IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,199

PHILIPPE H. MORANSAIS,

Petitioner,

v.

PAUL S. HEATHMAN, an individual, BROMWELL & CARRIER, INC., a Florida corporation, LENNON D. JORDAN, and J. LARRY SAULS,

Respondents.
_____/

This Is An Appeal From the Second District Court of Appeal, Case No. 96-03552

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

After Hurricane Andrew, Philippe Moransais and his wife decided to relocate to Lakeland, Florida from Miami. In the summer of 1993, he entered into a contract to purchase an existing home. (Appendix 1). The contract was contingent upon a number of items, including completion of a home inspection. After his brush with Hurricane Andrew, Mr. Moransais decided to hire a structural engineer to inspect his prospective new home. He found Lennon Jordan and Larry Sauls, who worked for Bromwell & Carrier, Inc. ("BCI"). Mr. Moransais entered into a "contract for professional services" to which Messrs. Jordan and Sauls were not a party.

Messrs. Jordan and Sauls performed a structural inspection of the home and wrote a report which BCI issued, concluding that "the residence appears to be in sound structural condition." (Appendix 2). Based on this conclusion, Mr. Moransais purchased the home. Thereafter, he learned that the house suffered from substantial structural problems, including holes in the foundation walls, cracking, broken and fallen foundation walls, unsupported piers, rotted bathroom flooring and other problems. Moreover, Messrs. Jordan and Sauls failed to report that the roof was without hurricane anchors. Engineers for Mr. Moransais' homeowners insurance carrier, as well as other engineers and contractors whom Mr. Moransais hired, all opined that these conditions existed prior to his purchase of the house. His homeowners insurance carrier refused to make the repairs and the carrier declined to renew his insurance policy. Consequently, Mr. Moransais was forced to move out of the house.

Mr. Moransais' Second Amended Complaint sued Mr. Jordan in Count IV and Mr. Sauls in Count V, asserting claims for negligence. The claim against Mr. Jordan differs from that against Mr. Sauls only in that Mr. Jordan had responsibility to supervise Mr. Sauls, who was an engineer intern working toward his professional engineering license. Their Motions to Dismiss the Second Amended Complaint against them were granted based upon the Economic Loss Rule. Thereafter, Mr. Moransais filed a Third Amended Complaint against them sounding in professional malpractice based upon Fla. Stat. Chapter 471. (Appendix 3).

Upon Defendants' Motions to Dismiss the Third Amended Complaint for professional malpractice, the Court "reluctantly" dismissed the action with prejudice. The Court issued a decision explaining its ruling:

> THIS MATTER came on for consideration of the Motions of Defendants, Jordan and Sauls, to dismiss Counts IV and V of the Third Amended Complaint because they fail to state a cause of action. Defendants claim that a proper application of the economic loss rule bars Plaintiff's claim for negligence or professional malpractice against both Defendants.
>
> THE COURT reluctantly concludes that Sandarac v. Frizzell Architects, 609 So.2d 1349 (Fla. 2d DCA 1992) compels dismissal under the facts as pled.
>
> PLAINTIFF claims that the Defendants negligently performed an engineering assessment of his [sic] residential property. Plaintiff relied on Defendants' assessment and suffered an economic loss. Plaintiffs' contractual claims against the seller [Heathman] and the engineering company, Bromwell & Carrier, Inc., are unaffected by this decision. Apart from Plaintiff's contractual theory against Bromwell & Carrier, Inc., he seeks to join, on negligence theories, the professional employees of

Bromwell & Carrier, Inc. who allegedly performed the work pursuant to the contract. Because plaintiff clearly had no contract with Defendants, Jordan and Sauls, Sandarac bars recovery. See also, Woodson v. Martin, 663 So.2d 1327 (Fla. 2d DCA 1995).

THERE is good reason to "reluctantly" apply the economic loss rule to these circumstances.

FIRST, the law in the Fifth District is otherwise. Southland Construction v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994).

SECOND, public policy favors a negligence theory of recovery where licensed and regulated professional are involved. See 471.023(3), Florida Statutes, 1995. This is so because if only a "shell" corporation can be held contractually liable, professional malpractice is not deterred (except in the costly regulatory process). Deterrence is a proper function of tort law.

FINALLY, it is for these reasons that the appellate courts have created an exception to the application of the economic loss rule (or an expansion of negligence law) to permit recovery against at least three regulated professionals: attorneys, abstractors and accounts. See Sandarac at page 1353. It is for others to determine if third-party beneficiary concepts should be applied to the professional engineer and engineer-in-training in this case. Said another way, only an appellate court can recede from Sandarac to allow the application of the "circle of foreseeability" to Jordan and Sauls. See dictum in City of Tampa v. Thornton-Tomasetti, 646 So.2d 279 (Fla. 2d DCA 1994).

ACCORDINGLY, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss Counts IV and V is GRANTED.

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Mr. Moransais effected a timely appeal to the Second District Court of Appeal. That Court affirmed the trial court's dismissal.

However, recognizing that its decision directly conflicts with the decision of the Fifth District Court of Appeal in Southland Construction, Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994), the Second District certified the following question as one of great public importance:

> WHEN THE ALLEGED DAMAGES ARE PURELY ECONOMIC, CAN THE PURCHASER OF A RESIDENCE, WHO CONTRACTS WITH AN ENGINEERING CORPORATION FOR A PRE-PURCHASE INSPECTION, MAINTAIN A PROFESSIONAL NEGLIGENCE ACTION AGAINST THE LICENSED ENGINEER WHO PERFORMED THE INSPECTION AS AN EMPLOYEE OF THE ENGINEERING CORPORATION?

SUMMARY OF ARGUMENT

The right of a homeowner to recover damages from a professional engineer does not violate the Economic Loss Rule. Engineering is a "profession" and the Florida Legislature has determined that engineers in the practice of their profession have the potential to cause "economic injury". Therefore, engineers in their individual capacity are liable for economic losses caused by their negligence, misconduct or wrongful acts. Following these concepts, the Fifth District Court of Appeal decision of Southland Construction, Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994), is directly on point. Messrs. Sauls and Mr. Jordan, like Mr. Richeson, "as an individual professional, owed [Moransais] a duty to perform his duties in a professional, competent manner." Southland, supra, at 8. Reversing the trial judge, the Fifth District held:

> Allowing tort recovery in this context is therefore not an extension of established tort liability. Rather, to deny tort liability on the basis of the 'economic loss' doctrine would reduce already-established tort liability. (Citations omitted).

Id. As the Moransais trial judge noted, public policy favors a negligence theory of recovery where licensed and regulated professionals are involved in order to deter malfeasance.

Numerous professionals such as accountants, attorneys, physicians, and abstractors, and other licensed professionals can be sued for professional malpractice by their clients. The Florida Legislature has imposed a statutory duty upon engineers to render their services to the public, without negligence, in order to avoid economic loss. No justification exists to exempt engineers from liability by parties who rely upon their professional expertise. To hold otherwise would grant professional engineers a license to perform professional services without regard to the consequences of their actions. This escape hatch from liability coupled with an ability to hide behind the walls of a professional service corporation flies in the face of existing legislation and public policy considerations. Messrs. Sauls and Jordan owed Mr. Moransais a direct duty to render professional services with due care and in furtherance of statutorily imposed safeguards to promote public safety, health and welfare. Mr. Moransais must not be forced to bear the burden of negligent engineering services while Messrs. Sauls and Jordan escape liability.

This Court should follow Southland, answer the certified question in the affirmative and reverse the dismissal order.

A R G U M E N T

JURISDICTION

The Second District Court of Appeal concluded in Moransais v. Paul S. Heathman, Bromwell and Carrier, Inc., Lennon D. Jordan, and J. Larry Sauls, 22 FLW D2726 (Fla. 2d DCA, Dec. 3, 1997) [hereinafter "Moransais"], that a cause of action for negligence cannot be sustained against a professional engineer based upon Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc., 609 So.2d 1349 (Fla. 2d DCA 1992) [hereinafter "Sandarac"]. In its decision, the Second District Court of Appeal has eliminated the once valued right of a homeowner to recover damages from professionals who negligently render professional engineering services in Florida. The history of the Economic Loss Rule in Florida supports the right of individuals to recover economic damages from professional engineers based upon a cause of action for negligence arising out of the rendering of professional services.

The District Court decision has recognized the conflict between its ruling and that of the Fifth District Court of Appeal in Southland Construction, Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994) [hereinafter "Southland"] and certified the question stated above. It is also submitted that the Second District opinion also conflicts with the ruling of the Third District in Bay Garden Manor Condominium Association, Inc. v. James D. Marks Associates, Inc., 576 So.2d 744 (Fla. 3d DCA 1991). It is submitted that based on the express conflict (and the fact that the Second District ruling is unsupported by law or logic), this Honorable Court should accept jurisdiction and the District Court

opinion should be reversed.

I.

FLORIDA HAS HISTORICALLY ALLOWED RECOVERY OF PURELY ECONOMIC LOSS BY A THIRD PARTY IN TORT.

The history of the privity doctrine does not limit the right of a remote but foreseeable party to recover damages from a negligent party. As stated by the Fourth District in Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA), adopted and approved, 264 So.2d 418 (Fla. 1972):

> [W]e recognize that liability must have an end but question the creation of any artificial limits of either time or remoteness to the original purchaser.

Gable, at 18. The cases discussed infra illustrate the historic treatment prior to Sandarac of purely economic loss suffered by third parties not in contractual privity with the negligent party.

Surprisingly, in 1964, the Second District was among the first to relax the privity requirement in regard to third parties. In Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc., 168 So.2d 333 (Fla. 2d DCA 1964), the lower court determined that an engineering firm, which had prepared the design and specifications for a chattel, owed no duty to third persons who might suffer economic loss due to a defect in the design, and that the firm's "warranty" extended only to its client.

The Second District disagreed, stating:

> In our view the extent of appellee's duty must best be defined by reference to the foreseeability of injury consequent upon breach of that duty. The complaint alleged that appellee knew that the design and specifications it prepared would be resold to and used by various fabricators. To argue that it is

> absolutely free of liability from negligence to these known users or consumers of its work is to disregard the half century of development in negligence law popularly thought to have originated in McPherson v. Buick Motor Co., 217 N.Y. 382 (1916), and explicitly recognized in this state in Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956). The allegations of the complaint bring appellant within the ambit of Britt Associates' duty, and the court erred in its contrary determination.

Audlane, supra, at 335.

The Fourth District recognized liability notwithstanding the absence of contractual privity was recognized in Luciani v. High, 372 So.2d 530 (Fla. 4th DCA 1979), where homeowners brought suit against an engineer, employed by the contractor, to perform testing and examination of the land upon which the residence was to be built. The complaint alleged that the engineer negligently performed the test, resulting in damage to appellants' property. The trial court granted a motion for judgment on the pleadings, which stated that the appellant had not contracted with the engineer, and that privity of contract was necessary to support the appellants' claim. The Court held that the engineer should not be absolved from liability to the owners for negligent testing simply because his contract was with the contractor and not the owners. It found the engineer was liable not only to those in privity with him, but also to those third persons who might foreseeably be injured as a result of his negligence. In the instant appeal, Moransais is in exactly the same position as the homeowner in Luciani, and should be provided the same remedy.

The Florida Supreme Court acknowledged that the Economic Loss Rule was not intended to eliminate causes of action in existence prior to the widespread application of the Economic Loss Rule in Florida. This view was expressed in Florida Power & Light Company v. Westinghouse Electric Corporation, 510 So.2d 899 (Fla. 1987) ("FP&L") which barred recovery of economic loss damages in an commercial setting and held that:

> We hold that the economic loss rule approved in this opinion is not a new principle of law in Florida and has not changed or modified any decisions of this Court. (Emphasis added).

FP&L, supra, at 902.

Following this pronouncement, the Southland Court recognized that prior decisions of the Supreme Court, most notably, A.R. Moyer, Inc. v. Graham, supra, survives and remains "good law in this State". Southland, supra, at 8. In Moyer, the court held that a third party general contractor, who may foreseeably be injured or sustain an economic loss proximately caused by negligent performance of a contractual duty of an architect or engineer employed by an owner, has a cause of action against the alleged negligent architect or engineer, **notwithstanding the absence of privity.**

Based upon the architect's supervisory role, the Court elected to expand the sphere of parties who could foreseeably sustain economic damage as a result of the architect's negligent performance of his contractual duties. Following the lead of Moyer, the Fifth District in Southland reasoned that liability of the engineer is a function of the circle of foreseeability of injury which is

closer and tighter in Southland than in Moyer. In Moyer, a contract existed between the owner and design professional, whereas in Southland, the contract was between the professional service corporation and the contractor. Accordingly, the general contractor in Southland and Moransais in the instant appeal are clearly more foreseeable victims of neglect conduct than the general contractor was in Moyer.

II.

FLORIDA RECOGNIZES AN EXCEPTION TO THE ECONOMIC LOSS RULE BASED UPON THE RESTATEMENT (SECOND) OF TORTS §552.

This is a great decade to represent defendants. The Economic Loss Rule has been stretched and sculpted to cover a multitude of sins, to the point where one might conclude, at least with respect to consumers caught in the stream of Florida commerce, there no longer are any sins -- at least none that are actionable. Fortunately, Florida recognizes an exception to the Economic Loss Rule to permit recovery of purely economic losses from a negligent provider of services that was not in privity with the recipient. Sandarac, supra, at 1352. This exception is based upon the Restatement (Second) of Torts, §552 (1977) [hereinafter "Restatement"] and provides in pertinent part as follows:

> Information negligently supplied for the guidance of others (1) one who, in the course of his business, profession or employment, or in any other transaction which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in communicating information. (2)

> Except as stated in subsection (3), the liability stated in subsection (1) is limited to loss suffered by (a) the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Florida courts have allowed specific claimants to recover purely economic damages from professionals and others in the absence of privity. First Florida Bank, N.A. v. Max Mitchell & Company, 558 So.2d 9 (Fla. 1990); Amwest Surety Insurance Company v. Ernst & Young, Inc., 677 So.2d 409 (Fla. 5th DCA 1996) (accountant); Angel, Cohen and Rogovin v. Oberson, Inc. N.V., 512 So.2d 192 (Fla. 1987) (attorney); First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984) (abstractor); Bay Garden Manor Condominium Association, Inc. v. James D. Marks Associates, Inc., supra (engineer); First State Savings Bank v. Albright & Associates of Ocala, Inc., 561 So.2d 1326 (Fla. 5th DCA), rev. den., 576 So.2d 284 (Fla. 1990) (appraiser).

The cornerstone of liability turns on the recipient's reliance upon professionals who supply expert information for the purpose of guiding others in business transactions. Similar to the issues raised in this appeal, the Third District Court of Appeal in Bay Garden Manor permitted the recovery of economic loss damages to a condominium association that was not in privity with a negligent engineer. The association relied upon a conversion inspection report that inaccurately described the structural condition of the

building. Relying on the Restatement and Pensacola Executive House Condominium Association, Inc. v. Baskerville-Donovan Engineers, Inc., 566 So.2d 850 (Fla. 1st DCA 1990), the Court held as follows:

> . . . it is undisputed that the engineers were hired to prepare reports of a structural inspection which would guide others in business decisions. The main question to be decided on remand are whether the inspection reports were false, whether the unit owners were persons that the engineer knew would rely on those opinions and whether the unit owners suffered recurring losses as a result of a justifiable reliance on the information - without regard to privity.

Bay Garden, supra, at 746.

In the instant appeal, Moransais answers each question raised in Bay Garden in the affirmative. The pleadings filed by Moransais alleged that the inspection reports were false and that Mr. Moransais was the person whom the engineers knew would rely on those opinions. As a consequence, Moransais justifiably relied on the information and sustained pecuniary loss. Further, there was never a contract between Moransais and Messrs. Sauls and Jordan.

In First Florida Bank, N.A. v. Max Mitchell & Company, supra, this Court addressed the liability of accountants who may be held liable in negligence to persons who are not in contractual privity. In Max Mitchell, a bank sued an accountant who had provided financial statements that they relied upon when issuing a loan to a client of the accountant. The Court, citing the Restatement, based liability upon the bank's "heavy **reliance** upon audited financial statements in the contemporary financial world." Max Mitchell, supra, at 15 (emphasis added).

The Court's decision in Max Mitchell was based on the "heavy reliance upon audited financial statements in the contemporary financial world." Why should a pre-sale home engineering inspection report be treated differently? No one would contend that the reliance of Mr. Moransais was less heavy. Can the courts justify a different result without concluding that consumers just live in a less important world? In the real estate industry, it is common practice to require inspection of a residential property prior to purchase. (See Standard Form Real Estate Contract Approved By The Florida Bar, 1995). Buyers of real estate heavily rely upon these reports to determine the nature and extent of any deficiencies that may impact the value of the property. Pre-sale inspection reports are as significant to the contemporary real estate world as audited financial statements are to the contemporary financial world.

In First American Title Insurance Company, Inc., the Court held that although an abstractor is not liable in tort for negligence to any and all foreseeably injured parties, liability will be extended to those whom the abstractor knows or should know will rely upon the abstract. Certainly, an engineer who prepares a pre-sale inspection report can expect that the unsophisticated home buyer will rely upon his report in deciding whether to purchase a home. This Court also recognized that an attorney could be liable for negligence in the absence of privity. See Angel, Cohen and Rogovin v. Oberon, supra.

Addressing the erosion of the privity requirement, the Court in Sandarac, citing Moyer, reiterated that a general contractor

could sue an architect or engineer for damages proximately caused by their negligence despite the absence of privity of contract between the parties. These cases support the proposition that third parties not in contractual privity with a negligent engineer who causes purely economic loss can recover damages in tort. In fact, Sandarac authorizes recovery of tort damages from the provider of information when "an existing, specifically identifiable, intended beneficiary of a contract has not been given that status in a contract." Sandarac at 1353. There is no question that Moransais was the party to receive and rely on the inspection report. Moreover, there was no contract between Moransais and Messrs. Sauls and Jordan. Although this Court in Florida Power & Light Company v. Westinghouse Electric Corporation, 510 So.2d 899 (Fla. 1987), AFM Corp. v. Southern Bell Telephone and Telegraph Co., 515 So.2d 180 (Fla. 1987), and Casa Clara Condominium Association Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993), clearly stated that prior decisions, such as A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973) [hereinafter "Moyer"] were unaffected by these rulings, those decisions have been used to unjustifiably and in broad fashion apply the Economic Loss Rule to cases involving third parties. The Sandarac opinion is illustrative of the misapplication of the holdings in FP&L and AFM. In fact, though founded in sound analysis to a point, the Sandarac opinion goes astray and becomes simply very bad law.

The Sandarac court, after analyzing the history of the Economic Loss Rule arrived at its defining premise that "the judiciary has cautiously expanded the law of negligence to protect

economic expectations only in situations where legal theories based on privity or statutory law have proven inadequate to protect important interests...." Sandarac, at 1352. Unfortunately, having "cautiously expanded the law of negligence" over some 400 years, some courts have recklessly constricted it over a four year period. "The Economic Loss Rule is stated with ease but applied with great difficulty," said the Second District in Sandarac at 1352. That difficulty is no less diminished several years and many cases later. Most articles and CLE lectures on the issue admit only to continuing confusion, and the ultimate distillation of the Rule to a simpler premise: the plaintiff always loses. See The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts (Fla. B.J., Nov. 1995). The underpinnings of the Economic Loss Rule were addressed in FP&L and AFM: absent property damage or personal injury, there can be no independent tort where there is a contract between the parties. It stretched from "contract remedies", to "contract in which there could have been remedies", to "privity", and all of it might have been supported by legal reasoning. It went amok in Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., supra, where the Court applied a faulty premise to reach an erroneous conclusion, from which it is time to recede, i.e., there are no tort remedies where a consumer has a contractual remedy against somebody even if it is not a meaningful remedy and even if the person who caused the loss was not a party to the contract. It would be nice if this were the case in which the Court chose to recede from this universally academically denounced decision, although it is not by any means

necessary to do so in order to reverse the Second District in the case at bar.

As the Fourth District Court of Appeal in Gable v. Silver commented:

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected.

258 So.2d at 17 (quoting) University of Florida Law Review, Vol. 23, p.626 (1971).

III.

THE ECONOMIC LOSS RULE IS INAPPLICABLE TO A NEGLIGENCE CAUSE OF ACTION BROUGHT BY A HOMEOWNER AGAINST A PROFESSIONAL ENGINEER.

The Fifth District Court of Appeal in Southland Construction, Inc. v. Richeson Corp., supra, recognized that professional engineers shall be personally liable for economic losses caused by their negligence, misconduct or wrongful acts. Relying upon Southland, and the sound reasoning therein, the certified question submitted to this Court must be answered in the affirmative.

In Southland, a general contractor sued an engineer for professional malpractice arising from the defective design of a retaining wall. The Fifth District ruled that the Economic Loss Rule did not apply to bar the general contractor's tort suit even in the absence of a contractual relationship between the individual engineer and contractor.

a. Engineers Have a Statutory Duty to Render Professional Services Without Negligence to Avoid Economic Loss to the Public.

In reaching its decision, the Court relied upon legislation regulating the engineering profession. This legislation was enacted to protect the life, health, safety and welfare of the public §61G15-19-003, Fla. Adm. Code Ann. (1995). It is significant to note that the Florida Legislature acknowledged that engineers, if they perform incompetently, will cause economic injury to the recipient of their services, apart from any injury to person or property. On this point, §471.001, Florida Statutes provides in pertinent part as follows:

> The legislature finds that, if an incompetent engineer performs engineering services, physical and **economic injury** to the citizens of the state would result and, therefore, deems it necessary in the interest of public health and safety to regulate the practice of engineering in this state. (Emphasis added)

Southland further considered §§471.023(3) and 621.07, Florida Statutes, which contemplate tort liability for individual engineers who perform services on behalf of a professional service corporation. These provisions provide as follows:

> 471.023(3). . . Any officer, agent, or employee of a corporation shall be personally liable and accountable only for negligent acts, wrongful acts or misconduct committed by him or committed by any person under his direct supervision and control, while rendering professional services on behalf of the corporation. . .
>
> * * *
>
> 621.07. . . Any officer, agent, member, manager, or employee of a corporation or limited liability of a company organized under this act shall be personally liable or held accountable only for negligent or wrongful acts or misconduct committed by that person, or by any person or that persons direct supervision, control while rendering

> professional services on behalf of the corporation or limited liability company to the person for whom such professional services are being rendered. . .

Against this legislative backdrop, Moransais is entitled to recover economic damages directly from individual engineers who negligently provide services on behalf of a professional service corporation. By statute, engineers may not insulate themselves by practicing through a corporation. The rule, as previously espoused by this Court, applies equally to physicians, engineers and other professionals. See Gershuny v. Martin McFall Messenger Anesthesia Professional Association, 539 So.2d 1131 (Fla. 1989); Schnetzler, M.D. v. Cross, 688 So.2d 445, 447 (Fla. 1st DCA 1997).

Statutory provisions regulating engineers coupled with public policy considerations hold engineers personally accountable for their negligent acts. A home buyer subjected to negligent engineering services should be afforded the same relief that is granted to foreseeable victims of negligence practiced by accountants, abstractors, physicians, appraisers and attorneys. In fact, problems associated with negligent engineering services can be much more severe than a loss caused by the negligence of other professionals. When the abstractor's or accountant's fountain pen slips, money can be lost; when the engineer's pen slips, roofs and walls can fly away in a hurricane. Denial of a remedy to the recipient of a pre-purchase inspection engineering report would clearly be inequitable.

b. Application of the Economic Loss Rule Would Render Legislation Meaningless.

The existence of statutory duties serves as the basis for an

independent cause of action separate and distinct from any contractual remedy. No contractual relationship existed between Moransais and Messrs. Sauls and Jordon. This liability is predicated on the breach of statutory obligations to render engineering services with due care. Recent decisions emphasize that the Economic Loss Rule does not eliminate statutory causes of action. See Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602 (Fla. 2d DCA 1997) (Florida Deceptive and Unfair Trade Practices Act not barred by the Economic Loss Rule); Rubio v. State Farm Fire & Casualty Co., 662 So.2d 956 (Fla. 3d DCA 1995), rev. den., 667 So.2d 252 (Fla. 1996) (statutory bad faith claim not barred by the Economic Loss Rule); Seibert v. Bayport Beach & Tennis Club Association, Inc., 573 So.2d 889, 892 (Fla. 2d DCA 1990), rev. den., 583 So.2d 1034 (Fla. 1991) (design professional liable for its failure to perform its statutory duty to comply with Standard Building Code).

This Court should be mindful that to bar a negligence cause of action by a home buyer against a professional engineer based upon the Economic Loss Rule would render the provisions of Chapter 471, Florida Statutes, meaningless. As directed in Holly v. Auld, 450 So.2d 217 (Fla. 1984), the judiciary is restricted from diminishing the obvious intent of a statute and held that Florida Courts are:

> [w]ithout power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.

Holly, at 219.

Reviewing the trial court's dismissal of an insured's statutory bad faith claim, the Third District Court of Appeal in Rubio stated "Courts cannot willy nilly strike down legislative enactments." Rubio, supra, at 957, fn.2.

A balanced reading of §§471.001, 471.023(3) and 621.07, Florida Statutes establishes the right to recover economic loss damages directly from the engineer responsible for commission of negligent acts. The Economic Loss Rule should not be applied to usurp the legislative intent of these statutes.

c. A Cause of Action for Professional Malpractice Is Not An Extension of Tort Liability.

Mr. Moransais acknowledges that Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., supra, limited Moyer "strictly to its facts". (The time has come to do the same with Casa Clara). Yet, the Economic Loss Rule has not eliminated a cause of action for tortious conduct independent of a contractual breach. See H.T.P. Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238, 1239 (Fla. 1996). Simple logical extension points to liability in the instant case. In H.T.P., the Court recognized that fraud in the inducement remained a viable tort. In that case, this Court further acknowledged the continuing vitality of negligent misrepresentation as a viable tort, notwithstanding the existence in a contract, where the misrepresentation induced the plaintiff to enter the contract. In Johnson v. Davis, 480 So.2d 625 (Fla. 1985) (a case cited in and presumably alive after Casa Clara), this Court recognized a tort where a homeowner failed to disclose defects in a home to the purchaser thereof. Presumably

this can be justified, even with the Economic Loss Rule, as a fraud in the inducement. But, presumably too, had the seller in Johnson **negligently** failed to disclose the defects, this misrepresentation leading up to the contract would also leave the buyer with a tort remedy. See HTP, supra, at 1239 (tort action will lie for intentional or negligent acts independent of breach). How then do we justify the absence of a remedy when the negligent misrepresentation, which clearly induced the buyer to enter into a purchase agreement, was made by a third party, a professional who has an even greater duty of care than a homeowner, a duty statutorily imposed?

The Second District in Sandarac and in the instant case failed to acknowledge that a cause of action for professional enbgineering malpractice was in existence prior to the inception of Florida's widespread application of the Economic Loss Rule. See §95.11(4)(e), Fla. Stat. (1974); Pierce v. AALL Insurance, Inc., 531 So.2d 84 (Fla. 1988) (defining "professionals")]; Pensacola Executive House Condominium Assn, Inc. v. Baskerville-Donovan Engineering, Inc, supra (holding that engineering is a profession). By rendering a professional engineering opinion concerning the condition of the home, Messrs. Sauls and Jordan engaged in the practice of engineering. §471.005(6), Fla. Stat. Measured against the foregoing principles, Southland explained that pursuit of a professional malpractice claim does not require an extension of established tort law:

> The professional malpractice of persons not in direct privity with a person injured by the professional's services is the gist of

> numerous lawsuits in this state as well as elsewhere. **Allowing tort recovery in this context is therefore not an extension of established tort liability. Rather, to deny tort liability on the basis of the 'economic loss' doctrine would reduce already-established tort liability.** (Emphasis added)

Southland, supra, at 8.

Moreover, the Fifth District held as follows:

> As regards the tort liability of engineers, one who negligently performs a professional engineering service, knowing that another person will be injured if it is negligently performed, is liable in tort, even though there is no contract between the parties (citations omitted).

Southland, supra, at 9.

The Fifth District further emphasized that such fundamental law was affirmed when the Florida Legislature enacted §§471.023(3) and 621.07, Florida Statutes. Southland, supra, at fn.6.

In RTC v. Holland & Knight, 832 F. Supp. 1528 (S.D. Fla. 1993), the District Court for the Southern District of Florida applying Florida law found "the economic loss rule and the independent tort doctrine inapplicable to the RTC's Complaint for professional malpractice." RTC, supra, at 1532.

Following this Court's decisions of FP&L and AFM, the Fifth District held the Economic Loss Rule inapplicable to professional services. In Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd., 552 So.2d 228, 232 (Fla. 5th DCA 1989), the Fifth District distinguished between professional and contractual duties as follows:

> The duty of a professional who renders services, such as a doctor, lawyer, or engineer, is different from the duty of one

> who renders manual services or delivers a product. The contractual duty of one who delivers a product or manual services is to conform to the quality or quantity specified in the express contract, if any, or in the absence of such specifications, or when the duty and level of performance is implied by law, to deliver a product reasonably suited for the purposes for which the product was intended (such as is involved in this case, the implied duty to deliver an adequate septic tank system) or to deliver services performed in a good and workmanlike manner. **However, the duty imposed by law upon professionals rendering professional services is to perform such services in accordance with the standard of care used by similar professionals in the community under similar circumstances. The measure of damages for breach of such different duties is likewise often different.** (Emphasis added)

Lochrane, supra, at 232.

A malpractice claim against individual engineers practicing on behalf of a professional service corporation does not expand tort law but, rather, follows already established principles of tort liability in Florida. **To hold otherwise** would render meaningless Chapters 471 and 621, Florida Statutes, which, in fact, specifically contemplate a direct tort claim against the individual professional engineer. **To hold otherwise** would effectively relieve an engineer from his professional statutory duty to render services with due care and at the same time, permit it to hide behind the walls of a professional service corporation to avoid financial liability. **To hold otherwise** would require this Court to treat engineers differently from other professionals when the Legislature has acknowledged that economic losses may result from rendering negligent professional engineering services.

The Second District Court of Appeal in Sandarac acknowledged the accountant, attorney, and abstractor cases, stating: "these cases all demonstrate a tendency to create a third party beneficiary status through negligence law when an existing, specifically identifiable, intended beneficiary of a contract has not been given that status in the contract." Sandarac, supra, at 1353. The Court then simply chose not to do the same with engineers, notwithstanding a strong statute imposing a duty, effectively making engineers "untouchable" by those who will suffer the most from their negligence. If the Second District or any other court can articulate a rational distinction between attorneys, accountants, abstractors on the one hand, and engineers on the other, it has not yet done so. Why should an engineer be immune from liability? The lack of contractual privity between the recipient of a pre-sale engineering report and the negligent engineer is irrelevant. When the home buyer relies on an inaccurate engineering inspection report and purchases a home with deficiencies, the home buyer should be afforded the same relief available to foreseeable victims of negligent accountants, abstractors, and attorneys. To deny a remedy ignores the financial consequences of an engineer's negligent conduct. As noted by the First District in Simmons v. Owens, 363 So.2d 142 (Fla. 1st DCA 1978):

> We must be realistic. The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser's biggest and most important investment in his or her life and, more times than not on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family budget and have no remedy or recourse.

> This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence.

Simmons, at 143.

Sandarac also relied on AFM, supra, which held that a purchaser of services could not recover economic losses in tort without a claim for personal injury or property damage. The Court noted that although AFM could appear inconsistent with Moyer, the contractor in Moyer was not a party to the contract with the architect nor a third party beneficiary of the contract; as such, there was no contract under which the contractor could recover his loss. The Court concluded that an action in tort existed, based on the fact that the supervisory responsibility vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract. Sandarac side-steps both Moyer and the privity doctrine which has historically supported Moyer's application. Gable, supra, at 11.

CONCLUSION

Application of the Economic Loss Rule to immunize professional engineers from liability to persons acting in reliance on their reports, denying recourse to Mr. Moransais, is a futile attempt to craft logic out of illogic, justice out of injustice. Philippe Moransais submits there is only one reasonable and just course, and that is for this Honorable Court to accept jurisdiction, treat engineers as it does all other professionals (including some without so compelling a statutory statement of duty), and reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief On the Merits and the Appendix to Brief on the Merits was furnished by U.S. mail to: C. Geoffrey Vining, P.A., 230 S. Florida Avenue, Suite 501, Lakeland, FL 33801 and Mark N. Miller, Esq., Lane, Trohn, et al., One Lake Morton Drive, Lakeland, FL 33802-0003, Attorneys for Appellees, this 2nd day of March, 1998.

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