IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,821

5 DCA CASE NO. 96-03182

PATRICIA SEIFERT, as Personal
Representative of the Estate of
Ernest Seifert, Deceased, for the
benefit of PATRICIA SEIFERT,
surviving spouse,

Petitioner,

v.

U.S. HOME CORPORATION and
WOODY TUCKER PLUMBING, INC.,

Respondents.
__________________________________/

AMENDED BRIEF OF PETITIONER SEIFERT

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INTRODUCTION

Petitioner/Plaintiff PATRICIA SEIFERT, as Personal Representative of the Estate of Ernest Seifert, Deceased, for the benefit of PATRICIA SEIFERT, surviving spouse, will be referred to as she stands before this Court, as she stood before the trial and district courts and by name. Respondent/Defendant U.S. HOME CORPORATION will be referred to as it stands before this Court, as it stood before the trial and district courts and as U.S. Home. Respondent/Defendant WOODY TUCKER PLUMBING, INC. is only a nominal party to these proceedings and will be referred to by name.

"A" refers to the consecutively numbered appendix filed with this amended brief. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Seifert and her husband bought a house from U.S. Home. The purchase contract contained an arbitration clause. Mr. Seifert died because a defect in the air conditioning system sucked carbon monoxide from the garage into the house. Although the contract said nothing about personal injury claims and the parties clearly contemplated arbitration of only commercial or contractual matters, the Fifth District reversed the trial court and required Mrs. Seifert to arbitrate her wrongful death claim. (A. 1, 26). This Court took conflict jurisdiction because the Fourth District reached a different conclusion on the same issue.

The incident. Patricia Seifert and her husband, Ernest, bought a new house in Timber Pines, a subdivision in Springhill, Florida. (A. 6). Six months later, Ernest was found dead in his new home. (A. 5-7).

Ernest parked his car in the garage; he forgot to turn off the ignition. (A. 6). He went into the house, closed the garage door and closed the door from the garage to the house. (A. 6). The house had been built with the air conditioner in the garage. The air conditioner was defective. It sucked carbon monoxide from the garage and spread it throughout the house through air ducts.[1/] (A. 6). Ernest died from carbon monoxide poisoning. (A. 7).

The claims. Mrs. Seifert filed a wrongful death action against U.S. Home, the developer who built and sold the house, and Woody Tucker, the subcontractor who installed the air conditioner. (A.5-20). She alleged three theories against U.S. Home: strict liability, breach of

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[1/] The air conditioner was defective either because it was improperly installed or because it had a defective part that permitted the carbon monoxide to be sucked into the house or because it should not have been installed in the garage in the first place. (A. 7, 9, 12-13, 18-19).

implied warranty of habitability and negligence.[2/] Each count sought damages in tort, not damages in contract. Id.

The trial court dismissed the count for strict liability because Florida has not yet adopted strict liability for the sale of new homes.[3/] (A. 31). It dismissed the count for breach of implied warranty with leave to amend to allege only contract damages. (A. 32). Mrs. Seifert elected not to do so.[4/] Negligence is the only remaining count.[5/]

[2/] Mrs. Seifert agreed to dismiss her count for express warranty. (SA-1).

[3/] A manufacturer and seller of new homes who places a dangerous product on the market should be strictly liable to persons injured by the defective condition. See generally West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976)(recognizing cause of action for strict liability in Florida); Putnam v. Roudebush, 352 So.2d 908 (Fla. 2d DCA 1977)(adopting same defenses to breach of warranty of habitability as would apply in products liability action). Many other jurisdictions have adopted strict liability. See, e.g., Berman v. Watergate West, Inc., 391 A.2d 1351, 1357 (D.C. 1978)("it is by now widely accepted that the law of products liability applies not only to the sale for goods, but also to the sale of newly constructed homes"); Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965)(home builder could be liable in strict liability for injury to child from excessively hot water from defective faucet); Kriegler v. Eichler Homes, Inc., 74 Cal.Rptr. 749 (1969)(strict liability applied to damages from defective heating system); Worrell v. Barnes, 484 P.2d 573 (Nev. 1971)(superior knowledge of builder makes him strictly liable for leaky gas fitting). See also William Prosser, Law of Torts § 104 at 682 (4th ed. 1971)(strict liability of builder of new house is "rapidly becoming the prevailing rule").

Unfortunately, Seifert could not challenge the trial court's ruling because that portion of the order which dismissed one count of a multi-count complaint was not appealable.

[4/] Florida has long recognized a claim for implied warranty of habitability. Gable v. Silver, 264 So.2d 418 (Fla. 1972)(adopting 258 So.2d 11 (Fla. 4th DCA 1972)). It is part of the overwhelming majority of jurisdictions. Conklin v. Hurley, 428 So.2d 654, 656 & n.2 (Fla. 1983). See also Schmeck v. Sea Oats Condominium Ass'n, Inc., 441 So.2d 1092, 1097 (Fla. 5th DCA 1983); Putnam v. Roudebush, 352 So.2d 908 (Fla. 2d DCA 1977)(air conditioning unit). Mrs. Seifert sought tort damages for personal injury in this count, not contract damages. The duty she alleges does not arise from the sales contract. Rather it arises by operation of law, apart from the terms of the agreement. See e.g., Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 326 (N.J. 1965)(rights and responsibilities of parties injured by defectively-constructed home better defined by tort than contract principles). This is consistent with the rule that a tenant may recover damages for per-

(continued...)

The arbitration clause. U.S. Home moved to compel arbitration and to stay the proceedings. (A. 23). It claimed the arbitration clause in the sales agreement between U.S. Home and the Seiferts required Mrs. Seifert to submit her wrongful death claim to arbitration.

> ARBITRATION. Any controversy or claim arising under or related to this Agreement or to the Property (with the exception of "consumer products" as defined by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. Section 2301 et. seq., and the regulations promulgated under that Act) or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller's representative, shall be settled and finally determined by mediation or by binding arbitration as provided by the Federal Arbitration Act (9 U.S.C., §§ 1-14) and similar state statutes and not by a court of law.

[4/] (...continued)
sonal injuries based on breach of the implied warrant of habitability. Cf. Mansur v. Eubanks, 401 So.2d 1328 (Fla. 1981)(landlord has a continuing duty to exercise reasonable care to repair defective conditions under the implied warranty of habitability).

Unfortunately, the trial court was bound by a Fifth District decision under which Mrs. Seifert would be limited to contract damages in this count. Compare Lockrane Eng'g, Inc. v. Willingham Real Growth Investment Fund Ltd., 552 So.2d 228 (Fla. 5th DCA 1986)(limiting implied warranty claim to contract damages) with Elizabeth N. v. Riverside Group, Inc., 585 So.2d 376, 379 (Fla. 1st DCA 1991)(citing cases from around the country which all hold duty does not arise from contract and allow tort damages). Again, Seifert could not challenge the trial court's ruling because that portion of the order was not appealable.

[5/] A builder of new homes may be liable to a homeowner under general negligence principles for damages caused by negligent construction. Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978). This Court disapproved Simmons, but only on the recoverability of economic losses. Casa Clara v. Charley Toppino & Sons, 620 So.2d 1244, n.9 (Fla. 1993). See also Citron v. Osme Wood Preserving, Inc., 681 So.2d 859, 862 (Fla.5th DCA1996)(manufacturer of town-home has "duty to exercise reasonable care so that their products in the marketplace will not harm persons or property"). Mrs. Seifert does not seek economic losses; she seeks only tort damages for wrongful death. See generally William Prosser, Law of Torts § 104 at 681 (4th ed. 1971)("It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done").

(A. 27).[6/]

The trial court's findings. The trial court heard extensive argument on the matter. It considered this arbitration clause and the wrongful death claim and found "the death of Plaintiff's husband is not a claim that would fall within the contract's arbitration clause." (A. 28-29). U.S. Home appealed.

The Fifth District's ruling. The Fifth District reversed. It held Mrs. Seifert had to arbitrate her wrongful death claim. It summarily relied on the decision it had just issued in Terminix Int'l Co., L.P. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997). It recognized that its decision conflicted with the Fourth District's analysis and decision in Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996). Judge Sharp specially concurred because she preferred the Fourth District's holding in Michaels, but was bound by Ponzio.

> It is particularly appropriate in this case because the construction contract which provides for arbitration is a typical contract of "adhesion": the party being "bound" did not prepare the fine print and is in no position to bargain about it.
>
> In such a context an agreement to arbitrate about contract disputes should not include issues beyond the subject matter of the contract, such as tort claims involving personal injuries, unless an interpretation of the contract is involved. In this case, the contract specified arbitration of issues concerning the "property." There is no indication here that the deceased/owner/signor of the contract intended to be bound to arbitrate wrongful death claims. Further, it is not clear to me that all the possible beneficiaries of the decedent's wrongful death claim should be bound by the decedent's contract.[7/]

[6/] Woody Tucker was not a party to the agreement. He joined in Mrs. Seifert's opposition to the motion to compel arbitration.

[7/] Mrs. Seifert has not questioned whether other beneficiaries might be bound by the arbitration clause because she signed the contract; there are no other beneficiaries. Of course, as Judge Sharp (continued...)

U.S. Home Corp. v. Seifert, 699 So.2d 787, 788. This Court granted review.

[7/] (...continued)
correctly implied, one who does not sign a contract cannot be bound by the arbitration clause in that contract. E.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920 (1995)(aff'g 19 F.3d 1503 (3d Cir. 1994)); Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1294 (3d Cir. 1996)("The Kaplans were not obligated to arbitrate because they had not agreed to do so"); Morewitz v. The West of England Ship Owners Mutual Protection and Indemnity Ass'n, 62 F.3d 1356, 1365 (11th Cir. 1995)(arbitration not required unless parties have actually agreed to it; arbitration clause could not affect third party beneficiaries claiming under insurance policy where they did not sign the insuring agreement which was only between the vessel and the insurer); Swensens's Ice Cream Co. v. Corsair Corp., 942 F.2d 1307, 1310 (8th Cir. 1991)(wife not compelled to arbitrate any dispute arising out of franchise agreements she did not sign; her execution of guarantee for third franchise location did not bind her to earlier agreements); Prudential-Bache Securities, Inc. v. U.S. Optical Frame Co., 534 So.2d 793 (Fla. 3d DCA 1988).

SUMMARY OF ARGUMENT

The Seiferts bought a house and signed a sales contract when they did so. Nothing in that contract indicated that the Seiferts and U.S. Home had agreed the Seiferts were giving up their right to sue in court for any bodily injuries the Seiferts might sustain as a result of any tort U.S. Home might commit. Should companies that sell products or services to consumers in this state be allowed to require consumers to arbitrate personal injury or wrongful death claims when the consumer never contemplated such a possibility when he signed the contract? This Court should find that the parties to a commercial agreement with an arbitration clause do not agree to arbitrate bodily injury claims by simply agreeing to arbitrate commercial disputes.

When the Seiferts signed this contract, they did not contemplate any bodily injury that might be caused by the home. When they signed this contract, they certainly did not contemplate U.S. Home's negligence would result in Mr. Seifert's death. When they signed this contract, they certainly did not realize their new home purchase meant they waived their right to file a wrongful death action in court. When they signed this contract, the Seiferts did not intend to waive their right to a jury trial on any bodily injury claim. The Seiferts did not knowingly agree to submit any bodily injury claims to arbitration. Nothing in that contract gave the Seiferts any indication they were doing so.

A court should require arbitration only when there is <u>no</u> <u>doubt</u> that the parties agreed to arbitrate the subject dispute. The drafter of the agreement must clearly express his intent to subject certain claims to arbitration. Failure to use express terms precludes arbitration of that claim, particularly when the drafter tries to refer a tort claim for bodily injury to arbitration, rather than a contract dispute. Resolution of a tort dispute for bodily injury does not depend on interpretation or

enforcement of the contract. Consequently, a contractually-imposed arbitration clause will not apply to such a claim.

Further, tort claims for bodily injuries relate to breach of a duty to use reasonable care, a duty imposed by law and owed to any person foreseeably injured by the breach, not just parties to the contract. Such claims arise from matters that the parties to the contract did not contemplate at the time of contracting. If a party to a contract could not sue for bodily injury damages under the contract, then neither could that party force arbitration of a claim for such damages.

No reasonable person could conclude that the purchaser of a new home contemplated potential bodily injury damages arising out of the sales contract or the property. Thus, no reasonable person could conclude that the home purchaser agreed in advance that such a bodily injury claim would be arbitrated. The trial court here and the Fourth District in Michaels properly concluded that the arbitration clause in this contract did not require arbitration of this wrongful death claim. This Court should affirm those rulings.

ARGUMENT

MRS. SEIFERT CANNOT BE REQUIRED TO ARBITRATE HER WRONGFUL DEATH ACTION BE CAUSE SHE DID NOT AGREE TO ARBITRATE SUCH A CLAIM WHEN SHE SIGNED THE SALES AGREEMENT FOR HER HOUSE.

The Seiferts bought a house and signed U.S. Home's standard sales contract. Nothing in that contract indicated that the Seiferts and U.S. Home agreed the Seiferts were giving up their right to sue in court for any bodily injuries they might sustain as a result of any tort U.S. Home might commit. Nothing anywhere indicates the parties even contemplated that U.S. Home's negligence could cause any bodily injuries. It is inconceivable the parties intended their contract to require arbitration of such claims. Since the key to determining the scope of an arbitration clause is the intent of the parties, this Court should find that the clause does not require arbitration of this wrongful death claim.

Three Florida cases address the question of whether a party should be compelled to arbitrate a personal injury claim. This Court took jurisdiction here because of the conflict in these decisions. The Fourth District held that a contractual arbitration clause does not require arbitration of torts that give rise to bodily injury. Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996). In this case, and a prior decision, the Fifth District held that the parties' intent is irrelevant and arbitration is mandated if there is any causal connection between the contract and the injury. Terminix Int'l Co., L.P. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997). There appears to be only one other case in the country that rules on the applicability of a contractual arbitration

clause to a claim for bodily injury. Like Michaels, it finds the clause inapplicable.[8/] Dusold v. Porta-John Corp., 807 P.2d 526 (Ariz.Ct.App. 1990).

In Michaels, a termite protection plan contained an arbitration clause for disputes "arising out of or relating to the interpretation, performance, or breach of any provisions of this agreement." The court held the clause did not apply to a personal injury action that alleged claims for negligence and strict liability. 668 So.2d at 1014. The court considered the language of the particular agreement, the intent of the parties, the nature of the underlying agreement and the policy interests at stake before it reached its conclusion.

The analysis and conclusion in Michaels, and analogous cases from other jurisdictions, are correct. An arbitration clause in a home sales contract which says nothing about personal injury claims cannot be construed to be require arbitration of a wrongful death case, an action that was never contemplated by the parties when they signed the contract.

[8/] The Fourth District's analysis and holding in Michaels is consistent with that of various federal and out-of-state courts which have decided related issues. E.g., Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566 (11th Cir. 1984)(despite extremely broad arbitration clause for "any" dispute arising during execution of charter party, tort claims for conversion and wrongful attachment not subject to arbitration; relationship between dispute and contract not satisfied simply because dispute would not have arisen absent existence of contract); Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Union, 359 F.2d 598, 601 (2d Cir. 1966)(for dispute to come within purview of arbitration clause, it must at least raise some question, the resolution of which requires reference to contract); McMahon v. RMS Electronics, Inc., 618 F.Supp. 189 (S.D.N.Y. 1985)(where tort claim does not require interpretation of underlying contract, arbitration of claim not required); Greenwood v. Sherfield, 895 S.W.2d 169 (Mo.App.Ct. 1995)(for tort claim to arise out of or relate to a particular contract, and thus be subject to contract's arbitration requirement, claim must raise issue which requires reference to contract); Merrill Lynch Pierce Fenner & Smith, Inc. v. Wilson, 805 S.W.2d 38, 39 (Tex.App.Ct. 1991)(to determine whether tort claim arises from contract, test is whether the particular tort claim is so interwoven with contract that it could not stand alone).

A. Nothing in the agreement, or in record, indicates the parties clearly intended to arbitrate this wrongful death claim.

1. An agreement to arbitrate must be clear and unambiguous. A court should require arbitration only when there is no doubt that the parties agreed to arbitrate the subject dispute. See Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1348 (11th Cir. 1982). See also Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 65,115 S.Ct. 1212, 1216 (1995); Atencio v. U.S. Security Ins. Co., 676 So.2d 489 (Fla. 3d DCA 1996); Intracoastal Ventures Corp. v. Safeco Ins. Co., 540 So.2d 162, 164-65 (Fla. 4th DCA 1989). Courts must carefully review arbitration agreements to ensure that a party is not forced to arbitrate a question he or she did not intend to arbitrate. Miller v. Roberts, 682 So.2d 691 (Fla. 5th DCA 1996)("[W]here an arbitration agreement exists between the parties, arbitration is required only of those controversies or disputes which the parties have agreed to submit to arbitration"); CSE, Inc. v. Barron, 620 So.2d 808 (Fla. 2d DCA 1993)(arbitration proper only for issues parties agreed to submit to arbitration); Painewebber, Inc. v. Hess, 497 So.2d 1323 (Fla. 3d DCA 1986)(arbitration clauses must be carefully construed to prevent arbitration of issues party did not intend to submit to arbitration). See also First Options of Chicago v. Kaplan, 514 U.S. 938, 945, 115 S.Ct. 1920, 1924 (1995)("[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration"); Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp., 10 F.3d 1563 (11th Cir. 1994)(party may not be compelled to arbitrate dispute outside scope of agreement).

The court must carefully view the precise language of the contract. Gregory v. Electro-Mechanical Corp., 83 F.3d 382 (11th Cir. 1996). The drafter must clearly express his intent to subject certain claims to arbitration. Intracoastal, 540 So.2d at 164. Failure to use express terms

precludes arbitration of that claim. Katzin v. Mansdorf, 624 So.2d 810 (Fla. 3d DCA 1993); Wood-Hopkins Contr. Co. v. C.H. Barco Contr. Co., 301 So.2d 479 (Fla. 1st DCA 1974)(language of arbitration provision must be specific enough to inform parties of particular matters to be submitted to arbitration). See also Fuller v. Guthrie, 656 F.2d 259, 261 (2d Cir. 1977)(decision to arbitrate must be consciously made because party relinquishes courtroom rights, including right to subpoena witnesses). Any ambiguity in an arbitration agreement is construed against the drafter. Wood-Hopkins, 301 So.2d at 480; Malone & Hyde, Inc. v. RTC Transp., Inc., 515 So.2d 365, 366 (Fla. 4th DCA 1987). The intent to arbitrate will not be presumed. Fischer v. Rodriguez-Capriles, 472 So.2d 1315, 1316 (Fla. 3d DCA 1985).

Specificity is required, at least in part, because arbitration waives fundamental rights - access to courts and the right to jury trial. Bell v. Congress Mortgage Co., Inc., 30 Cal.Rptr.2d 205, 208 (Cal.Ct.App. 1994)("[A]cceding to arbitration necessarily entails a waiver of the right to a jury trial"; "In light of the importance of the jury trial in our system of jurisprudence, any waiver thereof should appear in clear and unmistakable form . . . . We cannot elevate judicial expediency over access to the courts and the right to a jury trial in the absence of a clear waiver"); Sanchez v. Simons, 467 N.Y.S.2d 757, 760 (N.Y. Sup. Ct.1983)(arbitration clause in a consent to abortion form unenforceable absent evidence patient made informed and knowledgeable waiver of constitutional right to trial by jury)(citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938)); Dreiling v. Peugeot Motors of America, Inc., 539 F.Supp. 402 (D.Col. 1982)(though jury trial can be waived if done so knowingly and intentionally, "courts will indulge every reasonable presumption against waiver")(citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811 (1937)). See also Hoxworth v. Blinder Robinson & Co., 980 F.2d 912, 925 (3d

Cir. 1992); K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985); Luis Acosta, Inc. v. Citibank, N.A., 920 F.Supp 15, 17 (D. P.R.1996).

Clarity of language is particularly important when the drafter intends to refer a tort claim for personal injury to arbitration rather than a contract dispute. Terminix, 668 So.2d at 1015.

> Absent a clear explicit statement . . . in a contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the parties did not intend to withdraw such disputes from judicial authority.

Dusold, 807 P.2d at 530, adopted in Terminix, 668 So.2d at 1014. See also Fuller, 565 F.2d at 261; Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union, 359 F.2d 598, 603 (2d Cir. 1966). [9/]

2. The court also must consider the parties' intent and the context of the agreement. In determining the scope of an arbitration clause, the court also must look to the parties' intent and the context in which the agreement was made. All Am. Semiconductor, Inc. v. Unisys Corp., 637 So.2d 59 (Fla. 3d DCA 1994); Creative Sec. Corp. v. Bear Stearns & Co., 671 F.Supp. 961, 965 (S.D.N.Y. 1987). See also Air Products & Chemicals, Inc. v. Louisiana Land & Exploration Co., 806 F.2d 1524 (11th Cir. 1986)("When the court reviews a contract it must

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[9/] This analysis of the intent and understanding of the parties to an arbitration clause is comparable to the analysis courts have long applied in construing exculpatory clauses. Both the arbitration clause and the exculpatory clause require a party to give up certain legal rights, including the right to trial by jury and the right to full judicial review. An exculpatory clause will not be construed to release a party from liability for its own negligence unless the clause specifically and unambiguously says so. See Cox Cable Corp. v. Gulf Power Co., 591 So.2d 627 (Fla. 1992); University Plaza v. Stewart, 272 So.2d 507, 511 (Fla. 1973); Zinz v. Concordia Prop., Inc., 694 So.2d 120 (Fla. 4th DCA 1997). A clause that expressly assumes a risk must make clear to the plaintiff "that she was assuming the particular conduct by the defendants which caused her injury." Van Tuyn v. Zurich Am. Ins. Co., 447 So.2d 318, 320 (Fla. 4th DCA 1984); Restatement of Torts, Second, § 496B, comment d. An arbitration clause should be construed in the same fashion.

consider the objects to be accomplished by the parties when they entered the contract"); Seaboard Coast Line R.R. Co., 690 F.2d at 1348 ("[T]he question of whether a contract's arbitration clause requires arbitration of a given dispute [is] a matter of contract interpretation. Such a determination rests on the intent of the parties . . . ."(citations omitted). And see Luis Acosta, Inc., 920 F.Supp. at 17 ("Caution is also advisable in interpreting the scope of a clause that would putatively waive a fundamental right").

The court must determine if the arbitration provision would lead a reasonable plaintiff to expect arbitration of his or her claims. Where a tort claim for personal injury damages is in dispute between two parties who also have a contractual relationship, the dispute is not one "arising out of or related to the subject matter of the contract," unless resolution of the dispute must be determined by reference to the contract itself. Terminix, 668 So.2d at 1014; Armada, 726 F.2d at 1568; Dusold, 807 P.2d at 362. See also Victoria v. Superior Ct. Los Angeles County, 710 P.2d 833 (Cal. 1986). The mere fact that there would be no dispute if not for the contract is insufficient to make the controversy one "arising under or relating to" the contract. Terminix, 668 So.2d at 1014.

In Victoria, the court held an arbitration clause in a hospital's admission and treatment form was ineffective to mandate arbitration when patient was raped by hospital orderly.

> Surely it was not contemplated, let alone expected, by either party to the Agreement that this sort of attack would befall petitioner while she was hospitalized . . . . It is difficult to conclude that the parties intended and agreed that causes of action arising from such an attack would be within the scope of the arbitration clause.

Id. at 839. The Second Circuit came to a similar conclusion in Fuller. It refused to compel arbitration of a slander claim under a musical services contract.

> [I]t would stretch the meaning of 'musical services' beyond any

> reasonable definition to suggest that the slander claim falls within it. Although the agreement to arbitrate was undoubtedly intended to cover disputes arising from the character of Guthrie's performance and his payment for it, it is highly unlikely that the parties could have foreseen, no less intended, to provide a forum for wholly unexpected tortious behavior.

Id. at 261.

Such a limited reading of an arbitration clause is particularly appropriate when the clause is part of a standardized contract. "Although customers typically adhere to standardized agreements and are bound to them without even appearing to know the standard terms in detail they are not bound to unknown terms which are beyond the range of reasonable expectations."[10/] Restatement (Second) of Contracts § 211 (Standardized Agreements), comment subsection (3); Dreiling, 539 F.Supp at 403(waiver of jury trial in dealership provision held ineffective absent evidence that provision was bargained-for term of contract, mentioned during negotiations or even brought to the dealer's attention; "A constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision [in a] standardized form contract"; "In fact, the defendants have failed to show that the plaintiffs had any choice other than to accept the [standardized dealership] contract as written"). See also Bachus & Stratton, Inc. v. Mann,, 639 So.2d 35 (Fla. 4th DCA 1994)(look to arbitration provision to determine if it would lead a former employee to expect arbitration of post-employment incidents); Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992)(arbitration clause in abortion consent form unenforceable as falling beyond the patient's reasonable expectations).

[10/] Judge Sharp expressed this concern in her special concurrence when she stated that the Fourth District's conclusion was particularly appropriate because the contract was "a typical contract of adhesion."

3. The differences between contract and tort duties, and between contract and tort damages, are important considerations in determining what the contracting parties contemplated. Where the duty breached is one imposed by law rather than by contract, and owed to persons other than the contracting parties, the cause of action sounds in tort, not contract. Resolution of the dispute does not depend on the terms of the sales agreement. A negligence claim relates to breach of the duty to use reasonable care, a duty imposed by law and owed to any person foreseeably injured by the breach, not just parties to the contact.[11/] See Simmons, 363 So.2d 142(builder held to standard of reasonable care "for the protection of anyone who may foreseeably be endangered by their negligence"); Citron, 681 So.2d 859.

The law of contracts addresses economic losses and benefit of the bargain damages. This Court has repeatedly encouraged parties to negotiate such economic issues. Florida Power & Light Co. v. Westinghouse Elec. Co., 510 So.2d 899 (Fla. 1987). However, tort law establishes duties that arise outside the contract and are intended to protect society's interest in being free from harm. See Airport Rent-A-Car v. Prevost Car, Inc., 660 So.2d 628, 630 (Fla. 1995). These duties are not creatures of contract -- they are imposed by law.

Further, a contracting party anticipates that his or her damages on breach will be limited to those the parties contemplated when they entered into the contract. Tillman v. Howell, 634 So.2d 268, 270 (Fla. 4th DCA 1994)(quoting Hadley v. Baxendale, 9 Ex. 341, 156 Eng.Rep. 145 (1854))(damages for breach of contract are limited to those which "can reasonably be said to have been foreseen or contemplated by the parties at the time when they made the contract as a probable or natural result of a breach"); Grossman Holdings Ltd. v. Hourihan, 414 So.2d 1037 (Fla.

11/ The same is true of the dismissed counts. See supra, nn. 3, 4 and accompanying text.

1982)(adopting Restatement (First) of Contracts § 346(1)(a)(1932)). See also Michaels, 668 So.2d at 1014; Standard Fish Co., Ltd. v. Douglas Enterprises, Inc., 673 So.2d 503 (Fla. 3d DCA 1996)(recovery in contract actions limited to damages contemplated by the parties); Fuller, 565 F.2d 259 (slander was not contemplated by the parties to a musical services agreement); Tac Travel Am. Corp. v. World Airways, Inc., 443 F.Supp. 825, 828 (S.D.N.Y. 1978)(given the nature of the contract, it is unlikely that the parties contemplated that claims for personal injury or death would arise between them); Victoria, 710 P.2d 833 (rape of a patient was not contemplated by the parties to a hospital admission agreement). On the other hand, a defendant is liable in tort for all the injuries that are proximately caused by his negligence. Michaels, 634 So.2d at 270; Davey Compressor Co. v. City of Delray Beach, 613 So.2d 60, 61 (Fla. 4th DCA 1993); Miller v. Allstate Ins. Co., 573 So.2d 24, 29 (Fla. 3d DCA 1990).

Thus, a reasonable person could conclude that an arbitration clause in a contract which does not specifically address tort claims only covers negotiated economic losses.

4. The record in this case requires the conclusion that this wrongful death claim should not be arbitrated. Application of the principles discussed above to the clause at issue here results in only one conclusion: The clause does not require Mrs. Seifert to arbitrate her wrongful death claim. The agreement does not clearly require arbitration of such claims. The parties never contemplated arbitration of such a claim when they entered into this agreement for the sale of a new home.

First, the language of the agreement does not clearly state that such claims would be arbitrated. The arbitration clause provides:

> ARBITRATION. Any controversy or claim arising under or related

> to this Agreement or to the Property (with the exception of "consumer products" as defined by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. Section 2301 et. seq. and the regulations promulgated under that Act) or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller's representative, shall be settled and finally determined by mediation or by binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. Sections 1-14) and similar state statutes and not by a court of law.

Mrs. Seifert's wrongful death claim is not a claim "arising under or relating to" the contract or property because those matters contemplate contract claims and contract damages. Her claim is in tort and seeks tort damages.[12/] The language of the agreement does not clearly require arbitration of this claim

Further, there is nothing which shows the parties intended to arbitrate such claims or that the context in which they entered into this agreement gave notice of any such intent. The purpose of the agreement between the Seiferts and U.S. Home was the sale and purchase of a home. The Seiferts intended to purchase the home described in the agreement. U.S. Home intended to sell the Seiferts the home described in the agreement. There is no evidence in the agreement the parties ever imagined this sale/purchase would result in a wrongful death claim. The scope of the

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[12/] In the lower courts, U.S. Home argued that Mrs. Seifert's wrongful death action is covered by the arbitration clause because the clause states that arbitration of controversies or claims relating "to the property" shall be arbitrated. But that phrase "to the property" is simply insufficient to put the home purchaser on notice that bodily injury claims would have to be submitted to arbitration. The only reasonable construction of the phrase is that it applies to damage relating "to the property," i.e., contract damages. In light of the well settled law that a party can only sue in contract for those damages contemplated by the parties at the time of making the contract, and bodily injury damages are not in that category, U.S. Home is hard-pressed to argue that "to the property" was intended to include damages for bodily injury. See Tillman, 634 So.2d at 270. U.S. Home prepared the arbitration agreement; if it contemplated arbitration of bodily injury damages it was obligated to express its intent clearly and unambiguously. It did not do so – either because it, too, did not contemplate such damages or because no reasonable home purchaser would sign such an agreement.

arbitration clause should be limited to those issues that arise generally in the purchase/sale of a new home – economic risks; benefit of the bargain damages. In other words, breach of contract issues, not personal injury or wrongful death. The agreement between the Seiferts and U.S. Home did not specifically address any tort duty. The agreement did not indicate in any way that the parties contemplated potential tort or personal injury damages. Mrs. Seifert's wrongful death claim does not "arise" from the contract. There is no need to refer to any contract provision to resolve the dispute. See Miller, 682 So.2d at 692(counts in complaint sounding of torts do not require contract interpretation). Quite simply, the arbitration clause does not apply. Michaels, 668 So.2d at 1015.

A homeowner might anticipate disputes with her contractor for shoddy workmanship, building inspection failures and delays. Cf. Insignia Homes, Inc. v. Hinden, 675 So.2d 673, 674 (Fla. 4th DCA 1996)(homeowner would expect these types of controversies or claims to "arise under" or "relate to" the property and thus be subject to arbitration). But no new home purchaser would contemplate that she waived her right to litigate future claims for bodily injury or death in a court of law when she signed a sales agreement with an arbitration clause. The arbitration clause here failed to specify that personal injury claims would be submitted to arbitration. The Fifth District erred when it ordered Mrs. Seifert to arbitrate her wrongful death claim.

B. Policy considerations support the conclusion that it is not appropriate to arbitrate personal injury claims.

Many commentators and courts are of the opinion that arbitration, as a general rule, is not the best method for resolving serious personal injury claims. 1 Alternative Dispute Resolution in Florida § 3.7 (Fla. Bar. 2d ed. 1995). There are historical reasons for this view. Merchants began the practice of settling disputes through arbitration rather than litigation. Id. They found they were

able to avoid the uncertainties of a legal system unfamiliar with their specialized business problems by empowering a fellow merchant with similar experience and training to resolve commercial disputes. In this manner arbitration could provide what the judicial system could not - experts in the subject matter, familiar with industry customs, who are therefore highly qualified to fashion appropriate remedies. For this reason, arbitration is well suited to fit the needs of parties involved in disputes of a commercial or technical nature. It provides certain advantages over a judicial system composed of trial judges and lay persons who lack the arbitrators' training and expertise. Id.

By contrast, the judicial system, with its discovery process, procedural safeguards and full appellate review, is the more appropriate forum if the dispute involves resolution of substantial legal questions, or deals with factual situations commonly resolved by jurors. Id. at § 3.9. See also Armada Coal Export, Inc., 726 F.2d at 1568 (tort claims are more appropriately resolved by judges skilled in such matters rather than arbitrators who are trained to resolve contract disputes).

Mrs. Seifert's lawsuit presents legal issues which should be determined by a judge and subject to full appellate review.[13/] Her lawsuit involves factual situations and factual issues, such as the scope of wrongful death damages, which are commonly submitted to jurors. Although arbitration may be an appropriate method for resolving controversies over contract damages, a wrongful death claim is better suited to formal legal proceedings with full judicial processes and

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[13/] A perfect example of the appropriateness of appellate review is the order dismissing the strict liability and implied warranty claims. The trial court dismissed the count for strict liability because no Florida case has yet adopted that theory as applied to the sale of a new home. (SA-2). The trial court ruled that only contract damages could be recovered on the implied warranty claim. There is a split in the district courts of appeal on this issue. Compare Lockrane Eng'g, Inc., 552 So.2d 228 with Elizabeth N. v. Riverside Group, Inc., 585 So.2d 376. Mrs. Seifert is entitled to have a court, not a panel of merchants, decide such issues.

safeguards.

CONCLUSION

For the foregoing reasons, Appellee PATRICIA SEIFERT, as Personal Representative of the Estate of Ernest Seifert, Deceased, for the benefit of PATRICIA SEIFERT, surviving spouse, respectfully requests this Court to reverse the Fifth District's decision and reinstate the trial court's order denying U.S. Home's motion to compel arbitration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been and mailed this ____ day of March, 1998, to: Fredric S. Zinober, Esq., TEW, ZINOBER, BARNES, ZIMMET & UNICE, Counsel for U.S. Home Corp., 2655 McCormick Drive, Prestige Professional Park, Clearwater, FL 34619; and Joseph T. Patsko, Esq., AUSTIN, LEY, ROE, PATSKO & SWAIN, Counsel for Woody Tucker Plumbing, Inc., 300 South Hyde Park Avenue, Tampa, FL 33601.

Respectfully submitted,

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