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FILED
SID J. WHITE
OCT 6 1998
CLERK, SUPREME COURT
By ___
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,126

KENNEDY ELECTRIC, INC.,

Petitioner,

-vs.-

CARL STALLINGS, JR., etc.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF INTEREST OF AMICUS

The Academy of Florida Trial Lawyers is a large voluntary statewide association of trial lawyers specializing in litigation in all areas of the law, including all types of tort litigation. The lawyer members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

The Academy has been involved as amicus curiae in cases in the Florida appellate courts and in this Court involving the economic loss rule, as well as many other cases involving all aspects of the tort system. The Academy appears here to present a perspective other than that offered by the parties on important issues which have widespread effects upon victims of violations of statutory rights, to whom the legislature has granted the statutory right to sue to vindicate those rights.

STATEMENT OF THE CASE AND OF THE FACTS

This is a proceeding for discretionary conflict review of the Fifth District's holding that the economic loss rule cannot preclude a homeowner's statutory claim for violation of the building code. See Stallings v. Kennedy Electric, Inc., 710 So. 2d 195 (Fla. 5th DCA 1998). The Fifth District certified conflict with

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Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 22 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1997). The Academy adopts the statement of the case and facts set forth in the Fifth District's opinion.

SUMMARY OF THE ARGUMENT

This Court should hold that the economic loss rule is inapplicable to this case for two reasons. First, the separation of powers doctrine precludes application of the economic loss rule to bar enforcement of a statutory cause of action. Second, the economic loss rule should be held inapplicable where there is no privity of contract, and there is damage to property other than that sold by the Defendant.

The separation of powers doctrine precludes application of the economic loss rule. The legislature is constitutionally vested with the power to create causes of action for money damages. The legislature did so by creating a cause of action for violation of the State Minimum Building Codes. To abrogate that cause of action by applying the judicially created economic loss rule would be to unconstitutionally intrude upon the legislature's lawmaking power.

The economic loss rule should be held inapplicable where there is no privity of contract between the parties and there is damage to property other than that which was sold or provided by the Defendant. Here, the Plaintiffs

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could not protect themselves from the application of the economic loss rule with a contractual claim against Kennedy Electric, because they were not in privity with the Defendant and had no opportunity to negotiate contractual terms with that party. The damage to the Plaintiffs' house included damage to property different from that electrical wiring sold and installed by Kennedy Electric. Therefore, Plaintiffs lost more than their expectancy as to the value of the wiring in their home and have no recourse against the Defendant other than through their tort cause of action.

ARGUMENT

I.

THE DOCTRINE OF SEPARATION OF POWERS DOES NOT PERMIT THE JUDICIALLY CREATED ECONOMIC LOSS RULE TO DEFEAT A CAUSE OF ACTION CREATED BY THE LEGISLATURE

The district court's decision was correct because the courts should not, and indeed cannot, deprive consumers of a right granted to them by a constitutional statute. To allow the judicially created economic loss rule to defeat a cause of action expressly granted by the legislature would violate the Florida Constitution's requirement of separation of powers.

The legislature has determined in §553.84, Florida Statutes that,

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"[n]otwithstanding any other remedies available, any person or party . . . damaged as a result of a violation of this part or the State Minimum Building Codes, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation." The legislature has expressly granted this right in a statute that is constitutionally sound. The courts cannot and should not defeat this right by judicial fiat.

One of the greatest safeguards of our freedom is the prevention of any dangerous concentration of power by separation of the powers of the different branches of our government. School children learn about our system of checks and balances, a fundamental tenet of our federal constitution, echoed with equal clarity in the constitution of our state.

Article II, §3 of the Florida Constitution wisely provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. <u>No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein</u>.

(emphasis added). This Court has explained the purpose of this provision: "The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty. " <u>Chiles v. Children</u>, 589 So. 2d

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268 (Fla. 1991).

> This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized . . . no man or group of men will be able to impose its unchecked will.

United States v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 1712 (1965). Accord, e.g., Petition of Florida Bar, 61 So. 2d 646, 647 (Fla. 1952) ("the distribution of powers into three departments was not designed to promote haste or efficiency, but to head off autocratic power and insure more careful deliberation in the promulgation of governmental policy.")

The legislative power is vested in the legislature. Article III, §1, Fla. Const. The judicial power is vested in the court. Article V, §1, Fla. Const.

This means that it is the job of the legislature to draw "the fine lines between lawful and unlawful conduct and between acts which are the basis for actions for damages." McNayr v. Kelly, 184 So. 2d 428, 430 n.6 (Fla. 1966). The courts may interpret the laws passed by the legislature; the courts may determine their constitutionality; the courts may even "modernize traditional principles of tort law" which have evolved as part of the common law, when the legislature has not spoken to the issue. See, e.g., Conley v. Boyle Drug Co.,

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570 So. 2d 275, 284 (Fla. 1990); Hoffman v. Jones, 280 So. 2d 431, 434-36 (Fla. 1973). But the courts may not overrule or limit a valid legislative enactment that has passed constitutional scrutiny. See Delgado v. J.W. Courtesy Pontiac GMC, 693 So. 2d 602, 609 (Fla. 2d DCA 1997). As this Court observed in Twomey v. Clausohm, 234 So. 2d 338, 340-41 (Fla. 1970), "when . . . a valid legislative mandate is clear we do not have the judicial power to ignore it or otherwise hold it for naught merely because we personally think the problem should be handled in some other fashion."

In the field of torts, this Court has recognized that "it would be an improper infringement of separation of powers for the judiciary, by way of tort law, to intervene in fundamental decisionmaking of the executive and legislative branches of government . . . ." Kaisner v. Kolb, 543 So. 2d 732, 736 (Fla. 1989).

Even where the lines between areas of judicial and legislative authority are sometimes blurred, this Court historically has deferred to the legislature where the legislature has spoken. For example, although this Court has power to create a cause of action in some circumstances, "the legislature is best equipped to resolve the competing considerations implicated by such a cause of action." Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987). That is because the legislature, unlike the courts, is designed for "receiving public

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input and resolving broad public policy questions based on a societal consensus." Id. Consequently, even in areas of the common law that traditionally have been developed by the courts, the courts have deferred to the legislature where, as here, the legislature has made its intentions plain by enacting an unequivocal, constitutional statute.

When separation of powers and checks and balances are ignored, the government loses its compass. Instead of acting according to legal principles, the government acts at the whim of the individuals exercising governmental power. That is because, in such a situation, there is little to stop them.

That problem is evident in the Third District's decision in Comptech. There the court determined that it would not allow a statutory cause of action, even though the legislature expressly authorized such claims "notwithstanding any other remedies available." The court's decision cannot be reconciled with the statute. But who is going to tell the court that it is wrong? The legislature? The legislature has already expressed its will; the district court ignored it. The legislature cannot be any clearer than it was in the statute. It should not be necessary for the legislature now to say, "No, but we really, *really* meant it."

The Florida Constitution resolved this impasse in Article II, § 3. Thus, even though the Court has some power to determine public policy, it does not do so in the face of a valid, contrary legislative pronouncement. VanBibber v.

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Hartford Acc. & Indem. Ins. Co., 439 So. 2d 880, 883 (Fla. 1983). The statute here is such a valid, contrary legislative pronouncement. To allow the judicially created economic loss rule to limit it would violate these basic precepts of Florida law.

II.

THE ECONOMIC LOSS RULE SHOULD NOT APPLY WHERE THERE IS NO PRIVITY OF CONTRACT, AND THERE IS DAMAGE TO PROPERTY OTHER THAN THAT PROVIDED BY A DEFENDANT

Two of the underlying tenets which usually exist in economic loss rule cases are absent in this case: privity, and damage only to the property sold by the Defendant. Where there is no privity of contract between the Plaintiff and the Defendant, and there is damage to property other than that sold or provided by the Defendant, then the economic loss rule should be inapplicable. To the extent that it is necessary to reach such a result, this court should recede from its holding in Casa Clara Condo. Ass'n. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993). This Court should adopt the dissenting opinion in that case of Justice Shaw, which recognizes the inapplicability of the economic loss rule where there is no privity, and there is damage to other property.

This is not a case in which the Plaintiff is claiming damages only for disappointed expectations as to the performance of a component product sold

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and installed by a Defendant, such as where wiring in a home did not work right and caused power outages. Instead, there was actual physical fire damage to structural components of the house and personal property which Kennedy Electric did not sell or install. This is far from a case in which the only damage to any property was damage to the very property provided by the Defendant, such as in Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995) and Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987).

This Court should reject the proposition that the product in question was the entire house, because the Defendant did not sell or build the house. The roof and walls and other parts of the home (not to mention Plaintiff's personal property) were "other property" damaged by the negligence and statutory violation of the Defendant.

However, the Academy does not suggest that the "other property" exception to the economic loss rule should necessarily apply in cases where there is direct contractual privity between the parties. This Court need not go that far in this case. Instead, in a case such as this one, where there is no privity, the rule should be held to be inapplicable.

Plaintiffs could not protect themselves from the cost of damage to other property by the Defendant's shoddy workmanship by inserting a contractual

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provision in their agreement with Defendant, because there was no contract between those parties to begin with. There can be no contractual remedy--much less an exclusive contractual remedy--where the parties had no contract between them. Because two reasons for the economic loss rule are both absent in this case, this Court should hold the rule to be inapplicable.

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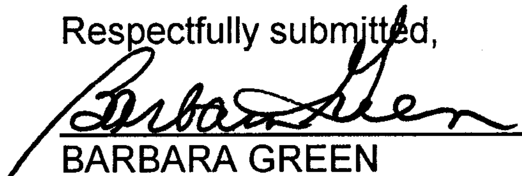
CONCLUSION

The decision of the court below was correct. The decision is compelled by the separation of powers doctrine embodied in Article II, §3, of the Florida Constitution. The Academy respectfully requests this Court to affirm the decision of the Fifth District below and to disapprove the decision of the Third District in Comptech. The Academy asks the Court to hold that the economic loss rule cannot defeat a cause of action created by a constitutionally valid statute. The Academy also asks the court to hold that the economic loss rule cannot defeat a cause of action for damage to other property where there is no privity of contract between the parties.

Respectfully submitted,



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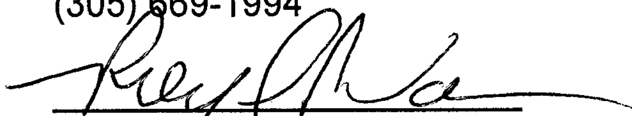

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies hereof have been served by U.S. Mail, upon Paul M. Meredith, 626 Reid Street, Palatka, Florida 32177 and John F. Sproull, 314 St. Johns Ave., Palatka, Florida 32177, John Beranek, 227 S. Calhoun St., Tallahassee, Florida 32302, Carl B. Schwait, 203 N.E. 1st St., Gainesville, Florida 32602-0850 on this, the 5th day of October, 1998.

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