IN THE SUPREME COURT
STATE OF FLORIDA

KENNEDY ELECTRIC, INC.
Petitioner,

vs.

CARL STALLINGS, JR., etc.,
et. al.,
Respondents.
_____/

CASE NO.: 93, 126
5DCA 97-1412

~~REPLY~~ BRIEF OF RESPONDENTS

CARL STALLINGS, JR., ETC., ET AL.

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Case No: 93,126

Kennedy Electric, Inc. v. Carl Stallings, Jr., etc., et. al

CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent/Plaintiffs Carl Stallings, Jr., et. al., certifies that the following

persons and entities have or may have an interest in the outcome of this case:

1. Paul M. Meredith
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   (Respondent)

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8. John Beranek
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10. Carl Schwait
    (counsel for Petitioner)

11. The Honorable A.W. Nichols, III
    (Circuit Court Judge)

12. Kennedy Electric, Inc.
    (Petitioner)

CERTIFICATE OF TYPE SIZE AND FONT

The Respondents, Stallings, by and through the undersigned counsel, hereby certifies that the type used in this Reply Brief is Arial 14 point.

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PRELIMINARY STATEMENT

In this Brief, the Petitioner, Kennedy Electric, will be referred to by name or as the Defendant. The Respondents will be referred to as Stallings or as the Plaintiffs.

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 a Petition from an Order Reinstating Plaintiffs' Fourth Amended Complaint, Count III, where the Fifth District Court of Appeal found as a matter of law that the Stallings' statutory cause of action could not be barred by the economic loss rule.

On November 27, 1989, a fire 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 a remote 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 inalienable. 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 Stallings' insured their home with standard homeowners insurance. However, 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, inhabitable or alienable. Petitioners in their presently pending brief, editorialize that the Stallings have had "the best of all worlds". This apparently fortunate state in which the Stallings found themselves is one in which no insurance company would insure the house without a complete rewiring of the home and the Stallings themselves could not spend the night in the home with risking death by fire. The Stallings had no option but to apply the insurance monies to their mortgage rather than repairing the house. They, very unhappily, were forced to mitigate their damages in a manner which left them homeless. It is interesting to note that the Petitioner, in page 11 of their brief, goes so far in attempting to cite prejudicial facts as to claim that "the problem is of their own making". These inaccurate factual assertions by Petitioner resemble the red herring of latches that they raise throughout their brief, a strawman which was never contested in the trial court and is simply a non issue which distracts from the essential matters before this court. 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 the foreclosure which resulted from the home's uninsurability and

uninhabitability. After six years of litigation, the uninhabited, uninsurable and inalienable home is subject to a stayed pending foreclosure action, Putnam County Circuit Court, Case No: 93-5346-CA-52. The foreclosure has been repeatedly stayed and now awaits this Court's ruling.

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 malfeasant electrical contractor.

The five year history of the trial 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; more importantly, the factual presence of the same statutory cause of action which was found to be factually deficient in Casa Clara was viable. 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. 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, Florida Statute 553.72. The Plaintiffs moved to amend their Third Amended Complaint and the trial Court granted leave to Amend (R218). The Defendant responded to the Fourth Amended Complaint with a Motion for Dismissal with prejudice (R219-221) in which

they alleged among other things that the independent statutory cause of action is not an exception to the economic loss rule. The trial court, on March 3, 1997, entered an Order Dismissing with prejudice all counts of the Plaintiffs' Fourth Amended Complaint (R238-240) Appeal was taken on the Order of Dismissal (R252-254). The Fifth District Court of Appeal heard argument on April 1, 1998 and thereupon reinstated Count III of the Fourth Amended Complaint finding that the economic loss rule is a judicial doctrine that could not be used to strike down statutory causes of action. This decision by the Fifth District Court of Appeal came, not withstanding the then recent Third District Court of Appeal's decision Comptech Int'l, Inc., v. Milam Commerce Park, 22 Fla. L. Weekly D2192 (Fla. 3d DCA September 17, 1997), (hereinafter referred to as Comptech I), wherein that majority rejected a vigorous dissent in which it was argued that using the economic loss rule to strike down this same statutory cause of action was nothing less than a violation of the separation of powers doctrine.

After the Fifth District Court of Appeal's ruling in this case, the Third District Court of Appeal reissued Comptech Int'l, Inc., v. Milam Commerce Park, 23 Fla. L. Weekly D1257 (Fla. 3d DCA May 20, 1998), (hereinafter referred to as Comptech II), so as to reconcile the perceived conflict

between the appellate courts. The reconciliation was based on the Stallings' pleadings which alleged that there was a statutory duty in a setting of non-privity. It is important to remember that this case is before the Court on a Motion to Dismiss as a matter of law and Petitioner's argument that there are factual distinctions found in the appellate briefs belie the procedural mechanism which brought this case to this Court. An appellate court must accept facts alleged in a complaint as true when viewing Order that determines sufficiency of that complaint. Sarkis v Pafford Oil Company, 697 So.2d 524, 528 (Fla. 1st DCA 1997) It is further interesting to note that the Petitioner objected in the brief before the appellate court to the suggestion of facts that were presented in the Stallings brief but now attempts to use those same generalized facts as grounds which can be used to interpret a Motion to Dismiss. Although Latite Roofing Company v. Urbanek & Kohl, 528 So.2d 1381 (Fla. 4th DCA 1988) was disapproved in Casa Clara, infra, the concept that a lack of privity of contract between the parties is relevant to the application of the economic loss rule has survived that disapproval. We are reminded in Sandarac v Frizzell, infra, that third party beneficiary status is relevant and under Florida contract law has been a matter of contract interpretation. Sandarac Ass'n v. W.R. Frizzell

Architects, Inc., 609 So.2d 1349, (Fla 2d DCA 1992), citing AR Moyer, Inc., v. Graham, 285 So.2d 397 (Fla. 1973) a case which, although limited to its facts, has not been reversed. The critical difference between the instant case and the third party beneficiary analysis of Sandarac, Moyer, and First Florida Bank, N.A., v Max Mitchell & Company,558 So.2d 9 (Fla. 1990) is the statutory duty created by the legislature and violated by Kennedy Electric. In AFM Corporation v Southern Bell Telephone and Telephone Company, 515 So. 2d 180 (Fla. 1987), the "supervisory responsibility" doctrine, which has become a well established exception to the economic loss rule, was cited as a duty that was "concurrent" to the contractual duty. In the instant case, the statutory duty is concurrent to any contractual duties which may or may not have attached by third party beneficiary status.

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 judicial fiat. To find otherwise offends Article I, § 21 of the Florida State Constitution which guarantees a citizen access to Courts, as well as in this case, offends the separation of powers doctrine found in Article III §§ 1 and 3.

Various courts following the rule of Casa Clara have found 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 must be recognized as an exception to the economic loss rule. The statutory cause of action for violation of a building code is a cause of action expressly discussed by the Third District Court of Appeals as well as this Court, in Casa Clara itself and has never been a statute whose constitutionality has been questioned. To abolish this 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. To abolish this statutory cause of action by application of the economic loss rule is to raise a judicially created doctrine designed to limit tort law and delineate tort law from contract law to the level of a constitutional doctrine - which it most clearly is not. The economic loss rule is not a constitutional doctrine nor is it a rule of statutory interpretation.

This Court has three clear and cogent rulings it might follow. The first and narrowest resolution is find that no conflict exists upon which to exercise jurisdiction. This would implicitly adopt the rule suggested by footnote 3 of

Comptech II. Under this finding an exception to the economic loss rule could be, in shorthand, labeled as the "statutory torts where privity is lacking" exception.

A second less narrow ruling would be to find that any statutory action wherein the stated legislative purpose is to allocate societal costs with an intent to expand existing remedies is not subject to the economic loss rule. Under this holding, legislative intent and purpose become the guidepost of whether or not a statutory enactment addresses those issues upon which the economic loss rule is based. Under this holding, regardless of whether or not the legislative enactment is a deviation from judicial policy conclusions, the allocation has been made and must be followed, unless found to be unconstitutional.

The third possible holding is perhaps the broadest possible ruling. Adopting the policy of Judge Dauksch, below, is the cleanest and most cogent ruling- a bright line ruling. Most importantly, finding that the economic loss rule is a judicial doctrine designed to control the growth of common law that therefore cannot be applied to statutory causes of action has the greatest potential for maximum judicial efficacy in application. Although all three holdings described herein would be legally and logically

supportable, it is this third bright line rule which may also, in constitutional regards, be the most correct ruling.

ARGUMENT

ISSUE I. WHETHER THERE IS A CONFLICT BETWEEN THE APPELLATE COURTS UPON WHICH THIS COURT SHOULD EXERCISE JURISDICTION.

ARGUMENT AS TO JURISDICTION

In addressing the question as to whether jurisdiction for this Court exist in this case, Petitioner, both relies on the Comptech court and attempts to discredit it. When this case was first decided by the Fifth District Court of Appeals, it certified the conflict with the recent Third District Court of Appeals decision in Comptech I. However, since this decision was issued, the Third District Court of Appeals reissued its opinion in order to resolve the conflict. The Petitioner asks that this Court rely upon the certification of conflict with Comptech I when the Third District Court of Appeals has issued a new opinion to remove the conflict. The Petitioner asks that this Court read Comptech I and II in two different directions. The first direction, one in which the Petitioner asks this Court to invoke jurisdiction, depends upon the Comptech I decision and the instant opinion in the Fifth District Court of Appeal wherein conflict was certified; yet the

Petitioners second view takes issue with the similar holding of Comptech II wherein the Third District Court of Appeals distinguished the pleadings of Stallings from those of Comptech's.

The Petitioner's disagreement with the Third District Court of Appeal's attempt to distinguish the two cases is based on a simple assertion that the salient footnote #3 of Comptech II is written by authors who do not understand the definition of the term "subcontractor" when discussing privity. The reconciliation between Comptech and Stallings which obviates the conflict giving this Court jurisdiction can be summarized as the following: Florida Statutes Chapter 553 allows for an independent statutory cause of action where the claimant was not in direct privity of contract with the violator of the statutory building code. The Third District Court of Appeal in Comptech II has distinguished Stallings by recognizing that in the Comptech case the general contractor was in direct privity of contract with the claimant at issue, whereas in Stallings the claimant was not. The rule that the Third District Court of Appeals proposes is that the economic loss rule applies to this statutory cause of action except where there is a statutory duty extended to parties who are not part of the bargaining process. The Petitioner requests this court invoke jurisdiction on the basis that the

essential holding of Comptech I and II and the **essential** holding of Stallings are at odds with other case law in how we apply the economic loss rule to foreseeable third party beneficiaries. This is not necessarily the case. The Comptech II authors suggest that the economic loss rule applies, even in statutory causes of action, where the parties were able to negotiate the risk.

The economic loss rule would not apply to any statutory cause of action which creates a remedy for a party who is outside the negotiation. The economic loss rule is a judicial doctrine which allocates risk between parties for economic losses except where there is injury to other property, injury to persons, and when there are exceptional policy considerations. One such policy consideration is where there is a statutory duty which was not subject to waiver through negotiations. This ruling would be consistent with AFM. This analysis is consistent with this court's judicial policies concerning loss/cost/risk allocation, Florida contract law, as well as being consistent with the most basic principles of equity. Where exceptions for the numerous supervisory professions were carved out by the courts as a policy exception to the economic loss rule, the legislature can likewise carve out an exception which hinges upon the question of whether or not the

parties were without privity of contract to negotiate or waive statutory duties. The legislature can create exceptions for unfair and deceptive trade practices or for civil theft and the legislature can, as in the case of Florida Statute Chapter 443, the Workman's Compensation Statute, eliminate causes of action altogether. This analysis is not novel. When we compare Burke v Napieracz, 674 So.2d 756 (Fla. 4th DCA 1992) to Gambolati v. Sarkisian, 622 So.2d 47 (Fla 4th DCA 1993), we see that the court's have already seized on this logical application of the economic loss rule to statutory causes of action. The Petitioner compares the economic loss rule to proximate cause or laches, both of which are false analogies. The economic loss rule is not a rule with which we define the elements of a cause of action nor is it a procedural rule in equity which can be applied by a Court in its discretionary function to insure just results. The reconciliation proposed by Comptech II is consistent with the third party beneficiary analysis used under the "supervisory role" line of cases and does not violate the separation of powers doctrine by effectively eliminating the statutory cause of action.

ISSUE II. WHETHER, IF A CONFLICT EXISTS THIS COURT SHOULD ISSUE A NARROW HOLDING, FINDING THAT FLORIDA STATUTE 553.72, BY LANGUAGE AND INTENT IS EXEMPT FROM APPLICATION OF ECONOMIC LOSS RULE.

Assuming jurisdiction, this court has two clear and cogent possible rulings. The Florida Legislature created an independent cause of action for violation of the building code and though pled and dismissed in Casa Clara, infra, it was dismissed not because it was barred by the economic loss rule, but because the party sued had no duty under the statute. 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, seems to clearly indicate that Toppino may have been found liable for a violation of Florida Statute 553, if like the Defendant herein, he had been a subcontractor. Toppino was simply not within the class of persons regulated by that chapter. As stated on the

appellate 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.

This court, in Casa Clara at 1246, specifically agreed with the Third District Court of Appeal's analysis as to the statutory cause of action for a building code violation.

The last sentences of the this Court's majority opinion in Casa Clara, infra, cannot be labeled as dicta, and may be essential to the this Court's holding. In fact, it was already clear in AFM Corporation, infra, and later followed in the post Casa Clara decisions, that an independent tort is not necessarily barred by the economic loss rule even though there may be only economic losses. The action herein is separate and independent from the contract by virtue of the statutory duty. 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)
> Florida Statute 553.89

This statutory language is not legally distinguishable from the language of the Florida Deceptive and Unfair Trade Practices Act, see Delgado, infra, despite the Third District's decision to read this language in Comptech II as figurative, "not literal".

Although the statute clearly renders the public policy considerations raised by the economic loss rule moot, it will be argued that the Stallings' were the foreseeable third party beneficiaries of the construction contract between the general contractor and Kennedy. If the Stallings were a foreseeable and specifically identifiable third party, their situation cannot be remedied by a contract action and cannot be easily 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 also exceed thescope of damages obtainable 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 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. Legislative intent is the pole start by which the Court must be guided. State v Webb, 398 So.2d 820 (Fla. 1981). Where the intent of the legislature is clear, it must be followed. Delgado, infra, quoting McDonald v. Rowland, 65 So.2d 12, 14 (Fla. 1953). 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

Compare this language of intent with the judicial intent underlying the economic loss rule.

> The underlying premise for such a policy flows from the conclusion that as between parties to a contract and the consuming public, the contracting parties and not the public should bear the cost of economic loss sustained because of a failure of one of the parties to bargain for adequate contract remedies. Florida Power & Light Company v. Westinghouse Electric Corporation, 510 So. 2d 899 (Fla. 1987)

The statutory cause of action created by the Florida Legislature is separate and independent from any contract action by the critical insertion of a statutory duty, see Delgado, p. 604. 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 purpose and diminish rather than limit tort law, Southland, infra.

ISSUE III. WHETHER, IF A CONFLICT EXISTS, IT SHOULD BE RESOLVED BY A BROAD, BRIGHT LINE RULE THAT THE ECONOMIC LOSS RULE IS A JUDICIAL DOCTRINE THAT CANNOT BE USED TO ELIMINATE STATUTORY CAUSES OF ACTION.

The economic loss rule is not a bar to an action. The economic loss rule is not a limitation on actions. The economic loss rule is not a tool of statutory interpretation. The economic loss rule is a geographic boundary. It is a judicial doctrine implemented by the courts to create a dam between tort law and contract law-the economic loss rule is essentially a political policy implemented by the courts to delineate individual responsibility from social responsibility. It has often been said that the failure to build this dam would "allow contract law to be drown in a sea of tort.", East River Steamship Corp. v. Transamerica Delaval, Inc. 476 U.S. 858, 866 (Fla.

1986) Until better understood, all discussions of the economic loss rule should include the history of the doctrine, the origin of the doctrine, its development and it's underlying policy.

The economic loss rule, as presently stated, was first advocated by Professor William Prosser, whose advocacy was based on hopes "that eventually the availability of both theories-tort and contract-for the same kind of loss with different requirements both for the claimants prima facie case and the defendant's affirmative defenses will be reduced in order to simplify the law and reduce the cost of litigation". Prosser and Keeton On Torts, 5th ed. West Pub. Co., Chapter 16, Tort and Contract, page 655. The economic loss rule is a "public policy". Delgado, page 607, 608.

One may note without humor that the economic loss rule that Prosser advocated and was adopted by the various state courts has neither simplified the law nor reduced the cost of litigation. However, it's adoption is reality and it is now the job of attorneys and lower courts to understand the economic loss rule, apply it in a rational manner, and in a manner which is consistent with it's underlying policy. The policy at issue, which has been phrased in a multitude of ways, can be simplified into the phrase "allocation of losses". Professor Prosser suggested that courts maintain some

flexibility when delineating what causes of actions are tort and which are purely contract. He suggested that the following factors should be considered by the courts.

The courts may recognize a cause of action if that cause of action would meet a recognized need for compensation. Cardinally, a court should leave a loss where it is unless there is a compelling or good reason to shift that loss, but Prosser goes on to suggest that in a number of cases a recognized need for compensation will be the most powerful factor influencing the recognition of tort liability. Prosser suggests numerous other additional factors that the courts should consider in recognizing causes of actions in tort, including "the moral aspect of the defendants conduct, the convenience of administration, the capacity to bear or distribute laws, and prevention and punishment. Prosser and Keeton, id, Factors Affecting Tort Liability, 20-25. It is the allocation of losses which is the essential policy consideration underlying all tort liability. This proffered reliance on Prosser and Keeton is certainly not intended as an endorsement of the public policy analysis advocated by Prosser. However, in that Prosser is generally credited as the author and proselytizer of the economic loss rule, Prosser's analysis which led to his advocacy as well as where the economic loss rule

fits into the overall scheme of tort liability according to Prosser should have some bearing on the court. Prosser and Keeton were not without precedence in that both Winfield and Pound advocated theories of "social interest" wherein individual responsibility and social responsibility was delineated by the interest which law was to protect with economic interests being protected by the market rather than the law. It should not be surprising that those interests which are analog to the ancient rule of caveat emptor, received recommendation by these more conservative jurors. There are two other distinct schools of thought in allocation of losses and delineating tort versus contract law. The middle ground was held by Justice Holmes and a more extreme view away from caveat emptor propounded by Justice Cardozo. Cardozo's theory of product liability was eventually adopted, but it was Prosser and Pound's structural rule concerning economic loss that was adopted in East River, wherein the United States Supreme Court adopted the economic loss rule as the rule in federal actions. East River was before the U.S. Supreme Court sitting in admiralty jurisdiction and was not and is not a question of constitutional law. Nonetheless, the Supreme Court's adoption of the economic loss rule converted the federal judiciary and then spread to most states. The federal

judiciary found occasion to certify this question of state law to the Florida Supreme Court in 1987. In Florida Power & Light the Florida Supreme Court answered the federal certified question in the affirmative, yes, Florida recognized the economic loss rule. Shortly thereafter, in AFM the Florida Supreme Court moved further into its dedication to the policy considerations of the economic loss rule. From 1987-1991 the various districts in the state of Florida struggled to apply that rule which has been repeatedly described as "easy to define, but difficult to apply". Sandarac, infra There has been one central reason behind the difficulty in applying the economic loss rule. The courts dogmatic adherence to a policy that was not meant to apply inflexibly to all situations. The courts binding dedication to the economic loss rule is so ardent that a court will refuse to read a statute literally if it would thwart the "manifest purpose" of the doctrine. Comptech II, p. 251088 This dogmatic application is especially curious in that it was suggested by Prosser and Keeton that the "border land between tort and contract is based on the distinction between misfeasance and nonfeasance."

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.

The economic loss rule is the border line between tort law and contract law which controls what interest will be protected by society versus those interests for which were bargained. To say that the economic loss rule bars any action is technically incorrect. If an interest protected by

contract law seeks remedy in tort law there is simply no action. The economic loss rule is neither a sword nor a shield, it is something more akin to a geographical definition. An action based on contract involving a purely economic interest does not exist in tort law, except when the legislature or court expressly creates such an action. The economic loss rule can not operate as a bar to an action, it is by definition the boundary between different areas of common law. This Court, in recognizing that a cause of action which has elements independent of the breach of contract are not governed by the economic loss rule, has implicitly recognized that tort causes of action in the context of contracts arise due to legal considerations independent of the contract. AFM, at 181. A statutorily created duty creates a remedy for the breach of that duty which is independent of the action in contract. Rubio, Delgado, Comptech dissent.

To put another way, whenever the legislature creates a civil cause of action by statute it is making a societal pronouncement of protecting an interest which if not found unconstitutional must be administered by the Court. The critical consideration is allocation of risks. It is the heart of the economic loss rule. If there is any real controversy which this court can now answer, is raised by and assertion in Sandarac, page 1353, wherein the

Second District Court of Appeals stated "if the judiciary allocates a risk in a manner that is contrary to the view of the majority of citizens, the legislature normally has the power to adjust the allocation". The question begged by Petitioner can be simply put as: Is Legislature's normal ability to adjust the allocation of risk something that is limited by the economic loss rule? At the risk of repetition, the respondent again asserts that the economic loss rule is not a constitutional rule. **Common law public policy does not take precedence over statutory law**. A judicial doctrine which defines, allows or eliminates causes of actions to further a judicial policy cannot be used to eliminate a legislative enactment. State of Florida, Second District Court of Appeal v. Lewis, 550 So.2d 522 (Fla. 1st DCA 1989) To argue otherwise is to misapprehend the nature of the economic loss rule. To speak in biological analogy, proximate cause and laches are rules of genus and specie, whereas the economic loss rule is a rule of biological order. If the legislature, so to speak, creates an order of animal, the Courts may use common law doctrines to help define its genus and specie. The judicial branch can not eliminate that animal order other than by finding it unconstitutional.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully submit that the decision of the Fifth District Court of Appeal reinstating Plaintiffs' Fourth Amended Complaint should be upheld, either on the basis of the specific nature of Florida Statute 553.72, et. seq., or upon a bright line rule which subordinates nonconstitutional judicial public policy to legislated public policy. Finally, this court can decide to not invoke jurisdiction and thereby adopt the logic of Comptech II.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to John Beranek, Post Office Box 391, 227 S. Calhoun Street, Tallahassee, Florida 32302; David Cornell and Carl Schwait, 203 N.E. 1st Street, Post Office Box 850, Gainesville, Florida 32602-0850; Honorable A.W. Nichols, III, c/o Putnam County Courthouse, Palatka, Florida 32177; Roy D. Wasson, Gables One Tower, Suite 450, 1320 S. Dixie Highway, Miami, Florida 33146 and John F. Sproull, 314 St. Johns Ave., Palatka, Florida 32177 by U.S. Mail on this 20 day of Oct, 1998.

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