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SUPREME COURT OF FLORIDA

KENNEDY ELECTRIC, INC.,

Defendant/Petitioner,

vs.

CARL STALLINGS, JR., etc., et al.,

Plaintiffs/Respondents.

S.C. CASE NO. 93,126
DCA CASE NO. 97-1412

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BRIEF OF PETITIONER, KENNEDY ELECTRIC, INC. ON THE MERITS ON REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

This is a Petitioner's brief in a certified conflict case. The Court has jurisdiction under Article V, Section III (b)(4) of the Florida Constitution and Florida Appellate Rule 9.030. For easy reference, copies of the conflicting opinions and the Stallings Appellants' Brief from the case below are attached to this brief as an appendix.

The basic issue is the application of the economic loss rule as a bar to an alleged statutory tort claim for purely economic damages by a homeowner resulting from fires in a recently constructed home. The home was alleged to have been built on property owned by Mr. and Mrs. Stallings under a contract with a general contractor. (A.200-203 and Stallings Br. p.14). The electrical wiring which became a part of the home was installed by Kennedy Electric, Inc., a subcontractor pursuant to "contract terms". (A.201,202). After two fires damaged the home, Mr. and Mrs. Stallings, sued Kennedy Electric, Inc., the subcontractor. The Stallings did not chose to sue the general contractor in this particular action.[1] The complaint as initially filed in 1991 was based solely on negligence and the allegations of a statutory violation were not added until after the case had been set for trial. The Fourth Amended Complaint adding that statutory count

[1]The Stallings' brief states that shortly after completion of the construction " . . . the general contractor who built the Stallings' home went out of business. The Stallings' counsel thereafter brought this action for damages against the electrical contractor." The inference that the general contractor was not sued in not completely accurate, but it is true that this suit involves only Kennedy Electric, Inc. as a defendant.

did not occur until 1996. (R.218). The trial court dismissed the complaint alleging tort liability based on common law theories and the building code statute, Section 553.84, Florida Statutes (1989). The dismissal was with prejudice and was based on the economic loss rule. (R.238-240).

Plaintiffs appealed and the Fifth District Court of Appeal summarized the case as follows:

> The Fourth Amended Complaint contains counts for negligence, negligence per se and statutory damages [under section 553.84] due to the alleged faulty electrical wiring by the appellee, who was the electrical subcontractor hired by the general contractor . . . the alleged damages were "lost use and enjoyment of their home", "additional rental expenses", and to completely rewire the home".

The Fifth District affirmed the dismissal with prejudice of the negligence counts but reversed as to the statutory building code violation tort claim. In a sweeping ruling, the Court held that "The economic loss rule does not apply to statutory causes of action and should not be used as a sword to defeat them." (Kennedy Opinion p.4). There are no exceptions to the broad holding. The opinion also concluded that the cause of action for the alleged statutory (§ 553.84) violation is essentially based on a negligent act by the defendant and that violation of the statute "would require the same proof as a breach of contract". (Kennedy Opinion p.4). In footnote 1 to the decision it is noted that there was no allegation of privity with the subcontractor.

The opinion was rendered May 1, 1998 and the Fifth District Court certified conflict with the recent opinion by the Third District Court of Appeal in Comptech Int'l., Inc. v. Milam Commerce

Park, Ltd., 22 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1997). Comptech dealt with the same statutory issue and held that the economic loss rule did bar a Section 553.84 tort claim for economic losses when the subcontractors on a building expansion project caused damage to "its electrical systems, warehouse space and computers". This September 17, 1997 opinion by the Third District Court of Appeal was then further considered on rehearing and a revised opinion was issued on May 20, 1998, subsequent to the Kennedy opinion. See Comptech Int'l., Inc. v. Milam Commerce Park, Ltd., 23 Fla. L. Weekly D1257 (Fla. 3d DCA May 20, 1998).[2] The two Comptech opinions reach the same result and are substantially the same. Although the revised opinion by the Third District attempted to distinguish the Kennedy opinion of the Fifth District, the obvious conflict remains. Further, the Third District was simply not aware of the underlying facts and contractual context of the Kennedy Electric, Inc. case and the majority's attempt to distinguish the two opinions (Comptech and Kennedy) is simply invalid.

In addition to the certified conflict between the Fifth District and the Third District, the Fifth District's opinion holding that the economic loss rule cannot bar any statutory cause of action is also in conflict with other district court opinions on the subject. These "other conflict" cases will be discussed in the argument on the merits herein. This Court thus has jurisdiction

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[2]Copies of the Kennedy opinion along with copies of the two Comptech opinions are attached along with the Stallings Appellants' Brief from the Fifth District Court of Appeal case.

based on the certified conflict and the express conflict on the same issue between the various districts and this Court's own opinions. We are also advised that the Comptech opinion is now the subject of conflict review before this Court.

The basic facts are relatively simple and are taken from the Fourth Amended Complaint and the District Court briefs. (R.200-203 and Appendix). Plaintiffs built a house under a contract with a general contractor. The general contractor contracted with an electrical subcontractor to install the wiring. The wiring is alleged to have been faulty and in violation of several building codes. Two fires broke out in the house causing damage. The Stallings' brief before the Fifth District Court of Appeal implied that the plaintiffs had not sued their own general contractor only because shortly after completion of the home that contractor had "gone out of business". (Stallings Br. p.3). We do not know whether this means that the general contractor was simply no longer building homes or whether the corporation was actually dissolved under Chapter 607, Florida Statutes. In any event, even a dissolved corporation may be sued under Section 607.1405, Florida Statutes (1998).

For reasons of their own, in this action plaintiffs sued only the electrical subcontractor. The Stallings asserted that there had been a contract between the general contractor and the subcontractors and that they "were the foreseeable third party beneficiaries of the construction contract". (Stallings Br. p.3,14). The complaint also alleged that the electrical wiring had

been done by Kennedy Electric, Inc. pursuant to "code requirements and contract terms". (R.201,202).

The parties and the Fifth District Court of Appeal accepted the obvious fact that the proof of a statutory (§ 553.84) violation in the nature of a building code violation would require the same facts necessary to prove a breach of contract. The District Court so states. (Kennedy Opinion p.4). The Fifth District also recognized, at the urging of the Stallings, that homeowners build homes "invariably" pursuant to written contracts.

In both of its Comptech opinions, the Third District Court of Appeal held that the economic loss rule did bar the statutory tort cause of action based on Section 553.84 and the Fifth District held directly to the contrary in Kennedy. This statute provides:

> Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties damaged as a result of violation of this part of 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 Fifth District misquotes the statute in its opinion by mistakenly inserting the word "civil" before "remedies" in the first line. The statute is vague and does not state what kind of "cause of action" (contract or tort) is contemplated. There is virtually no legislative history on this statute.

The Third District majority opinion concluded that this Court was committed to the economic loss rule and had authorized only two exceptions to the rule under Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla.

1993). The District Court found there was no justification to create a third exception. The Third District ruled that the plaintiff's claim under the building code statute "is subsumed by the ELR because the economic losses sought are no different from those that could have been asserted in a contract action for breach of the lease agreement" which contained the agreement to do the construction through the subcontractors. The Comptech majority opinion distinguished Delgado v. J. W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602 (Fla. 2d DCA 1997), a Deceptive and Unfair Trade Practices Act case under Ch. 501, Florida Statutes, which the Fifth District had relied upon in its contrary opinion.

The Stallings also argued in their brief before the Fifth District that they had an insurance policy covering the house and that the insurance company paid its policy limits on the fire loss claim. The Stallings argued that they had used this money to pay off a loan instead of using the money to repair the house. (Stallings Br.p.2). Now, the Stallings seek to recover for the fire loss and all their damages in tort from the electrical subcontractor.

The Petitioner, Kennedy Electric, Inc., contends that several conflicting cases now exist in Florida on the overall issue of whether the economic loss rule bars statutory causes of action. Kennedy respectfully suggests that this claim is indeed lawfully barred by the economic loss rule, that the Fifth District is in error and that the Third District's view is correct, except for its revised opinion's conclusion in footnote 3 which states that

Kennedy Electric, Inc. involved a "noncontractual" fact situation. The Third District simply did not know the Kennedy facts. Once again, this complex area of the law is in need of this Court's guidance.

SUMMARY OF ARGUMENT

The economic loss rule has been repeatedly stated by the courts of Florida and by this Court's landmark decision in Casa Clara. The rule has been applied to numerous claims categorized as statutory torts. Now, the Fifth District Court of Appeal has ruled that the economic loss doctrine may not be used as a sword to defeat any statutory cause of action. The economic loss rule is not a sword, and is instead, a long honored rule of law which protects and encourages contractual protections in a commercial setting.

The present claims are alleged to be a statutory tort under the building code statute (Section 553.84). However, the claim is nothing more than an assertion of negligence against the defendant and the elements of the cause of action are contractual in nature. As this Court has consistently ruled; the benefit of the bargain is the concern of contract rather than tort law.

The economic loss rule encourages parties to protect the benefits of their bargain by contractual negotiations or insurance. Here, plaintiffs had both contractual rights and insurance coverage and the economic loss rule clearly applied to bar their tort cause of action. This case obviously occurred in a contractual setting and the Stallings can not be held to have enhanced their rights to sue in tort merely because they may have chosen not to enforce their contract rights against their general contractor.

ARGUMENT

WHETHER THE ECONOMIC LOSS RULE BARS A STATUTORY TORT CLAIM FOR DAMAGES TO A HOME BASED ON A BUILDING CODE VIOLATION WHERE THE SAME FACTS WOULD HAVE CONSTITUTED A BREACH OF THE CONTRACT TO BUILD THE HOME--THE DISTRICT COURT WRONGLY HELD THAT THE ECONOMIC LOSS RULE CAN NEVER BAR ANY CLAIM BASED ON A STATUTE.

The economic loss rule was recognized by this Court in Florida Power & Light Company v. Westinghouse Electric Corporation, 510 So. 2d 899 (Fla. 1987) and in earlier cases. The doctrine was further refined and reinforced in Casa Clara Condominium Assoc., Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993). Since Casa Clara the economic loss doctrine has been the subject of countless trial court rulings and judicial opinions in Florida. The doctrine has been litigated repeatedly and there is an over abundance of reported cases. Frankly speaking, skillful counsel can find some case-law support for almost any proposition on economic loss rule issues in the morass of opinions on the subject. Often quoted is the language from Sandarac Ass'n. v. W. R. Frizzel Architects, Inc., 609 So. 2d 1349, 1352 (Fla. 2d DCA 1992), review denied, 626 So. 2d 207 (Fla. 1993) that "[t]he economic loss rule is stated with ease but applied with great difficulty" and that "[l]awyers and judges alike have found it difficult to determine when the rule applies and when an exception is appropriate." In fact, very few exceptions are warranted.

Despite the volume of economic loss rule litigation, at no point has this Court retreated from the doctrine and the district courts of appeal have been specifically directed that they are to

comply with this Court's guidance and rulings on the issue of the doctrine's application.

In the face of authority which simply may not be disregarded, the Fifth District Court of Appeal has announced its view that the economic loss rule may never bar a cause of action which is based at least in part on a statute. We respectfully submit that the Fifth District is both wrong and in conflict with a substantial volume of case law including, but not limited to, the Third District's Comptech opinion.

A Matter Of Policy

We respectfully submit that this Court is faced with a policy decision and that simply summarizing and analyzing the many, many rulings of the district courts of appeal and indeed the federal courts on economic loss rule issues, would be of very limited assistance. Thus, although we could further analyze the more than 40 cases cited and discussed in the Comptech opinion, we will discuss only those which are directly relevant. It is also worth noting that the Fifth District's Kennedy Electric opinion cites only two supporting cases: Rubio v. State Farm Fire & Casualty Co., 662 So. 2d 956 (Fla. 3d DCA 1995), rev. denied, 669 So. 2d 252 (Fla. 1996) and Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602 (Fla. 2d DCA 1997). Conspicuous by its absence from Kennedy is any discussion or even mention of this Court's landmark Casa Clara decision which has extremely similar facts and which clearly mandates the application of the doctrine even to the "appealing and sympathetic class" of "homeowners."

We respectfully suggest that; the general rule of law applicable to a cause of action based in part on a statute should be that such claims are still governed by the economic loss rule so long as they occur in a contractual setting and the elements of the cause of action under the statute would be substantially the same as the elements of the cause of action under a breach of contract. If a particular statute specifically authorizes damages different than contract law would allow then an exception should exist. We suggest that this relatively simple and straightforward principle be adopted herein and the law clarified accordingly.

In the present situation, the Stallings had a contract with their general contractor and were arguably third party beneficiaries of the contract between the general contractor and the subcontractors. All construction contracts provide for work in accordance with the plans and specifications and for work to be done in accordance with applicable building codes. The Fourth Amended Complaint alleged the electrical work was done under "code requirements and contract terms". (R.201,202). If the Stallings' home was built in non-compliance with the building code, then it was also built in non-compliance with the contract to build the home and in non-compliance with the contract between the general contractor and the subcontractor. The Stallings had every opportunity to negotiate adequate contractual protection, and if they did not do so, it is a problem of their own making. The Stallings also had the opportunity to contractually protect themselves by insuring the home. Indeed, the Stallings have

volunteered the information that they had insurance covering the fire loss, but that they used the full payout of the face amount of the policy to pay down their home loan rather then repairing the house. They have argued that their insurance policy was inadequate but that they accepted the policy limits payment. (Stallings Br. p.2).

Thus, the Stallings have had the best of all worlds. They had the opportunities to protect themselves by contract and by insurance and did so. They have taken the very strange approach of walking away from these protections and rights and have instead now litigated for over seven years in an attempt to impose tort liability in some common law or statutory fashion for their purely economic losses. The initial complaint was filed August 26, 1991 and the Fourth Amended Complaint adding the statutory tort cause of action did not occur until 1996. The names of the Stallings children still appear in the style of the case although there is no mention of them in the complaint. The final complaint was dismissed with prejudice by an order rendered May 15, 1997. (R.1-4 and 249).

Economic Loss and The Economic Loss Rule of Law

A majority of all of the states and all federal courts have held that pure economic loss is basically a matter of contract rather than tort. Florida and the United States Supreme Court in East River Steamship Corp. v. Transamerica Delaval, Inc., 106 S.Ct. 2295 (1986), hold that pure economic loss, unaccompanied by physical injury or injury to other property, is to be dealt with

under contract principles. This is quite clearly the law of Florida and it applies to claims growing out of construction defects. Florida Power & Light Company v. Westinghouse Electric Corp., supra, AFM Corp. v. Southern Bell Telephone Company, 515 So. 2d 180 (Fla. 1987) and Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., supra. The opinions consistently note that in a commercial contractual setting, parties can and should protect themselves through negotiated contract protection and through insurance. Here, the Stallings did both.

In Casa Clara, Toppino provided defective concrete to condominiums and single family homes resulting in damage to the structures. The homeowners sued numerous defendants including Toppino. This Court summarized its own Casa Clara decision in the more recent Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628, 630 (Fla. 1995), as follows:

> The circuit court dismissed all counts against Toppino, pursuant to its finding that the economic loss rule prohibits tort recovery when a product damages itself, thereby causing economic loss, but fails to cause personal injury or damage to property other than itself. The district court affirmed and this court approved the district court's decision. In so doing, we recognized that the law of contract protects one's economic losses, whereas the law of torts protects society's interest in being free from harm. See Casa Clara, 620 So. 2d at 1246-47. Finding no reason to burden society as a whole with the losses of one who has failed to bargain for adequate contractual remedies, we conclude that "contract principles [are] more appropriate than tort principles for recovering economic loss without accompanying physical injury or property damage".

The Fifth District's current holding that the economic loss rule has absolutely no application to a tort claim based on a statute even when the elements of the tort claim and the contract claim are

the same is directly conflicting with both the letter and spirit of Westinghouse, Casa Clara, Airport Rent-A-Car and many other cases.

We anticipate that the Stallings will argue that they have no contractual remedy against the general contractor because he has gone out of business and no contractual remedy against the subcontractor simply because they have no direct contract privity with the subcontractor. This "no alternate remedy" argument was thoroughly addressed and rejected as an exception to the economic loss rule in Airport Rent-A-Car, Inc. v. Prevost Car, Inc., supra. The plaintiff in that case relied upon Latite Roofing Company, Inc. v. Urbanek, 528 So. 2d 1381 (Fla. 4th DCA 1988) and A. R. Moyer, Inc. v. Graham, 285 So. 2d 395 (Fla. 1973) which arguably approved that "no alternate recovery" exception. This Court had already disapproved Latite and specifically limited Moyer in the Casa Clara decision at 1248. Airport Rent-A-Car noted this ruling and directly rejected the theory of "no alternate remedy" as an exception to the rule. This case involved a very similar situation of a fire breaking out in a bus and a plaintiff suing for "the resulting loss due to repair costs, decreased value" and other consequential damages. This Court held that such damages are clearly within the economic loss rule and constituted "essentially the failure of the purchaser to receive the benefit of its bargain--traditionally, the core concern of contract law". It is simply not determinative that the plaintiff may not be able to win his contract actions. It is only important that the plaintiff has had the opportunity to protect himself through his contract

negotiations. Without question, Mr. and Mrs. Stallings had that opportunity in this case.

We note here that the Third District's footnote 3 in its revised opinion is simply in error in holding that Kennedy was a "noncontractual setting". The Third District simply did not have access to the basic facts of the Kennedy case.

Sympathetic Homeowners Are Not An Exception

We also anticipate that the plaintiffs will argue that they are first time home purchasers and that they were not at fault in failing to discover that a staple allegedly had been driven through a wire causing a fire. This, and other similar conduct, was the specific negligence asserted against Kennedy Electric. Again, Casa Clara answers the question and leaves no doubt whatsoever. Home purchasers of single family residences are indeed bound by the economic loss rule. We recognize that the District Court's decision in Casa Clara discusses the building code statute (§ 553.84) and holds that a concrete supplier simply has no duty to comply with the building code. We frankly are at a bit of a loss to understand why a concrete truck pouring concrete into forms at a home under construction is not involved in the "construction" of that home, but in any event, that was the holding of the District Court case and this Court's opinion did not address the issue and merely concludes by stating:

> We also agree with the district court that the homeowners cannot recover against Toppino under a building code.

Again, it is worth noting that the product in question here is the complete home and not merely the components of the home. Thus,

there is no exclusion from the economic loss rule doctrine based on any argument concerning "other property" and the Fifth District opinion does not address any "other property" issues.

Absent Special Circumstances,
All Statutory Claims Barred

There is no contest here between the judicial branch and the legislative branch. Florida courts enforce the Florida statutes in conjunction with the common law which is often referred to by those seeking to avoid its effect as "court made law". The common law of this state, based in part on the statutorily adopted common law of England, is a backdrop for all legislative enactments. The Legislature is presumed to know the state of the law and there is not the slightest indication through legislative history that the Legislature intended to change any aspect of existing law in the 1974 enactment of Section 553.84.

Adequate case law fully supports application of the economic loss rule to claims based on a statute. Indeed, a statutory right may be sued upon, but a plaintiff must still comply with numerous court made rules. Indeed, any right may be barred by latches if a plaintiff delays too long in seeking the aid of the courts. Norton v. Jones, 90 So. 854 (Fla. 1922). Here, the plaintiffs litigated for 5 years before the statutory count was even added by order of October 10, 1996, at which point the case had already been set for trial. (R.209,218). In Saratoga Fishing Co. v. J.M. Martinac & Co., 117 S.Ct. 1783, 1788 (1997), the United States Supreme Court noted that "a host of other tort principles, such as forseeability, proximate cause, and the 'economic loss' doctrine . . . would

continue to, limit liability in important ways." Indeed, latches applies to this case. The negligence counts were filed in 1991 and the statutory counts not added until 1996.

Numerous Florida cases uphold and apply the economic loss rule as a bar to claims based on statutes which are essentially statutory tort claims. Sarkis v. Pafford Oil Co., Inc., 697 So. 2d 524 (Fla. 1st DCA 1997) applied the economic loss rule to civil theft and civil racketeering claims. Of course, both claims were based on statutes. Speaking for the Court, Judge Padovano stated in Sarkis at p. 527:

> The application of the economic loss rule to statutory causes of action is not confined to a determination whether the action duplicates potential contract remedies. In such cases, the courts must also consider the possibility that a bar to the action would amount to a judicial interference with authority vested in the legislature. Florida courts have held that the economic loss rule can be applied to statutory actions, but this line of cases appears to be limited to actions that could be characterized as statutory torts. For example, the economic loss rule has been applied as a bar to a statutory action for civil theft. See Gambolati v. Sarkisian, 622 So. 2d 47 (Fla. 4th DCA 1993); Gilman Yacht Sales v. First National Bank of Chicago, 600 So. 2d 1131 (Fla. 4th DCA 1992). Compare Burke v. Napieracz, 674 So. 2d 756 (Fla. 1st DCA 1996)(the rule did not bar a civil theft claim because the underlying act did not arise out of a failure to perform the contract but arose from an affirmative act of the theft independent from the contract). Likewise, the economic loss rule has been applied as a bar to a civil racketeering claim. Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490 (Fla. 3d DCA 1994); Futch v. Head, 511 So. 2d 314 (Fla. 1st DCA 1987).

In addition to the above cases, the Third District's Comptech opinion directly holds that the economic loss rule bars the statutory cause of action based upon the building code statute in question and Comptech relies on Hotels of Key Largo, Inc. v. R.H.I.

Hotels, Inc., 694 So. 2d 74 (Fla. 3d DCA 1997) and Hoseline, Inc. v. USA Diversified Products, Inc., 40 F.3d 1198 (11th Cir. 1994), in addition to the list of cases relied upon above in Sarkis. Here alone are examples of eight cases applying the economic loss rule to a statutory cause of action.

All of these cases hold that the rule applies to bar statutory tort claims and that is precisely the kind of claim being asserted by the Stallings herein. The Fifth District's opinion is also in direct conflict with each of these cases although the Court has chosen to certify only one conflict. The Fifth District's decision is a blanket holding that the economic loss rule doctrine simply does not apply to any statutory cause of action and may not be used as a "sword to defeat them". (A. Stallings Opinion p.3). This same view is adopted by the Comptech dissent.

We must also comment on one further erroneous aspect of the Fifth District's opinion which states that Section 553.84 provides a cause of action for a violation of a building code or "doing construction work without the required permit". The permit requirement is not actually in Section 553.84 and we certainly do not believe that either the Legislature or the Fifth District Court of Appeal intended to create a cause of action for economic loss damages merely because construction takes place without a permit. This totally disregards the doctrine of proximate cause. It is similar to suggesting that a non-negligent person who drives a car without a license is liable if involved in an accident without

regard to fault. This is simply not the law of Florida and causation remains an essential element of any cause of action.

Section 553.84

Section 553.84 is an extremely vague statute and it is by no means a clear expression of legislative intent that the economic loss rule should not apply. This issue was addressed by the dissent in Comptech and will thus be briefly analyzed here. The statute states that a damaged person has a cause of action against the person who committed the violation. The statute does not state whether this cause of action is in contract or in tort. However, the plaintiff in this case and the District Court of Appeal clearly see the cause of action as one in tort although it is recognized that the same elements would have to be proven as in a breach of contract case. The Comptech dissent emphasizes the words "Notwithstanding any other remedies available" and the majority in Comptech argues that this certainly did not mean "Notwithstanding the economic loss rule". Simply put, the statute cannot be interpreted to mean: "notwithstanding all common law rules, a party will still have a cause of action". We suggest that the statute should be construed in accordance with its plain meaning and its overall contextual position in the chapter on building codes. Section 553.84 follows immediately after Section 553.83 which is entitled Injunctive Relief. Thus, the first statute provides for an injunction and the second statute had probable reference to the immediately preceding statute which was clearly an equitable statute.

The statute stated in the Fifth District's opinion is misquoted and the word "civil" does not appear in the first line which the Court chose to emphasize. Simply put, Section 553.84 does not speak in terms of other "civil" remedies. Several courts, including the Third District, have noted that Section 553.84 has rarely been used and that courts have not addressed its intent. There is absolutely no legislative history on the statute and it certainly is not a clear expression of the Legislature which has been "willy-nilly" abrogated by the trial court herein.

Errors In The Comptech Opinion

The Third District wrote two substantially similar opinions and there was, of course, a strong dissent which remained virtually unchanged in the revised version. The second Comptech opinion attempted to distinguish the Stallings case in footnote 3 stating that the building code statute "continues to provide a remedy in non-contractual settings for those injured as a result of building code violations". The footnote characterizes the Kennedy case as being "independent of a contract". This conclusion in the second Comptech opinion is obviously the result of the Third District's lack of knowledge as to the contractual setting of the entire Kennedy controversy. As previously indicated, the Stallings had a contract with their general contractor, who in turn had a contract with the subcontractor. The general contractor was unquestionably responsible for the acts of all of his subcontractors, and had the Stallings sued the general contractor in this case, a full contractual remedy could have been obtained. This is what should

have happened. In a third party complaint, the general contractor might have sought indemnity from the subcontractor, but in no event would the general contractor have been able to escape responsibility for faulty wiring by his subcontractor.

The Stallings simply chose this form of litigation for their own reasons. The construction and the fire occurred within a very brief time span and the Stallings were not presented with a statute of limitations problem. Again, it is not a plaintiff's ability to win a contractual claim that determines the application of the economic loss rule. If the plaintiff has the opportunity to negotiate for his own protection, then the rule applies. There is simply no promise to anyone that a commercial contracting party such as a general contractor will remain solvent and able to pay a judgment. The fact that a prospective defendant does not have the money to pay a judgment does not create a cause of action against others. Airport Rent-A-Car specifically rejected the no alternative recovery argument. In addition, the Stallings have urged that they are indeed third party beneficiaries of the contract between the general and subcontractors and that the wiring was done under "contract terms".

What is obviously at play here is the issue of insurance coverage. Companies in the construction business buy coverage for liability arising from their own negligent torts committed by their employees. These companies do not buy coverage for their own breaches of contracts. By transforming this case from a breach of contract to a tort, insurance coverage is implicated. We have no

idea whether this was the plaintiff's motivation in adding the statutory tort claim at the 11th hour. The Third District was simply ill-advised and uninformed in concluding that this was a "noncontractual setting".

The Delgado and Rubio Opinions

The Fifth District Court of Appeal relied solely on the Delgado opinion from the Second District dealing with a claim under Florida's Deceptive and Unfair Trade Practices Act and on Rubio v. State Farm from the Third District dealing with a first party bad-faith claim under Section 624.155, Florida Statutes (1993). Both of these cases had chosen not to apply the economic loss rule and both were based upon the nature of the specific statutory right in question under Chapter 501 and Section 624.155 of the Florida Statutes.

A first party bad faith claim did not exist at common law and was specifically created by the Legislature to protect insurance consumers. Similarly, the unfair trade practices law did not exist at common law and was specifically created to protect consumers. The Third District majority found Delgado distinguishable as representing a legislative policy decision to expand remedies for recovering economic losses.

Both Delgado and Rubio make sense because the Legislature was clearly changing existing law and providing for the recovery of economic damages which could not be previously recovered. The economic losses of consumers were specifically provided for in Chapter 501. The Courts had previously ruled that an insurance

contract between a policyholder and the insurance company did not provide for a first party bad-faith case and that cause of action was specifically created and damages provided for in Section 624.115. Thus, these two cases make sense in their limited application, but they do not require a different result herein.

The Stallings' claim for statutory damages is nothing more than another negligence claim. As clearly established under Florida law, where a statutory cause of action is essentially a statutory tort claim, the economic loss rule applies. Accordingly, the trial court's dismissal of Count III was proper.

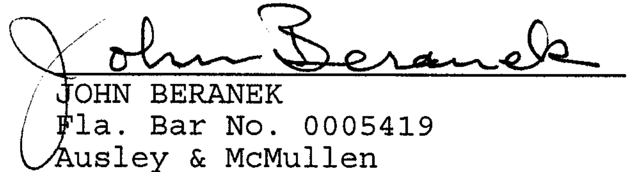
In conclusion, we suggest that this Court apply the relatively straightforward rule suggested at the beginning of this brief. When a cause of action is based in part on a statute, such claims are still governed by the economic loss rule so long as they occur in a contractual setting and the elements of the cause of action under the statute would be substantially the same as the elements of the cause of action under a breach of contract. Obviously, Kennedy Electric did not volunteer to install wiring in this house, and was in fact working pursuant to a contract. Indeed, if the Stallings had contracted directly with an electrical installer, then it could not be questioned that the Stallings would have been limited to a contract claim. This is the fair result which should be reached herein.

CONCLUSION

The opinion of the Fifth District should be reversed and the trial court's dismissal of the Fourth Amended Complaint affirmed.

CERTIFICATE OF SERVICE

I CERTIFY that a copy has been furnished by U.S. Mail to **Paul M. Meredith**, Attorney for Plaintiff/Respondent, 626 Reid Street, Palatka, Florida 32177 and **John F. Sproull**, Co-counsel for Plaintiff/Respondent, 314 St. Johns Avenue, Palatka, Florida 32177, this 6th day of July, 1998.



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SUPREME COURT OF FLORIDA

KENNEDY ELECTRIC, INC.,

Defendant/Petitioner,

vs.

CARL STALLINGS, JR., etc., et al.,

Plaintiffs/Respondents.

S.C. CASE NO. 93,126
2DCA CASE NO. 97-1412

APPENDIX

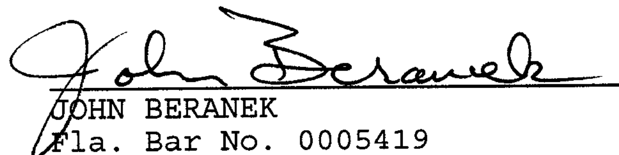
1. 5/1/98 Opinion (Stallings v. Kennedy Electric, Inc.)

2. 9/17/97 (Comptech I)-Comptech Int'l., Inc. v. Milam Commerce Park, Ltd., 22 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1997)

3. 5/20/98 (Comptech II)-Comptech Int'l., Inc. v. Milam Commerce Park, Ltd., 23 Fla. L. Weekly D1257 (Fla. 3d DCA May 20, 1998)

4. 9/2/98 Initial Brief of Appellant(s) Carl Stallings, Jr., etc., et al.

I CERTIFY that a copy has been furnished by U.S. Mail to **Paul M. Meredith**, Attorney for Plaintiff/Respondent, 626 Reid Street, Palatka, Florida 32177 and **John F. Sproull**, Co-counsel for Plaintiff/Respondent, 314 St. Johns Avenue, Palatka, Florida 32177, this 6th day of July, 1998.



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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1998

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CARL STALLINGS, JR., etc., et al.,

Appellants,

v.

CASE NO. 97-1412

KENNEDY ELECTRIC, INC.,

Appellee.

Opinion filed May 1, 1998

Appeal from the Circuit Court
for Putnam County,
A.W. Nichols, III, Judge.

Paul M. Meredith, John F. Sproull and
David H. McCoy, Palatka, for Appellants.

Carl B. Schwait, Kelly B. Pritchard and
David A. Cornell of Dell, Graham, Willcox,
Barber, Jopling, Schwait, Gershow & Specie, P.A.,
Gainesville, for Appellee.

DAUKSCH, J.

The appellant challenges the trial court's dismissal with prejudice of its fourth amended complaint. The fourth amended complaint contains counts for negligence, negligence per se and statutory damages due to the alleged faulty electrical wiring by the appellee, who was the electrical subcontractor hired by the general contractor to install electrical wiring during the construction of appellants' home.[1] Appellants contend that two

[1] Appellants/homeowners did not allege privity with the appellee/subcontractor.

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fires which occurred in their new home were the product of faulty electrical wiring by appellee. The alleged damages were "lost use and enjoyment of their home", "additional rental expense", and "to completely rewire the home." We affirm the dismissal with prejudice of the negligence and negligence per se counts but reverse as to the statutory claim under section 553.84, Florida Statutes (1995).

Section 553.84 provides a cause of action where a defendant has injured a plaintiff by violating the building code or doing construction without the required permit and states as follows:

> *Notwithstanding any other civil remedies available*, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of 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.

(emphasis added). The trial court reasoned that the statute has its basis in a negligent act which would therefore subject the claim to the economic loss rule. However, barring appellants' statutory claim under section 553.84 based on the economic loss rule would essentially abolish the statutory cause of action.

The issue of whether the economic loss rule precludes statutory causes of action has been considered in Rubio v. State Farm Fire & Casualty Co., 662 So.2d 956 (Fla. 3d DCA 1995) rev. den., 669 So.2d 252 (Fla. 1996). In Rubio, the trial court ruled that the economic loss rule eliminated the insured's statutory cause of action for bad faith established by section 624.155, Florida Statutes (1993). See Id. at 957. The Third District reversed and stated:

> By dismissing...with prejudice based on the economic loss rule, which bars claims for tort damages in a contractual setting where there are only economic losses, the trial court abrogated the rights granted to insureds by section 624.155 and the common law. *Courts cannot willy nilly strike down legislative enactments.*

Id. at 957 n. 2 (emphasis added; citations omitted).

The Second District followed Rubio in the case of Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602 (Fla. 2d DCA 1997) where the court overturned a trial court ruling that the economic loss rule barred a cause of action based on the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201-.213, Florida Statutes (1993). Id. at 611. In Delgado, just as in this case, the statute created an express statutory cause of action. In Delgado, just as in this case, the statute provided that the statutory remedies were in addition to other remedies. The Delgado court rejected the idea that the economic loss rule eliminated the statutory cause of action stating:

> *[C]ourts do not have the right to limit and, in essence, to abrogate, as the trial court did in this case, the expanded remedies granted to consumers under this legislatively created scheme by allowing the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies.* In sum, any tension between the legislative policy embodied in the FDUTPA and the judicial policy embodied in the economic loss rule must be resolved under the doctrine of separation of powers in favor of the legislative will so long as the FDUTPA passes constitutional scrutiny.[2]

Id. at 609 (emphasis added; citations and footnote omitted).

A few months after Delgado, the Third District decided Comptech Int'l, Inc. v. Milam

[2] It should be noted that the constitutionality of section 553.84 is not an issue on this appeal.

Commerce Park, Ltd., 22 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1997). One of the issues in Comptech was the effect of the economic loss rule upon claims brought under section 553.84. The court ruled that the economic loss rule does not permit a cause of action for economic damages brought under the South Florida Building Code where the claims are clearly contractual in nature and the cause of action is inseparably connected to the breaching party's performance under the agreement. Id. at D2192. The court reasoned that a claim under section 553.84 is subsumed by the economic loss rule because the economic losses are no different than those that could have been asserted in a breach of contract action. Id. at D2193.

Notwithstanding the fact that the statute has its basis in a negligent act and violation thereof would require the same proof as a breach of contract, the statute is very clear. It begins "notwithstanding any other remedies available, any...party...damaged as a result of a violation...has a cause of action...against the...party who committed the violation." § 553.84 Fla. Stat. (1996). The legislature has clearly set forth that a party can sue under section 553.84 in addition to any other remedy. Affirming the trial court's ruling essentially eliminates the statutory cause of action. The Comptech court addressed this issue stating that a statutory claim could be brought as long as the claim did not arise under a contract. Id. at D2193. In purchasing a new home, this is a meaningless assurance because homeowners almost invariably buy pursuant to a written contract.

The economic loss rule does not apply to statutory causes of action and should not be used as a sword to defeat them. This is particularly the case where the statute declares that a cause of action exists "notwithstanding any other remedies available" like section

553.84. The trial court's dismissal with prejudice of the statutory claim under section 553.84 is therefore reversed. We also certify conflict with Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 22 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1997).

AFFIRMED in part, REVERSED in part, REMANDED.

HARRIS and ANTOON, JJ., concur.

*574657 NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

COMPTECH INTERNATIONAL, INC., a Florida corporation, Appellant,
v.
MILAM COMMERCE PARK, LTD., a Florida limited partnership and D & M Modeling, Inc., a dissolved Florida corporation, Appellees.

No. 96-1056.
District Court of Appeal of Florida,
Third District.
Sept. 17, 1997.

Computer hardware distributor sued landlord for negligence arising out of construction of new office space for distributor. The Circuit Court, Dade County, Robbie M. Barr and Sidney B. Shapiro, JJ., dismissed counts and granted landlord's motion for summary judgment. Distributor appealed. The District Court of Appeal, Gersten, J., held that: (1) economic loss rule did not permit tenant's cause of action for economic damages brought under South Florida Building Code, and (2) damaged computers did not fall within "other property" exception to economic loss rule.

Affirmed.

Cope, J., filed a dissenting opinion.

1. LANDLORD AND TENANT ⚷169(9)
233 ----
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k169 Actions for Injuries from Negligence
233k169(9) Damages.
Fla.App. 3 Dist. 1997.
Economic loss rule did not permit tenant's cause of action for economic damages brought under South Florida Building Code, where claims were clearly contractual in nature and cause of action was inseparably connected to landlord's performance under lease agreement, that is, economic losses sought were no different from those that could have been asserted in contract action for breach of lease agreement.

2. NEGLIGENCE ⚷31
272 ----
272I Acts or Omissions Constituting Negligence
272I(C) Condition and Use of Land, Buildings, and Other Structures
272k31 Requirements of statutes or ordinances.
Fla.App. 3 Dist. 1997.
Although South Florida building code provides that compliance is responsibility of owner, code does not impose duty on landowner to supervise construction undertaken by independent contractor; liability, under the code and in accordance with common-law principles, is imposed on person or party who committed violation. West's F.S.A. § 553.84.

3. LANDLORD AND TENANT ⚷169(9)
233 ----
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k169 Actions for Injuries from Negligence
233k169(9) Damages.
Fla.App. 3 Dist. 1997.
Computer hardware distributor's damaged computers did not fall within "other property" exception to economic loss rule for purposes of negligence claim against landlord, as potential damage to computers should have been contemplated by parties' commercial lease contract, and computers were directly related and connected to furthering distributor's business, which was also the object of lease.

4. DAMAGES ⚷36
115 ----
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k36 In general.
Fla.App. 3 Dist. 1997.
Policy behind economic loss rule is to encourage contracting parties to protect their economic interests through negotiation and insurance, recognizing that in free market, disappointed economic expectations are often unintended result of imperfect bargain.

5. INDEMNITY ⚷8.1(1)
208 ----
208k5 Construction and Operation of Contracts

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208k8.1 Indemnitee's Own Negligence or Fault
208k8.1(1) In general.
Fla.App. 3 Dist. 1997.
Indemnity clause which indemnifies against indemnitee's own negligence must express such intent in clear and unequivocal terms.

6. INDEMNITY ⚿8.1(1)
208 ----
208k5 Construction and Operation of Contracts
208k8.1 Indemnitee's Own Negligence or Fault
208k8.1(1) In general.
Fla.App. 3 Dist. 1997.
Principle that clause indemnifying against indemnitee's own negligence must be clear and unequivocal is only applicable where damages are occasioned solely by indemnitee's own negligence.

7. INDEMNITY ⚿8.1(2.1)
208 ----
208k5 Construction and Operation of Contracts
208k8.1 Indemnitee's Own Negligence or Fault
208k8.1(2) Particular Cases and Issues
208k8.1(2.1) In general.
Fla.App. 3 Dist. 1997.
Indemnification agreement sufficiently manifested parties' clear and unequivocal intent to indemnify landlord for any of its own acts of negligence, where agreement stated that "lessor shall not be responsible or liable at any time for any defects ... resulting from any defect or negligence."

8. DAMAGES ⚿36
115 ----
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k36 In general.
Fla.App. 3 Dist. 1997.
To qualify as "other property" under economic loss rule, damaged items must not have been within contemplation of the parties' bargain, that is, no "other property" can be damaged where property at issue was subject of contract.

9. LANDLORD AND TENANT ⚿169(9)
233 ----
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k169 Actions for Injuries from Negligence
233k169(9) Damages.
Fla.App. 3 Dist. 1997.
Foreseeable damage to business property which constituted part of bargained-for commercial leasehold agreement does not constitute exception to economic loss doctrine.

Jeffrey J. Pardo, Miami Beach, for appellant Comptech International, Inc.

Womack, Appleby & Brennan, Miami, and David C. Appleby, for appellee Milam Commerce Park, Ltd.

Before COPE, GERSTEN and SHEVIN, JJ.

GERSTEN, Judge.

**1 Appellant, Comptech International, Inc. ("Comptech"), appeals a final summary judgment in favor of its landlord, appellee Milam Commerce Park, Ltd. ("Milam"). We affirm finding the "other property" exception to the economic loss rule ("ELR") does not apply because potential damage to Comptech's computers should have been contemplated by the parties' commercial lease contract. Once again, we reiterate this Court's strong embrace of the economic loss rule and express desire to uphold the doctrine's underlying policies.

Comptech, a computer hardware distributor, leased commercial space from Milam since 1987. In 1990, the two parties agreed to enter into a second lease. The new lease stipulated that Comptech would lease an additional 13,000 square feet of warehouse space, and, that Milam would build 2,000 square feet of office space in the area that Comptech was already leasing. The lease contained an indemnity provision whereby Comptech agreed to indemnify Milam from all claims for damages arising under the use and occupancy of the premises, including any improvements.

During the construction of the additional office space, Comptech complained that the improvements were not being constructed in a timely and workmanlike fashion resulting in damage to its office space and computers. Comptech brought suit against Milam asserting negligence in selection of contractors, negligent construction, damages resulting from violation of the South Florida Building Code, punitive damages, and return of rent illegally collected. All of the counts in Comptech's third amended complaint except "negligence in selection of contractors" were dismissed with prejudice.

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Thereafter, the trial court granted Milam's motion for summary judgment on the sole remaining negligence count finding that:

> Any duty imposed upon [Milam] to hire a competent contractor to fulfill the terms of the lease agreement at issue wherein additional office space was to be built, was a duty which stemmed from the lease agreement. Any breach of that duty giving rise to a negligence claim is foreclosed by the Economic Loss Doctrine. A breach of contract alone cannot support a cause of action in tort. *Casa Clara v. Charley Toppino & Sons,* 620 So.2d 1244 (Fla.1993).

We agree. Although we reject as meritless the several arguments raised by Comptech on appeal, our reasoning for affirmance requires further discussion to clarify application of the ELR's "other property" exception in a commercial context, as well as its effect upon claims brought under the South Florida Building Code.

First, we reject Comptech's argument that Milam's alleged breach of the building code constitutes an "exception" to the ELR. (FN1) Our Supreme Court has recognized only two narrow exceptions to the application of the doctrine, *see Casa Clara,* 620 So.2d at 1244, and there is no justification under these circumstances to carve out a third.

**2 [1] Simply, the ELR does not permit a cause of action for economic damages brought under the South Florida Building Code where the claims are clearly contractual in nature and the cause of action is inseparably connected to the breaching party's performance under the agreement. *See Hotels of Key Largo, Inc. v. RHI Hotels, Inc.,* 694 So.2d 74 (Fla. 3d DCA 1997); *Ginsberg v. Lennar Florida Holdings, Inc.,* 645 So.2d 490 (Fla. 3d DCA 1994) (and cases cited therein), rev. *denied,* 659 So.2d 272 (Fla.1995); accord *Hoseline, Inc. v. U.S.A. Diversified Products, Inc.,* 40 F.3d 1198 (11th Cir.1994). In other words, a claim under this statute is subsumed by the ELR because the economic losses sought are no different from those that could have been asserted in a contract action for breach of the lease agreement. *See Sarkis v. Pafford Oil Co., Inc.,* 697 So.2d 524 (Fla. 1st DCA 1997).

[2] Of course, the economic loss rule will not exclude separate and independent building code violation claims, or claims arising from noncontractual settings. (FN2) We note further that under the circumstances of this case, we are not confronted with a statutory manifestation of a legislative policy decision to expand remedies for recovering economic losses. *Cf. Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.,* 693 So.2d 602 (Fla. 2d DCA 1997)(economic loss rule not a bar to consumers' contract-based claims brought under the Florida Deceptive and Unfair Trade Practices Act because of underlying legislative policy "that the consuming public is entitled to expanded remedies for recovering economic losses suffered as a consequence of deceptive and unfair trade practices and acts."). (FN3)

[3] Second, we also reject Comptech's argument that its damaged property falls within the "other property" exception to the ELR. Specifically, Comptech's complaint alleged its office suffered property damage by:

> i. tearing down walls there;
>
> ii. Ruining the flooring there;
>
> iii. destroying the existing bathrooms;
>
> iv. interrupting and overloading the electrical system thereby causing both lost data and physical damage to computers;
>
> v. preventing use of warehouse space and causing Comptech to continuously move its inventory from location to location.
>
> v. failing to prevent excessive dust and dirt from being absorbed by the air conditioning system thereby damaging computers and data therein.
>
> vii. failing to clean up debris.

Basically, the complaint alleged Comptech suffered property damage to its electrical systems, warehouse space and computers, claiming damages in excess of $2,000,000.00 plus interest and costs. Comptech further sought punitive damages against Milam in the sum of $5,000,000.00.

[4] Under Florida law, the ELR prohibits a plaintiff who has a contract claim from recovering tort damages for purely economic losses in the absence of personal injury or damage to "other property." *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.,* 620 So.2d 1244 (Fla.1993); *AFM Corp. v. Southern Bell Tel. & Tel. Co.,* 515 So.2d 180 (Fla.1987); *Florida Power & Light Co. v. Westinghouse Elec. Corp.,* 510 So.2d 899 (Fla.1987). The policy behind the rule is to encourage contracting

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parties to protect their economic interests through negotiation and insurance, recognizing that in a free market, disappointed economic expectations are often the unintended result of an imperfect bargain.

**3 In accordance with the ELR's underlying policy, this court on numerous occasions has reiterated its position that disappointed economic expectations are best protected by the law of contract and not tort. *McDonough Equipment Corp. v. Sunset Amoco West, Inc.*, 669 So.2d 300 (Fla. 3d DCA 1996); *Standard Fish Company, Ltd., v. 7337 Douglas Enterprises, Inc.*, 673 So.2d 503 (Fla. 3d DCA 1996); *Florida Bldg. Inspection Services, Inc. v. Arnold Corp.*, 660 So.2d 730 (Fla. 3d DCA 1995); *Palau International Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So.2d 412 (Fla. 3d DCA 1995), rev. *denied*, 661 So.2d 825 (Fla.1995); *Bay Garden Manor Condominium Assoc., Inc. v. James D. Marks Associates Inc.*, 576 So.2d 744, 745 (Fla. 3d DCA 1991). As explained by the supreme court in *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d at 1246 (citations omitted):

> [E]conomic losses are disappointed economic expectations, which are protected by contract law, rather than tort law. This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party.

A commercial party always has the ability to protect its interests through negotiation and contractual bargaining or insurance. The ability of the parties to independently protect themselves from the risk of economic loss through the negotiation process has been a recurring theme in several of this court's recent decisions.

For example, in *Palau International Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So.2d at 412, we held that an aircraft purchaser was not allowed recourse in tort where he could have obtained options through better negotiations to protect himself from a defect in the aircraft's landing gear. Likewise, in *Standard Fish Company, Ltd. v. 7337 Douglas Enterprises, Inc.*, 673 So.2d at 503, this court noted that the damage alleged was not outside the scope of the negotiations providing for cold fish storage and that the risks of damage complained of could have been allocated through contract negotiations. Similarly, in *Florida Bldg. Inspection Services, Inc. v. Arnold Corporation*, 660 So.2d at 730, we found that a sublessee of warehouse space who suffered water damage from a leaky roof had the ability to allocate risk through a better negotiated contract. More recently, as observed in *McDonough Equipment Corp. v. Sunset Amoco West, Inc.*, 669 So.2d at 300, we explained that a negotiated contract for services which defines limitations of liability and respective risks cannot be circumvented by seeking to recover purely economic losses through a tort action.

**4 Turning to the present case, Comptech seeks to avoid the application of the ELR by arguing that its damaged property constitutes "other property" which fell outside the parameters of the lease agreement and the ELR. No Florida court has defined what constitutes "other property" under the ELR in the context of a commercial lease. In *Casa Clara*, the Florida Supreme Court discussed the exception under the circumstances of plaintiffs who purchased finished products in which the allegedly defective product was a component. Although factually distinguishable, we find the reasoning in this landmark case to be highly instructive.

The plaintiffs in *Casa Clara* were homeowners who alleged that contaminated concrete ruined steel reinforcing rebar, which in turn ruined their homes. Attempting to avoid application of the ELR, the homeowners argued that their homes constituted "other property" which was damaged by the component concrete. The Florida Supreme Court disagreed, reasoning that:

> the character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant.... [The homeowners] bargained for the finished products, not their various components. The concrete became an integral part of the finished product and, thus, did not injure "other" property.

Casa Clara, 620 So.2d at 1247.

In holding that damage to a component part of a product does not trigger the "other" property exception to the ELR, the Court focused on the object of the parties' bargain. The homes themselves were in fact the benefit that the parties had bargained for.

Subsequent products liability cases have also focused on the object of the bargain in relation to the damaged property in analyzing the applicability of the "other property" exception. *See Jarmco, Inc. v. Polygard, Inc.*, 668 So.2d 300 (Fla. 4th DCA 1996), rev. *granted*, 678 So.2d 339 (Fla.1996), *and decision approved by*, 684 So.2d 732 (Fla.1996); *Fishman v.*

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Boldt, 666 So.2d 273 (Fla. 4th DCA), rev. *granted*, 680 So.2d 422 (Fla.1996); *E.I. Du Pont de Nemours & Co. v. Finks Farms, Inc.*, 656 So.2d 171 (Fla. 2d DCA 1995). In *Jarmco*, the Fourth district held that a boat builder's non-fraud claims against a resin seller for damages to its boat resulting from allegedly defective resin were barred by the ELR. In rejecting the boat builder's claim that the boat constituted "other property", the Fourth District noted the Florida Supreme Court's intent in *Casa Clara* that the ELR have broad application, and that "the 'other' property exception to the ELR must be limited to property that is unrelated and unconnected to the product sold...." *Jarmco, Inc. v. Polygard, Inc.*, 668 So.2d at 303.

**5 In accordance with the Supreme Court of Florida's consistent endorsement of the ELR, we find no basis for applying the exception to Comptech because the "other property" damage was, or should have been, contemplated by the contract. Comptech depended upon its computers to configure new computer products which were then purchased by its customers. Obviously the computers constituted an essential part of the business endeavor. Likewise, the purpose for entering the lease and the build-out agreement was to benefit the business endeavor. Thus, the computers were directly related and connected to furthering Comptech's business, which was also the object of the lease and build-out agreement.

[5] [6] [7] Moreover, the possibility of collateral damage to the equipment during the construction was an eventuality that could have been reasonably contemplated by the parties. In fact, the parties did negotiate the allocation of risks and remedies as evidenced by the indemnification provision of the contract. In the indemnification provision, Comptech agreed to hold Milam harmless for "all claims of every kind" including "damaged merchandise, equipment, fixture or other property, or damage to business or for business interruption, arising, directly or indirectly out of, from or on account of such occupancy and use, or resulting from present or future condition or state of repair thereof." (FN4) The language in the indemnification clause further supports our conclusion that the alleged damages do not constitute a tort separate and apart from the breach of contract.

[8] Essentially, Comptech could have contended with the potential risks to its business computers by negotiating to supply its own contractors, negotiating a more favorable indemnification provision, or calling for more protective measures to equipment it must have known could have been at risk in the construction environment. (FN5) Comptech's computers were fundamentally related to the commercial endeavor contemplated by the bargained for lease agreement and thus do not constitute "other property" for ELR purposes. *See Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734 (11th Cir.1995). (FN6)

[9] Thus we conclude that foreseeable damage to business property which constituted part of a bargained-for commercial leasehold agreement, does not constitute an exception to the economic loss doctrine. *See East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986); *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d at 734; *American Eagle Ins. Co. v. United Technologies Corp.*, 48 F.3d 142 (5th Cir.1995); *King v. Hilton-Davis*, 855 F.2d 1047 (3rd Cir.1988); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir.1987). (FN7) A finding to the contrary, if taken to its logical extreme, would eviscerate the ELR in a commercial lease context, and would be antithetical to the foundation of commerce in this country--the freedom to contract. (FN8)

**6 In conclusion, the possibility of construction damage to Comptech's computers was a proper subject of risk allocation pursuant to the lease negotiations. Comptech's failure to contend with those risks during the negotiation process is a programming glitch that cannot be remedied by inserting a disk into "tort drive." Accordingly, we affirm the judgment below.

Affirmed.

SHEVIN, J., concurs.

COPE, J., dissents.

COPE, Judge (dissenting).

Under the economic loss doctrine, a contract party is confined to contract remedies for economic loss, and cannot sue in tort unless there has been personal injury or property damage. *See Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244, 1246 (Fla.1993); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899, 900 (Fla.1987); majority opinion at ----. In this case, tenant Comptech International, Inc., leased business premises from landlord Milam Commerce Park, Ltd., and the lease agreement called

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for the landlord to build out part of the leased space while the tenant occupied the remainder. The landlord performed the renovations negligently, causing damage to tenant's computers, among other things. (FN9)

I.

The first question is whether the damage to the tenant's computers constitutes property damage within the meaning of the economic loss doctrine, so as to allow the tenant to sue the landlord in tort. The majority says, and I agree, that "[n]o Florida court has defined what constitutes 'other property' under the [economic loss rule] in the context of a commercial lease." Majority opinion at ----.

In my view, a landlord-caused injury to a tenant's property within the leased premises qualifies as property damage for purposes of the economic loss doctrine, and the tenant may sue in tort.

A.

Tenant leased a warehouse and office facility from landlord and after three years needed additional space to expand. The parties entered into a second lease for an additional 13,000 square feet of warehouse space. In the second lease, the landlord agreed to build a 2000-square-foot addition to tenant's already-occupied office.

To handle this construction, the landlord hired an unlicensed contractor. The landlord did not prepare any architectural plans or obtain any building permits. Tenant says that during the renovation, the construction company released excessive dust and dirt throughout the office space, causing physical damage to the tenant's computers, and overloaded the electrical system, causing loss of data and further physical damage. Tenant also contends that the construction company damaged the existing bathrooms and flooring in the tenant's original space.

The tenant brought suit against the landlord for property damage occasioned by the negligently performed renovation. The trial court entered summary judgment for the landlord, reasoning that the landlord's construction obligations arose out of a contract and that recovery was barred under the economic loss rule.

B.

**7 Tenant alleges that its on-premises computers suffered property damage by reason of the landlord's negligence. This is sufficient to state a claim in tort, and is not barred by the economic loss rule.

The Florida Supreme Court in *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla.1993), considered the economic loss rule in the context of a claim that a condominium building had been constructed with defective concrete. The concrete was a component part of the finished product, the condominium building. The court ruled that the economic loss rule barred the homeowners' tort suit against the concrete supplier under a negligence theory. *See id.* at 1245. In reaching that conclusion, the court pointed out that "[t]he homeowners are seeking purely economic damages--no one has sustained any physical injuries *and no property, other than the structures built with Toppino's concrete, has sustained any damage.*" *Id.* at 1246 (emphasis added; footnote omitted). The implication is that if the defective concrete had fallen within a condominium unit, injuring either the homeowner or the homeowner's property, then the homeowner would be allowed to bring a tort suit for personal injury or property damage.

Similarly, in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, the Florida Supreme Court held "contract principles more appropriate than tort principles for resolving economic loss *without* an accompanying physical injury or property damage." 510 So.2d at 902 (emphasis added). Here there *is* "accompanying ... property damage." *Id.* Tenant is allowed to proceed in tort.

Logic dictates that property damage claims be analyzed by the same rule that applies to personal injury claims. If, for example, the landlord negligently caused the ceiling to fall on the tenants and injure them, clearly the tenants could sue the landlord in tort for personal injury. The landlord concedes this. By a parity of reasoning, if the landlord negligently performs renovations, thereby ruining the tenant's on-premises computers, the tenant may seek a tort recovery for property damage.

Supporting the proposition that the tenant can proceed in tort is a recent decision of the United States Supreme Court, *Saratoga Fishing Co. v. J.M. Martinac & Co.*, --- U.S. ----, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997). There a manufacturer built a fishing boat and sold it to buyer. Buyer added extra equipment (a skiff, fishing net, and spare parts) and resold the boat and contents to a subsequent purchaser. Owing to a defect in the boat, the boat

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caught fire and sank.

The question before the Court was whether, under the economic loss doctrine, the contents of the boat (the extra equipment) should be considered part of the boat--"the 'product itself,' in which case the plaintiff cannot recover in tort for its physical loss? Or is it 'other property,' in which case the plaintiff can recover?" *Id.* at ----, 117 S.Ct. at 1785.

**8 The Court ruled that the extra equipment was "other property" for purposes of the economic loss doctrine, and held that the plaintiff could proceed in tort. *See id.* at ----, 117 S.Ct. at 1786. "Items added to the product by the Initial User are ... 'other property'...." *Id.* The Court explicitly rested its ruling on *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), which is the foundation of Florida's economic loss doctrine. *See, e.g., Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628, 631 (Fla.1995); *AFM Corp. v. Southern Bell Telephone and Telegraph Co.*, 515 So.2d 180, 181 (Fla.1987).

The Court went on to say:

State law often distinguishes between items added to or used in conjunction with a defective item purchased from a Manufacturer (or its distributors) and (following *East River*) permits recovery for the former when physically harmed by a dangerously defective product. Thus the owner of a chicken farm, for example, recovered for chickens killed when the chicken house ventilation system failed, suffocating the 140,000 chickens inside. *A.J. Decoster Co. v. Westinghouse Electric Corp.*, 333 Md. 245, 634 A.2d 1330 (1994). A warehouse owner recovered for damage to a building caused by a defective roof. *United Air Lines, Inc. v. CEI Industries of Ill., Inc.*, 148 Ill.App.3d 332, 102 Ill.Dec. 1, 499 N.E.2d 558 (1986). And a prior case in admiralty (not unlike the one before us) held that a ship charterer, who adds expensive seismic equipment to the ship, may recover for its loss in a fire cause by a defective engine. *Nicor Supply Ships Assocs. v. General Motors Corp.*, 876 F.2d 501 (C.A.5 1989).

--- U.S. at ----, 117 S.Ct. at 1787.

In the present case, we deal with a lease of premises rather than an ocean fishing vessel, but the analogy holds. Equipment brought on board the vessel is "other property." *See id.* Computers brought into the office space are "other property" as well.

C.

The majority opinion correctly points out that there is an indemnity provision in the lease whereby the tenant agreed to hold the landlord harmless for, among other things, damage to merchandise, equipment, or other property arising out of tenant's occupancy. *See* majority opinion at ----. The idea was to protect the landlord from liability for anything that the tenant did while occupying the premises.

Usually such a contractual allocation of risk would be dispositive--but not in this case. Something is missing: the indemnity clause does *not* state that it exculpates the landlord for the landlord's own negligence. Contracts purporting "to indemnify a party against its own wrongful acts are viewed with disfavor in Florida. Such contracts will be enforced only if they express an intent to indemnify against the indemnitee's own wrongful acts *in clear and unequivocal terms.*" *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So.2d 487, 489 (Fla.1979) (citations omitted; emphasis added). If the indemnity contract is to protect the indemnitee from liability caused by its own negligence, the contract must explicitly say just that. *See id.; University Plaza Shopping Ctr., Inc. v. Stewart*, 272 So.2d 507, 509-12 (Fla.1973). A general provision indemnifying the indemnitee against any and all liability is not enough. *See University Plaza Shopping Ctr., Inc., v. Stewart*, 272 So.2d at 510-11.

**9 The landlord says that the tenant could have put something in the contract to allocate responsibility for loss during the build-out. That argument is both makeweight and wrong. It is makeweight because in hindsight it can always be said that the parties could have negotiated a more specific contract. It is wrong because if the landlord wanted to be exculpated for its own negligence, then it was the landlord's job, not the tenant's, to put a proper exculpatory clause in the contract--which landlord did not do. As the United States Supreme Court said in *Saratoga Fishing*, "No court has thought that the mere possibility of such a contract term precluded tort recovery for damage to an Initial User's other property." --- U.S. at ----, 117 S.Ct. at 1788.

More to the point, the legal test under the economic loss doctrine is whether plaintiff is making a claim for personal injury or property damage. If the claim is for personal injury or property damage, then the

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plaintiff is allowed to proceed in tort. It does not matter that the parties could have written a different contract.

Here the landlord was supposed to use due care in the build-out and botched the job, causing damage to tenant's property. There is a claim in tort. (FN10)

II.

The second question is whether the economic loss doctrine abolishes the statutory cause of action for violation of the building code.

A.

As already stated, the landlord did the building addition without pulling the required permits. The legislature has enacted section 553.84, Florida Statutes (1989), which states:

> **553.84 Statutory civil action.**--*Notwithstanding any other remedies available,* any person or party, in an individual capacity or on behalf of a class of persons or parties, 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.

(Emphasis added). The statute provides a cause of action where defendant has injured plaintiff by violating the building code or doing construction without the required building permit. *Id.* §§ 553.84, .79. (FN11)

The majority opinion says that the tenant has no claim under this statute because there was a contract. *See* majority opinion at ---- - ----. The majority opinion goes on to say, "we are not confronted with a statutory manifestation of a legislative policy decision to expand remedies for recovering economic losses." *Id.* at ---- - ---- (citation omitted).

With all due respect, that analysis is backwards. The statute says the exact opposite of what the majority opinion claims. The statute begins: " *Notwithstanding any other remedies available,* any ... party ... damaged as a result of a violation ... has a cause of action ... against the ... party who committed the violation." § 553.84, Fla. Stat. (1989). "Notwithstanding any other remedies" means "notwithstanding any other remedies"--including a contract remedy. The legislature has plainly said that a litigant can sue under section 553.84 in addition to any other remedies the litigant may have. The fact that tenant also has a contract claim is irrelevant.

B.

**10 In a recent case this court has rejected the idea that the economic loss doctrine swallows up statutory causes of action. In *Rubio v. State Farm Fire & Casualty Co.,* 662 So.2d 956 (Fla. 3d DCA 1995), *review denied,* 669 So.2d 252 (Fla.1996), the trial court ruled that the economic loss doctrine eliminated the insured's statutory cause of action for bad faith established by section 624.155, Florida Statutes (1993). *See id.* at 957. Reversing, this court said:

> By dismissing ... with prejudice based on the economic loss rule, which bars claims for tort damages in a contractual setting where there are only economic losses, the trial court abrogated the rights granted to insureds by section 624.155 and the common law. *Courts cannot willy nilly strike down legislative enactments.*

Id. at 957 n. 2 (emphasis added; citations omitted).

The Second District Court of Appeal followed *Rubio* and overturned a trial court ruling that the economic loss doctrine barred a cause of action based on the Florida Deceptive and Unfair Trade Practices Act, §§ 501.201-.213, Fla. Stat. (1993) ("FDUTPA"). *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.,* 693 So.2d 602, 607-11 (Fla. 2d DCA 1997). There, as here, the statute created an express statutory cause of action. *Id.* at 603. There, as here, the statute said that the statutory remedies were in addition to other remedies. *Id.* at 603-07. Rejecting the idea that the economic loss doctrine eliminated the statutory cause of action, the Second District said:

> *[C]ourts do not have the right to limit and, in essence, to abrogate, as the trial court did in this case, the expanded remedies granted to consumers under this legislatively created scheme by allowing the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies.* In sum, any tension between the legislative policy embodied in the FDUTPA and the judicial policy embodied in the economic loss rule must be resolved under the doctrine of the separation of powers in favor of the legislative will so long as the FDUTPA passes constitutional scrutiny.

693 So.2d at 609 (emphasis added; citations and

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footnote omitted).

The practical effect of the majority's ruling is to eliminate the statutory cause of action. The majority says that a statutory claim can be brought so long as the claim does not arise under a contract. *See* majority opinion at ---- - ----. That is a meaningless assurance. In virtually every case, the homeowner who builds a house or rebuilds after a hurricane or adds a room addition does so under a written contract. So does a commercial business. As a practical matter the majority eliminates the statutory cause of action under section 553.84.

C.

**11. The narrowest ground for deciding this case would be to follow *Delgado* and hold that where, as here, a statute creates a cause of action which is expressly stated to be in addition to other remedies, we will apply the statute as written and will not apply the economic loss doctrine.

More broadly, however, the *Rubio* panel was right: the economic loss doctrine does not apply to statutory causes of action at all. *See* 662 So.2d at 957 n. 2. The economic loss doctrine is simply a judge-made rule which is designed to sort out when a plaintiff may make a common-law contract claim and when a plaintiff may make a common-law tort claim. Since common-law contract claims and common-law tort claims are themselves judge-made causes of action, it is permissible for the judiciary to adopt the economic loss doctrine as a judge-made rule for deciding which claims can be brought in contract and which claims in tort.

The reason for adopting the economic loss doctrine had nothing to do with the interpretation of statutes. Once the legislature creates a statutory cause of action, we are obliged to respect the legislative will. As *Rubio* said, the economic loss doctrine is not a weapon for nullifying statutory causes of action. *See id.* (FN12)

III.

To sum up:

1. Where a landlord through its own negligence damages tenant's personal property within the leased premises, and where the exculpatory clause in the lease does not exculpate the landlord for its own negligence, the tenant has a cause of action in tort. Since tenant is suing for property damage, the economic loss doctrine does not apply.

2. The economic loss doctrine cannot be invoked to bar a statutory cause of action. That is particularly so where, as in this case, the statute expressly declares that the statutory cause of action will exist "[n]otwithstanding any other remedies available," § 553.84, Fla. Stat., and consequently will exist even though plaintiff also has a breach of contract remedy. The plaintiff's claim under section 553.84 is not barred by the economic loss doctrine.

For the stated reasons the summary final judgment should be reversed.

FN1. Comptech's third amended complaint contained a count asserting that Milam failed to comply with the South Florida Building Code by failing to hire licensed contractors and failing to obtain required permits and inspections. Section 553.84, Florida Statutes (1989), provides that "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 building code standards require certain permits to be obtained prior to constructing or altering a building. § 553.79(1), Fla. Stat. (1989).

FN2. The dissent inaccurately contends that "The practical effect of the majority's ruling is to eliminate the statutory cause of action." Dissenting opinion at ----. This is just not so. Our holding is limited to actions for economic damages inseparably connected to the breaching party's performance under the agreement. Where the essence of an asserted building code violation concerns the heart of the parties' agreement, attempting to mask a contract claim in the guise of a building code violation will not suffice to subvert the spirit of the economic loss doctrine. *See Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So.2d 74 (Fla. 3d DCA 1997).

FN3. We have not overlooked that each of the four dismissed counts, including the building code count, presented an entirely new claim, the litigation had been ongoing for two years, and trial of the case had already commenced when the court allowed Comptech to amend its second amended complaint, allegedly to conform to certain evidence which had been improperly presented at trial. Comptech did not allege any control duty by Milam over its independent contractors and the construction agreement between the contractors and Milam did not implicate any such duty. Without expressing

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any opinion on this issue, we note that:

Although the South Florida building code provides that compliance is the responsibility of the owner, the code does not impose a duty on a landowner to supervise construction undertaken by an independent contractor. *Brown v. South Broward Hosp. Dist.*, 402 So.2d 58 (Fla. 4th DCA 1981). *See also City of Miami v. Perez*, 509 So.2d 343 (Fla. 3d DCA 1987) , rev. den., 519 So.2d 987 (Fla.1987); *Skow v. Department of Transp.*, 468 So.2d 422 (Fla. 1st DCA 1985) (no explicit duty on a property owner to monitor, inspect or correct safety violations by an independent contractor); *Van Ness v. Independent Constr. Co.*, 392 So.2d 1017 (Fla. 5th DCA), rev. *denied*, 402 So.2d 614 (Fla.1981) (owner has no common-law duty to supervise independent contractor's work). Liability, under the code, and in accordance with common-law principles, is imposed on "the person or party who committed the violation." § 553.84, Fla. Stat. (1987).

Sierra v. Allied Stores Corp., 538 So.2d 943, 944 (Fla. 3d DCA 1989).

**11_ FN4. The dissent argues, and we agree, that an indemnity clause which indemnifies against the indemnitee's own negligence must express such intent in clear and unequivocal terms. *See Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So.2d 487 (Fla.1979). However, this principle is only applicable where the damages are occasioned solely by the indemnitee's own negligence. *See Transport International Pool, Inc. v. Pat Salmon & Sons of Florida Inc.*, 609 So.2d 658 (Fla. 4th DCA 1992).

Here, the alleged damage was caused by the contractor's substandard construction in failing to prevent excessive dust and dirt from being absorbed by the air conditioning system and by interrupting and overloading the electrical system. Comptech has failed to allege any conduct separate and apart from the contractual obligations owed to Comptech by Milam which could constitute direct negligence supporting an independent tort. Thus the foregoing principle asserted by the dissent is inapplicable to invalidate the indemnity provision. *See Transport International*, 609 So.2d at 660.

Moreover, while our disposition of this case rests on the application of the ELR, we cannot help but reflect that the contractual language used in the indemnification agreement sufficiently manifests the parties clear and unequivocal intent to indemnify Milam for any of its own acts of negligence. *See Joseph L. Rozier Machinery Co. v. Nilo Barge Line, Inc.*, 318 So.2d 557 (Fla. 2d DCA 1975), *cert. denied*, 328 So.2d 843 (Fla.1976).

The problem in *Charles Poe* was that the contract language provided the lessee would assume responsibility "for claims asserted by any person whatever." *Charles Poe*, 374 So.2d at 489. This language did not specifically express an intent to indemnify the lessor for the lessor's own active negligence.

By contrast, the indemnification agreement entered into by Comptech specifically indemnified Milam from all claims resulting from any negligence: *"Lessor shall not be responsible or liable at any time for any defects*, latent or otherwise, in any building improvements in the Demised Premises or any of the equipment, machinery, utilities, appliances or apparatus therein ... *resulting from any defect or negligence* in the occupancy, construction, operation or use of any building or improvements in the Demised Premises, or any of the equipment, fixtures, machinery, appliances of apparatus therein." (Emphasis added.) We think this language clearly expresses the parties intent that Milam be held harmless for any acts of its own negligence. *See Winn Dixie Stores, Inc. v. D & J Constr. Co.*, 633 So.2d 65 (Fla. 4th DCA 1994); *Etiole Int'l N.V. v. Miami Elevator Co., Inc.*, 573 So.2d 921 (Fla. 3d DCA 1990). *Middleton v. Lomaskin*, 266 So.2d 678 (Fla. 3d DCA 1972).

Regardless of the validity of the indemnification clause, its relevance for purposes of our analysis is that it reflects Comptech agreed to negotiate rights regarding the risk of the alleged property damage. The indemnification clause thus supports the conclusion that the alleged damages do not constitute a tort separate and apart from the breach of contract.

FN5. Instead, realizing after-the-fact the ramifications of its ineffectual bargaining skills, Comptech filed suit seeking damages not only for the actual value of the computers, but for all business that was lost as a result of the computer damage, including punitive damages, for a total in excess of $7,000,000.00. To allow tort recovery under these circumstances is absurd. A landlord should not be responsible for the entire business losses of its commercial tenant where both parties had the ability to freely allocate the risks of potential mishap.

FN6. This is not to say that circumstances could never

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arise under which there is a claim in tort for damage to a tenants property, but only that such circumstances are not present in this case. In fact, we agree with the dissent that there are circumstances where "a landlord-caused injury to a tenant's property within the leased premises qualifies as property damage for purposes of the economic loss doctrine." Dissenting opinion at ----.

But the dissent misses the point that in order to qualify as "other property," the damaged items must not have been within the contemplation of the parties' bargain. In other words, no "other property" can be damaged, where the property at issue was the subject of the contract. That is precisely the case here.

The agreement to build the addition was for the purpose of developing Comptech's computer business. Comptech was in the business of providing computer hardware distribution which involved testing computer components and peripheral equipment. The purpose for entering into the construction agreement and lease was to accommodate Comptech's plans for expanded sales growth. Obviously the computer business was the object of the parties commercial lease bargain.

**11_ FN7. The dissent improperly relies on the recent United States Supreme Court decision of *Saratoga Fishing Co. v. J.M. Martinac & Co.*, --- U.S. ----, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997), to support the proposition that the tenant may proceed in tort.

The facts in *Saratoga* involved a defective product in the context of resale to a subsequent user. The Supreme Court quite logically held that equipment added to a product after it has been sold to a subsequent user is not part of the original product itself and therefore constitutes "other property." *Saratoga*, 65 U.S.L.W. at 4431, --- U.S. at ----, 117 S.Ct. at ----.

Although recognizing an exception to the ELR, the Court stressed the limited applicability of its ruling and the importance of the economic loss doctrine in continuing to limit the potential for imposing too great a tort liability upon manufacturers and distributors. Noting that the decision narrowly applied the exception to equipment added to a product after resale to a subsequent purchaser, the Court emphasized: "Our holding merely maintains liability, for *equipment added* after the initial sale, despite the presence of a resale by the Initial User." *Saratoga*, 65 U.S.L.W. at 4431, --- U.S. at ----, 117 S.Ct. at ----.

In essence, the Court's ruling simply extended the benefit-of-the-bargain analysis to subsequent purchasers by allowing them to inherit the initial user's claims. Because the added materials to the boat in *Saratoga* were not part of the bargained for original agreement between the manufacturer and the initial user, they clearly fell under the "other property" exception to the ELR.

The facts in the present case are clearly distinguishable. Comptech concerns a bargained-for lease agreement; not a product sold to subsequent users after equipment was added. The computers were not added to a product, but were part and parcel of the parties' contemplated agreement at all times. Moreover, risk to the computers was specifically contemplated by the parties as evidenced by the terms of the build-out agreement and the explicit indemnification provision covering potential liability. We are confident that the preceding analysis and a common sense reading of *Saratoga* mandate this opinion.

FN8. By having the freedom to contract, parties can plan and predict their potentials for loss at the beginning of the business relationship. Commercial entities are especially capable of protecting themselves through negotiation or insurance, or they may choose to assume the risk. Even where a commercial loss does trigger the "other property" exception, damages must be limited to the actual value of the damaged property to protect society's interest in the performance of promises. Otherwise, "the ground's gonna swallow" the process of negotiation and the fulfillment of contracts, resulting in adverse economic and societal consequences. Everything But The Girl, *Wrong, on* Walking Wounded (Atlantic Recording Corporation 1996).

FN9. For present purposes the tenant's version of the facts must be accepted as true, since this is an appeal from the granting of summary judgment for landlord.

FN10. By footnote the majority opinion says that tenant "did not allege any control duty by [landlord] over its independent contractors and the construction agreement between the contractors and [landlord] did not implicate any such duty." Majority opinion at ---- n. 3.

The tenant's claim in this case is that the landlord

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was negligent in (1) hiring an unlicensed, unqualified construction company, (2) failing to prepare architectural plans, and (3) failing to obtain required permits. These are claims that landlord itself was negligent.

Since tenant alleges direct negligence on the part of the landlord, it is not necessary at this time to consider the existence or extent of landlord's liability for the acts of the unlicensed contractor.

FN11. It may be that the tenant will be unable to establish a causal nexus between the statutory violation and the injury the tenant sustained. *See Saratoga Fishing*, --- U.S. at ----, 117 S.Ct. at 1788 (stating that other tort principles, including foreseeability and proximate cause, limit tort liability in important ways). The only issue before us at this time is whether the statutory cause of action is defeated by the economic loss doctrine.

FN12. Contributing to the confusion in this area of the law, cases can be found which have applied the economic loss doctrine to bar recovery for the statutory cause of action for civil theft (§ 772.11, Fla.Stat.). *See Sarkis v. Pafford Oil Co.*, 697 So.2d 524 (Fla. 1st DCA 1997); *see also Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198 (11th Cir.1994).

These cases rest on faulty assumptions. The economic loss doctrine does not apply to civil theft claims because the statute precludes it:

Cumulative remedy.--The application of one civil remedy under this chapter *does not preclude the application of any other remedy, civil or criminal, under* this chapter or *any other provision of law. Civil remedies under this act are supplemental,* and not mutually exclusive.

§ 772.18, Fla. Stat. (1989) (emphasis added). By legislative declaration, the statutory causes of action for civil theft (and, for that matter, racketeering, *see id.* § 772.104) are in addition to any other remedies--and therefore are in addition to any remedy which might exist for breach of contract.

There is, to be sure, a line of cases holding that a simple failure to pay money owed under a contract does not constitute civil theft. The line of cases originates with this court's decision in *Rosen v. Marlin*, 486 So.2d 623 (Fla. 3d DCA 1986), and rests on the idea that a civil theft occurs only if there has been an outright taking of property. *See id.* at 625-26. A simple failure to pay money owed is neither a taking nor a theft. *See id.* By contrast, an escrow agent's theft of escrow funds is both a breach of the escrow contract and a civil theft, because there has been a taking. *See id.; Masvidal v. Ochoa*, 505 So.2d 555, 556 (Fla. 3d DCA 1987).

At bottom, *Rosen* and progeny simply define the elements of the relevant causes of action. *Rosen* was decided in 1986, a year before the Florida Supreme Court **11_ announced its adoption of the economic loss doctrine in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d at 900-02.

The above analysis applies with equal force to the suggestion in *Sarkis* that the economic loss doctrine has been applied to bar civil racketeering claims. *See Sarkis*, 697 So.2d at 527.

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**COMPTECH INTERNATIONAL, INC., a Florida corporation, Appellant,
v.
MILAM COMMERCE PARK, LTD., a Florida limited partnership and D & M Modeling, Inc., a dissolved Florida corporation. Appellees.**

No. 96-1056.

District Court of Appeal of Florida,
Third District.

May 20, 1998.

An Appeal from the Circuit Court for Dade County, Robbie M. Barr, and Sidney B. Shapiro, Judges.

Jeffrey J. Pardo, for appellant Comptech International, Inc.

Womack, Appleby & Brennan, and David C. Appleby, for appellee Milam Commerce Park, Ltd.

Before COPE, GERSTEN and SHEVIN, JJ.

ON MOTION FOR REHEARING

GERSTEN, Judge.

*1 We withdraw our previously issued opinion and substitute the following in its place.

Appellant, Comptech International, Inc. ("Comptech"), appeals a final summary judgment in favor of its landlord, appellee Milam Commerce Park, Ltd. ("Milam"). We affirm finding the "other property" exception to the economic loss rule ("ELR") does not apply because potential damage to Comptech's computers should have been contemplated by the parties' commercial lease contract. Once again, we reiterate this Court's strong embrace of the economic loss rule and express desire to uphold the doctrine's underlying policies.

Comptech, a computer hardware distributor, leased commercial space from Milam since 1987. In 1990, the two parties agreed to enter into a second lease. The new lease stipulated that Comptech would lease an additional 13,000 square feet of warehouse space, and, that Milam would build 2,000 square feet of office space in the area that Comptech was already leasing. The lease contained an indemnity provision whereby Comptech agreed to indemnify Milam from all claims for damages arising under the use and occupancy of the premises, including any improvements.

During the construction of the additional office space, Comptech complained that the improvements were not being constructed in a timely and workman-like fashion resulting in damage to its office space and computers. Comptech brought suit against Milam asserting negligence in selection of contractors, negligent construction, damages resulting from violation of the South Florida Building Code, punitive damages, and return of rent illegally collected. All of the counts in Comptech's third amended complaint except "negligence in selection of contractors" were dismissed with prejudice.

Thereafter, the trial court granted Milam's motion for summary judgment on the sole remaining negligence count finding that:

> Any duty imposed upon [Milam] to hire a competent contractor to fulfill the terms of the lease agreement at issue wherein additional office space was to be built, was a duty which stemmed from the lease agreement. Any breach of that duty giving rise to a negligence claim is foreclosed by the Economic Loss Doctrine. A breach of contract alone cannot support a cause of action in tort. Casa Clara v. Charlie Toppino & Sons, 620 So.2d 1244 (Fla.1993).

We agree. Although we reject as meritless the several arguments raised by Comptech on appeal, our reasoning for affirmance requires further discussion to clarify application of the ELR's "other property" exception in a commercial context, as well as its effect upon claims brought under the South Florida Building Code.

I.

First, we reject Comptech's argument that Milam's alleged breach of the building code, Section 553.85, Florida Statutes (1989), constitutes an "exception" to the ELR. [FN1] Our Supreme Court has recognized only two narrow exceptions to the application of the doctrine, see Casa Clara, 620 So.2d at 1244, and there is no justification under these circumstances to

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carve out a third.

*2 Simply, the ELR does not permit a cause of action for economic damages brought under the South Florida Building Code where the claims are clearly contractual in nature and the cause of action is inseparably connected to the breaching party's performance under the agreement. See Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So.2d 74 (Fla. 3d DCA), review denied 700 So.2d 685 (Fla.1997); Ginsberg v. Lennar Florida Holdings, Inc., 645 So.2d 490 (Fla. 3d DCA 1994)(and cases cited therein), review denied, 659 So.2d 490 (Fla.1995); accord Hoseline, Inc. v. U.S.A. Diversified Products, Inc., 40 F.3d 1198 (11th Cir.1994). Where the parties to an agreement negotiate within a contractual setting the same duties as occasioned by the statute, a breach of which would lead to the same economic losses involving identical elements to the claim, the economic loss doctrine prevails.

As recently recognized in Sarkis v. Pafford Oil Co., Inc., 697 So.2d 524 (Fla. 1st DCA 1997): "Florida courts have held that the economic loss rule can be applied to statutory actions, but this line of cases appears to be limited to actions that could be characterized as statutory torts." Section 553.84 is a statutory tort. Thus the ELR applies if the cause of action founded on the statutory tort is dependent upon the contract. [FN2]

Here, Milam's alleged breach of duty to Comptech stemmed from the lease. But for the lease agreement, there would have been no damages. The statutory tort claim is dependent upon the contractual obligation at issue. Thus the statutory tort claim is subsumed by the ELR because the economic losses sought are no different from those that could have been asserted in a contract action for breach of the lease agreement. See Sarkis v. Pafford Oil Co., Inc., 697 So.2d at 524.

The dissent argues to the contrary quoting the language in Section 553.84 which provides a cause of action against the party committing a violation "notwithstanding any other remedies." According to the dissent, this language constitutes a statutory mandate eliminating application of the ELR to the statutory cause of action. We decline to adopt such a literal interpretation which in our view would thwart the manifest purpose of the economic loss doctrine. "Notwithstanding any other remedies available" does not necessarily imply "notwithstanding the Economic Loss Rule," when "but for" the contract, there would be no damages.

We emphasize that the ELR does not exclude separate and independent building code violation claims, or claims arising from noncontractual settings. [FN3] At the risk of being repetitive, we clarify that our holding is limited to actions for economic damages inseparably connected to the breaching party's performance under the agreement. Where the essence of an asserted building code violation concerns the heart of the parties' agreement, attempting to mask a contract claim in the guise of a building code violation will not suffice to subvert the spirit of the economic loss doctrine. See Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So.2d at 74. [FN4] Thus we find the ELR does apply to prohibit Comptech from pursuing a dependent statutory tort action in an attempt to expand its remedies for breach of contract beyond that which was agreed to. [FN5]

II.

*3 Second, we also reject Comptech's argument that its damaged property falls within the "other property" exception to the ELR. Specifically, Comptech's complaint alleged its office suffered property damage by:

i. tearing down walls there;
ii. Ruining the flooring there;
iii. destroying the existing bathrooms;
iv. interrupting and overloading the electrical system thereby causing both lost data and physical damage to computers;
v. preventing use of warehouse space and causing Comptech to continuously move its inventory from location to location.
v. failing to prevent excessive dust and dirt from being absorbed by the air conditioning system thereby damaging computers and data therein.
vii. failing to clean up debris.

Basically, the complaint alleged Comptech suffered property damage to its electrical systems, warehouse space and computers, claiming damages in excess of $2,000,000.00 plus interest and costs. Comptech further sought punitive damages against Milam in the sum of $5,000,000.00.

Under Florida law, the ELR prohibits a plaintiff who has a contract claim from recovering tort damages for purely economic losses in the absence of personal injury or damage to "other property." Casa Clara Condominium Ass'n, Inc. v. Charles Toppino & Sons, Inc., 620 So.2d 1244 (Fla.1993); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180 (Fla.1987); Florida Power & Light Co. v.

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Westinghouse Elec. Corp., 510 So.2d 899 (Fla.1987). The policy behind the rule is to encourage contracting parties to protect their economic interests through negotiation and insurance, recognizing that in a free market, disappointed economic expectations are often the unintended result of an imperfect bargain.

In accordance with the ELR's underlying policy, this court on numerous occasions has reiterated its position that disappointed economic expectations are best protected by the law of contract and not tort. McDonough Equipment Corp. v. Sunset Amoco West, Inc., 669 So.2d 300 (Fla. 3d DCA 1996); Standard Fish Company, Ltd., v. 7337 Douglas Enterprises, Inc., 673 So.2d 503 (Fla. 3d DCA 1996); Florida Bldg. Inspection Services, Inc. v. Arnold Corp., 660 So.2d 730 (Fla. 3d DCA 1995); Palau International Traders, Inc. v. Narcam Aircraft, Inc., 653 So.2d 412 (Fla. 3d DCA 1995), rev. denied, 661 So.2d 825 (Fla.1995); Bay Garden Manor Condominium Assoc., Inc. v. James D. Marks Associates Inc., 576 So.2d 744, 745 (Fla. 3d DCA 1991). As explained by the supreme court in Casa Clara Condominium Ass'n, Inc. v. Charles Toppino & Sons, Inc., 620 So.2d at 1246 (citations omitted):

> [E]conomic losses are disappointed economic expectations, which are protected by contract law, rather than tort law. This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party.

*4 A commercial party always has the ability to protect its interests through negotiation and contractual bargaining or insurance. The ability of the parties to independently protect themselves from the risk of economic loss through the negotiation process has been a recurring theme in several of this court's recent decisions.

For example, in Palau International Traders, Inc. v. Narcam Aircraft, Inc., 653 So.2d at 412, we held that an aircraft purchaser was not allowed recourse in tort where he could have obtained options through better negotiations to protect himself from a defect in the aircraft's landing gear. Likewise, in Standard Fish Company, Ltd., v. 7337 Douglas Enterprises, Inc., 673 So.2d at 503, this court noted that the damage alleged was not outside the scope of the negotiations providing for cold fish storage and that the risks of damage complained of could have been allocated through contract negotiations. Similarly, in Florida Bldg. Inspection Services, Inc. v. Arnold Corp., 660 So.2d at 730, we found that a sublessee of warehouse space who suffered water damage from a leaky roof had the ability to allocate risk through a better negotiated contract. More recently, as observed in McDonough Equipment Corp. v. Sunset Amoco West, Inc., 669 So.2d at 300, we explained that a negotiated contract for services which defines limitations of liability and respective risks cannot be circumvented by seeking to recover purely economic losses through a tort action.

Turning to the present case, Comptech seeks to avoid the application of the ELR by arguing that its damaged property constitutes "other property" which fell outside the parameters of the lease agreement and the ELR. No Florida court has defined what constitutes "other property" under the ELR in the context of a commercial lease. In Casa Clara, the Florida Supreme Court discussed the exception under the circumstances of plaintiffs who purchased finished products in which the allegedly defective product was a component. Although factually distinguishable, we find the reasoning in this landmark case to be highly instructive.

The plaintiffs in Casa Clara were homeowners who alleged that contaminated concrete ruined steel reinforcing rebar, which in turn ruined their homes. Attempting to avoid application of the ELR, the homeowners argued that their homes constituted "other property" which was damaged by the component concrete. The Florida Supreme Court disagreed, reasoning that:

> the character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant.... [The homeowners] bargained for the finished products, not their various components. The concrete became an integral part of the finished product and, thus, did not injure "other" property.

*5 Casa Clara, 620 So.2d at 1247.

In holding that damage to a component part of a product does not trigger the "other" property exception to the ELR, the Court focused on the object of the parties' bargain. The homes themselves were in fact the benefit that the parties had bargained for.

Subsequent products liability cases have also focused on the object of the bargain in relation to the damaged property in analyzing the applicability of the "other property" exception. See Jarmco, Inc. v. Polly Guard, Inc., 668 So.2d 300 (Fla. 4th DCA 1996), rev. granted, 678 So.2d 339 (Fla.1996), and decision

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approved by, 21 Fla. L. Weekly S452 (Fla.1996); Fishman v. Boldt, 666 So.2d 273 (Fla. 4th DCA), rev. granted, 680 So.2d 422 (Fla.1996); E.I. Du Pont de Nemours & Co. v. Finks Farms, Inc., 656 So.2d 171 (Fla. 2d DCA 1995). In Jarmco, the Fourth district held that a boat builder's non-fraud claims against a resin seller for damages to its boat resulting from allegedly defective resin were barred by the ELR. In rejecting the boat builder's claim that the boat constituted "other property", the Fourth District noted the Florida Supreme Court's intent in Casa Clara that the ELR have broad application, and that "the 'other' property exception to the ELR must be limited to property that is unrelated and unconnected to the product sold...." Jarmco, Inc. v. Polly Guard, Inc., 668 So.2d at 303.

In accordance with the Supreme Court of Florida's consistent endorsement of the ELR, we find no basis for applying the exception to Comptech because the "other property" damage was, or should have been, contemplated by the contract. Comptech depended upon its computers to configure new computer products which were then purchased by its customers. Obviously the computers constituted an essential part of the business endeavor. Likewise, the purpose for entering the lease and the build-out agreement was to benefit the business endeavor. Thus, the computers were directly related and connected to furthering Comptech's business, which was also the object of the lease and build-out agreement.

Moreover, the possibility of collateral damage to the equipment during the construction was an eventuality that could have been reasonably contemplated by the parties. In fact, the parties did negotiate the allocation of risks and remedies as evidenced by the indemnification provision of the contract. In the indemnification provision, Comptech agreed to hold Milam harmless for "all claims of every kind" including "damaged merchandise, equipment, fixture or other property, or damage to business or for business interruption, arising, directly or indirectly out of, from or on account of such occupancy and use, or resulting from present or future condition or state of repair thereof." [FN6] The language in the indemnification clause further supports our conclusion that the alleged damages do not constitute a tort separate and apart from the breach of contract.

*6 Essentially, Comptech could have contended with the potential risks to its business computers by negotiating to supply its own contractors, negotiating a more favorable indemnification provision, or calling for more protective measures to equipment it must have known were at risk in the construction environment. [FN7] Comptech's computers were fundamentally related to the commercial endeavor contemplated by the bargained for lease agreement and thus do not constitute "other property" for ELR purposes. See Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734 (11th Cir.1995). [FN8]

Thus we conclude that foreseeable damage to business property which constituted part of a bargained-for commercial leasehold agreement, does not constitute an exception to the economic loss doctrine. See East River S.S. Corp. v. Tansamerica Delaval Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986); Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d at 734; American Eagle Ins. Co. v. United Technologies Corp., 48 F.3d 142 (5th Cir.1995); King v. Hilton-Davis, 855 F.2d 1047 (3rd Cir.1988); Shipco 2295, Inc. v. Avondale Shipyards, Inc., 825 F.2d 925 (5th Cir.1987). [FN9] A finding to the contrary, if taken to its logical extreme, would eviscerate the ELR in a commercial lease context, and would be antithetical to the foundation of commerce in this country--the freedom to contract. [FN10]

III.

In conclusion, the possibility of construction damage to Comptech's computers was a proper subject of risk allocation pursuant to the lease negotiations. Comptech's failure to contend with those risks during the negotiation process is a programming glitch that cannot be remedied by inserting a disk into "tort drive." Accordingly, we affirm the judgment below.

Affirmed.

SHEVIN, J., concurs.

COPE, Judge (dissenting).

In view of the majority's substitution of an opinion on motion for rehearing, I withdraw my previously issued dissent and substitute the following revised dissent.

Under the economic loss doctrine, a contract party is confined to contract remedies for economic loss, and cannot sue in tort unless there has been personal injury or property damage. See Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244, 1246 (Fla.1993); Florida

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Power & Light Co. v. Westinghouse Elec. Corp., 510 So.2d 899, 900 (Fla.1987); majority opinion at ----. In this case, tenant Comptech International, Inc., leased business premises from landlord Milam Commerce Park, Ltd., and the lease agreement called for the landlord to build out part of the leased space while the tenant occupied the remainder. The landlord performed the renovations negligently, causing damage to the tenant's computers, among other things. [FN11]

I.

*7 The first question is whether the damage to the tenant's computers constitutes property damage within the meaning of the economic loss doctrine so as to allow the tenant to sue the landlord in tort. The majority says, and I agree, that "[n]o Florida court has defined what constitutes 'other property' under the [economic loss rule] in the context of a commercial lease." Majority opinion at ----.

In my view, a landlord-caused injury to a tenant's property within the leased premises qualifies as property damage for purposes of the economic loss doctrine, and the tenant may sue in tort.

A.

The tenant leased a warehouse and office facility from the landlord and after three years needed additional space to expand. The parties entered into a second lease for an additional 13,000 square feet of warehouse space. In the second lease, the landlord agreed to build a 2000-square-foot addition to the tenant's already-occupied office.

To handle this construction, the landlord hired an unlicensed contractor. The landlord did not prepare any architectural plans or obtain any building permits. The tenant says that during the renovation, the construction company released excessive dust and dirt throughout the office space, causing physical damage to the tenant's computers, and overloaded the electrical system, causing loss of data and further physical damage. The tenant also contends that the construction company damaged the existing bathrooms and flooring in the tenant's original space.

The tenant brought suit against the landlord for property damage occasioned by the negligently performed renovation. The trial court entered summary judgment for the landlord, reasoning that the landlord's construction obligations arose out of a contract and that recovery was barred under the economic loss rule.

B.

The tenant alleges that its on-premises computers suffered property damage by reason of the landlord's negligence. This is sufficient to state a claim in tort, and is not barred by the economic loss rule.

In Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla.1993), the Florida Supreme Court considered the economic loss rule in the context of a claim that a condominium building had been constructed with defective concrete. The concrete was a component part of the finished product, the condominium building. The court ruled that the economic loss rule barred the homeowners' tort suit against the concrete supplier under a negligence theory. See id. at 1245. In reaching that conclusion, the court pointed out that "[t]he homeowners are seeking purely economic damages--no one has sustained any physical injuries and no property, other than the structures built with Toppino's concrete, has sustained any damage." Id. at 1246 (emphasis added; footnote omitted). The implication is that if the defective concrete had fallen within a condominium unit, injuring either the homeowner or the homeowner's property, then the homeowner would be allowed to bring a tort suit for personal injury or property damage.

*8 Similarly, in Florida Power & Light Co. v. Westinghouse Electric Corp., the Florida Supreme Court found "contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage." 510 So.2d at 902 (emphasis added). Here there is "accompanying ... property damage." Id. The tenant is allowed to proceed in tort.

Logic dictates that property damage claims be analyzed by the same rule that applies to personal injury claims. If, for example, the landlord negligently caused the ceiling to fall on the tenants and injure them, clearly the tenants could sue the landlord in tort for personal injury. The landlord concedes this. By a parity of reasoning, if the landlord negligently performs renovations, thereby ruining the tenant's on-premises computers, the tenant may seek a tort recovery for property damage.

Supporting the proposition that the tenant can proceed in tort is a recent decision of the United States

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Supreme Court, Saratoga Fishing Co. v. J.M. Martinac & Co., --- U.S. ----, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997). There, a manufacturer built a fishing boat and sold it to the buyer. The buyer added extra equipment (a skiff, fishing net, and spare parts) and resold the boat and contents to a subsequent purchaser. Owing to a defect in the boat, the boat caught fire and sank.

The question before the Court was whether, under the economic loss doctrine, the contents of the boat (the extra equipment) should be considered part of the boat--"the 'product itself,' in which case the plaintiff cannot recover in tort for its physical loss? Or is it 'other property,' in which case the plaintiff can recover?" Id. at 1785.

The Court ruled that the extra equipment was "other property" for purposes of the economic loss doctrine, and held that the plaintiff could proceed in tort. Id. "Items added to the product by the Initial User are ... 'other property'...." Id. at 1786. The Court explicitly rested its ruling on East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), which is the foundation of Florida's economic loss doctrine. See, e.g., Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So.2d 628, 631 (Fla.1995); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180, 181 (Fla.1987).

The Court went on to say:

> State law often distinguishes between items added to or used in conjunction with a defective item purchased from a Manufacturer (or its distributors) and (following East River) permits recovery for the former when physically harmed by a dangerously defective product. Thus the owner of a chicken farm, for example, recovered for chickens killed when the chicken house ventilation system failed, suffocating the 140,000 chickens inside. A.J. Decoster Co. v. Westinghouse Electric Corp.,333 Md. 245, 634 A.2d 1330 (1994). A warehouse owner recovered for damage to a building caused by a defective roof. United Air Lines, Inc. v. CEI Industries of Ill., Inc., 148 Ill.App.3d 332, 102 Ill.Dec. 1, 499 N.E.2d 558 (1986). And a prior case in admiralty (not unlike the one before us) held that a ship charterer, who adds expensive seismic equipment to the ship, may recover for its loss in a fire caused by a defective engine. Nicor Supply Ships Assocs. v. General Motors Corp., 876 F.2d 501 (C.A.5 1989).

*9 --- U.S. at ----, 117 S.Ct. at 1787.

That case was recently relied upon by the United States Court of Appeals for the Third Circuit in holding that the contents of a pre-fabricated warehouse constitute "other property" within the meaning of the economic loss doctrine. 2-J Corp. v. Tice, 126 F.3d 539, 544 (3d Cir.1997). In the present case, we deal with a lease of premises rather than occupation of a warehouse or an ocean fishing vessel, but the analogy holds. Equipment brought on board the vessel and inventory stored in the warehouse are "other property." Id. Computers brought into the office space are "other property" as well.

C.

The majority opinion correctly points out that there is an indemnity provision in the lease under which the tenant agreed to hold the landlord harmless for, among other things, damage to merchandise, equipment, or other property arising out of the tenant's occupancy. See majority opinion at ----. The idea was to protect the landlord from liability for anything that the tenant did while occupying the premises.

Usually, such a contractual allocation of risk would be dispositive--but not in this case. Something is missing: the indemnity clause does not state that it exculpates the landlord for the landlord's own negligence. Contracts purporting "to indemnify a party against its own wrongful acts are viewed with disfavor in Florida. Such contracts will be enforced only if they express an intent to indemnify against the indemnitee's own wrongful acts in clear and unequivocal terms." Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So.2d 487, 489 (Fla.1979) (citations omitted; emphasis added). If the indemnity contract is to protect the indemnitee from liability caused by its own negligence, the contract must explicitly say just that. See id.; University Plaza Shopping Ctr., Inc. v. Stewart, 272 So.2d 507, 509-12 (Fla.1973). A general provision indemnifying the indemnitee against any and all liability is not enough. See University Plaza Shopping Ctr., Inc. v. Stewart, 272 So.2d at 510-11.

The landlord says that the tenant could have put something in the contract to allocate responsibility for loss during the buildout. That argument is both makeweight and wrong. It is makeweight because in hindsight it can always be said that the parties could have negotiated a more specific contract. It is wrong because if the landlord wanted to be exculpated for its own negligence, then it was the landlord's job, not the

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tenant's, to put a proper exculpatory clause in the contract--which the landlord did not do. As the United States Supreme Court said in Saratoga Fishing, "No court has thought that the mere possibility of such a contract term precluded tort recovery for damage to an Initial User's other property." 117 U.S. at 1788.

*10 More to the point, the legal test under the economic loss doctrine is whether the plaintiff is making a claim for personal injury or property damage. If the claim is for personal injury or property damage, then the plaintiff is allowed to proceed in tort. It does not matter that the parties could have written a different contract.

Here, the landlord was supposed to use due care in the buildout and botched the job, causing damage to tenant's property. There is a claim in tort. [FN12]

II.

The second question is whether the economic loss doctrine abolishes the statutory cause of action for violation of the building code.

A.

As already stated, the landlord did the building addition without pulling the required permits. The Legislature has enacted section 553.84, Florida Statutes (1989), which states:

> 553.84 Statutory civil action.--Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, 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.

(Emphasis added). The statute provides a cause of action where defendant has injured plaintiff by violating the building code or doing construction without the required building permit. See Id. §§ 553.84, .79. [FN13]

The majority opinion says that the tenant has no claim under this statute because there was a contract. See majority opinion at ---- -----. The majority opinion goes on to state that "we are not confronted with a statutory manifestation of a legislative policy decision to expand remedies for recovering economic losses." Id. at 6 n. 4. (citation omitted).

With all due respect, that analysis is backwards. The statute says the exact opposite of what the majority opinion claims. The statute begins: "Notwithstanding any other remedies available, any ... party ... damaged as a result of a violation ... has a cause of action ... against the ... party who committed the violation." § 553.84, Fla. Stat. "Notwithstanding any other remedies" means "notwithstanding any other remedies"--including a contract remedy. The Legislature has plainly said that a litigant can sue under section 553.84 in addition to any other remedies the litigant may have. The fact that tenant also has a contract claim is irrelevant.

B.

In a recent case, this court has rejected the idea that the economic loss doctrine swallows up statutory causes of action. In Rubio v. State Farm Fire & Cas. Co., 662 So.2d 956 (Fla. 3d DCA 1995), the insured sued their own insurance company for breaching the insurance contract by failing to pay their insurance claim. The trial court ruled that the economic loss doctrine eliminated the insured's statutory cause of action for bad faith established by section 624.155, Florida Statutes (1993), because the bad faith claim arose out of the same breach of contract. See 662 So.2d at 957. Reversing, this court said:

> *11 By dismissing ... with prejudice based on the economic loss rule, which bars claims for tort damages in a contractual setting where there are only economic losses, the trial court abrogated the rights granted to insureds by section 624.155 and the common law. Courts cannot willy nilly strike down legislative enactments.

662 So.2d at 957 n. 2 (emphasis added; citations omitted).

The Second District Court of Appeal followed Rubio and overturned a trial court ruling that the economic loss doctrine barred a cause of action based on the Florida Deceptive and Unfair Trade Practices Act, §§ 501.201-.213, Fla. Stat. (1993) ("FDUTPA"). See Delgado v. J.W. Courtesy Pontiac GMC- Truck, Inc., 693 So.2d 602, 611 (Fla. 2d DCA 1997). There, as here, the statute created an express statutory cause of action. See id. at 606. There, as here, the statute said that the statutory remedies were in addition to other remedies. See id. at 606. Rejecting the idea that the economic loss doctrine eliminated the statutory cause of action, the Second District said:

> [C]ourts do not have the right to limit and, in essence, to abrogate, as the trial court did in this case, the expanded remedies granted to consumers under this legislatively created scheme by allowing

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> the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies. In sum, any tension between the legislative policy embodied in the FDUTPA and the judicial policy embodied in the economic loss rule must be resolved under the doctrine of the separation of powers in favor of the legislative will so long as the FDUTPA passes constitutional scrutiny.

Id. at 609 (emphasis added; citations and footnote omitted).

The practical effect of the majority's ruling is to eliminate the statutory cause of action. The majority says that a statutory claim can be brought so long as the claim does not arise under a contract. See majority opinion at ---- -----. That is a meaningless assurance. In virtually every case, the homeowner who builds a house or rebuilds after a hurricane or adds a room addition does so under a written contract. The same is true for a commercial business. As a practical matter, the majority eliminates the statutory cause of action under section 553.84.

C.

The narrowest ground for deciding this case would be to follow Delgado and hold that where, as here, a statute creates a cause of action which is expressly stated to be in addition to other remedies, we will apply the statute as written and will not apply the economic loss doctrine.

More broadly, however, the Rubio panel was right: the economic loss doctrine does not apply to statutory causes of action at all. See 662 So.2d at 957 n. 2. The economic loss doctrine is simply a judge-made rule which is designed to sort out when a plaintiff may make a common-law contract claim and when a plaintiff may make a common-law tort claim. Since common-law contract claims and common-law tort claims are themselves judge-made causes of action, it is permissible for the judiciary to adopt the economic loss doctrine as a judge-made rule for deciding which claims can be brought in contract and which claims in tort.

*12 The reason for adopting the economic loss doctrine had nothing to do with the interpretation of statutes. Once the Legislature creates a statutory cause of action, we are obliged to respect the legislative will. As Rubio said, the economic loss doctrine is not a weapon for nullifying statutory causes of action. See id. [FN14]

D.

Finally, assuming arguendo that the economic loss doctrine applies to statutory causes of action, the majority has misapplied its own rule. The obligation to obey the building code arises from statute, and is an obligation which arises independent of the contract.

III.

To sum up:

1. Where a landlord through its own negligence damages a tenant's personal property within the leased premises, and where the exculpatory clause in the lease does not exculpate the landlord for its own negligence, the tenant has a cause of action in tort. Since the tenant is suing for property damage, the economic loss doctrine does not apply.

2. The economic loss doctrine cannot be invoked to bar a statutory cause of action. [FN15] That is particularly so where, as in this case, the statute expressly declares that the statutory cause of action will exist "[n]otwithstanding any other remedies available," § 553.84, Fla. Stat., and consequently will exist even though the plaintiff also has a breach of contract remedy. The plaintiff's claim under section 553.84 is not barred by the economic loss doctrine. Assuming arguendo the majority is correct, it misapplies its own rule in this case.

For the stated reasons, the summary final judgment should be reversed.

FN1. Comptech's third amended complaint contained a count asserting that Milam failed to comply with the South Florida Building Code by failing to hire licensed contractors and failing to obtain required permits and inspections. Section 553.84, Florida Statutes (1989), provides that "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 building code standards require certain permits to be obtained prior to constructing or altering a building. § 553.79(1), Fla. Stat. (1989).

FN2. The dissent attempts to blur this distinction by reasoning that the ELR can never apply to a statutory action since all statutory enactments are independent. Dissent at 30. This analysis serves only to obscure the issues with which we are actually confronted. Simply because the cause of action arises out of a

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statute does not make it an "independent" obligation. Instead, the independence comes from the fact that the claims could not be asserted in a breach of contract action. For instance, in Rubio v. State Farm & Casualty Co., 662 So.2d 956 (Fla. 3d DCA 1995), we allowed a statutory claim against an insurer, despite the ELR, where the statutory cause of action provided for a recovery to the insured not contemplated by contract. The statute in Rubio extended to insureds a cause of action for bad faith by an insurer in covering the insureds' own claims. Prior to the statute's enactment, there was no common law cause of action for bad faith involving an insured's own claim, only when the claim involved a third party. See Rubio, 662 So.2d at 957. As there was no contractual or common law basis on which the insured could sue, the statute created a duty completely independent of what was conceived in the contract and thus the ELR was not triggered. In contrast to the dissent's construction, the ELR does not swallow up any statutory cause of action which creates a duty independent of contractual obligations. See Stallings v. Kennedy Electric, Inc., No. 97-1412 (Fla. 5th DCA May 1, 1998)(independent Section 553.84 cause of action not barred by ELR; there was no contract between the homebuyer and the subcontractor related to any Section 553.84 duty).

FN3. The dissent inaccurately contends that "The practical effect of the majority's ruling is to eliminate the statutory cause of action." Dissenting opinion at ----. This is incorrect. The statute continues to provide a remedy in noncontractual settings for those injured as a result of building code violations. See supra note 2; Stallings v. Kennedy Electric, Inc., No. 97-1412 (Fla. 5th DCA May 1, 1998). While most cases in Florida citing to Section 553.84 either ignore or dismiss the statutory cause of action, those that do acknowledge a cause of action under the statute consistently involve actions independent of a contract between the litigants. See Stallings v. Kennedy Electric, Inc., No. 97- 1412 (Fla. 5th DCA May 1, 1998)(independent Section 553.84 cause of action not barred by ELR; there was no contract between the homebuyer and the subcontractor related to any Section 553.84 duty); Edward J. Seibert v. Bayport Beach and Tennis Club Ass'n, Inc., 573 So.2d 889 (Fla. 2d DCA 1990), review denied, 583 So.2d 1034 (Fla.1991)(architect held potentially liable to condominium association where architect's alleged negligent design preceded condominium owners' control of the association); Sierra v. Allied Stores Corp., 538 So.2d 943 (Fla. 3d DCA 1989) (restaurant patron had cause of action against restaurant and mall for injuries sustained from improperly vented exhaust pipe).

FN4. We note further that under the circumstances of this case, we are not confronted with a statutory manifestation of a legislative policy decision to expand remedies for recovering economic losses. Cf. Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., No. 96-1692 (Fla. 2d DCA March 21, 1997)(economic loss rule not a bar to consumers' contract-based claims brought under the Florida Deceptive and Unfair Trade Practices Act because of underlying legislative policy "that the consuming public is entitled to expanded remedies for recovering economic losses suffered as a consequence of deceptive and unfair trade practices and acts.")

FN5. We have not overlooked that each of the four dismissed counts, including the building code count, presented an entirely new claim, the litigation had been ongoing for two years, and trial of the case had already commenced when the court allowed Comptech to amend its second amended complaint, allegedly to conform to certain evidence which had been improperly presented at trial. Comptech did not allege any control duty by Milam over its independent contractors and the construction agreement between the contractors and Milam did not implicate any such duty. Without expressing any opinion on this issue, we note that:

Although the South Florida building code provides that compliance is the responsibility of the owner, the code does not impose a duty on a landowner to supervise construction undertaken by an independent contractor. Brown v. South Broward Hosp. Dist., 402 So.2d 58 (Fla. 4th DCA 1981). See also City of Miami v. Perez, 509 So.2d 343 (Fla. 3d DCA 1987), rev. den., 519 So.2d 987 (Fla.1987); Skow v. Department of Transp., 468 So.2d 422 (Fla. 1st DCA 1985) (no explicit duty on a property owner to monitor, inspect or correct safety violations by an independent contractor); Van Ness v. Independent Constr. Co., 392 So.2d 1017 (Fla. 5th DCA), rev. denied, 402 So.2d 614 (Fla.1981) (owner has no common-law duty to supervise independent contractor's work). Liability, under the code, and in accordance with common-law principles, is imposed on "the person or party who committed the violation." § 553.84, Fla. Stat. (1987).

Sierra v. Allied Stores Corp., 538 So.2d 943, 944 (Fla. 3d DCA 1989).

FN6. The dissent argues, and we agree, that an indemnity clause which indemnifies against the indemnitee's own negligence must express such intent in clear and unequivocal terms. See Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487 (Fla.1979). However, this principle is only applicable where the damages are occasioned solely by the indemnitee's own negligence. See Transport International Pool, Inc. v. Pat Salmon & Sons of Florida Inc., 609 So.2d 658 (Fla. 4th DCA 1992).

Here, the alleged damage was caused by the

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contractor's substandard construction in failing to prevent excessive dust and dirt from being absorbed by the air conditioning system and by interrupting and overloading the electrical system. Comptech has failed to allege any conduct separate and apart from the contractual obligations owed to Comptech by Milam which could constitute direct negligence supporting an independent tort. Thus the foregoing principle asserted by the dissent is inapplicable to invalidate the indemnity provision. See Transport International, 609 So.2d at 660.

Moreover, while our disposition of this case rests on the application of the ELR, we cannot help but reflect that the contractual language used in the indemnification agreement sufficiently manifests the parties clear and unequivocal intent to indemnify Milam for any of its own acts of negligence. See Joseph L. Rozier Machinery Co. v. Nilo Barge Line, Inc., 318 So.2d 557 (Fla. 2d DCA 1975), cert. denied, 328 So.2d 843 (Fla.1976).

The problem in Charles Poe was that the contract language provided the lessee would assume responsibility "for claims asserted by any person whatever." Charles Poe, 374 So.2d at 489. This language did not specifically express an intent to indemnify the lessor for the lessor's own active negligence.

By contrast, the indemnification agreement entered into by Comptech specifically indemnified Milam from all claims resulting from any negligence: "Lessor shall not be responsible or liable at any time for any defects, latent or otherwise, in any building improvements in the Demised Premises or any of the equipment, machinery, utilities, appliances or apparatus therein ... resulting from any defect or negligence in the occupancy, construction, operation or use of any building or improvements in the Demised Premises, or any of the equipment, fixtures, machinery, appliances of apparatus therein." (Emphasis added.) We think this language clearly expresses the parties intent that Milam be held harmless for any acts of its own negligence. See Winn Dixie Stores, Inc. v. D & J Constr. Co., 633 So.2d 65 (Fla. 4th DCA 1994); Etiole Int'l N.V. v. Miami Elevator Co., Inc., 573 So.2d 921 (Fla. 3d DCA 1990); Middleton v. Lomaskin, 266 So.2d 678 (Fla. 3d DCA 1972).

Regardless of the validity of the indemnification clause, its relevance for purposes of our analysis is that it reflects Comptech agreed to negotiate rights regarding the risk of the alleged property damage. The indemnification clause thus supports the conclusion that the alleged damages do not constitute a tort separate and apart from the breach of contract.

FN7. Instead, realizing after-the-fact the ramifications of its ineffectual bargaining skills, Comptech filed suit seeking damages not only for the actual value of the computers, but for all business that was lost as a result of the computer damage, including punitive damages, for a total in excess of $7,000,000.00. To allow tort recovery under these circumstances is absurd. A landlord should not be responsible for the entire business losses of its commercial tenant where both parties had the ability to freely allocate the risks of potential mishap.

FN8. This is not to say that circumstances could never arise under which there is a claim in tort for damage to a tenants property, but only that such circumstances are not present in this case. In fact, we agree with the dissent that there are circumstances where "a landlord-caused injury to a tenant's property within the leased premises qualifies as property damage for purposes of the economic loss doctrine." Dissenting opinion at ----. But the dissent misses the point that in order to qualify as "other property," the damaged items must not have been within the contemplation of the parties' bargain. In other words, no "other property" can be damaged, where the property at issue was the subject of the contract. That is precisely the case here.

The agreement to build the addition was for the purpose of developing Comptech's computer business. Comptech was in the business of providing computer hardware distribution which involved testing computer components and peripheral equipment. The purpose for entering into the construction agreement and lease was to accommodate Comptech's plans for expanded sales growth. Obviously the computer business was the object of the parties commercial lease bargain.

FN9. The dissent improperly relies on the recent United States Supreme Court decision of Saratoga Fishing Co. v. J.M. Martinac & Co., --- U.S. ----, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997), to support the proposition that the tenant may proceed in tort.

The facts in Saratoga involved a defective product in the context of resale to a subsequent user. The Supreme Court quite logically held that equipment added to a product after it has been sold to a subsequent user is not part of the original product itself and therefore constitutes "other property." Saratoga, --- U.S. at ----, 117 S.Ct. at 1789.

Although recognizing an exception to the ELR, the Court stressed the limited applicability of its ruling and the importance of the economic loss doctrine in continuing to limit the potential for imposing too great a tort liability upon manufacturers and distributors. Noting that the decision narrowly applied the exception to equipment added to a product after resale to a subsequent purchaser, the Court emphasized: "Our holding merely maintains liability, for equipment added after the initial sale, despite the presence of a resale by the Initial User." Saratoga, --- U.S. at ----, 117 S.Ct. at 1788.

In essence, the Court's ruling simply extended the benefitof-the-bargain analysis to subsequent

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purchasers by allowing them to inherit the initial user's claims. Because the added materials to the boat in Saratoga were not part of the bargainedfor original agreement between the manufacturer and the initial user, they clearly fell under the "other property" exception to the ELR.

The facts in the present case are clearly distinguishable. Comptech concerns a bargained-for lease agreement; not a product sold to subsequent users after equipment was added. The computers were not added to a product, but were part and parcel of the parties' contemplated agreement at all times. Moreover, risk to the computers was specifically contemplated by the parties as evidenced by the terms of the build-out agreement and the explicit indemnification provision covering potential liability. We are confident that the preceding analysis and a common sense reading of Saratoga mandate this opinion.

FN10. By having the freedom to contract, parties can plan and predict their potentials for loss at the beginning of the business relationship. Commercial entities are especially capable of protecting themselves through negotiation or insurance, or they may choose to assume the risk. Even where a commercial loss does trigger the "other property" exception, damages must be limited to the actual value of the damaged property to protect society's interest in the performance of promises. Otherwise, "the ground's gonna swallow" the process of negotiation and the fulfillment of contracts, resulting in adverse economic and societal consequences. Everything But The Girl, Wrong, on Walking Wounded (Atlantic Recording Corporation 1996).

FN11. For present purposes, the tenant's version of the facts must be accepted as true since this is an appeal from the granting of summary judgment for landlord.

FN12. In a footnote, the majority opinion says that *tenant* "did not allege any control duty by [landlord] over its independent contractors and the construction agreement between the contractors and [landlord] did not implicate any such duty." Majority opinion at ---- n. 5.

The tenant's claim in this case is that the landlord was negligent in (1) hiring an unlicensed, unqualified construction company, (2) failing to prepare architectural plans, and (3) failing to obtain required permits. These are claims that the landlord itself was negligent.

Since tenant alleges direct negligence on the part of the landlord, it is not necessary at this time to consider the existence or extent of the landlord's liability for the acts of the unlicensed contractor.

FN13. It may be that the tenant will be unable to establish a causal nexus between the statutory violation and the injury the tenant sustained. See Saratoga Fishing, --- U.S. at ----, 117 S.Ct. at 1788 (stating that other tort principles, including foreseeability and proximate cause, limit tort liability in important ways). The only issue before us at this time is whether the statutory cause of action is defeated by the economic loss doctrine.

FN14. Contributing to the confusion in this area of the law, cases can be found which have applied the economic loss doctrine to bar recovery under the statutory cause of action for civil theft, section 772.11, Florida Statutes. See Sarkis v. Pafford Oil Co., 697 So.2d 524 (Fla. 1st DCA 1997); see also Hoseline, Inc. v. U.S.A. Diversified Prods., Inc., 40 F.3d 1198 (11th Cir.1994).

These cases rest on faulty assumptions. The economic loss doctrine does not apply to civil theft claims because the statute precludes it:

772.18 Cumulative remedy.--The application of one civil remedy under this chapter does not preclude the application of any other remedy, civil or criminal, under this chapter or any other provision of law. Civil remedies under this act are supplemental, and not mutually exclusive.

(Emphasis added). By legislative declaration, the statutory causes of action for civil theft (and, for that matter, section 772.104, Florida Statutes, the cause of action for racketeering) are in addition to any other remedies--and therefore are in addition to any remedy which might exist for breach of contract.

There is, to be sure, a line of cases holding that a *simple failure to pay money owed under a contract* does not constitute civil theft. The line of cases originates with this court's decision in Rosen v. Marlin, 486 So.2d 623 (Fla. 3d DCA 1986), and rests on the idea that a civil theft occurs only if there has been an outright taking of property. See id. at 625-26. A simple failure to pay money owed is neither a taking nor a theft. See id. By contrast, an escrow agent's theft of escrow funds is both a breach of the escrow contract and a civil theft because there has been a taking. See id.; Masvidal v. Ochoa, 505 So.2d 555, 556 (Fla. 3d DCA 1987).

At bottom, Rosen and its progeny simply define the elements of the relevant causes of action. Rosen was decided in 1986, a year before the Florida Supreme Court announced its adoption of the economic loss doctrine in Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d at 900-02.

The above analysis applies with equal force to the suggestion in Sarkis that the economic loss doctrine has been applied to bar civil racketeering claims. See Sarkis, 697 So.2d at 528.

FN15. The Fifth District Court of Appeal so held in Stallings v. Kennedy Electric, Inc., No. 97-1412 (Fla. 5th DCA May 1, 1998), and certified conflict

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with this panel's previously released opinion to the contrary.

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PRELIMINARY STATEMENT

In this Brief, the Appellants, Stallings, et. al., will be referred to by name or as the Plaintiffs. The Appellee will be referred to as Kennedy or as the Defendant.

References to the record will be made in the symbol (R) followed by the page number or numbers.

STATEMENT OF THE CASE AND OF THE FACTS

This is an Appeal from an Order Dismissing Plaintiffs' Fourth Amended Complaint with prejudice (R 238-240) where the trial Court found as a matter of law that the Stallings could not plead any cause of action which was not barred by the "economic loss rule". On November 27, 1989, a fire mysteriously occurred inside a sealed wall cavity of the Stallings' newly built home. Fire Marshals and insurance investigators determined that the fire was caused by faulty electrical work during the construction of the home. The home was repaired and reoccupied. In December, 1990, a second fire occurred in the attic of the home and again Fire Marshals and insurance investigators found faulty electrical wiring to be the cause of the fire. The second fire caused extensive damage to the home, including a large gaping hole in the roof, and to this day the house sits uninsurable, uninhabitable and unalienable. The Stallings' homeowner's insurance coverage limited repair cost to only the "damaged" portion of the house and the policy coverage extended to only a portion of the personal property which was damaged. The policy did not require the insurer to rewire the house as a whole, which is the only measure which would render the house insurable, habitable or alienable. With the home and contents suffering ever increasing damages, the Stallings accepted the homeowners policy limit and applied the monies to the existing mortgage to stave off foreclosure. After six years of litigation, the uninhabited, uninsurable and unalienable home is subject to a pending foreclosure action, Putnam County Circuit Court, Case No: 93-5346-CA-52. The foreclosure has been repeatedly stayed and is now set for final hearing. A Motion to Stay the foreclosure has been filed and set for hearing in hopes of holding the foreclosure in abeyance until this appeal is heard.

In the brief amount of time that spanned the completion of the home until the second fire, the general contractor who had built the Stallings' home went out of business. The Stallings' counsel thereafter brought this action for damages against the electrical contractor.

The five year history of the litigation was one-third dedicated to discovery and two-thirds dedicated to the litigation of the application of the economic loss rule. On October 15, 1991, less than two (2) months after this suit was filed, the Third District Court of Appeal announced the landmark decision of Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 588 So. 2d 631 (Fla 3d DCA 1991), creating a clear and direct conflict with Kramer v Piper Aircraft Corporation, 520 So.2d 37 (Fla. 1988) and Navajo Circle, Inc. v Development Concepts, 373 So.2d 689 (Fla. 2d DCA 1979) as well as conflicting with a number of other district level decisions. Casa Clara was affirmed by the Florida Supreme Court in 1993, Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993), one and one-half years (1 ½) after this lawsuit was initiated and two (2) years after the fire. The history of the three amended pleadings is the history of Casa Clara and its progeny. By the Third Amended Complaint (R 176-178) the expansion of the economic loss rule slowed to a point where what was, and what was not, barred by the economic loss rule became slightly more distinct: the damage to the Stallings' personalty, the home's contents, was critical; the factual presence of the same statutory cause of action which was found to be factually deficient in Casa Clara was viable; finally a cause of action unique to the facts of this case - facts which when combining the negligent code violation creating an electrical fire hazard to a foreseeable party

with a lack of privity would establish a recognized action, independent of the economic loss rule. The Fourth Amended Complaint (R 197-203) sought economic damages for the personalty not covered by insurance, costs of alternative residency, diminution of value, the complete rewiring of the entire home as well as other economic injuries caused by the fire, some but not all separate from the damage to the product itself. Plaintiffs' counsel could achieve this by first simply incorporating, in its recitation of general facts alleged, a reference to the personalty that the Stallings lost to flames, smoke damage, by fire hoses and rain which entered the large hole in the roof. Second, negligence per se should clear the hurdle of the economic loss rule by pleading a violation of a county ordinance regulating a dangerous instrumentality where there was not privity. Third, an independent cause of action created by the Florida State Legislature could be pled and met under the violation of the State building code statute. The Plaintiffs moved to amend their Third Amended Complaint (R 176-178) and the trial Court granted leave to Amend (R 185). The Defendant responded to the Fourth Amended Complaint (R 197-203) with a Motion for Dismissal with prejudice (R 219-221) in which they alleged that the Plaintiffs' attempt to amend "damage to other property" was so flawed by typographical error that the Court could not clearly find that the amendment met the now recognized exception to the economic loss rule and further argued to the Court that neither the negligence per se nor the independent statutory cause of action are exceptions to the economic loss rule. The Court on March 3, 1997 entered an Order Dismissing with prejudice all counts of the Plaintiffs' Fourth Amended Complaint. (R 238-240) Appeal was taken on the Order of dismissal (R 238-240) as well as, pursuant to Fla.R.App.P. 9.110(h), of any and all interlocutory orders preceding the final order.

SUMMARY OF THE ARGUMENT

For every wrong there is a remedy and in finding that remedy the law will not let justice suffer by means of clerical mistake or judicial fiat. To find otherwise offends Article I, § 21 of the Florida State Constitution which guarantees a citizen's access to Courts, as well as offending the separation of powers doctrine found in Article III §§ 1 and 3.

The Fourth Amended Complaint (R 197-203), in support of Count I, contains a paragraph not found in the previous complaint (R 28-31) in which the Plaintiffs attempt to plea the "damage to other property" exception to the economic loss rule. In that critical recitation, the pleading filed with the Court contained a typographical error. Clerical error should not constitute grounds for dismissal. Accepting paragraph six (6) as an obvious clerical error which attempts to plead "damaging personalty therein", an exception to the economic loss rule has been clearly plead.

Negligence per se, pled in Count II, is not, by definition, subject to the privity of contract-contemplation of risk public policies upon which the economic loss rule is based. Electrical wiring is a dangerous instrumentality which establishes negligence per se and is also the type of building code that when violated constitutes negligence per se. Count II, from two different perspectives, establishes negligence per se and thereby meets an exception to the economic loss rule.

The progeny of Casa Clara have clearly articulated that an independent cause of action created by the legislature is not subject to the judicially created limitations of the economic loss rule. Count III is just one of the several independent causes of action that has been recognized as an exception to the economic loss rule. The statutory cause of action - violation of a building

code, is one of the same causes of action expressly discussed by the Third District Court of Appeals in Casa Clara itself and has never been a statute whose constitutionality has been questioned. To abolish the statutory action by means of the judicially created economic loss rule would constitute a violation of the separation of powers doctrine and deprive the Stallings of their rights to access the courts and due process of law.

ARGUMENT

POINT I: THE LOWER COURT ERRED IN ENTERING AN ORDER DISMISSING WITH PREJUDICE COUNT I OF THE PLAINTIFFS' FOURTH AMENDED COMPLAINT BY FAILING TO RECOGNIZE THAT A CLERICAL ERROR IN THE PLEADING SHOULD NOT FORM THE BASIS OF A DISMISSAL WITH PREJUDICE.

A comparison of the Third Amended Complaint (R 28-31) and the Fourth Amended Complaint (R 197-203) clearly reveals a new paragraph 6 being added to the general recitation of facts so as to easily be incorporated into all counts. It stated with great ambiguity "Approximately one year later, a second fire damaged Plaintiff's new home. The fire arose in the attic of the Plaintiff's home and various personalities contained therein and arose at a point where a staple had been driven through a electrical wire." Clearly, the fire did not arise in "various personalities" (sic). Plaintiffs' attempt to incorporate a simple and easy recitation of the very real damage caused to the Plaintiffs' personalty should have clearly avoided application of the economic loss rule. That it was Plaintiffs' intent to plead this exception to the rule of Casa Clara need not depend on the trial court accepting the representation of two of its officers. A comparison of the two complaints reveals clearly that an additional statement has been added to the Fourth Amended Complaint (R 197-203) and that statement contains a typographical error. The sentence was supposed to read "Approximately one year later, a second fire damaged Plaintiffs' new home. The fire arose in the attic of the Plaintiffs' home and arose at a point where a staple had been driven through a electrical wire. The fire damaged the home and various personalty contained therein." Simple solution - bad editor. It is undoubtedly inartful drafting to allow a typographical error to enter an amended pleading in which a critical portion of the

amendment is the very sentence which contains the typographical error. Unfortunately, in the world of three draft legal writings, acceptable paragraphs can become flawed with clerical errors in the last edition that render pleadings patently and embarrassingly ambiguous. Thankfully, so common are clerical errors, in a field where each practitioner produces thousands of pages of writing a year, that there is long established case law addressing clerical errors which is entirely unambiguous. Clerical errors should not constitute grounds for dismissal with prejudice, Conklin v Smith 191 So 2d 313 (Fla 1st DCA 1966), and curable defects should not be dismissed with prejudice. Johnson v Bailey v Southeast Brake Corporation, 517 So. 2d 776 (Fla 2d DCA 1988) The Defendant, having conducted discovery, will not argue before the Court that damage "to other property" does not exist - simply that the sentence containing the typographical error is too ambiguous and too poorly drafted to recognize.

Doubts as to whether the amendment could cure the defect should be resolved in favor of allowing an amendment. Weich v Cook, 250 So.2d 281, 282 (Fla. 1st DCA 1971) The Response to the Motion for leave to amend the third amended pleading did not reference the typographical error nor was it raised by either party in the hearing on the Motion to Amend. The typographical error surfaced in the hearing on the Motion to Dismiss with prejudice, the lower court was then proffered an honest explanation which should have resulted in an amendment rather than dismissal. Even if the Court felt that the amendment would not result in a statement of a viable cause of action, amendment rather than dismissal should have been ordered. Petterson v Concrete Construction, Inc., 202 So.2d 191, 197 (Fla. 4th DCA 1967). The Defendant, having completed

discovery, provided no showing of genuine prejudice which would result from amending the proffered typographical error nor was there any argument that amending the typographical error would be tantamount to a procedural abuse or even that the amendment would be futile. A Motion for Rehearing (R 241-144) of the Motion to Dismiss provided to the trial court the case law on clerical errors but the Court did not find the grounds raised sufficient to grant a Rehearing. (R 249)

POINT 2: THE LOWER COURT ERRED BY ENTERING AN ORDER DISMISSING WITH PREJUDICE COUNT II OF PLAINTIFFS' FOURTH AMENDED COMPLAINT ON THE BASIS OF A CAUSE OF ACTION ALLEGING NEGLIGENCE PER SE BEING BARRED BY THE ECONOMIC LOSS RULE.

A violation of a building code by those governed by it will provide the basis for a statutory cause of action under Florida Statute 553, but may not always constitute grounds for a cause of action in strict liability or negligence per se. However, the rule of de Jesus v Seaboard Coast Line R.R. Co., 281 So.2d 198 (Fla. 1973), requires an analysis of whether or not the ordinance in question regulates a type of activity that when violated makes for a primae facie showing of negligence or negligence per se. When a violation of building code is a code provision which regulates a dangerous instrumentality or when the code provision in question protects a particular class of individuals from a particular type of harm rather than protecting the general public from unspecified harms, violations constitutes negligence per se. de Jesus, see also Edward J Seibert. A.I.A, P.A. v Bayport Beach & Tennis Club Ass'n, 573 So.2d 889, at 892 (Fla. 2d DCA 1991). The Plaintiffs' position in pleading Count II of the Fourth Amendment Complaint (R 197-203) that the violation of the electrical code is a violation of the type of ordinance or statute which constitutes negligence per se has direct precedence. Brown v South Broward Hosp. District, 402 So. 2d 58 (Fla. 4th DCA 1981) This position is further supported by two different perspectives: The first being that electrical wiring is a dangerous instrumentality implanted in sealed wall cavities and remote attic crawl spaces for which latent defects will only be discovered upon perilous and potentially tragic occurrences. Secondly, the National Electrical Code, Article 336-1, 336-3, 336-10, 336-12, 336-13, 336-15, incorporated into building codes around the state,

including Putnam County, is the type of ordinance designed to protect a particular class of individuals from a particular type of harm. The electrical code is a major portion of the fire safety code, and as stated in Del Risco v. Industrial Affiliates, 566 So.2d 1148 (Fla. 3d DCA 1990) "It matters not what county code a fire safety provision is contained so long as it is in fact a fire safety provision..." Del Risco at 148, see also John's Pass Seafood Co. v. Weber, 369 So.2d 616 (Fla. 2d DCA 1979); Concord Florida, Inc. v. Lewin, 341 So.2d 242 (Fla 3d DCA 1976) cert. denied 348 So. 2d 946 (Fla. 1977), see also Florida Statute 553.72. It can not be doubted that the electrical code, whether it is found in Putnam County's building code or in a separate state statute, meets the necessary de Jesus analysis far more easily, for example, than the elevator safety codes which are routinely found to be statutory violations which constitutes negligence per se. see Szilagyi v North Florida Hotel Corp., 610 So.2d 1319 (Fla. 1st DCA 1992) and Nicosia v Otis Elevator Company, et al, 548 So.2d 854 (Fla. 3d DCA 1989)

That a violation of Florida Statute Chapter 553 and of the local County Building Code creates an independent tort was established in the pre Casa Clara case of Sierra v Allied Stores Corp., 538 So.2d 943, 944 (Fla. 3d DCA 1989). That independent torts survive Casa Clara has been affirmed by various District Courts including Casa Clara's authors the Third District Court of Appeals. see Greenburg v Mount Sinai Medical Center, 629 So. 2d 252 (Fla. 3d DCA 1993) see also, Community Bank of Homestead v. Boone, 164 B.R. 167 (Bankr. S.D. Fla. 1994); GNB, Inc. v United Danco Batteries, Inc., 627 So.2d 492 (Fla. 2d DCA 1993), c.f., AFM Corporation v Southern Bell Telephone and Telephone Company, 515 So. 2d 180, 181, 182 (Fla. 1987).

Negligence per se for a code violation such as the instant one constitutes an action for negligence per se which is not barred by the economic loss rule.

POINT 3: THE COURT ERRED BY ENTERING AN ORDER DISMISSING WITH PREJUDICE PLAINTIFFS' COUNT III OF THE FOURTH AMENDED COMPLAINT ON THE BASIS THAT THE ECONOMIC LOSS RULE BARS AN INDEPENDENT STATUTORY CAUSE OF ACTION FOR VIOLATION OF A BUILDING CODE.

An action under Putnam County Code and Florida Statute 553.72 for violation of the building code was dismissed as a cause of action for negligence per se in Count II, but it was also dismissed as independent cause of action for the same reason - the economic loss rule. The Florida Legislature created an independent action for violation of the building code and though pled and dismissed in Casa Clara, it was dismissed not because it was barred by the economic loss rule. In Casa Clara, the concrete supplier, Toppino, had been sued in a multi-count complaint, one count of which was a statutory violation of the building code as it is in this case. The Third District Court of Appeal in affirming the dismissal of that Count against Toppino found ". . . as a material supplier, Toppino is not charged with a duty of compliance of the State Minimum Building Codes". Casa Clara at 634. The Casa Clara holding, rather than eliminating Count III of the Stallings' cause of action, clearly indicates that Toppino may have been found liable for a violation of Florida Statute 553, if like the Defendant herein, he had been a contractor. Toppino was simply not within the class of persons regulated by that chapter. As stated on the District level, "It is not alleged that Toppino performed any **construction**, erection, alteration, repair or demolition of the structures. Therefore as a material supplier, Toppino was not charged with a duty of compliance with the State Minimum Building Codes. Absent a duty under the code, the homeowners cannot bring an action against Toppino for violating the code." (emphasis added) Casa Clara at 648. The Florida Supreme Court, in Casa Clara at 1246, affirmed the Third District Court of Appeal's analysis as to the building code violation.

The language in Casa Clara, relative to Florida Statute 553.84, is arguably not essential to the Supreme Court's holding, however, it is left clear in AFM Corporation v Southern Bell Telephone and Telephone Company, 515 So. 2d 180, 181, 182 (Fla. 1987) and in the post Casa Clara decisions, supra, that an independent tort is not entirely barred by the economic loss rule even though there may be only economic losses. The action herein is separate and independent from the contract. AFM Corporation at 181 The statute itself is explicit in what considerations contract remedies should merit, it states:

> **Notwithstanding any other remedies available**, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part of 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. (emphasis added) F.S. 553.84

Although the statute renders the questions raised by the judicial convolutions moot, it should be noted that the Stallings' were the foreseeable third party beneficiaries of the construction contract between the general contractor and Kennedy. However, if they had been in constructive privity of contract, and were a foreseeable and specifically identifiable third party, their situation cannot be remedied by a contract action and cannot be distinguished from the status of the Plaintiff in Southland Construction, Inc. v. The Richeson Corp., 642 So.2d 5 (Fla.5th DCA 1994). Their economic losses not only exceed a disappointed economic expectation, but exceeds the acceptable scope of damages in a contract action whether first party or third party beneficiary. Also moot, but notable, is that the frequently touted prophylactic measures required of buyers, such as insurance, were undertaken but ineffective. With no privity came no warranties. Inspection and discovery of the defect by the buyer was impossible. There were no known

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defects to be disclosed by a seller and the defect could not be a contemplated risk included in the bargaining of the purchase price. The logic and intent of the economic loss rule is absent. The intent of the legislature is clear.

> The purpose and intent of this act is to provide a mechanism for the promulgation, adoption, and enforcement of state minimum building codes which contain standards flexible enough **to cover all phases of construction** and which will allow reasonable protection **for public safety**, health and general welfare for all people of Florida and **at the most reasonable cost to the consumer.** (emphasis added) Florida Statute, §553.72

The statutory cause of action created by the Florida Legislature is separate and independent from any contract action whether one looks at pre Casa Clara rulings on Florida Statute 553.84, the analysis of Casa Clara itself or the post Casa Clara cases, supra. The legislative creation of a statutory cause of action can not be doubted to be independent and separate from the economic loss rule. To find otherwise would be to expand the economic loss rule beyond its present state and diminish rather than limit tort law, Southland Construction, Inc. More fundamentally, it would also constitute a violation of the doctrine of separation of powers found in Fla. Const. Art. III.

Although the legislature may abolish common law actions, Rotwein v Gerstein, 36 So.2d 419 (Fla. 1948), the judiciary cannot substitute its judgment for the legislature in so far as the wisdom and policy of an act is concerned and can only amend, change, modify, suspend or repeal a valid law if it is found to violate the supreme law of the land. State ex rel. Railroad Comrs. v Louisville & N.R. Co., 57 So. 175 (Fla. 1911) and Board of Public Instruction v Brown, 154 So. 850 (Fla. 1934). If the Court, in its development of the common law, abolishes or limits a

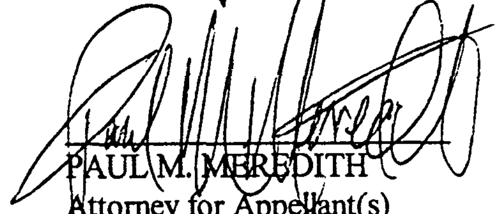
common law cause of action, the judiciary is within its constitutional role. However, the Court cannot, in developing the common law, abolish or nullify statutory acts. The economic loss rule is a court created doctrine, Southland Construction at 1995, the legislature created the independent statutory tort. If the Order Dismissing with prejudice Plaintiffs' statutory cause of action in Count III (R 238-240), stands as to Plaintiffs' statutory cause of action, the lower Court has in effect ruled on the constitutionality of Florida Statute 553 without that question being before it. As such, its ruling would violate the Plaintiffs' rights to due process.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully submits that the Order Dismissing Plaintiffs' Fourth Amended Complaint should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Kelly Pritchard, Post Office Box 850, Gainesville, Florida 32602 and John F. Sproull, 314 St. Johns Ave., Palatka, Florida 32177 by U.S. Mail on this 2 day of Sept., 1997.



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