ORIGINAL

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

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

JOHN BERANEK
Fla. Bar No. 0005419
Ausley & McMullen
Post Office Box 391
227 S. Calhoun Street
Tallahassee, Florida 32302
850/224-9115

CARL B. SCHWAIT
DAVID A. CORNELL
Dell Graham, P.A.
203 N.E. 1st Street
P.O. Box 850
Gainesville, Florida 32602-0850
352/372-4381

Attorneys for Petitioner

Case No. 93,126
Kennedy Electric, Inc. v. Carl Stallings, Jr., etc., et al.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Defendant/Petitioner Kennedy Electric, Inc. certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. John Beranek
   (counsel for Petitioner)
2. David Cornell
   (counsel for Petitioner)
3. Kennedy Electric, Inc.
   (Petitioner)
4. Paul Meredith
   (counsel for Respondent)
5. The Honorable A. W. Nichols, III
   (Circuit Court Judge)
6. Carl Schwait
   (counsel for Petitioner)
7. John F. Sproull
   (counsel for Respondent)
8. Carl Stallings, Jr.
   (Respondent)
9. Carl Stallings, III
   (minor Respondent)
10. Kathryn Stallings
    (minor Respondent)
11. Suzette Stallings
    (Respondent)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This is a reply brief by Kennedy Electric, Inc. directed to the October 20, 1998 respondent's brief by Stallings. This reply brief will also comment on the amicus brief by the Academy of Florida Trial Lawyers. The Appendix to the Petitioner's brief on the merits of July 6, 1998, will again be relied upon and will be designated herein as (A. ___).

Jurisdiction

As argued in the Petitioner's previous brief of July 6, 1998, this Court has jurisdiction on two grounds. Initially, the Fifth District Court of Appeal certified a conflict with the Third District's September 17, 1997 opinion in Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 22 Fla. L. Weekly, D2192 (Fla. 3d DCA September 17, 1997), revised and reissued at 711 So. 2d 1255 (Fla. 3d DCA May 20, 1998). The Fifth District broadly held in Stallings v. Kennedy Electric, Inc., 710 So. 2d 195 (Fla. 5th DCA 1998) that the economic loss rule can never bar a statutory cause of action. In Comptech, the Third District held that the economic loss rule did bar a statutory cause of action. At issue in both Comptech and Kennedy Electric was the Florida building code statute, Section 553.84 Florida Statutes (1997). After the Fifth District's opinion certifying a conflict with the Third District's initial Comptech decision, the Third District considered its opinion further and added language attempting to distinguish the Kennedy case on the grounds that Kennedy occurred in a non-contractual setting. We suggest that the conflict between Comptech and Kennedy Electric

continues to exist and that the setting in Kennedy was clearly contractual in nature.

This Court has granted review on conflict grounds on both Comptech and Kennedy Electric and the two cases are consolidated and set for oral argument on March 1, 1999 pursuant to the Court's November 25, 1998 order. Comptech's counsel has also argued conflict with Stallings and probable jurisdiction has been noted.

In addition to the certified conflict, the Fifth District's "bright line" holding that the economic loss rule can never apply to a cause of action based on a statute is in direct conflict with several other district court decisions holding that the economic loss rule does bar statutory causes of action. As stated in Sarkis v. Pafford Oil Co., Inc., 697 So. 2d 524 (Fla. 1st DCA 1997), at p. 527:

> 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. (citations omitted).

Thus, this Court has jurisdiction based on either the certified conflict with Comptech or based on express conflict between the districts as demonstrated in Sarkis. This second basis for jurisdiction was argued in detail along with citations to eight conflicting cases including Sarkis in the prior brief at p.17-18 by Kennedy Electric. These conflict arguments were simply not responded to in any manner by the Stallings brief served October 20, 1998, nor by the amicus brief.

SUMMARY OF ARGUMENT

Conflict jurisdiction exists. This Court should continue to adhere to Casa Clara Condominium Association, Inc. v. Charlie Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) and the economic loss rule. Minor clarification concerning statutory claims should be made.

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 issue of whether the economic loss rule can bar statutorily based causes of action has been the subject of substantial litigation in the state of Florida. This Court should review both Comptech and Kennedy Electric and clarify the law on this subject. No one suggests that this Court should "willy-nilly" strike down a legislatively authorized cause of action when a statute actually creates statutory rights not previously existing under the common law of contracts and damages. Indeed, no one would suggest that this Court should strike any traditional tort remedy recognized in the common law under the jurisprudence of this state. The economic loss rule has no such effect and this rule is a time honored and accepted principle.

In Florida Power & Light Company v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987), this Court discussed the rule and stated at p. 902:

> We hold the economic loss rule approved in this opinion is not a new principle of law in Florida and has not changed or modified any decisions of this court.

The doctrine that economic losses are a part of contract law rather than tort law is not new and was certainly not abrogated or changed when the Legislature enacted Section 553.84 in 1974.

The economic loss rule is a part of the jurisprudence of most states and the entire federal system. It has repeatedly been commented on by courts including the United States Supreme Court. See East River Steamship Corp. v. Transamerica Delaval, Inc., 106 S.Ct. 2295 (1986). The landmark decision in the State of Florida on the doctrine is Casa Clara Condominium Association, Inc. v. Charlie Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993). The Court has repeatedly reaffirmed its adherence to the economic loss rule. In Airport Rent-A-Car, Inc. v. Prevost Car, Inc. 660 So. 2d 628 (Fla. 1995) the Court made clear that it is the binding law of this state.

The Comptech opinion by the Third District Court of Appeal cites over forty cases dealing with the economic loss rule. The contrary Kennedy Electric opinion by the Fifth District Court of Appeal cites only two other cases; Rubio v. State Farm Fire & Casualty Company, 662 So. 2d 956 (Fla. 3d DCA 1995) review den'd 669 So. 2d 252 (Fla. 1996), (dealing with an insurance first-party bad faith statute) and Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602 (Fla. 2d DCA 1997), (concerning the Unfair Trade Practices Act). Both of these statutes created totally new rights which did not previously exist under Florida contract or

tort law. These cases have no application to Section 553.84 which created no new rights.

Kennedy Electric agrees with the basic rationale of the Third District to the effect that the economic loss rule can bar a statutory cause of action under Section 553.84. However, we do disagree with footnote 3 and the assertion that a cause of action based upon Section 553.84 can exist as a statutory tort if there is a lack of privity of contract. The District Court was wrong on this point both as a matter of fact and as a matter of law. Factually, the Third District simply did not have before it the full facts of the Kennedy Electric case. In fact Kennedy Electric involved a contractual setting between a homeowner who constructed a home pursuant to a contract to build that home with a general contractor. The general contractor contracted with an electrical subcontractor. The Fourth Amended Complaint in Kennedy says very little about the presence or absence of a contract. The complaint is simply silent on the issue of privity and the District Court so stated in footnote 1. Indeed, the Fourth Amended Complaint states specifically that:

> In 1987, Plaintiffs began construction of a new home . . . the Defendant was hired or employed to install all necessary electrical wiring for the Plaintiffs' new home.
>
> * * *
>
> At the time the Defendant installed the electrical system . . . subject to minimum code requirements and contract terms. (R.201-202).

In its Fifth District brief, the Stallings argued that they were third party beneficiaries of the contract to build the home

and that the general contractor had gone out of business after completion of the home. (A. Brief p.3). The Fifth District Court's opinion recognizes the contractual setting and ruled that a violation of the statute "would require the same proof as a breach of contract." The Fifth District disagreed with the Third District's view that a lack of privity might create a tort cause of action and stated:

> The Comptech court addressed this issue stating that a statutory claim could be brought as long as the claim did not arise under 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 Stallings brief is difficult to deal with. It does not respond to any of the arguments posed in the Kennedy Electric merits brief nor does it respond to any of the arguments favoring application of the economic loss rule in the Comptech majority opinion. The brief is based on generalities and layers of cloudy logic. We are told that "the law will not let justice suffer by means of judicial fiat" and are apparently to assume that the Casa Clara decision is that "judicial fiat". What Stallings actually seeks is a "bright line ruling" as fashioned by Judge Dauksch that the economic loss rule may never be used in any case involving a statutory cause of action. The Stallings brief seems to urge that there should be no relationship whatsoever between the judicial branch and the legislative branch. The brief relies heavily on an over-simplified application of separation of powers and further asserts that the absence of privity between a subcontractor and a home purchaser drastically increases the rights that that home

purchaser becomes vested with. No attempt is made to show any logic or policy for this argument and we submit it should be soundly rejected by this Court.

The Stallings brief further advises that a mortgage foreclosure is pending on the property and that the property is uninhabitable, uninsurable and inalienable. We are also told that the general contractor went "out of business" and although it is not in the complaint, Stallings seems to suggest this is why he passed up a chance to sue the defendant with whom he had obvious privity in favor of one with whom he has chosen not to allege privity. Of course, as the case turned out, after four years of pleadings now Stallings contends he has more rights against the individual with whom he claims he had no contractual privity. In the strange world of the Stallings brief, less seems to equal more.

At page 5 of his brief, Mr. Stallings lists all of his various damages. A correction is necessary. The Fifth District Court of Appeal specifically listed with quotation marks the claimed damages in the complaint. The Fifth District said that the damages were "lost use and enjoyment of their home," "additional rental expenses," and "to completely rewire the home." This simply does not constitute damage to "other property". The only thing damaged was the house.

On page 22 of his brief, Stallings mentions the names "Prosser" "Keeton" "Winfield" "Pound" "Holmes" and "Cardozo" all on a single page without so much as a citation or any clear references as to the effect they should have. Finally, on page 26, the brief

makes a "biological analogy between laches and the rules of genus and specie." We are frankly unable to respond to most of these arguments in any logical fashion. We can only suggest that this Court is not guilty of "dogmatic adherence" to Casa Clara as asserted on p. 23 of the brief.

Finally, relying upon AFM Corp. v. Southern Bell Pell & Tel. Co., 515 So. 2d 180 (Fla. 1987), Stallings asserts at page 16 that this is a statutory "independent" tort "by virtue of the statutory duty." Plaintiff cites page 181 of AFM Corp. and ironically, on page 181 of AFM, the following quotation by this Court appears:

> In First American Title Insurance Company v. First Title Service Company, 457 So. 2d 467 (Fla. 1984) we addressed a claim against an abstract company for the alleged negligent preparation of an abstract. Although the plaintiff did not contract directly with the abstract company, we found it was a beneficiary of the contract... [and] that the plaintiff established a cause of action as a third party beneficiary of the abstracter's employment contract.

Obviously, this once again demonstrates the contractual setting of the Kennedy case. Stallings could have sued as a third party beneficiary and, in fact, made that argument at p. 3 of his brief. AFM does have application though and it is directly supportive of the Kennedy Electric position rather than the Stallings' position. The AFM decision concludes with the statement:

> Without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.

Under the AFM decision there clearly was no independent tort outside the doctrine of the economic loss rule. We return to the

basic proposition put forth in Kennedy Electric's initial brief on the merits. At p. 11, Kennedy Electric stated as follows:

> 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.

We make the same suggestion once again noting that neither the Stallings brief nor the amicus brief have even commented on this suggestion.

Before one decides that Section 553.84 creates some totally new and independent cause of action in tort, it is worthwhile looking closely at the statute. The statute reads in relevant part: "Notwithstanding any other remedies . . . any person . . . damaged . . . has a cause of action . . ." The statute says no more than that a damaged party has an undefined cause of action notwithstanding what other remedies might be available. The statute makes no distinction between "remedies" and "cause of action" and the words appear to be synonymous. The statute says no more than "notwithstanding other remedies, a party has a remedy." The statute does not say what kind of remedy nor what kind of damages. Obviously, the judicial branch must construe this statute and may apply the economic loss rule along with all other common law theories and concepts in the application of the statute. This

statute is, at best, vague and certainly grants no rights other than those which already exist under the common law.

Whether the economic loss rule will bar a statutory cause of action depends upon the particular statute in question. In ADY v. American Honda Finance Corp., 675 So. 2d 577 (Fla. 1996), this Court considered the interpretation of statutes and noted that a statute in derogation of the common law must be strictly construed. The Court stated:

> A court will presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute.

In Law Offices of Harold Silver, P.A. v. Farmers Bank & Trust Company of Kentucky, 498 So. 2d 984 (Fla. 1st DCA 1987), the Court considered whether a statutory remedy under Chapter 56 was intended to be exclusive of any common law remedy and held that "statutes designed to alter the common law must speak in unequivocal terms".

The present statute is, at best, vague and uncertain. It creates no new rights and certainly creates no rights in derogation of existing common law contract principles. The economic loss rule is simply not abrogated by Section 553.84 and the long existing Florida law limiting recovery of economic losses to contract should not be abrogated by an overly broad reading of this vague statute.

It is a gross over-simplification to suggest that application of the economic loss rule herein would willy-nilly abrogate a clear statute in violation of separation of powers principles. The statute continues to exist. Obviously, if the alleged wiring defect here caused personal injury to occupants or guests in the

home, then the economic loss rule would have no application to the personal injury claim. Indeed, if the wiring had caused damage to "other property" as defined in Casa Clara such as another house or a car, then the rule would have been similarly inapplicable to claims for the other house or car. The statute (§ 553.84) could be applicable in both such situations. However, we suggest it would be unnecessary and would actually add nothing to the already existing causes of action for personal injury or property damage under Florida law.

It is also an improper over-simplification to suggest that the absence of privity of contract has the effect of creating a statutory tort cause of action. It is as though the Stallings have gone looking for a defendant whom they had no relationship with rather than a defendant whom they had a direct contractual relationship with. Somehow the Stallings want this Court to adopt the view that "less equals more". The Stallings chose not to pursue their cause of action against their own general contractor in this particular case and chose not to pursue their cause of action as a third party beneficiary of the contract against Kennedy as the electrical subcontractor. Instead, they only wish to sue in tort for damages such as their loss of enjoyment. This view of less rights equals more rights would cause extreme mischief in the law of contractual relationships. Every construction defect case will now be both a contract case and a tort case.

The same rationale applied to "other property" in Casa Clara should be applied herein. When there is a pervasive contractual

relationship, but a technical lack of privity, we must look to the product purchased by the plaintiff just as this Court did in Casa Clara. Here, the plaintiff's expectations are contractually based. Plaintiff bought a house as a package pursuant to a contract with a general contractor who built the home and hired a subcontractor to install wiring. Instead of suing the general contractor in contract or the subcontractor in contract, Stallings disavows all of his contractual rights. The economic loss rule should apply to prevent this transformation of contract to tort.

As this Court stated in AFM Corp. v. Southern Bell Tel. and Tel., Co., supra, although a plaintiff may not have contracted directly, that plaintiff may still be a beneficiary of a direct contract and the economic loss rule continues to apply even to the indirect contract beneficiary.

The amicus brief is a much more candid approach. Because the plaintiff's bar would prefer it, amicus asks this Court to overrule its Casa Clara decision and to do a total about-face on the issue of "other property" under the economic loss rule. We also note that amicus seems to believe that Mr. Stallings had no ability to protect himself through his contract negotiations for the construction of his home and further that the damages sought in the Stallings complaint were much broader and involved "other property." On the one hand amicus seeks to totally abrogate the definition of other property adopted in the Casa Clara decision and on the other hand amicus seems to argue that the damages actually sought in the complaint fit within that definition. Respectfully,

we suggest that amicus is simply not well advised as to the facts of this case.

The amicus brief is at least candid. It states that the Court should overrule the Casa Clara decision. It also suggests the Court adopt an entirely new rule regarding the doctrine of other property. Amicus argues that the product sold is not the house, but is instead each part of the house. Amicus argues that the electrical work was the only product sold by the subcontractor, and that "the roof and the walls" should be viewed as separate. Amicus argues that the roof constitutes "other property" and thus the economic loss rule should not be applied to the roof.

These issues were expressly and clearly answered in the Casa Clara opinion. The Court ruled that "economic loss" constituted the "costs of repair and replacement of the defective product". The Court stated that the buyer's desire to enjoy the benefit of his bargain was simply not an interest that tort law traditionally protects. The Court gave specific definition to the term "other property". The opinion rejects the argument that the "individual components" and items of building material rather than the homes themselves were the purchased products. This argument was rejected with the statement that "one must look to the product purchased by the plaintiff, not the product sold by the defendant". Casa Clara specifically held that the product was the completed home rather than the individual components of each dwelling. This part of the Casa Clara opinion specifically applies to the Stallings home and absolutely no valid reasons have been suggested as to why this

Court should dramatically change the definition of "other property" as established and accepted by the Florida courts. This Court should not abandon Casa Clara.

CONCLUSION

The decision of the Fifth District Court of Appeal should be reversed. The economic loss rule applies to bar the tort cause of action asserted herein.

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 1st day of December, 1998.

Timothy B. Elliott for

JOHN BERANEK
Fla. Bar No. 0005419
Ausley & McMullen
Post Office Box 391
227 S. Calhoun Street
Tallahassee, Florida 32302
850/224-9115

CARL B. SCHWAIT
DAVID A. CORNELL
Dell Graham, P.A.
203 N.E. 1st Street
P.O. Box 850
Gainesville, Florida 32602-0850
352/372-4381

Attorneys for Petitioners

pld\kennedy.br2