In the Supreme Court
State of Florida

Case No. 93,336
3d DCA Case No. 96-1056

COMPTECH INTERNATIONAL, INC.

Appellant

vs.

MILAM COMMERCE PARK, LTD.

Appellee

Initial Brief of Appellant Comptech International, Inc.

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STATEMENT OF THE CASE AND FACTS[1]

The Tenant, Comptech International, Inc. ("Comptech" or the "Tenant"), leased a warehouse and office facility from the Landlord, Milam Commerce Park, Ltd. ("Milam" or the "Landlord"). After three years, the Tenant 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 2,000 square foot addition to the Tenant's already-occupied office. Comptech claims that the Landlord was negligent in performing its duty to construct the additional space for several reasons, including that the Landlord

(1) hired an unlicensed contractor who used unlicensed subcontractors,

(2) failed to obtain, submit, or use architectural plans to do the construction,

(3) failed to apply for or to obtain any building permits to do the construction,

(4) failed to obtain any municipal inspections of the construction work, and

(5) failed to obtain a Certificate of Occupancy for the leasehold premises.

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[1] The Facts are taken from the four corners of the Third Amended Complaint (R-Vol. III, pp. 448-459) and the Third District's Opinion on Motion for Rehearing (R-Vol. IV, pp. 727-758).

During the renovation, the unlicensed construction company released excessive dust and dirt throughout the Tenant's already-occupied office space, which caused physical damage to the Tenant's computers, and overloaded the electrical system in a manner which caused both loss of data and physical damage to the Tenant's computer systems. The contractor damaged existing bathrooms and flooring in the Tenant's original space as well.

The Tenant brought suit against the Landlord for property damage, economic losses, and punitive damages caused by the negligently performed renovation. The Tenant also sought civil remedies pursuant to the *Florida Building Codes Act*, § 553,84, Fla. Stat, (1989) (the "*Building Code*").

On November 29, 1993, the trial court dismissed, with prejudice, all but the negligent construction claim (R-Vol. IV, p. 696); and, on April 8, 1996, the trial court entered summary judgment for the Landlord on the negligence claim too (R-Vol. IV, pp. 698-699). The trial court reasoned that, the Landlord's construction obligations arose out of a contract and that recovery was barred by the economic loss rule. *Id*.

On May 20, 1998, in a revised opinion, the Third District affirmed, and held that (1) where claims are contractual in nature, there cannot be an action for economic damages under the *Building Code*, and (2) the "other property" exception to the economic loss rule does not apply when it was foreseeable under, and hence should

have been contemplated by, the contract that the Tenant's computers could be damaged.(R-Vol. IV, pp. 727-758)[2]

On June 19, 1998, Comptech filed its Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court. (R-Vol. IV, pp. 760-761)

On September 22, 1998, the Supreme Court notified the parties that it had accepted this case for review.

[2] Throughout this Initial Brief, the Third District's Opinion on Motion for Rehearing will be cited as "*Comptech* DCA Opinion, at p. ___," referring to the page of the Opinion as published by the District Court.

SUMMARY OF THE ARGUMENT

Comptech cannot be harmonized with decisions which reason that the economic loss rule is not intended to abrogate civil claims created by statute. When the Legislature created a civil remedy under the *Building Code*, it is presumed to have known the common law of contract and tort and the limitations on such remedies created by judges. In crafting new statutory causes of action, the Legislature is master of both the elements of, and boundaries on the new cause of action. The Legislature's use of unqualified terms "any person" and "notwithstanding any other remedies available" in the text of *Building Code* evidences its intent not to apply judicial limits on common law remedies to this statutory cause of action. Therefore, the economic loss rule does not bar the Tenant's cause of action under the *Building Code* for damages caused by the Landlord's violations of the South Florida Building Code.

Comptech culminates the Third District's march towards a more expansive application of the economic loss rule. *Comptech* is the first decision which clearly advocates that a statutory cause of action must give way to the application of the economic loss rule. While this conflict has been brewing in previous decisions, no court has ever stated unqualifiedly that the common law rule supersedes a statutorily created right or remedy. That expansion drew a reasoned dissent, caused several members of the Third District to determine that rehearing *en banc* was required, and

formed the basis for this Court to grant review. *Comptech's* analysis of the rule is therefore unparalleled, and critically important for the Court to assess.

As adopted by *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993), and refined by *Saratoga Fishing Co. v. J. Martinac & Co.*,___ U.S. ___, 117 S.Ct. 1783 (1997), the correct test for distinguishing between a defective product and "other property" under the economic loss rule is the "object-of-the-bargain" test. The Third District seeks to broaden the effect of the rule by applying a "foreseeability" test which was disapproved in *Saratoga Fishing*. Applying the "object-of-the-bargain" test to *Comptech*, the Tenant's computers, computer data, and original leasehold premises, each constitutes "other property" under the economic loss rule. Foresight, applied retrospectively by the courts, will repeatedly lead to results which are distinct from the proper application of the "object-of-the-bargain" analysis.

Finally, *Comptech* expressly and directly conflicts with decisions of this Court which require that an indemnity or other exculpatory provision of a contract must clearly and unequivocally state its intention to protect a party from its own active negligence. Such standard is equally applicable to an exculpatory provision which intends to protect a party from its own violation of a statute which provides for civil remedies.

ARGUMENT

Preface

Where a claim is raised beyond the four-corners of the contract between the parties, every competent defense counsel asserts the economic loss rule as a bar to the claim. Judges across the State often find the rule a quagmire of conflicting, albeit legitimate, opinions, rights, and public policies. Neither expansion nor limitation of the rule is required to reconcile either this case or other divergent cases with the proper application of the rule. However, proper application of the rule does require that the conflicting rights and public policies be considered both in the proper order and in the proper context. In an effort to assist the Court, your Appellant submits the decision tree diagram attached as Exhibit "A" to its Initial Brief, entitled *Application Of The Economic Loss Rule*.[3]

[3] (The "ELR Diagram"). Each item on the ELR Diagram is numbered. In this Initial Brief, each such item is referenced as "ELR Diagram #__," while the process of movement from one decision to another is referenced as "ELR Diagram # __ " __."

Point 1

> **When the legislature creates a statutory cause of action, as it has expressly done in *The Florida Building Codes Act*, § 553.84, then the economic loss rule does not bar a Tenant's cause of action pursuant to the statute for damages caused by the Landlord's violation of the State Minimum Building Codes.**

The District Court held that the economic loss rule bars the Tenant's statutory claim for damages caused by the Landlord's violation of the State Minimum Building Codes.

> [T]he 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.

Comptech DCA Opinion, p. 3-4. The Tenant submits that the Third District erred by judicially interfering with authority vested in the Legislature to create private rights that are in derogation of the common law. *See e.g., Time Insurance Co., Inc. v. Burger*, 1998 WL 309272 (Fla. June 12, 1998)[4]

The economic loss rule is a judge-made limitation on common law tort remedies that rejects recovery for purely economic losses. *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d

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[4] Common law prohibition against first-party bad faith claims lifted in 1982 by the enactment of Fla. Stat. § 624.155 suggests that the claimant's rights are greater than those available under contract; damages for emotional distress are recoverable in first-party actions against health insurers under section 624.155(1)(b)(1).

1244 (Fla. 1993) (where faulty concrete damages only the condominium into which it is incorporated, but does not cause personal injury or damage to any property other than condominium itself, the economic loss rule prohibits homebuyer's tort claim against seller). As the court explained in *Casa Clara*:

> The rule is "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others."

620 So. 2d at 1246, quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L.Rev. 891, 894 (1989). The court defined economic losses as "disappointed economic expectations, which are protected by contract law, rather than tort law." *Id.*

Casa Clara followed the rationale of *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) in holding that a homeowner's economic disappointment which results from his failure to receive the benefit of the bargain is a core concern of contract, not tort, law. 620 So.2d at 1247; *citing East River*, 476 U.S. at 870, 106 S.Ct. at 2301 (economic loss rule bars tort claim against shipbuilder for economic losses resulting from faulty turbines that cause damage only to the ship itself). But, while the *Building*

Code was not applicable to the claims raised in *Casa Clara,*[5] the Court did not venture to hold that the economic loss rule would abrogate a civil remedy expressly granted by the Legislature. To the contrary, the Court stated that such statutory remedies would continue to be available.

> ... If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law. **There are protections for homebuyers, however, such as statutory warranties**, ...

620 So.2d at 1247 (emphasis added, citations and footnote omitted). The Court referred to the laws relating to *Home Warranty Associations* §§ 634.301 *et seq.*, Fla.Stat. (1991), which provides a civil remedy for damages resulting from a violation of the statute:

> **634.3284 (1). Civil remedy**. Any person damaged by a violation of the provisions of this part may bring a civil action against a person violating such provisions in the circuit court of the county in which the alleged violator resides or has her or his principal place of business or in the county in which the alleged violation occurred. Upon adverse adjudication, the defendant will be liable for actual damages or $500, whichever is greater, together with court costs and reasonable attorney's fees incurred by the plaintiff..

620 So.2d at 1247, fn. 4.

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[5] Toppino, a supplier, had no duty to comply with the *Building Code*. 620 So.2d at 1245.

A homeowner's claim against his seller which arises from a violation of the *Home Warranty Statute* would undoubtedly be contractual in nature (the underlying home building and sales contract). Moreover, the homeowner's cause of action would be connected inseparably to the breaching party's performance under the contract (disappointed economic expectations from the builder's performance). Still, according to *Casa Clara*, the remedy created by the *Home Warranty Statute* would protect the homeowner.

The pertinent analysis is not whether the claimant's economic losses arise from the common law contractual relationship between the parties, as *Comptech* would have it; rather, it is whether the Legislature has expressly created a civil remedy notwithstanding the rights and limitations existing at common law. If the Legislature has expressly granted a civil remedy, and the allegations, if proven, fairly meet the required elements of the statutory claim, then the claimant may proceed with its statutory claim notwithstanding any common law doctrine which might have otherwise precluded it. *See*, ELR Diagram, # 1 " 2.

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.

The statute provides a cause of action where, as here, the defendant's violations of the *Building Code* have caused damages to the plaintiff. The statute is explicit in its establishment of an additional remedy. Once the claimant has fairly met the required statutory elements, the claimant shall be afforded the right of action "notwithstanding any other remedies available."

The Fifth District reached the correct result respecting this statutory cause of action in *Stallings v. Kennedy Electric, Inc.*, 23 Fla. L. Weekly D1087 (Fla. 5th DCA, May 1, 1998). In *Stallings*, a homeowner sued the electrical subcontractor for negligence, negligence *per se*, and statutory damages caused by allegedly faulty electrical wiring in the home. *Stallings* disagreed with the reasoning of the Third District in *Comptech* that a claim under the *Building Code* is subsumed by the economic loss rule.[6]

> 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. [Applying the economic

[6] The Third District reasoned that the economic losses in a statutory claim are no different than those that could have been asserted in a claim for breach of contract. *See*, *Comptech* DCA Opinion, p. 4

> loss rule] essentially eliminates the statutory cause of action.

Stallings also challenged the kernel of the Third District's rationale that a statutory claim can be raised only so long as the claim does not arise from 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.

Id.

The issue of whether the economic loss rule precludes a statutory cause of action has been considered in other district court cases. In *Rubio v. State Farm Fire & Casualty Co.*, 662 So.2d 956 (Fla. 3rd DCA 1995) *review denied*, 669 So.2d 252 (Fla.1996), 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. 2nd DCA 1997), wherein the court overturned a trial court ruling that the economic loss rule barred a statutory claim created by the *Florida Deceptive and Unfair Trade Practices Act*, Sections 501.201-.213, Florida Statutes (1993)("*FDUTPA*"). *Id.* at 611. Like the *Building Code*, *FDUTPA* creates an express right of action, and provides that its statutory remedies are in addition to other remedies. *Delgado* rejected the idea that the economic loss rule eliminated the statutory cause of action.

> [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.

Id. at 609 (citations and footnote omitted).

In the recent case of *Facchina v. Mutual Benefits Corp*., 23 Fla. L. Weekly D2185b (Fla. 4th DCA, September 23, 1998), a male model contracted with an insurance company for the use of model's photograph for the sole purpose of selling insurance policies. The

model claimed that the insurance company published his photograph in such a manner as to suggest that the model was dying of AIDS. The model sued for unauthorized publication of photograph, defamation, and invasion of privacy, pursuant to an express right of civil action created to redress commercial discrimination in section 540.08, Florida Statutes (1997). The Fourth District reversed the trial court's dismissal of the claims, and held that the statutory cause of action is not one based on the common law; that, the text chosen by the legislature controls the rights and liabilities of the parties to such a cause of action; and therefore, the model's claims were not barred by economic loss rule.

The Tenant's claim for damages caused by the Landlord's violations of the State Minimum Building Codes is based neither on tort nor on contract law; rather, it is based on a statutorily-created right. When the legislature creates a statutory cause of action, as it has expressly done in the *Building Code*, it is presumed to know the common law of contract and tort and the limitations on such remedies created by judges. The economic loss rule is one of those judicial limitations on the common law remedies in tort and contract. In crafting new statutory causes of action, the Legislature is master of the elements and boundaries on the new cause of action. Hence, the legislature's use of unqualified terms "any person" and "notwithstanding any other

remedies available" in the text of such a statute evidences the Legislature's intent not to apply judicial limits on common law remedies to the statutory cause of action.

Judge Cope's dissenting opinion states the law accurately. The economic loss rule does not apply to statutory causes of action.

> 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. ... **Once the Legislature creates a statutory cause of action, we are obliged to respect the legislative will.**

Comptech DCA Opinion, at p. 29.

The majority in *Comptech* placed undue reliance on several prior decisions to bolster its evaluation. *See, Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So.2d 74 (Fla. 3rd DCA), *review denied* 700 So.2d 685 (Fla. 1997); *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490 (Fla. 3rd DCA 1994), *review denied* 659 So.2d 490 (Fla. 1995); *Hoseline, Inc. v. U.S.A. Diversified Products, Inc.*, 40 F.3d 1198 (11th Cir. 1994); and *Sarkis v. Pafford Oil Co., Inc.*, 697 So.2d 524 (Fla. 1st DCA 1997). *Comptech* DCA Opinion, at p. 4.

In *Hotels of Key Largo*, hotel franchisees brought action against their franchisor, alleging that the franchisees were fraudulently induced into entering licensing agreement, that the franchisor breached its implied duty of good faith and fair dealing, and that the franchisor violated the *Florida Franchise Act*, Fla. Stat. § 817.416. The Third District held that the gravamen of the "fraudulent inducement" claims was "fraud in the performance," and that the economic loss rule limited the franchisees right to pursue the claim in contract[7]. While the decision aptly describes the distinction between "fraud in the inducement" and "fraud in the performance," the statutory claim had been dismissed by the trial court because it had failed to state a cause of action under the *Florida Franchise Act*.[8] *Hotels of Key Largo* simply does not address the preclusion of a statutory claim perforce of the economic loss rule.

In *Ginsberg*, the Third District held that where claims are contractual in nature, the economic loss rule precludes counts for conversion, *Civil Theft*, and *Civil RICO* violations.[9] 645 So.2d at

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[7] *See*, ELR Diagram, # 5 # 6.

[8] *See*, ELR Diagram, # 1 # 3.

[9] In deciding the statutory claims, *Ginsberg* relied upon *Sanchez v. Encinas*, 627 So.2d 489 (Fla. 3rd DCA 1993) (bona fide contractual dispute negates any claim for civil theft); *Gambolati v. Sarkisian*, 622 So.2d 47 (Fla. 4th DCA 1993) (claim for civil theft and conversion may not lie where relationship is contractual in nature); *Gilman Yacht Sales v. First Nat. Bank of*

494.[10] While the court decided the common law tort claim of conversion correctly,[11] it reached the correct conclusion for the wrong reason as to the statutory claims. Lennar's claim for violation of the *Florida Civil Remedies for Criminal Practices Act*, section 772.11 Florida Statutes (1993)(*"Civil Theft"*) was not defective because it arose from a contractual setting; rather, it was defective because Lennar had failed to allege an essential element of the statute under which the claim was asserted (that Lennar held a possessory interest in the rents). Absent the right to possession of the rents, Lennar could not claim that Ginsberg had stolen any of Lennar's "property."[12] 645 So.2d at 500

Chicago, 600 So.2d 1131 (Fla. 4th DCA 1992) (action for civil theft or conversion will not lie in suit for breach of a brokerage contract); *Kay v. Katzen*, 568 So.2d 960 (Fla. 3rd DCA 1990) (action for civil theft and conversion will not lie where claim is clearly contractual in nature); *Futch v. Head*, 511 So.2d 314 (Fla. 1st DCA) (oral contract will preclude finding of conversion, recovery of damages for breach of contract will not support an award of treble damages under Florida's RICO law), *review denied*, 518 So.2d 1275 (Fla.1987); *Rosen v. Marlin*, 486 So.2d 623 (Fla. 3rd DCA) *review denied* 494 So.2d 1151 (Fla.1986). To the extent these cases invoked the economic loss rule to preclude a statutory right of claim because the claim arose from contract, such cases were decided in error.

[10]*But 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 theft independent from the contract). ELR Diagram, # 1 # 2.

[11] *See*, ELR Diagram # 1 # 3 # 4 # 5 #6.

[12]*Civil Theft* requires that one knowingly obtain or use the property of another. Simply put, since Lennar failed to assert

Likewise, Lennar's claim under Florida's *Civil RICO Statute*, section 772.103(3), Florida Statutes (1993)(*"Civil RICO"*), failed because, by definition, there had not been any criminal activity.[13] 645 So.2d at 501.

In *Sarkis*, the First District took an incongruous approach to applying the economic loss rule to claims which arise from a statute. There, gasoline station lessees sued a gasoline company and its sales representative, alleging that company had been part of conspiracy to supply lessees with inferior grades of gasoline through distributor at price of higher grades and had covered up its participation in plan. While the First District applied the economic loss rule to preclude the statutory claims for *Civil Theft* and *Civil RICO,* it refused to apply the rule to preclude claims under *FUDTPA* and the *Motor Fuel Marketing Practices Act*, sections 526.301-526.3135, Florida Statutes (1993)(hereinafter the *"Fair Fuel Act"*). *Sarkis* attempted to distinguish *Civil Theft* and *Civil RICO* claims from those created by other statutes by deeming *Civil*

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that the rents its "property," it lacked an essential element of the statutory claim, and had no statutory right, therefore, to complain that the rents had been stolen from them. 645 So.2d at 500-501

[13] *Civil RICO* statute applies only where there has been some sort of ongoing criminal behavior. Its purpose is to punish, through civil penalties, actions which are ongoing and criminal in nature. There can be no cause of action under the *Civil RICO* for the operation of a criminal enterprise dedicated to the ongoing theft of the rents if the rents have not been and could not have been stolen by those allegedly doing the stealing. *Id.*

Theft and *Civil RICO* claims to be mere extensions and dependents of the contracts between the parties:

> **Civil theft** is a statutory form of conversion and **civil racketeering** is an action that can be pursued if the defendant has engaged in a pattern of criminal activity such as theft. The delivery of inferior fuel may be a form of conversion of the funds paid under the agreement and over time it may even be a pattern of conversion. However, **these economic losses are no different from those that could be asserted in a contract action based on the failure to deliver the proper grade of fuel.**

697 So.2d at 528.

In contrast, *Sarkis* deemed the elements of *FUDTPA* and the *Fair Fuel Act* claims as independent of the contract:

> The elements of [*FUDTPA*] are independent of the elements of a simple breach of contract and the remedies available for a "willful" violation of the statute, as alleged in the amended complaint, are not the same as those available in a contract action.
>
> * * * * *
>
> If the plaintiffs can show that they were injured by a discriminatory fuel allocation under a contract between Amoco and Pafford, as alleged in the amended complaint, they are entitled to relief under the statute.

Id.

The incongruity of *Sarkis* lay in its application of two different standards to the same category of claims. For example, if the standard is whether the elements of the statutory claim are independent of the elements for the breach of contract claim (as

applied to the *FUDTPA* and *Fair Fuel Act* claims), then the consistent application of that standard should have allowed the claims for violation of both *Civil Theft* and *Civil RICO.* Both claims arose from statute, and required as elements the violation of a criminal statute plus criminal intent; yet, such elements were not essential to any claim arising under contract. The independence of the statutory claim from the contractual claim emanated from the essential elements of the statute which were not required to state the contract claim. Applied the other way, if the standard is whether the economic losses are any different from those that could be asserted in a contract action (as applied to the *Civil Theft* and *Civil RICO* claims), then the consistent application of that standard should have disallowed the claims under both *FUDTPA* and the *Fair Fuel Act*. While both sets of claims may require different elements to prove liability, neither category either limits or expands the measure of economic losses that which would have been compensable from a breach of contract claim.[14]

The Tenant submits that the correct approach is simply to review the claim to determine whether it asserts ultimate facts which, if proven, will satisfy the elements of the statute under

[14] E.g.., the measure of damages under *FUDTPA* is "actual damages, plus attorney's fees and court costs" (Fla. Stat. § 501.211); the measure of damages under the *Fair Fuel Act* is "appropriate relief, including an action for a declaratory judgment, injunctive relief, and actual damages" (Fla. Stat. § 526.312(a)); each of which is generally accepted as a measure of contract damages.

which relief is sought.[15] If it does not (e.g., *Hotels of Key Largo* or *Casa Clara*), then the claim should be dismissed for failure to state the statutory claim. However, if it does, then the claimant will have stated a statutory claim; and, neither the economic loss rule nor any other judge-made rule should abrogate it, lest a separation of powers violation result.[16]

Here, the Tenant claims that its business was ruined as the result of the Landlord's numerous violations of the *Building Code*. The Tenant must still prove that the Landlord violated the South Florida Building Code, and that the Landlord's violations were the cause of the Tenant's damages. And once the Tenant should prove such ultimate facts, the Florida Legislature has mandated that the Tenant be entitled to recover from the Landlord.

The Third District decision in *Comptech* interfered with the Legislature's authority when it applied the economic loss rule to abrogate the Tenant's claim under the *Building Code*. The Third District's decision in *Comptech* therefore should be **Reversed** with directions to reinstate the claim.

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[15] Rule 1.110(b)(2), *Rules of Civil Procedure* requires that the claim set forth "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief."

[16] The claimant still would be obliged to prove each ultimate fact alleged; and, the defendant still would not be precluded from asserting an affirmative defense based on any enforceable limitation or other exculpatory provision of the contract between the parties. *See*, Point 3 of this Initial Brief for further discussion of this issue.

Point 2

The accepted "object-of-the-bargain" test is the applicable standard by which to distinguish between a defective product and "other property" under the economic loss rule.

The economic loss rule prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself. *East River,* 476 U.S. at 871-875; *Casa Clara*, 620 So.2d at 1247; *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987). The issue presented here does not seek to expand either the rule or the existing standard applied to distinguish between the product itself and "other property." Rather, the Tenant seeks both to uphold the existing "object-of-the-bargain" standard for determining what is "other property," and to prevent that standard from being misinterpreted in a manner that would injure the rule itself.

In this case, the Landlord bargained to provide the Tenant commercial leasehold premises. The Landlord's negligence caused damage to the Tenant's computers and computer data which the Tenant had brought onto the leasehold premises. The Tenant claims that such on-premises computers and their computer data are "other property" which excepts its tort claim from the economic loss rule.

The Third District disagreed, and held that the Tenant's on-premises computers were not "other property" because the

possibility of damage to the Tenant's equipment during construction either was, or should have been, contemplated by the lease contract.[17] Using a "foreseeability" test, the Third District reasoned that the Tenant should have negotiated the allocation of risks and remedies attendant to such a foreseeable loss as part of the contact. *Id.*

The Third District decision cannot be reconciled with the "object-of-the-bargain" test forged in *East River*, and adopted in Florida by *Casa Clara,* to distinguish between the defective product itself and "other property" under the economic loss rule. Moreover, the United States Supreme Court's recent decision in *Saratoga Fishing* soundly rejected the applicability to the economic loss rule of a "foreseeability" test as advocated by the Third District.

Products liability grew out of a public policy that people needed more protection from dangerous products than was afforded by the law of warranty. *See, Seely v. White Motor Co.*, 403 P.2d 145, 149 (Cal. 1965). It became clear, however, that if the development were allowed to progress too far, then "contract law would drown in a sea of tort." *See*, G. Gilmore, *The Death of Contract*, pp. 87-94 (1974). The economic loss rule developed out of *Seely* to determine whether a commercial product which injured only itself was the kind

[17] *Comptech* DCA Opinion., at p. 13.

of harm against which public policy should require manufacturers to protect, independent of any contractual obligation. *See, East River Steamship Corp.*, 476 U.S. at 866.

The paradigmatic products liability action is one where a product, "reasonably certain to place life and limb in peril," and distributed without reinspection, causes bodily injury. *See e.g., MacPherson v. Buick Motor Co.*, 111 N. E. 1051, 1053 (NY 1916). The manufacturer is liable whether or not it is negligent because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *East River*, 476 U.S. at 866-867, *citing Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d, at 441 (concurring opinion). For similar reasons of safety, the manufacturer's duty of care has been broadened to include protection against property damage. *See, Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 240 N. W. 392, 399 (Wis. 1932); *Genesee County Patrons Fire Relief Assn. v. L. Sonneborn Sons, Inc.*, 189 N. E. 551, 553-555 (N.Y. 1934). Such damage is considered so akin to personal injury that the two are treated alike. *See, Seely v. White Motor Co.*, 403 P.2d. at 152.

In *East River,* the United States Supreme Court held that an admiralty tort plaintiff cannot recover for the physical damage a defective product causes to the "product itself," but can recover for physical damage the product causes to "other property." There

the product itself consisted at least of a ship as built and outfitted by its original manufacturer and sold to an initial user. The Court stated:

> a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself. "The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products." When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

476 U.S. at 871.

In *Casa Clara*, 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. 620 So.2d 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 Court defined

and applied the "object-of-the-bargain" test as follows:

> 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] They 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.

620 So.2d at 1247.

The necessary implication is that if the defective concrete had fallen within a condominium unit, and injured either the homeowner or his property which had been brought onto the property, then the homeowner would be allowed to bring a tort suit for personal injury or property damage.

The United States Supreme Court decision in *Saratoga Fishing* further refined the term "other property." In *Saratoga Fishing*, 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 rule, the contents of the boat (the extra equipment) should be considered part of the boat -- "the 'product itself,' in which case the plaintiff could not recover in tort for its physical loss? Or were the contents 'other property,' in which case the plaintiff could recover?" *Id.* at 1785. Applying the "object-of-the-

bargain" test, the Court held that the extra equipment was "other property" for purposes of the economic loss doctrine, and held that the plaintiff could proceed in tort. *Id.*

Saratoga Fishing interpreted the "object-of-the-bargain" as the product in its condition as it left the seller's hands into the stream of commerce.[18]

> When a Manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the "product itself " under *East River*. Items added to the product by the Initial User are therefore "other property," ...

Id. at 1786. The Supreme Court used several state law examples to make its point.

> 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,

[18] as distinguished from *Casa Clara's* view that the "object-of-the-bargain" was the product in its condition as it was purchased by the initial user.

> 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).

___ U.S. at___, 117 S.Ct. at 1787.

Saratoga Fishing soundly rejected any argument that "foreseeability" is a factor in distinguishing between the product itself and "other property" under the economic loss rule.

> ... [There is nothing to] prevent a Manufacturer and an Initial User from apportioning through their contract potential loss of any other items--say, added equipment or totally separate physical property -- that a defective manufactured product, say an exploding engine, might cause. **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 S.Ct. at 1783 (emphasis added).

Even the dissent in *Saratoga Fishing* rejected the notion that foreseeability should be considered when distinguishing between the product itself and "other property." Justice Scalia argued in his dissent that, like *Casa Clara*, the proper test to determine the product itself should be the "object-of-the-bargain" from the *purchaser's* perspective. ___ U.S. at___, 117 S.Ct. at ____.[19]

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[19] Applying the majority rationale of *Saratoga Fishing* to *Casa Clara* would have yielded the same result because the "object-of-the-bargain" from the condominium developer's perspective, in its sale to the initial user, still would have incorporated the defective concrete as a component. However, it is likely that the *Casa Clara's* rationale would have yielded a different result in *Saratoga Fishing* because, as Justice Scalia pointed out, the "object-of-the-bargain" from the purchaser's

> These courts have adopted this purchaser oriented approach on the belief, which I think correct, that it is in accord with the policy judgments underlying our decision in *East River*.

Id.[20]

The United States Court of Appeals for the Third Circuit recently relied upon *Saratoga Fishing* to hold 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 (3rd Cir.1997).

Whether the product itself is considered as the "object-of-the-*seller's*-bargain" or the "object-of-the-*buyer's*-bargain," at least it was the bargain of one of the parties in interest. Foresight, applied retrospectively by the courts, will repeatedly lead to results which are distinct from the proper application of the "object-of-the-bargain" analysis.

The Third District has never found "other property" under the economic loss rule.[21] In this case, the Third District concluded

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perspective was the vessel which incorporated the extra added equipment.

[20] *citing* Fox & Loftus, *Riding the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later*, 64 Def. Couns. J. 260, 264, n. 29 (1997) (which cites numerous other cases and observes that "[t]he trend in defining 'economic loss' is to focus on what the plaintiff purchased rather than what the defendant agreed to provide").

[21] It came close in *National Marine Underwriters, Inc. v. Donzi Marine Corp.*, 655 So.2d 176 (Fla. 3rd DCA 1995)(no recovery for damage to Loran radio added to new boat by initial user

that neither the Tenant's computers nor its computer data were additions to the bargained-for lease; rather, they were part and parcel of the parties' contemplated agreement.[22] It was irrelevant to the Third District's analysis that the Tenant's computers and computer data were neither mentioned nor referenced in the bargained-for lease. According to the Third District, such property *should have been contemplated* by the lease because "Comptech depended upon its computers" to provide its value-added services, the computers "constituted an essential part of the business endeavor," and "the purpose for entering the lease and the build-out agreement was to benefit the business endeavor."[23]

Public policy considerations also mandate against the Third District's "foreseeability" test because, given the same facts, such test would be unable to reproduce a consistent result across the many courts of our State. The rule of law can accept divergent results from different triers of same facts,[24] but not from

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because insurer failed to make actual claim for such loss). Had the insurer made an actual claim for the damage to the Loran radio, then the court may have had to decide the "other property" issue.

[22] *See*, *Comptech* DCA Decision, at p. 16, n. 9.

[23] *Id.*, at p. 12.

[24] E.g., contract damages are generally limited to those which are foreseeable. *See, Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854); *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903); *Poinsettia Dairy Products v. Wessel Co.*, 166 So. 306, 310 (Fla. 1936)*; Scott v. Rolling Hills Place Inc.*, 688 So.2d 937 (Fla. 5th DCA 1996).

different courts applying the same rule of law. It would be untenable for each individual court to retrospectively impress on every contract its own idea of what the parties could or should have contemplated in negotiating their agreement. And with no apparent limit to a court's own concept of what could have been negotiated between the parties, some courts would apply such analysis to eliminate the "other property" exception altogether.

That flaw becomes palpable when the supporting examples of *Saratoga Fishing* are bluntly dissected using the Third District's foreseeability test. *A.J. Decoster Co.* would have met all of the Third District's "foreseeability" criteria;[25] yet, the farm owner recovered the value of his 140,000 chickens which suffocated when the ventilation system failed. Likewise, the seismic equipment added to the ship in *Nicor Supply* would have met the Third District's criteria; yet the ship charterer recovered for its loss in a fire caused by a defective engine.

That practical significance extends to Florida cases as well. In *E.I. DuPont de Nemours & Co. v. Finks Farms, Inc.*, 656 So.2d 171 (Fla. 2nd DCA 1995), it was absolutely foreseeable that a chemical purchased to treat plants would be sprayed on such plants; yet, the plants were considered "other property." In *Casa Clara*, in

[25] E.g., the chicken farm owner depended upon its chickens for his business, the chickens certainly "constituted an essential part of the business endeavor," and "the purpose for [acquiring a ventilation system] was to benefit the business endeavor.

argument before the justices, it was clear that, had falling debris damaged a piano brought onto the premises, the piano would have constituted “other property.”

In this case, the “object-of-the-bargain” is a commercial lease rather than a condominium, an ocean fishing vessel, or a chicken farm ventilation system; but still, the analogy holds true. Like a piano brought into the condominium, equipment brought on board a vessel by its initial user, and chickens on the farm, the Tenant’s computers and computer data, which the Tenant brought onto the commercial lease premises are “other property.” Hence, the Tenant’s tort claim for economic losses which stem from the Landlord’s damage to such “other property” is not barred by the economic loss rule.

Point 3

Although dictum, the Third District decision's footnote that would enforce an indemnity provision that fails to express an intent to indemnify against the indemnitor's own wrongful acts in clear and unequivocal terms conflicts with decisions of this Court on the same questions of law.

The economic loss rule governs only whether a claimant may pursue his claim in tort. Proper application of the rule neither abrogates the contract between the parties nor diminishes the enforceability of contractual provisions which, under common law, either limit damages or exculpate a party from liability altogether.

> The fundamental mission of contract law is to allow parties to protect their bargain by contractual terms dealing with future uncertainties and possibilities. Indeed to contract at all is to contain the unknown.

Jarmco, Inv. v. Polygard, Inc., 668 So.2d 300, 305 (Fla. 4th DCA), *review granted* 678 So.2d 339 (Fla. 1996). In this Point, the Tenant seeks to uphold the guideline established and required by this Court to enforce such contractual provisions. Further, the Tenant argues that the Third District decision in *Comptech*, by departing from this Court's guideline, injures the fundamental mission of contract law.

The lease between the parties contained an indemnity provision by which the Tenant agreed to indemnify the Landlord from "all claims resulting from any negligence." The Third District reasoned

that an indemnification from "all claims resulting from any negligence" was close enough to the legal requirement so as to clearly express the parties' intent that the Landlord be held harmless for any acts of its own active negligence. *Comptech* DCA Decision, pp. 13-14, n.6; citing ***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. 3rd DCA 1990); and ***Middleton v. Lomaskin***, 266 So.2d 678 (Fla. 3rd DCA 1972).

Florida law requires clear and unequivocal contract terms to establish a self-exculpating indemnity provision for a party's own wrongful acts. ***See, University Plaza Shopping Center, Inc. v. Stewart***, 272 So.2d 507 (Fla. 1973) and ***Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.***, 374 So.2d 487 (Fla. 1979).

> Our basic objective in construing the indemnity provision is to give effect to the intent of the parties involved. In our judgment, the use of the general terms "indemnity against any and all claims" does not disclose an intention to indemnity for consequences arising solely from the negligence of the indemnitee.

University Plaza, 272 So.2d at 511; ***accord, Charles Poe***, 374 So.2d at 488. The District Court's decision is in express and direct conflict with these cases and their underlying rationale.

Judge Cope's dissenting opinion points out the contractual defect which precludes holding that the Tenant ever intended to hold the Landlord harmless from the Landlord's own negligence.

Comptech DCA Opinion, at p. 24.

> Something is missing: the indemnity clause does not state that it exculpates the landlord for the landlord's own negligence.

Id. 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, 374 So.2d 487, 489 (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*, 272 So.2d 507, 509-12. A general provision indemnifying the indemnitee against any and all liability is simply not enough. *See, University Plaza*, 272 So.2d at 510-11. Here, the Landlord's indemnification phrase, "all claims resulting from any negligence," is no more clear and unequivocal as either of those used by the indemnitee in *Charles Poe* or *University Plaza*.

The Third District unduly relied upon cases where the indemnity provision was clear and unequivocal, and hence, expressly and directly now conflicts with these decisions. *See, Joseph I. Rozier Machinery Co. v. Nib Barge Line, Inc.*, 318 So. 2d 557 (Fla. 2nd DCA 1975); *Winn Dixie*; *Etiole*; and, *Middleton*. Compare the Milam Lease provision with the language of these cases: *Winn Dixie*,

which indemnified

> notwithstanding such accident or damage may have been caused in whole or in part or **negligence of you [Winn Dixie]** or any of your servants, agents or employees ...

573 So.2d at 921 (emphasis added);

or *Middleton*, which indemnified

> whether caused by **negligent acts of LANDLORD**, its agents or servants or otherwise ...

266 So. 2d at 678 (emphasis added);

or *Joseph L. Rozier Machinery Co.*, which indemnified against

> property damage due or claimed to be due to any **negligence of Lessor**, employees or agents of Lessor or any other person...

318 So. 2d at 558 (emphasis added);

or *Etiole*, which indemnified against

> damages on account of any such actions or claims, regardless of the cause of said actions and regardless of any **negligence upon the part of MIAMI ELEVATOR COMPANY**.

573 So.2d at 922 (emphasis added). The provisions in these cases make a clear, unequivocal, and express reference to the indemnitee's own negligence from which it intends to indemnify. Milam's indemnification provision distinguishes itself by failing to mention the Landlord's own negligence.

Charles Poe extended the holding of *University Plaza* to cases where the indemnitee's negligence was not the sole cause of damages. 374 So.2d 489-90. The Third District opinion's effort to

avoid *Charles Poe* by stating that Tenant's damages did not arise strictly from the Landlord's sole negligence is no distinction at all. *Comptech* DCA Opinion, pp. 13-14, at n.6. While the substandard work may have been physically done by the unlicensed contractors, The Tenant's claim against the Landlord is based on the Landlord's own negligent acts, which included its hiring the unlicensed contractors, constructing without architectural plans or permits, and occupying the premises without a certificate of occupancy.

Moreover, just as an indemnitee's own active negligence is a liability which must be described clearly and unequivocally, so too is an indemnitee's liability for damages arising from its own active violation of statute such as the *Building Code*. Being a civil right of action,[26] the person for whose benefit the civil remedy lies, also has the right to indemnify another against damages which may arise under such civil right of action; but, like exculpatory clauses, only if such civil right of action is identified with specificity and the indemnitee's intent to exculpate is clear and unequivocal. In short, if the Landlord had wanted the Tenant to indemnify the Landlord from its own violations of the *Building Code*, then it was the Landlord's obligation to prove that the Tenant clearly and unequivocally so intended. Such

[26] But compare, rights such as child support which the custodial parent may not waive or contract away. *See, Robinson v. State Department of Health and Rehabilitative Services*, 473 So.2d 228, 229 (Fla. 5th DCA), *appeal dismissed* 478 So.2d 53 (Fla. 1985).

a clear and unequivocal intention may only be expressed by both

- identifying the statutory right in such a manner as to reflect that the indemnitor had knowledge of the rights against which he/she was indemnifying; and,
- stating in clear and unequivocal terms the indemnitor's intention to release or indemnify the indemnitee.

Therefore, the Tenant submits that, notwithstanding any stretch of the indemnity provision to cover the Landlord's own negligence, the indemnity provision makes absolutely no attempt to exculpate the Landlord from the civil remedies afforded the Tenant under the *Building Code*.

CONCLUSION

For the reasons described above, the decision of the Third District should be Reversed, and this cause should be remanded to the Circuit Court with directions to reinstate all of the counts of the Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief was mailed by first class mail, postage prepaid, on October 19, 1998, to

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