bought a "finished" box of Benlate as if intending to use the box independently of Finks' commercial tomato farm activity. Finks would confine the economic loss doctrine to harm from a manufactured product from a defect which only harms the "finished product" itself. Finks would treat a box of Benlate as if the contents of the box had no interrelationship or intended intermingling with the plants and soil on which it was sprayed. The object of the Finks in purchasing Benlate was not to put it on a shelf and admire its symmetrical shape and coloration. Finks bought Benlate to apply that product on the plants and soil at Finks Farm: to incorporate Benlate within its plants and soil in precisely the same way that there was an installation or assemblage of switches into heat pumps, and oil pumps into engines.

2/ Finks concedes that Benlate was "sprayed upon plants, *with product and water soaking into the ground*." (Answer brief at 6) (emphasis added). That acknowledgement further compels the conclusion that even if there were injury to soil and ground from Benlate, that form of injury would not fall within the "other property" exception to the doctrine inasmuch as the *intended* application was to the soil and ground beneath the plants themselves.

The Finks' "finished product" foundation for distinguishing economic loss cases from "other property" instances is a doctrinally unsatisfactory and practically unreliable method for determining when tort remedies should be available in the world of commercial purchases and sales. It is no substitute for the methodology applied in the several decisions noted above which have addressed the "other property" exception.

The driving force for the economic loss doctrine, as framed in *Seely* and articulated in the *FP&L* and *Casa Clara* decisions, is that property which is *contemplated* to be at risk from poor or defective product performance is not "other" property. No tort remedy is available when, *as intended by the purchaser*, the purchased product is applied to or intermixed with property that suffers injury as a consequence of the product's *contemplated* application or use. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1058-1060 (D.S.C. 1993). Otherwise, the compulsion to bargain for contractual coverage for such risks, or to accept a lower price and bear all of the risk, would be defeated. Worse, the Uniform Commercial Code's labyrinth of risk allocation and certainty for commercial expectations would be irreparably bypassed.[8/] In the

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[8/] *Casa Clara* advised that one looks at the "product purchased by the plaintiff, not the product sold by the defendant," 620 So. 2d at 1247, but the Court concluded that the object of the purchase was not an independent usage of the component cement, but rather its incorporation into a "home." Notably, the Court relied for its analysis on *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), where seed potatoes pre-treated with Fusarex were the purchased product. They, like the Benlate here, were seen to be interrelated to the intended object of the purchase -- components to be cut up, planted and intermingled with soil and water in a process designed to generate a full and healthy potato crop. Just as Finks lost the expected performance of its crop, so did the potato farmer in *King* lose "the expected performance of the seed potatoes," that is, "a disease-free, pest-free seed potato that is capable of producing healthy plants." 855 F.2d at 1052.

agricultural context, this is the message of *Bailey Farms*, *Ringer*, *Neibarger* and *Theuerkauf*.

It remains, perhaps, to define exactly what was the object of Finks' purchase of Benlate. It was not a box of Benlate, *qua* Benlate, assuredly. It could only have been a healthy tomato crop -- an agricultural phenomenon resulting from the intertwining of seedlings, soil, water, any growth additives that were used, and any growth-prevention inhibitors (of which Benlate was one).[9/]

As anticipated in the defendants' initial brief, Finks has argued an "efficacy-defect" dichotomy discussed in *dicta* in the *Monsanto* decision.[10/] Finks contends that the effectiveness of Benlate as a fungicide is not at issue -- it performed well to prevent fungus -- but rather that it was "toxic to the plants and property." (Answer brief at 27). The suggestion that Benlate *was* "effective" as a fungicide, but "defective" as a product, is absurd.

A fungicide claimed by purchasers to kill plants on application is hardly a commercially effective fungicide, when the object of the bargain behind its purchase was the growth of healthy tomatoes for wholesale to distributors. Benlate was ineffective for

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9/ Finks suggests throughout its brief that there was contamination from Benlate to the soil and ground property, as if this would lift the claim for relief outside the economic loss doctrine's bar to tort remedies. This suggestion is factually inaccurate, as noted in the Statement of the Facts portion of this brief. The jury verdict reflected only net loss of tomato *crop*, not damage to soil or ground contamination.

10/ Du Pont explained at length in its initial brief that the economic loss doctrine applies equally whether a product is ineffective or defective, and that in this regard the distinction suggested in *Monsanto Agricultural Products Co. v. Edenfield*, 426 So. 2d 574 (Fla. 1st DCA 1982) has never been acknowledged by the Florida Supreme Court as part of its economic loss jurisprudence. (Initial brief at 18-19).

its intended purpose, as much so as was the weed killer "Lasso" in *Monsanto* (assuming the jury was right in ascribing tomato plant loss to the Benlate applied by Finks).[11/] In this regard, *Monsanto's dicta* remains isolated, despite repeated opportunities for adoption in the subsequently decided *FP&L*, *Aetna*, and *Casa Clara* decisions, as well as a host of district court decisions.

Perhaps the most revealing measure of the proposition for which Finks argues is its identification of and reliance on cases which do not discuss the economic loss doctrine at all, or which involve other controlling legal principles, or which arise in the minority of jurisdictions which have simply rejected the doctrine altogether.

Florida Nursery & Landscape Co. v. Nally, 127 So. 2d 700 (Fla. 2d DCA 1961), is a pre-*FP&L* decision which reflects no discussion of the economic loss doctrine whatsoever. Its entire rationale was that substantial evidence supported implied warranty and negligence claims for property loss against a company which sprayed contaminated chemicals on a nursery. Finks' comment that *Casa Clara* did not "purport to disturb" this "established case law" (Answer brief at 26) is certainly correct, but only because the *Nally* decision had nothing to do with the economic loss doctrine.

11/ The analogy drawn by Finks to promote distinction between efficacy and defect is unconvincing. Finks maintains that had it purchased a special fertilizer which failed to double its crop, then it would have lost only economic expectations, but that had the fertilizer been defective and killed it's expected crop, that would be compensable property damage in tort. (Answer brief at 29). The fallacy in this reasoning is that agriculture is an inherently unstable venture and chemicals are required to grow any crop, as Finks eloquently has described in its discussion of commercial vegetable crop farming. (Answer brief at 4). It is commercially reasonable to presume, as did the court in *Monsanto*, that applied chemicals may harm the crop rather than improve it, so that a warranty with express disclaimers appropriately constitutes a contractual arrangement by which a manufacturer responds to liability.

Cassisi v. Maytag Co., 396 So. 2d 1140 (Fla. 1st DCA 1981), is a products liability action brought when an allegedly defective clothes dryer, installed in the purchaser's home, caused the house to burn down. Although the decision preceded *FP&L*, and both by its facts and date of adoption places no limitation on *Casa Clara,* it harmonizes comfortably with both decisions. *Cassisi* is the classic, "other property" exception situation. The defective dryer was plainly a product distinct from, and useable independently from the house into which it was placed after purchase. Unlike the *Casa Clara* situation this house *was* indeed "other" property, as distinct from a product intended to be incorporated as a component into the object of the purchaser's purchase. The object of the bargain there -- a dryer -- was not a facet of the purchase of the house.[12/]

Ohio Casualty Insurance Co. v. Bazzi Construction Co., Inc., 815 F.2d 1146 (7th Cir. 1987), *affirming*, 648 F.Supp. 1056 (N.D. Ill. 1986), involved an insurer's duty to defend. A contractor was sued for negligence by the owner. Defense was tendered to the insurer, who disclaimed coverage, on the theory that damage was only to the insured's own work or product, a basis under Illinois law and the insurance policy for a coverage exclusion. The court required that the insurer defend because damage to pre-existing structures was alleged to be covered under the policy, and because the scope of an insurer's duty to defend is broader than ultimate liability. *Bazzi* was decided

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[12/] Finks' objective in purchasing Benlate was not merely to place it on "pre-existing" property (the soil and plants), and to have it function independently of that property. It was to apply it as an ingredient *with* plants and soil to produce commercially saleable tomatoes. There exists no doctrinal "existing" versus "pre-existing" structure dichotomy to be drawn between *Casa Clara* and *Cassisi.*

exclusively under principles applied to the interpretation of insurance policies within the context of an insured's duty to defend.[13/]

Yet another out-of-state authority on which Finks relies is *Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, Inc.*, 263 N.Y. 463, 189 N.E. 551 (N.Y. 1934), a case with no discussion of the economic loss doctrine in which the New York court determined that a manufacturer could be held liable in negligence where its cement waterproofing preparation was highly explosive and imminently dangerous to life or property, and destroyed a barn and personal property when fumes from the product came in contact with a lantern. The "imminent danger" theory of tort recovery has been rejected by the Florida Supreme Court in *Casa Clara*, and New York's express adoption of the economic loss doctrine has more recently diverged from that adopted by Florida in *FP&L* with New York's approval of the "catastrophic accident" basis for tort recovery. *See Bellevue South Assocs. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 579 N.E.2d 195, 200 (1991). New York law is no barometer of Florida's economic loss jurisprudence.

Lowe v. E.I. Du Pont de Nemours, 802 F.2d 310 (8th Cir. 1986), is another decision with no discussion of the economic loss doctrine. The Finks' reference is doubly misleading, moreover, because Arkansas law applies the minority view on economic loss and has rejected the *Seely* analysis formally adopted by the Florida Supreme Court in *FP&L*. *See Blagg v. Fred Hunt Co., Inc.*, 272 Ark. 185, 612 S.W.2d 321 (Ark. 1981).

[13/] Illinois has long applied the economic loss doctrine, as well. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982). Any implication to the contrary from Finks' use of *Bazzi* should be disregarded.

Certainly the most desperate of Finks' case citations for challenging the economic loss doctrine is *ISK Biotech Corp. v. Douberly*, 19 Fla. L. Weekly D1767 (Fla. 1st DCA June 20, 1994), a decision which nowhere mentions the economic loss doctrine.[14/] Finks' extensive reliance on a Florida decision which does not touch on the subject is telling as to *controlling* Florida law. Finks' comment that "Du Pont chooses to ignore" this decision is certainly correct, just as defendants will continue to ignore other decisions which do not bear on the issues before the court.[15/]

II. The independent tort doctrine also bars the tort claims.

Finks has made no formal response to this issue, apparently content to rest on one sentence in the argument summary that "[t]he purchase [of Benlate] was not the result of any negotiation and no contract was entered." (Answer brief at 24). Finks may have chosen or failed to negotiate, but its purchase of Benlate was no less a contract for that default. *See Casa Clara*, 620 So. 2d at 1247.

The contract of purchase by Finks was not, obviously, to Finks' liking. The terms of that contract -- price, quantity, terms of delivery, warranties and disclaimers included -- nonetheless were a part of Finks' purchase of Benlate. Du Pont had provided an express warranty with every purchase of Benlate, and that warranty was a contract, under Florida law, which specifically governed the terms of purchase.

14/ Counsel for the defendants has reviewed the briefs submitted in *Douberly* which reflect that the manufacturer did not raise the economic loss doctrine as an appellate issue.

15/ The irony of Finks' use of *Douberly* is the factual recitation in that opinion that those parts of the watermelon crop to which Benlate was applied "suffered *no* damage." 19 Fla. L. Weekly at 1767-68 (emphasis supplied).

Whitehead v. Rizon East Ass'n, 425 So. 2d 627, 629 n. 5 (Fla. 4th DCA 1983); *Brown v. Hall*, 221 So. 2d 454, 458 (Fla. 2d DCA 1969). To the extent that Finks was dissatisfied with that particular contractual term, it had the burden to establish that the express warranty with disclaimer was unconscionable. *Meeting Makers, Inc., v. American Airlines, Inc.*, 513 So. 2d 700 (Fla. 3d DCA 1987). It has never made the effort.

The *Monsanto* decision which is otherwise favored by Finks demonstrates that there was a contract, and that Finks was bound by the express warranty it elected to ignore:

> even if [the purchaser] did not know of the limitation in warranty at the time of purchase of the product, it became a part of the bargain . . . .

426 So. 2d at 578.

The injuries pled by Finks constituted damages which might have been recovered under Uniform Commercial Code warranties (unless effectively disclaimed), had Finks not chosen to forego that contract-based remedy. Finks' forbearance, like the silence in its brief, cannot do away with the express warranty contracted for with Du Pont.

The independent tort doctrine, of course, shares the critical concern underpinning the economic loss doctrine, that contract law be preserved. With no allegation of any "independent" tort committed by Du Pont, the contract of purchase and sale into which Finks freely entered precludes a tort remedy.

III. The Court erred in failing to direct a verdict based on the lack of competent evidence to establish causation.

Either intentionally or inadvertently, Finks has completely misdirected its response to defendants' position with regard to the deficiency in proof in this case. The

defendants have contended only that Finks failed to establish that any alleged defect in Benlate was the proximate cause of Finks' injuries. Proximate cause, of course, is one of the four fundamental elements of a negligence or strict liability lawsuit. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Watson v. Lucerne Mach. & Equip., Inc.*, 347 So. 2d 459 (Fla. 2d DCA), *cert. denied*, 352 So. 2d 176 (1977); *Adkins v. Economy Engineering Co.*, 495 So. 2d 247 (Fla. 2d DCA 1986), *rev. denied*, 503 So. 2d 326 (Fla. 1987); *Barati v. Aero Indus. Inc.*, 579 So. 2d 176 (Fla. 5th DCA), *rev. denied*, 591 So. 2d 180 (1991); *Fenner v. General Motors Corp.*, 657 F.2d 647 (5th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982). A directed verdict should have been granted for the defendants because Finks failed to link any alleged defect in Benlate with the cause in fact of Finks' diminished yield from the 1991 spring tomato crop. *See Stahl v. Metropolitan Dade County*, 438 So. 2d 14 (Fla. 3d DCA 1983).

In assessing the defendants' contention, the court can readily discern and set aside the non-responsive material contained in the Finks' answer brief. For example, Finks make a fuss about their "self-effacing, shy genius" Dr. Johnson, who was indeed "ignored" by the defendants in their initial brief. (Answer brief at p. 18). Dr. Johnson knew nothing about and had nothing to say about causation. He was called by Finks to prove the existence of a defect,[16/] a completely different element of a plaintiff's proof.

The same diversionary excursion into elements of the Finks' causes of action *other than causation* run through its answer brief.

16/ Finks has noted for the court that Dr. Johnson was called only "to review mass spectrometry data and testing done by Du PONT scientists themselves in order to ascertain whether Du PONT had found deadly SU herbicides in Benlate in Spring, 1991." (Answer brief at p. 18).

(1) The evidence referenced by Finks regarding Du Pont's testimony, interrogatories and documents (Answer brief at pp. 19-21) -- all generally describing the history of Benlate, its recall and the claims which followed -- prove nothing about causation in *this* case.

(2) Finks' lengthy description and legal discussion regarding similar fact witnesses (Answer brief at pp. 8-14, 35-37) fails to cite a single Florida case which states that the testimony of a similar fact witness may be used to prove causation. In fact, Florida law is to the contrary. Evidence of similar accidents or claims is generally *not* admissible to establish causation. *Friddle v. Seaboard Coast Line R.R. Co.*, 306 So. 2d 97 (Fla. 1974), adopting dissent of Judge Mager in *Seaboard Coast Line R.R. Co. v. Friddle*, 290 So. 2d 85, 89 (Fla. 4th DCA 1974). The admission of similar fact evidence to prove causation in an agricultural case is particularly inappropriate due to the numerous differences between farming practices and the many variables which affect growing plants. *See, e.g., Henderson v. Cominco American, Inc.*, 95 Idaho, 690, 518 P.2d 873 (1973).[17]

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[17] These types of variables are present here as to every similar fact witness presented by Finks. The witnesses operated farms in different parts of the state where soil and weather conditions varied (*see, e.g.*, testimony of Frank Diehl, Ricky Lippman, Genevieve McDonald, Chris Faulkner); some of the witnesses had not grown tomatoes (*see, e.g.*, testimony of Chris Faulkner, R.T. Weeks); the growing operations were different including the time of year when plants are grown (*see, e.g.*, testimony of Ricky Lippman, Frank Diehl); different chemicals were utilized (*see, e.g.*, testimony of Frank Diehl, Genieve McDonald); and Benlate was applied differently at different farms (*see, e.g.*, testimony of Frank Diehl). None of these witnesses were familiar with the spring 1991 tomato crop at Finks Farm. None of their testimony had any bearing on the issue of causation at Finks Farm.

Ultimately, plaintiff's proof of causation stands or fails with the testimony of one witness: its expert, Dr. Carl Whitcomb. In that regard, Finks concedes all of the facts necessary to support defendants' contention that causation was never established through Dr. Whitcomb. Specifically, Finks acknowledges:

> (1) that Dr. Whitcomb's photographs depict Benlate contamination in *1992*, not in the spring of 1991. (Answer brief at 16);
>
> (2) that Dr. Whitcomb testified only that Benlate contaminated the *fields* of Finks Farms.[18] (Answer brief at 16, 34); and
>
> (c) that the symptoms seen on the Sudex in 1992 were merely "consistent" with the symptoms seen in his 1992 test and with plants tested with sulfonylureas at Oklahoma State University.[19] (Answer brief at 16).

Most significantly, Finks does not contest defendants' observation that Dr. Whitcomb never offered an opinion with regard to the *spring 1991 tomato crop*.

Two statements by Dr. Whitcomb sum up the deficiency in his testimony *as it relates to causation*, neither of which were addressed in Finks' brief. Dr. Whitcomb acknowledged his absolute lack of familiarity with the relevant crop:

> Since I didn't see the [spring 1991] crop I really couldn't pass judgment about [insect problems]. What I was there to do

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[18] His conclusion that Finks' "fields" were contaminated by Benlate does not prove that Benlate was the proximate cause of a reduced yield of the 1991 tomato crop.

[19] His conclusion that symptoms observed in 1992 are consistent with damage allegedly caused by Benlate at his test site in Oklahoma, or with damage allegedly caused by sulfonylureas at Oklahoma State University, are completely insufficient as a matter of law to prove causation. *See Victoria Hospital v. Perez*, 395 So. 2d 1165 (Fla. 1st DCA 1981); *O'Neal v. Pine Island Fish Camp, Inc.*, 403 So. 2d 980 (Fla. 1st DCA 1979); *Fenner v. General Motors Corp.*, 657 F.2d 647 (5th Cir. 1981); *Husky Indus. Inc. v. Black*, 434 So. 2d 988 (Fla. 4th DCA 1983); *Gooding v. University Hosp. Building, Inc.*, 445 So. 2d 1015 (Fla. 1984).

> was to evaluate the vegetation on the site at the time of visit. And that's what I did.

(T. 1511).

> [I] was evaluating . . . the farm and the weeds at the time I visited, not his tomato crop. I didn't see it.

(T. 1513).

It would be redundant to repeat here the analysis of the impermissible inference on inferences which is contained in defendants' initial brief.[20/] Dr. Whitcomb's testimony does not fill the gaps which those inferences leave in the area of causation. The Finks' assertion that Dr. Whitcomb performed "tests" using Benlate (Answer brief at p. 15) pointedly ignores deficiencies in the testing procedures such as (i) his failure to perform a single chemical, soil, water, or plant tissue test to confirm his theory of herbicides in the Oklahoma tests, or (ii) his failure to perform *any* tests at Finks Farm. The Finks assertion that the only method by which an herbicide could have gotten into Fink's fields was through Benlate contamination (Answer brief at p. 16), is completely without record support.

The testimony of Dr. Whitcomb aside, there is no proof to demonstrate a causal link between the alleged defect in Benlate and the net crop loss which is asserted to be attributable to the defendants.[21/] The indispensable "causation" element of Finks' cause

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[20/] See initial brief at pp. 31-39.

[21/] The testimony of other witnesses referenced by plaintiff did nothing to fill the gap of proof regarding causation. Cokey Williams, a non-expert lay witness, testified that there were observable symptoms which he did not believe looked like gemini virus, but he agreed that his consideration of causes was a "guess." (T. 1187). Glenn Finks, who observed the spring 1991 crop and who Finks suggests thought the cause of the conditions he observed was chemical injury (Answer brief at (continued...)

of action simply fell into an abyss. Having failed in that regard, a directed verdict should have been granted for the defendants.

IV. The trial court erred in awarding prejudgment interest to Finks Farms where there was no evidence of the date of loss.

The controlling decision on this point is *Faulkner v. Charles Buzbee & Sons, Inc.*, 585 So. 2d 1190 (Fla. 2d DCA 1991), in which the court held that a loss is not sustained in these precise circumstances until the date on which a plaintiff receives the proceeds of the sale of its tomatoes. Finks would have court use the date of last sale to the Tomato Man coop as the time when its damages became liquidated, apparently in a desire to be more fair to the defendants.[22/] With gratitude for the thought, defendants reiterate that this court has already settled the law on this point, and it has been given no reason to ignore or reconsider its *Faulkner* decision.

V. Finks is not entitled to post-judgment interest on interest, as claimed.

As a last point in its brief, Finks asserts that it should have been awarded post judgment interest on interest as a part of the amended final judgment entered on its behalf. This asserted error in the trial court's judgment was not brought to the court by way of cross appeal and, consequently, is not properly before the court for consideration.

[21/](...continued)
p. 8), was, in fact, completely silent on this issue.

[22/] Answer brief at pp. 45-46.

City of Riviera Beach v. Fitzgerald, 492 So. 2d 1382 (Fla. 4th DCA 1986), *rev. denied*, 503 So. 2d 326 (Fla. 1987).[23/]

Conclusion

Appellants respectfully request that the court reverse the amended final judgment in favor of Finks Farms, and remand with directions to enter a final judgment in favor of the several defendants.

Respectfully submitted,

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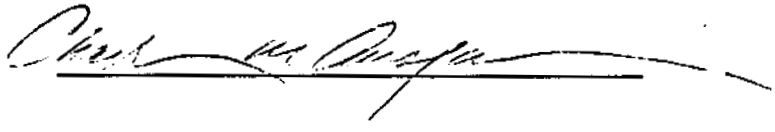
[23/] The judgment entered by the trial court was consistent with the court's decision in *City of Tampa v. Janke Constr., Inc.*, 626 So. 2d 239 (Fla. 2d DCA 1993), in any event.

Certificate of Service

I hereby certify that a copy of this reply brief was delivered **via overnight delivery** on September 7, 1994 to: Michael D. Martin, Esq., Counsel for Finks Farms, Inc., 200 Lake Morton Drive, Suite 300, P. O. Box 117, Lakeland, Florida 33802-0117; and was delivered via U.S. mail on September 7, 1994 to: Kenneth K. Thompson, Esq., Counsel for Finks Farms, Inc., 1400-A North 15th Street, P. O. Drawer 5250, Immokalee, Florida 33934-2202, and to Brian S. Duffy, Esq., Counsel for Terra International, Inc., 101 North Monroe Street, Suite 950, P. O. Drawer 229, Tallahassee, Florida 32302-0229.



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based on negligence. However, I believe the claims for implied warranty of merchantability should go to the jury. Therefore, I vote to reverse and remand the implied warranty claims brought by plaintiff.

RINGER v. AGWAY, INC.

United States District Court, ED Pa, July 30, 1990
No. 89-2806

[¶1102.6, ¶1105.4] Choice of law; uniform construction.

In a diversity action arising out of the sale of Maine seed potatoes (allegedly ringrot-infested) to a Pennsylvania farmer, the district court applies Pennsylvania law on "most significant interest" grounds while noting that since the UCC is in effect in both Maine and Pennsylvania, any conflict of laws is illusory.

[¶2314.2(4)] Recovery of "economic loss" in tort.

In a diversity action arising out of the sale of allegedly ringrot-infested seed potatoes, the district court, applying Pennsylvania law, follows the Third Circuit's prediction [in Aloe Coal Co. v. Clark Equipment Co., 3 UCC Rep Serv 2d 966; 816 F2d 110 (CA3, 1987)] that the Pennsylvania Supreme Court, if faced with the question, would find that purely "economic loss" is not recoverable in tort or products liability actions, and bars plaintiffs from such recovery except through contract.

[¶2314.2(4)] Recovery of damage to "other property" in tort.

In an action arising out of the sale of allegedly ringrot-infested seed potatoes, plaintiff-farmers—barred from recovery in tort of their purely economic loss—alleged the following damage to "other property": (1) disease-free potatoes shipped with the diseased ones; (2) the loss of potatoes that, due to the disease, never grew; and (3) machinery, land and buildings that came in contact with the disease. Held: Since all this alleged damage merely represented the loss of the benefit of plaintiffs' bargain with seller, it did not constitute damage to "other property." Thus, defendant is granted partial summary judgment with regard to plaintiffs' negligence and strict liability claims. Plaintiffs' remedy lies in contract under the UCC.

UCC Sections Cited: §2-601, §2-608, §2-711 to §2-720.

Barry C. Shabbick, Palmerton, for plaintiff.
Alan R. Boynton, Jr., Harrisburg, for defendant.

HUYETT, District Judge. Plaintiffs, residents of Pennsylvania, bring this action against defendant, Agway, Inc., a Delaware corporation, alleging breach of contract, negligence and fraudulent misrepresentation. Defendant requests partial summary judgment on plaintiffs' negligence, and, to the extent that plaintiffs pursue them, strict liability claims.[1] The issue to be decided on this motion is, essentially, whether

[1] . . .

plaintiffs have sustained injury to "other property." In the context of a commercial transaction, plaintiffs must suffer injury to "other property" in order to prevail on a claim of negligence.

For the reasons stated below, defendant's motion for partial summary judgment shall be granted and portions of the final pretrial order asserting claims based upon negligence theories shall be stricken.

I.

Plaintiff, Ringer Farms, is a small family-run farming operation in the Allentown area. Among other crops, the Ringers grow potatoes for sale to restaurants, stores and other customers in the Lehigh Valley. Plaintiffs planted their 1987 potato crop with Katahdin seed potatoes purchased from Agway. By harvest time, the Ringers realized that they had experienced significantly impaired yields on their acreage planted with the Agway seed potatoes.

Upon investigation into the cause of the crop failure, it was determined that the Ringers' crop was infected with bacterial ringrot. This infection damages the potato tuber and makes the tuber more susceptible to secondary diseases.[2] Further investigation determined that Agway's source of the Katahdin seed potatoes supplied to the Ringers was also infected with bacterial ringrot.[3]

Plaintiffs lost the majority of their potato crop yield for 1987. Additionally, the bacterial ringrot infestation required that they undertake a rather extensive eradication program to clear the pathogen from their machinery, facilities and the land itself, in order to protect future crops.

Plaintiffs have sought relief under both tort and contract theories. The tort recovery plaintiffs seek is available only if the sustained damage is within the "other property" exception to the rule that economic losses arising out of commercial transactions, except those involving personal injury or damage to "other property," are not recoverable under theories of negligence or strict liability. Defendant contends that because plaintiffs' claims arise from a purely commercial transaction, and because they have suffered damage only to items

[2] The Pennsylvania State University, College of Agriculture conducted testing on September 9, 1987 of tubers from plaintiffs' field, and found the presence of blackleg, bacterial softrot of tubers, and possible pinkeye and verticillium wilt. Samples of Katahdin tubers taken from the fields of the Ringers' farm and delivered to Dr. Kim at the Pennsylvania Department of Agriculture, Bureau of Plant Industry, on September 11, 1987, confirmed the presence of bacterial ringrot.

[3] Bacterial ringrot was discovered in 1987 on the farm of Campbell Farms, RD No. 1, Box 1464, Fairfield, Maine, which had purchased seed potatoes from Frank White, Fort Fairfield, Maine.

understood to be within the confines of the bargain between the parties—in other words, no damage to "other property"—the plaintiffs' tort claims should be dismissed.

II.

A. Choice of Law

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1332. In a diversity action, the district court is bound by the law of the forum state, including its choice of law rules. Klaxon v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487, 496, 61 S.Ct. 1020 (1941); Melville v. American Home Assurance Co., 584 F.2d 1306, 1308 (3d Cir. 1978). Pennsylvania has adopted a flexible conflicts methodology which takes into account contacts, policies and interests of concerned jurisdictions. Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796, 805–806 (1964); Melville, 584 F.2d at 1310. The jurisdiction having the most significant interest in the outcome of the issue is the forum whose law should be applied. Griffith, 416 Pa. at 22, 203 A.2d at 805–06. Here, Agway, doing business in Pennsylvania, solicited plaintiffs' business in Pennsylvania. Moreover, the damage to plaintiffs' crop occurred in Pennsylvania. The commonwealth's concern for its farm families, as well as its interest in keeping its agricultural industry free from damaging disease conditions, suggests that Pennsylvania law should be applied.[4]

B. Contract or Tort?

This action presents only the latest in what has been an ongoing tension between the areas of contract and tort. It "brings into sharp focus a long standing controversy in the law of product liability." American Home Assurance Co. v. Major Tool and Machine, Inc., 767 F.2d 446, 447 (8th Cir. 1985). The conflict appears to have originated in 1965, with two diverging judicial interpretations regarding losses in the commercial arena. In California, it was determined that economic losses, incurred in a commercial transaction, should be recovered under the warranty provisions of the Uniform Commercial Code. "The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act of the Uniform

[4] However, since the only alternative choice of law would be Maine's, the source of the tubers, and since the present action is controlled by the Uniform Commercial Code, adopted in both Maine and Pennsylvania, I am not confronted with anything but an illusory conflict of laws.

Commercial Code, but rather to govern the distinct problem of physical injuries." Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 21, 403 P.2d 145, 149 [2 UCC Rep Serv 915] (1965). In contrast, the New Jersey Supreme Court held that economic losses were recoverable under strict liability theories, because the U.C.C. did not provide an exclusive set of remedies. Santor v. A. and M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305, 309 [2 UCC Rep Serv 599] (1965).[5]

Today, Seely appears to be the majority rule. Pure economic loss, caused by deterioration or malfunction of the product itself, without injury to persons or damage to "other property" will not support a cause of action for strict liability. In accord with this, one Pennsylvania appellate court has noted, "[t]he national trend has increasingly classified cases of this nature as sounding purely in contract." REM Coal Co., Inc. v. Clark Equipment Co., 386 Pa. Super. 401, 563 A.2d 128, 129 [9 UCC Rep Serv 2d 916] (1989).

In the instant matter, the Pennsylvania Supreme Court has not yet spoken on the issue. However, I am guided by the Third Circuit and its application of East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 [1 UCC Rep Serv 2d 609] (1986). In East River, the Court, in admiralty, reasoned that no products liability claim exists when a commercial interest alleges injury only to the purchased product itself, resulting in purely economic loss. Id. at 867–868, 106 S.Ct. at 2300.

Where there is no injury to property, other than the product itself, "the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service." Id. at 871, 106 S.Ct at 2302. Commercial interests are better able to apportion the risks that products will not perform as intended through a contract, and when they so allocate the risk, their choice should not be circumvented by a tort remedy. Id. at 873, 106 S.Ct. at 2303 ("[W]arranty law sufficiently protects the purchaser by allowing it to obtain the benefit of its bargain.").

The Third Circuit has determined that the Pennsylvania Supreme Court would, if presented with an issue such as the present one, adopt East River as the law of Pennsylvania. See Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 119 [3 UCC Rep Serv 2d 966] (3rd Cir. 1987), cert. denied 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 111 (1987);

[5] I note that Santor "has been rejected by most of the courts that have considered it." 2000 Watermark Association v. Celotex Corp., 784 F.2d 1183, 1186 [42 UCC Rep Serv 1608] (4th Cir. 1986). The Fourth Circuit noted that New Jersey has narrowed Santor away from application to commercial parties towards consumer interests only.

King v. Hilton-Davis, 855 F.2d 1047, 1053 [6 UCC Rep Serv 2d 1424] (3rd Cir. 1988).

In Aloe Coal, the buyer of a front end loader brought suit against the manufacturer for negligence, strict liability and breach of warranty, after the loader caught fire and was seriously damaged. The Aloe Coal court noted the Supreme Court's meticulous consideration of the fundamental principles of tort and contract law, and suggested that East River emphasized five considerations:

> "(1) when the defective product injures only itself the reasons for imposing a tort duty are weak and those limiting remedies to contract law are strong; (2) damage to the product itself is most naturally understood as a warranty claim; (3) contract law is well suited to commercial controversies because the parties may set the terms of their own agreements; (4) warranty law sufficiently protects purchasers by allowing them to obtain the benefit of their bargain; and (5) warranty law has a built in limitation on liability, whereas tort actions could subject manufacturers to an indefinite amount of damages."

Aloe Coal, 816 F.2d at 117–118. The Third Circuit concluded that the buyer's remedies were those available under the law of warranty, and that Pennsylvania courts would "reaffirm their lack of hospitality to tort liability for purely economic loss." Id. at 119.

Plaintiffs rely heavily on the Third Circuit decision in King which dealt with a factual issue very similar to the one at hand. In King the plaintiffs purchased seed potatoes which were treated with Fusarex, a sprout inhibitor. A problem with the Fusarex caused a failure of the seed potatoes to germinate. The plaintiffs brought suit against the manufacturer of the Fusarex and the seller of the seed potatoes, based on theories of strict liability, negligence, and breach of contractual warranties. The jury found against both the seller and the manufacturer.[6] The Third Circuit, however, determined that the defect in the chemical simply rendered the seed potatoes less valuable as seed potatoes. King, 855 F.2d at 1051. The reduction in value was the only loss sustained. Absent damage to "other property," the tort claims were rejected as follows:

> "[I]t is the character of the plaintiff's loss that determines the nature of the available remedies. When loss of the benefit of a bargain is the plaintiff's sole loss, the judgement of the Supreme Court was that the undesirable consequences of affording a tort remedy in addition to a contract-based recovery were sufficient to outweigh the limited interest of the plaintiff in having relief beyond that provided by warranty claims. The relevant bargain in this context is that struck by the

[6] Based on an exculpatory clause in the agreement of sale, the court granted post-trial motions to set aside the verdict against the seller.

plaintiff. It is that bargain that determines his or her economic loss and whether he or she has been injured beyond that loss."

Id. The Third Circuit determined that recovery would not be allowed under a negligence or strict liability theory for economic loss only. The trial court's judgment against the defendant based on these theories was reversed.

As previously stated, Pennsylvania's highest court has not spoken on this issue. However, "[I am] admonished not to disregard a ruling of a Pennsylvania . . . intermediate appellate court unless [I am] convinced that the decision would have been decided otherwise by the [Pennsylvania] Supreme Court." Public Service Ent. Group v. Philadelphia Elec., 722 F.Supp. 184, 192 (D.N.J. 1989) (citations omitted). The Superior Court of Pennsylvania recently adopted the reasoning of Aloe Coal and King, and concluded that the standard of East River would be followed in Pennsylvania. The superior court held that "negligence and strict liability theories do not apply in an action between commercial enterprises involving a product that malfunctions where the only resulting damage is to the product itself." REM Coal Company Inc., 563 A.2d at 134; see also N.Y. State Elec. & Gas v. Westinghouse, 387 Pa. Super. 537, 564 A.2d 919, [10 UCC Rep Serv 2d 831] (1989).

C. "Other Property"

Plaintiffs argue that they have sustained damage to "other property." However, in order to pursue tort remedies, plaintiffs must show some loss other than the benefit of their bargain. Plaintiffs allege that their bargained for expectation was disease free seed potatoes capable of producing healthy plants. They allege damage to "other property" as follows: (1) other potato tubers in the same supply of seed potatoes; (2) potato tubers which failed to grow from the plants which the infected seed potatoes produced; (3) machinery, land and buildings which came into contact with the allegedly defective seed potatoes. None of these items of damages constitute damage to "other property."

The damage to the tubers does not constitute damage to "other property." Plaintiffs suggest that an unknown quantity of the seed potatoes purchased from Agway were defective, and that those defective seed potatoes then damaged another unknown quantity of healthy seed potatoes in the same supply. This argument is unpersuasive. Here, clearly, plaintiff's have lost the benefit of their bargain with Agway. The only potatoes damaged were those purchased from Agway in the spring of 1987. As noted in East River, "[t]he injury suffered—the failure to the product to function properly—is the essence of a warranty action,

through which a contracting party can seek to recoup the benefit of its bargain." East River, 476 U.S. at 866–68, 106 S.Ct. at 2299–2300.

Similarly, plaintiffs creatively argue that a component of their purchased product malfunctioned, resulting in damage to the overall product. They suggest that the potato tubers growing underground constitute "other property." In essence, plaintiffs suggest that the infected seed potatoes produced a plant growing above ground and that the production of this above ground plant was the sole aspect of plaintiffs' bargain with Agway.

Factually and legally, plaintiffs' argument is without merit. First, the planted potato is not distinct from the potato plant or the resulting potato tubers which grow therefrom. Second, the provider of a product may not be liable in tort when a component or integral part of that product malfunctions or fails, resulting in damage to the overall product. See, e.g., Aloe Coal 816 F.2d at 117; King, 855 F.2d at 1052. The damage to the entirety of the vegetative product—the potato plants which grew above ground and the potato tubers which failed to be produced from those plants—constitutes damage only to those products purchased from Agway.

Plaintiffs also claim that damage to the machinery, buildings and fields involved in the potato crop is damage to "other property." Plaintiffs argue that the bacterial ringrot caused them to incur the expense of eradication of the pathogen and claim losses for the cost of eliminating the infection from the potato wagons, cutter, conveyor systems, storage bins, planter, tractor, harvesters and storage facilities. According to plaintiffs, none of this equipment was part of the contract with defendants. However, this form of loss, contrary to plaintiffs' contention, is wholly commercial in nature and will not be recognized as "other property." These unfortunate losses were an ordinary commercial risk of a transaction in the potato industry. Other courts have consistently held that those aspects of damage which involve items or facilities obviously involving the bargain between the parties is not damage to "other property." See, e.g., King v. Hilton-Davis, 855 F.2d at 1051; Purvis v. Consolidated Energy Products Co., 674 F.2d 217 (1982) (tobacco farmer could not recover under strict liability for crop loss resulting from defective curing barn); Agristor Leasing v. Guggisberg, 617 F. Supp. 902 [41 UCC Rep Serv 1671] (D. Minn. 1985) (farmers unable to recover in negligence or strict liability for damage to feed and cows resulting from defective feed storage system); Superwood v. Siempelkamp Corp., 311 N.W.2d 159 [32 UCC Rep Serv 28] (Minn. 1981) (plywood, damaged by defective plywood press, not considered "other property"); National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 [36 UCC Rep Serv 779] (1983) (plaintiff could

not recover from manufacturer, under negligence or strict liability, for costs of removing defective steel tubing in cranes, because the damages resulted from the purchase of unsatisfactory products and the cause of action for such loss should be pursued under a warranty or contract theory).

In essence, plaintiffs here are alleging disappointed commercial expectations. Their losses are economic and their remedy lies in contract. "[W]arranty law is suited to economic loss cases because in such cases, the parties have the opportunity to have set the terms of their agreement regarding product value and quality in advance." REM Coal Co., Inc., at 133 (citation omitted). Pennsylvania's breach of warranty law provides the Ringers an appropriate remedy for enforcing their bargained for expectations, as well as Agway's obligations. See 13 Pa. Cons. Stat. Ann. §§2-601, 2-608, 2-711 to 2-720 (1984).

III.

Plaintiff's damages, lost profits, increased costs because of the eradication program, and other consequential damages, constitute purely economic loss. "Where economic damages are claimed which are a foreseeable result of a breach of contract, it is to contract law rather than tort to which a commercial plaintiff must look to be made whole. To hold otherwise would be to disrupt the expectations of the parties by supplanting their agreement by allowance of a tort recovery, which raises the possibility of potentially unlimited liability." Public Service Ent. Group v. Philadelphia Elec., 722 F. Supp. at 196.

I conclude that plaintiffs cannot state a cause of action under either negligence or strict liability theories. The damage sustained by plaintiffs falls within the scope of the bargain with Agway, and is properly addressed through contractual theories of recovery only.

For the reasons stated above, defendant's motion for partial summary judgment is granted.

BIMEX CORP. v. ELITE PLASTIC SERVICES, INC

Illinois Appellate Court, First District, June 25, 1990
200 Ill App 3d 589, 558 NE2d 299

[12314.5(2)] No warranty of fitness for a particular purpose where manufacturer had no knowledge of intended use.

In a manufacturer's suit against a distributor for money due on manufacturer's product, trial court correctly found that manufacturer gave no warranties, express or