IN THE SUPREME COURT OF FLORIDA

COMPTECH INTERNATIONAL, INC.

Petitioner,

vs.

MILAM COMMERCE PARK, LTD.

Respondent.
_____/

CASE NO. 93,336

District Court of Appeal
Third District-No. 96-1056

AMICUS CURIAE BRIEF OF THE FLORIDA CONCRETE & PRODUCTS ASSOCIATION

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INTRODUCTION

Almost twelve years have passed since this Court adopted the Economic Loss Rule in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987) and reaffirmed the long-standing rule that "contract principles [are] more appropriate than tort principles" for resolving claims involving purely economic losses.

Despite the clarity and soundness of that polestar decision, the Rule has become the subject of an all-out attack in the last decade by litigants who failed to protect their own economic interests through contract or insurance. This, in turn, has forced the Court to revisit and further clarify the Rule on six different occasions, including in the landmark case of *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993). See *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238 (Fla.1996); *Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995); *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla.1987); *Aetna Life & Cas. Co. v. Therm-O-Disc, Inc.*, 511 So.2d 992 (Fla.1987). See also *Jarmco, Inc. v. Polygard, Inc.*, 668 So.2d 300 (Fla. 4th DCA 1996), which this Court affirmed in *Polygard, Inc. v. Jarmco, Inc.*, 684 So. 2d 732 (Fla. 1996).

The Florida Concrete & Products Association (hereafter "the Association"), which represents approximately eighty percent of the ready-mix concrete, cement and related concrete industry manufacturers and suppliers in Florida, participated in *Casa Clara, Airport Rent-A-Car* and *Jarmco* because its members (like nearly all product manufacturers

and suppliers in Florida) have relied on the Rule and the risk allocation provisions of the Uniform Commercial Code ("UCC") in negotiating their contracts with customers, in pricing their products, and in assessing their insurance needs. In each of those appeals, the Association analyzed the Rule's core policy underpinnings and described the very negative and socially undesirable economic consequences its members and the consuming public would suffer if the Court were to allow those who fail to protect their own economic interests recover their purely economic losses in tort.

This Court ultimately agreed in each appeal, recognizing that any departure from a broad and forceful application of the Rule (in the non-fraud context) in favor of those who fail to protect their own economic interests necessarily will impose an unwarranted financial burden on the rest of society in the form of higher prices for all goods and services, jeopardizing the stability of commerce in Florida and, potentially, the very existence of the many small businesses that produce the majority of goods and services in this State. The Court also reaffirmed that each of the Rule's limited exceptions, including the so-called "other" property exception at issue in this case, must be narrowly construed to prevent them from swallowing the Rule itself, thereby undermining the bedrock foundation on which commerce in this country has been based for over 200 years -- Freedom of Contract.

Unfortunately, this time-honored principle has come under attack again in this case because Petitioner failed to protect its own economic interests through contract or insurance. Petitioner, however, fails to offer any compelling reason why this Court should rewrite the

terms and conditions of its contract with Respondent so that it can avoid the ramifications of that contract or why the consuming public should bear the cost of its failure to protect itself. As a result, this Court should stand by its opinions in *Florida Power & Light* and *Casa Clara* by refusing to "intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public." *Id.* at 902.

If it does not, the Association's members (and virtually all manufacturers and suppliers of goods and services) will be exposed to hundreds of millions, if not billions, of dollars of unanticipated and clearly unwarranted tort liability, effectively eviscerating the terms of their contracts with customers and the statutorily-codified risk allocation provisions of the UCC. The inevitable by-product of this commerce-destroying path will be significantly higher prices for all goods and services in Florida, a price the citizens of Florida should not have to pay because Petitioner failed to protect itself.

Accordingly, the Association respectfully joins in this appeal to once again explain why the Court should resist all efforts to undermine the Rule and why Petitioner's version of the "other" property exception must be rejected to protect the stability and prosperity of our economy.

STATEMENT OF THE CASE AND FACTS

The only relevant facts are as follows: Petitioner leased office space from Respondent to store, use and/or sell the very property it claims was injured by Respondent's "negligence." That lease-based contract also required Respondent to perform construction work in and around that very property.

In their contract, however, Petitioner expressly agreed that Respondent would not be liable for damages to Petitioner's "merchandise, equipment, fixture or other property, or damage to business or for business interruption, arising directly or indirectly out of, from or on account of such occupancy and use, or resulting from present or future condition or state of repair thereof." By definition, Petitioner's computers clearly constitute either "merchandise, equipment, fixtures, or other property."

The primary issue presented for resolution by this Court, therefore, is whether Petitioner should be allowed to bypass the terms and conditions of its contract with Respondent so that it can sue Respondent in tort (or under a statutory theory) to recover the very losses it agreed it could not recover in its contract with Respondent.

SUMMARY OF THE ARGUMENT

In *Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995); *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993); *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla 1987); *Aetna Life & Casualty v. Therm-O-Disc*, 511 So.2d 992 (Fla. 1987); and *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987), this Court reaffirmed that the Economic Loss Rule is an immutable principle of Florida jurisprudence and must be applied broadly and forcefully to preserve the law of contracts and the Uniform Commercial Code (UCC). By preventing the recovery of purely economic losses in tort, the Rule serves as the "fundamental boundary" between contract law and the law of torts, thereby encouraging parties to protect their own economic interests through contractual negotiations and insurance.

Despite this Court's firm and repeated embrace of the Rule, however, Petitioner contends it should be permitted to recover its purely economic losses in tort because it has suffered damage to "other" property under that exception to the Rule and because "judge-made" rules like the Economic Loss Rule cannot be invoked to bar its statutory rights under the Florida Building Codes Act without violating the separation of powers doctrine.

The Petitioner cannot have it both ways. It cannot contend, on the one hand, that a "judge-made" rule cannot be invoked to bar its statutory rights and then contend, on the other hand, that the very same "judge-made" rule (and its exceptions) should be applied in

such a way as to abrogate the statutory right of the Association's members to contractually disclaim liability for consequential losses under the UCC which, by definition, would encompass Petitioner's alleged losses. The statutory rights afforded to members of the Association by the UCC deserve no less protection under a separation of powers analysis than the Petitioner's alleged statutory rights under the Florida Building Codes Act.

The same conclusion follows from *Casa Clara's* "object-of-the-bargain" test for determining whether "other" property has been damaged. Under that test, there can be no question that the central focus and object of Petitioner's "bargain" when it leased space from Respondent and agreed to allow Respondent to perform construction work therein was the very property it conveniently now calls "other" property in this case. Any doubt about this inescapable conclusion is silenced by the fact that Petitioner agreed when it contracted with Respondent to hold Respondent harmless for damage to its "merchandise, equipment, fixture or other property, or damage to business or for business interruption, arising directly or indirectly out of, from or on account of such occupancy and use, or resulting from present or future condition or state of repair thereof."

Surely it would defy logic and nullify the risk allocation provisions of the UCC to find that Petitioner may sue Respondent in tort on the grounds it has suffered damage to "other" property where, as here, the parties expressly allocated risk for damage to that property in their contract. This is not a matter of foreseeability, as Petitioner contends, but of plain common sense.

This is not to say that Petitioner should have no remedy for its alleged losses or that it should be left with no means to recover those losses. To the contrary, the lesson of *Florida Power & Light* and *Casa Clara* is that Petitioner's remedy lies in contract, subject only to the terms and conditions of that agreement.

Why, then, has Petitioner not pursued a contract action against Respondent for its alleged losses? The answer is obvious and underscores the very reason this case is before this Court: the Petitioner, in a deal it no longer likes, contractually agreed to release Respondent for damage to the very property at issue in this case and now finds "a tort remedy attractive because it often permits the recovery of greater damages than an action on a contract," thereby allowing Petitioner to "avoid the conditions" of its contract. *Casa Clara*, 620 So. 2d at 1245 *quoting* William L. Prosser, *The Borderland of Tort and Contract in Selected Topics on the Law of Torts,* 380, 425 (Thomas M. Cooley Lectures, 4th Series, 1953).

This Court should refrain from accepting Petitioner's invitation to rewrite its contract so that it can recover the very losses it agreed it could not recover in its contract with Respondent. A contrary conclusion would require this Court to overrule *Casa Clara*, *Florida Power & Light* and *Airport Rent-A-Car,* effectively requiring it to abandon the Rule and the UCC in Florida in the process. Such an about-face would be devastating to our economy and could jeopardize the very existence of some members of the Association.

Such an about-face also would directly and very negatively impact all consumers in Florida in the form of higher prices for all goods and services. In the construction industry, the inevitable result will be significantly higher prices for building materials and construction in general, potentially preventing many citizens, and particularly those on the lower end of the income scale, from fulfilling their dream of owning a home.

In the final analysis, the controlling question in this case is identical to the one in *Casa Clara*: whether society as a whole should bear the economic burden of those who fail to protect their own economic interests through contract or insurance. For the reasons discussed in *Casa Clara*, the answer to that question must again be a resounding "No!"

ARGUMENT

I. THE ECONOMIC LOSS RULE BARS PETITIONER'S NEGLIGENCE CLAIM

A. The Rule's Policy Underpinnings Compel Dismissal Of Petitioner's Negligence Claim

The primary purpose of this brief will be to explain why Petitioner's negligence claim is barred by the Economic Loss Rule and why its interpretation of the "other" property exception must be rejected if the Rule is to have any continuing viability in Florida.

No meaningful analysis of the "other" property exception can be undertaken, however, without first examining the policy considerations that led this Court to formally adopt the Rule in *Florida Power & Light*. This is necessary because proper application of the Rule, and its various exceptions, does not turn on bright-line, definition-driven analysis as some suggest. Rather, it turns on an understanding of the Rule's core policy goal and foundation: the preservation of contract law and, in the case of product sales, the Uniform Commercial Code.

Justice Traynor explained the Rule's policy underpinnings in his now-famous decision in *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965):

> 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. He can

> appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

63 Cal.2d at 18, 45 Cal.Rptr. at 23, 403 P.2d at 151 (citations omitted).

The United States Supreme Court later agreed, holding "[w]hen 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. . . . The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

Ultimately, this Court also agreed, concluding:

> We . . . find no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public. We hold contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage. The lack of tort remedy does not mean that the purchaser is unable to protect himself from loss. We note the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view. Further, the purchaser . . . can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.

Florida Power & Light, 510 So.2d at 902 (emphasis added).

It is clear from these passages of *Seely*, *East River*, and *Florida Power & Light* that the Rule is founded on a recognition that contract law and the law of torts are designed to protect two, very different interests. Contract law, on the one hand, is designed to protect the expectancy interests of parties to private, bargained-for agreements. It seeks to hold parties to their contractual promises and is rooted in the concept of ensuring that each party receives the benefit of their bargain. The duties implicated and imposed by the law of contracts, therefore, arise exclusively from the terms and conditions of the parties' contracts and, in the case of product sales, the statutory provisions of the Uniform Commercial Code.

The law of torts, on the other hand, is rooted in the concept of protecting society as a whole from physical harm. A tort-based duty of care differs significantly from the duties voluntarily assumed by parties in contract because the tort-based duty of care is imposed by law to protect society as a whole from physical harm. It does not depend on, and generally cannot be limited by, private, bargained-for agreements.

Tort law seeks to impose liability for injury-causing products on the manufacturers and sellers of those products 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, *quoting Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). The basic function of tort law is to shift the burden of loss from the injured party to the party responsible for that injury, the latter of which is presumed to be better suited to prevent the injury in the first place and to bear the burden of any loss it causes. *Casa Clara*, 620 So.2d at 1246.

The critical common thread running through all of these cases, however, is a recognition that tort-based duties are not implicated in the absence of actual physical injury to persons or to property that is unrelated or connected in any way to the object of a consumer's bargain. *Airport Rent-A-Car*, 660 So.2d at 632. This threshold recognition is grounded on an understanding that the cost of tort protection ultimately is borne by society as a whole in the form of higher prices for all goods and services. This is true because manufacturers and suppliers faced with unanticipated tort liability for purely economic losses necessarily "must raise prices on every contract to cover the enhanced risk." *Florida Power & Light*, 510 So.2d at 901.

While the imposition of this cost burden may be justified in cases where a product or service causes actual physical injury to persons or "other" property, the issue when only economic losses are involved is "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies" or to protect their own economic interests through insurance. *Casa Clara*, 620 So.2d at 1247, *quoting* Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L. Rev. 891, 933 (1989). This Court answered that question in the negative in *Casa Clara, Florida Power & Light* and *Airport Rent-A-Car* and should do so once again.

In the end, the Rule accomplishes its policy-driven goal of preserving the law of contracts by serving as "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." *Casa Clara*, 620 So.2d at 1246, *quoting* Barrett, *supra*, at 933. By performing this critical task, the Rule preserves the core principle on which commerce in this country has been based for over 200 years - Freedom of Contract.

The lessons of *East River, Seely, Casa Clara, Florida Power & Light, AFM* and *Airport Rent-A-Car* are clear: parties who purchase products or other services are encouraged to negotiate for warranty protection or to purchase insurance to protect their own economic interests. They may, of course, elect to forego such protection (like Petitioner) in exchange for a lower price. Either way, the choice is theirs in our society and the judiciary "should refrain from injecting [itself] into this type of economic decision-making." *Florida Power & Light,* 510 So. 2d at 902. The consuming public simply should not be forced to bear the losses of those, like Petitioner, who fail to protect themselves.

Under these guiding principles, the Petitioner was encouraged to negotiate with the Respondent for warranty or other contract-based protection or to purchase insurance to protect itself from the very economic losses it now claims to have suffered. *Florida Power & Light*, 510 So.2d at 901-902; *Casa Clara*, 620 So.2d at 1246-1247. Petitioner was free, of course, to forego such protection in exchange for a lower rental price.

Petitioner clearly understood this lesson, because the record reflects it allocated the risk for the potential loss of the very property at issue in this case in its contract with

Respondent. Specifically, Petitioner agreed in that arm's length transaction that Respondent would not be liable for damage to Petitioner's "merchandise, equipment, fixture or other property, or damage to business or for business interruption, arising, directly or indirectly out of, from or on account of such occupancy and use, or resulting from present or future condition or state of repair thereof."

Petitioner's election not to bargain for greater warranty protection or to purchase insurance to protect its economic interests was an economic risk it alone must bear, not the rest of society. It has cited no justification for this Court to undo the bargain it struck with Respondent by permitting it to avoid the ramifications of what now appears to be a bad bargain, benefit from the lower rental price it no doubt paid in exchange for no warranty or insurance protection, and then sue its privy in tort to recover the very economic losses it agreed it could not recover in its contract with Respondent.

Simply put, if Petitioner's view of the law were to become the law of Florida, the **very antithesis** of the Rule's bedrock policy foundation will be achieved: parties will be encouraged to **never** bargain for warranty protection or purchase insurance, relying instead on tort law for their free "warranty" protection. This, in turn, will render it impossible for manufacturers and sellers to allocate their liability exposure through contract, exposing them to tort liability "in an indeterminate amount, for an indeterminate time to an indeterminate class." See *Ultramares Corp. v. Touche, Niven & Co.,* 255 N.Y. 170, 179-780, 174 N.E. 441, 444 (1931). The law of contracts and the Uniform Commercial Code would crumble into a heap of meaningless principles.

Viewed in this light, it is readily apparent that Petitioner's suggested interpretation of the "other" property exception must be carefully scrutinized and ultimately rejected. Adoption of its arguments would swallow the Rule in nearly every case and allow Petitioner to escape the ramifications of its own failure to protect itself.

The citizens of Florida do not deserve the higher costs for goods and services (and rental space) that inevitably will follow. The citizens of Florida, rather, need this Court to uphold the principles of stare decisis by following its prior decisions in *Casa Clara*, *Airport Rent-A-Car* and *Florida Power & Light* and once again reaffirm that "contract principles [are] more appropriate than tort principles" for resolving economic loss claims.

B. Petitioner Has Not Suffered Damage To "Other" Property Within The Meaning Of The Economic Loss Rule

The "other" property exception has been the subject of more debate and confusion than any other Economic Loss Rule issue. This debate, and the ensuing confusion and conflict it has caused, stems primarily from the opinions of some courts and litigants, including Petitioner, that the exception must be applied "literally" without regard for the Rule's underlying policy goal of preserving the law of contracts and statutory embodiments of that law like the UCC.

Under this "literalist" approach to the Rule, the "other" property exception is said to apply if the target product (or, in this case, service) causes damage to any other tangible thing, even if: 1) the target product or service and the damaged property are components or elements of a second, larger product; 2) damage to the "other" property was or could have

been contemplated by the parties in their contract; or 3) the damage in question was a natural and foreseeable consequence of any warranty breach (i.e., a consequential loss).[1]

Petitioner seeks to advance such a "literalist" argument in this case. Specifically, it contends the "object of its bargain" was its lease with Respondent (presumably consisting of the paper memorializing the lease and the empty air inside the building Respondent owned) and that everything else, including the computers and other equipment or merchandise it intended to place in that space, constitutes "other" property under the Rule. Of course, the only property Petitioner owned is the very property at issue in this case, forcing one to ask the metaphysically strained question: "property other than what?" Certainly the lease papers and the empty space they represent did not cause damage to Petitioner's property.

Under scrutiny, however, it becomes obvious that Petitioner's portrayal of the "object of its bargain" is far too convenient because it ignores a key fact: the lease agreement contemplated more than the mere rental of space to Petitioner. Rather, it called for Respondent to perform construction work around Petitioner's existing property, including the property at issue in this case. It was that work, not the leasing of space, which caused Petitioner's damages. Those services, therefore, must be considered in assessing whether Petitioner has suffered damage to "other" property.

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[1] The Florida cases most often cited for this proposition are *E.I. DuPont de Nemours & Co. v. Finks Farms*, 656. So.2d 171 (Fla. 2d DCA 1995) and *Adobe Building Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA 1981), *rev. dismissed*, 411 So.2d 380 (Fla. 1981). *Adobe*, of course, was disapproved and rejected by this Court in *Casa Clara*. 620 So.2d at 1248 n.9. *Finks Farms* also conflicts with *Casa Clara* and should be quashed for the reasons set forth below.

To this end, Respondent had a contract-based duty to perform construction work around Petitioner's existing property without damaging same. Petitioner, likewise, had a contract-based expectation that Respondent (through its chosen employees or contractors) could perform that obviously disruptive work around its existing property without damaging same. When Respondent performed that construction work in a defective, damage-causing manner, Petitioner failed to receive the benefit of its bargain, suffering "disappointed economic expectations" in the process.

Petitioner's remedy for Respondent's contract-based breach, however, lies in contract, not tort, because Respondent's duties arose from that contract and the character of its loss was precisely the type of losses the parties contemplated in their contract. This fact alone fatally undermines Petitioner's attempt to call its property "other" property because that property was the only property it owned. Respondent's breach simply cannot give rise to a tort claim under *Casa Clara* without eviscerating the Rule and the law of contracts.

In the end, Petitioner's "other" property argument ignores the central teaching of *Casa Clara*: the product or service purchased by the plaintiff must be measured by the object of its intended contractual performance, not merely by considering the product or service in isolation from the intended purpose for which it was purchased. Since the homeowners in *Casa Clara* also attempted to ignore this lesson, analysis of Petitioner's negligence claim must begin (and ultimately end) with that landmark decision.

In that case, numerous homeowners and condominium unit owners alleged that concrete manufactured and supplied by the defendant for use in the construction of their homes was contaminated by excessive amounts of salt. 620 So.2d at 1245. The concrete's high salt content, in turn, allegedly destroyed the reinforcing steel embedded within it by causing the steel to rust. This caused the concrete itself to crack and fall apart, resulting in the total destruction of the plaintiffs' homes. *Id.*

The homeowners argued they suffered damage to "other property" because the concrete damaged the reinforcing steel embedded within it and other components used to build their homes, as well as the homes themselves. While there was literal truth to their contention that the concrete had damaged property other than itself, this Court rejected their "literalist" argument, holding that the focus for applying the "other" property exception must be on the "character" of a plaintiff's loss 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." *Id.* Since the object of the homeowners' bargains were their homes, the homeowners did not suffer damage to "other" property under the Rule despite the fact the concrete literally damaged property "other" than itself. *Id.*

In this case, the object of Petitioner's bargain was the performance of construction services in and around its property, including the computers in question. It necessarily had an expectation that Respondent could perform those services without damaging its property. When Respondent failed to perform those services as expected, resulting in damage to that

very property, Petitioner merely suffered losses that were expressly contemplated by the parties in their agreement, not damage to "other" property under *Casa Clara*.

Despite the clear application of *Casa Clara* to Petitioner's claims, however, the Association respectfully submits that *Casa Clara's* "one must look to the product purchased by the plaintiff, not the product sold by the defendant" formula for defining "other" property has caused significant confusion in this state. Specifically, that formula can be read to lend superficial support to a "literalist" application of the Rule in cases (like the instant case) where the product or service purchased by the plaintiff and the product or service sold by the defendant **are the same**. In such cases, which often arise in the "general contractor" or "assembler of products" context, how does one define the character of a plaintiff's loss?

This Court did not reach that issue in *Casa Clara* because it was not asked to address, for example, whether the general contractor in that case or a homeowner who purchased concrete directly from the concrete supplier to build a home could sue that supplier in tort to recover damages identical to those suffered by the homeowners in that case. In that situation, would this Court have applied the other property exception and allowed the general contractor or concrete-purchasing homeowner to sue the supplier in tort because the concrete damaged other components they also purchased to build a home?

Applied literally, this Court's "one must look to the product purchased by the plaintiff, not the product sold by the defendant" test arguably leads to conflicting "yes" and "no" answers, depending on whether one focuses on the product purchased by the plaintiff

or the product sold by the defendant. It is clear from the underlying rationale of *Casa Clara* and the Rule's foundational goal of preserving the law of contracts, however, that the Rule must be applied with equal (or even greater) force to the general contractor or concrete-purchasing homeowner because they, like the homeowners in *Casa Clara*, would have been encouraged to negotiate with the concrete supplier for warranty or insurance protection to protect their economic interests. Likewise, they were free to forego such protection, buying the concrete or other building materials "as is" in exchange for the lowest possible price.

Certainly, those who purchase a product directly from a seller of goods or services and are in a position to protect themselves through contract or insurance should be the very last to be afforded tort remedies under the Rule, particularly if they willingly relinquished their right to sue the supplier in contract by buying the concrete "as is." It would be anomalous to hold that a general contractor could sue the concrete supplier in tort and contract but then hold, as this Court did in *Casa Clara*, that the homeowners can not sue the supplier in tort or contract.

Moreover, if the general contractor was allowed to sue in tort, it would be encouraged to never "bargain" for warranty or insurance protection in defiance of the central teachings of *Florida Power & Light* and *Casa Clara.* The Rule's policy underpinnings would be lost in a cloud of subterfuge, assuring the realization of the devastating economic consequences this Court sought to avoid in *Casa Clara.*

In addition, and perhaps most importantly, if Petitioner's strict reading of *Casa Clara* were adopted in the products liability context where the statutory provisions of the UCC govern, the "other" property exception would almost always nullify the risk allocation and remedial provisions of that Code in violation of the Association's member's statutory rights to disclaim liability for consequential losses. Specifically, under Section 672.714 of the Code, a buyer of goods, such as building materials, may recover incidental and consequential damages in the event of a warranty breach. By definition, consequential damages include:

> (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

See Section 672.715(2).

Under the UCC, therefore, the general contractor in *Casa Clara*, or the hypothetical concrete-purchasing homeowner, would be free to sue the concrete supplier in contract to recover their consequential losses, which, by statutory definition, would include damage to any property proximately caused by a defect in the concrete, including the reinforcing steel and the homes themselves.

Under Section 672.719(3) of the Code, however, the concrete supplier would be free to disclaim or limit its liability for those very consequential losses, including damage to any property, including "other" property, "proximately resulting from any breach of warranty."

See Sections 672.715(2)(b) and 672-719(3). A holding, therefore, that a general contractor or concrete-purchasing homeowner can sue its privy in tort to recover those very same consequential losses on the grounds that said losses constitute "other" property under the Rule not only would render the Rule itself totally meaningless, it would deal a final death-blow to the risk allocation provisions of the UCC. See *Florida Power & Light*, 510 So.2d at 902. In the end, such a result would deny the Association and its members their statutory right to disclaim liability for consequential losses under the UCC in violation of the very separation of powers doctrine the Petitioner dramatically invokes in connection with its discussion of its statutory rights under the Florida Building Codes Act.

Viewed in this light, it is clear that a "literalist" approach to the other property exception must be rejected to prevent the law of contracts and the UCC from being swallowed by the law of torts. Rather, the "other" property exception must be limited to property that is wholly unrelated or unconnected to the object of a plaintiff's bargain and which could not be defined to constitute "consequential losses" under the UCC.

In light of the foregoing, it should come as no surprise that nearly every Florida court that has considered the "other" exception since *Florida Power & Light* (with the exception of one) has rejected a "literalist" interpretation of the Rule. In *Aetna Life & Casualty Co. v. Therm-O-Disc*, 511 So.2d 992 (Fla. 1987), for example, this Court held that the Rule barred a purchaser of switches used to construct heat transfer units from suing the manufacturer of those switches in tort after the switches proved to be defective and destroyed the heat transfer units in which they were incorporated. Obviously, each defective switch damaged

property "other" than itself. Nevertheless, this Court held the plaintiff could not recover its losses in tort as a matter of law. *Id.*

Similarly, in *Standard Fish Co. v. 7337 Douglas Enterprises*, 673 So.2d 503 (Fla. 3d DCA 1996), a case factually analogous to the instant case, the plaintiff, like Petitioner, leased space from a cold storage facility to store its frozen fish products. The fish, like Petitioner's computers, were destroyed after being placed in the facility due to "repeated exposure to harmful conditions."

After analyzing the Rule's policy underpinnings, the court rejected the notion that the fish constituted "other" property, holding instead that the plaintiff "did not sustain any personal injury or damage to property outside of its storage contract." Since it merely failed to receive the benefit of its bargain – the cold storage of fish – its remedy lied in contract, not tort. *Id.*

The court further noted, like this Court in *Casa Clara* and *Florida Power & Light*, that plaintiff had:

> [A]dequate contractual and statutory remedies against Custom Cold that it is currently pursuing, and that Standard also had the ability to independently protect itself by purchasing insurance as suggested in the contract for storage. Under these circumstances, we find no justification for expanding negligence law to provide Standard with a remedy against Douglas "without consideration, that is of longer duration and financial impact than the remedy [Standard] contracted for...in the first place. Such a result would be contrary to the well established policy of limiting recovery in contract actions to damages which were within the contemplation of the parties."

Id. at 505, *quoting Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So.2d 412 (Fla. 3d DCA), *rev. den.*, 661 So.2d 825 (Fla. 1995).

This rationale is directly applicable to this case. Petitioner had the ability to protect itself in contract or to purchase insurance to protect its economic interests. It was free to sue Respondent in contract for breaching Respondent's contract-based duty to furnish construction services without damaging Petitioner's property. Since damage to Petitioner's property was well "within the contemplation of the parties" as evidenced by the express language of their contract, it is clear under *Standard Fish* that Petitioner may not sue in tort to bypass the terms of its contract with Respondent.

The same conclusion follows directly from the Fifth District's decision in *All American Semi Conductor, Inc. v. Mil-Pro Services, Inc.*, 686 So.2d 760 (Fla. 5th DCA 1997). In that case, the plaintiff hired the defendant to program microchips. Due to a defect in the machine used to perform that task, the microchips were destroyed. *Id.* at 761.

The plaintiff, like Petitioner, argued that because the "programming services" it purchased destroyed its pre-existing microchips, it suffered damage to "other" property under the Rule. The Fifth District rejected this contention, holding that the microchips, like the fish in *Standard Fish,* were not "other" property but, rather, the object of Plaintiff's bargain. *Id.*

Similarly, in *GAF Corp. v. Zack Co.*, 445 So.2d 350 (Fla. 3d DCA), *rev. den.*, 453 So.2d 45 (Fla. 1984), a roofing contractor filed tort claims against a manufacturer of roofing materials used to construct several roofs on the theory the defective materials damaged the roofs in which they were incorporated, or, in other words, "other" property. Despite the

literal truth of this argument, the court held the general contractor could not sue the manufacturer in tort to recover its purely economic losses. It is important to note that the general contractor in *GAF Corp.* stood in the same shoes as the general contractor in *Casa Clara*. Since this Court has cited *GAF Corp.* with approval in *Casa Clara* and *Florida Power & Light,* it follows this Court likely would have followed *GAF Corp.* and held that the contractors in *Casa Clara* also could not sue the concrete supplier in tort if it had been confronted with that issue.

The First District reached the same conclusion in *American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 451 (Fla. 1st DCA 1991). In that case, the court rejected the argument that a replacement oil pump damaged "other" property when it failed, destroying the engine in which it was incorporated. Rather:

> [T]he the object of the bargain was a repaired engine, not just a replacement oil pump. The oil pump furnished essential lubrication and heat protection to the engine - this is the part of the "bargain" purchased, not just the metal and parts making up the oil pump. The pump became an integral part of the repaired engine and when it damaged itself, and the engine parts, this was not damage to "other property". . . . [T]he "character of the loss" is not just a useless pump - it is an engine deprived of a substance that is essential to its operation.

578 So.2d at 454 (emphasis added).

The Petitioner's "literalist" interpretation of the other property exception also was rejected by the Fourth District in *Jarmco, Inc. v. Polygard, Inc.,* 668 So.2d 300 (Fla. 4th DCA 1996), a decision which Justice Pariente joined and which later was affirmed by this Court. See *Polygard, Inc. v. Jarmco, Inc.,* 684 So.2d 732 (Fla. 1996). In that critical case,

the plaintiff purchased resin to complete the construction of a partially constructed boat. When the resin failed and caused the total destruction of the boat, the plaintiff argued that it suffered damage to "other" property. *Id.* at 302-303.

In rejecting this literalist approach to the "other" property exception, the court reasoned:

> [The] same analysis of the product purchased could quite as well have been made by the court in *Casa Clara*: the defective cement contaminated by salt damaged the steel support rods that it had been poured around, and therefore it could be said that the concrete damaged "other" property. But the court did not engage in that analysis. Its failure to do so suggests that the "other" property exception to the ELR must be limited to property that is unrelated and unconnected to the product sold and there is no privity between the owner of the property damaged and the distribution chain for the product causing the damage.

Jarmco, Inc. v. Polygard, Inc., 668 So.2d 300, 303 (Fla. 4th DCA 1996).

Since Petitioner's "property" obviously was related and/or connected to, and, indeed, the focus of, Respondent's construction services under their contract, Petitioner's decision to forego greater warranty protection in the event that property was damaged is a cost it alone must bear. Under *Jarmco*, it has not suffered damage to "other" property, but only to property that was directly contemplated by the parties in their agreement.

The same conclusion follows from *McDonough Equipment Corp. v. Sunset Amoco West, Inc.,* 669 So. 2d 300 (Fla. 3d DCA 1996). In that "negligent services" case, the plaintiff hired the defendant to remove and replace underground storage tanks and piping to bring its gas station into compliance with certain environmental laws. During these

excavation efforts, the defendant struck a gas line, causing extensive contamination of plaintiff's soil and groundwater, which plaintiff contended constituted damage to "other" property.

After noting that the parties had contractually "defined the limitation of liability through bargaining, risk acceptance and compensation," the court rejected plaintiff's "other property" argument, reasoning:

> [W]e must likewise conclude in the instant case that [plaintiff] may not recover in tort purely economic losses in the form of contractually delegated clean-up costs in the absence of evidence of personal injury or independent property damage. To hold otherwise, we think, would stand the economic loss rule and its underlying premise on their head. In their negotiated contract for services, [plaintiff and defendant] expressly defined the limitation of liability and respective risks for each party, including the risk of underground water contamination. Having done so, [Plaintiff] may not now circumvent its contractual limitations and risks by seeking to recoup such losses in a tort action.

669 So. 2d at 302 (emphasis added).

Similarly, Petitioner contracted with Respondent for the performance of construction services in and around the property in question. In its "negotiated contract for services," Petitioner assumed the risk for damage to that property. To hold that it can now recover those negotiated losses in tort, despite the fact that it agreed it could not do so in contract, surely would "stand the economic loss rule and its underlying premise on their head." *Id.*

The same conclusion follows from a host of judicial decisions outside of Florida, including the Michigan Supreme Court's decision in *Neibarger v. Universal Cooperatives,*

Inc., 439 Mich. 512, 486 N.W. 2d 612 (1992). In that case, dairy farmers brought tort actions against the designer and seller of an allegedly defective milking system, which caused severe injuries and death to their cattle. In rejecting the argument the cows constituted damage to "other" property under the Rule, the high court of Michigan reasoned:

> A contrary holding would not only serve to blur the distinction between tort and contract, but would undermine the purpose of the Legislature in adopting the UCC. The code represents a carefully considered approach to governing "the economic relations between suppliers and consumers of goods." If a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages ... could be entirely avoided. In that event, Article 2 would be rendered meaningless....[T]he UCC provides remedies sufficient to compensate the buyer of a defective product for direct, incidental, and consequential losses, including property damage. Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, the occurrence of such damage could have been the subject of negotiations between the parties.

486 So. 2d at 528, 532 (emphasis added). See also *Citizens Insurance Co. v. Osmose Wood Preserving, Inc.*, ___ N.W. 2d ___, 1998 WL 436304 (Mich. App. 1998) (extensive damage to plaintiff's real and personal property due to a roof collapse caused by defective roofing materials did not constitute "other" property); *Masb-Seg Property v. Metalux,* ___ N.W. 2d ___, 1998 WL 549269 (Mich. App. 1998)(fire damage caused by defective fluorescent light does not constitute damage actionable in tort).

This Court, of course, has looked favorably to decisions from the courts of Michigan to define the proper application of the economic loss rule in the products liability context. See *HTP, Ltd. v. Lineas Aereas Costarricenses,* S.A., 685 So. 2d 1238, 1239-40, (Fla. 1996), *adopting Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.,* 532 N.W. 2d 541 (1995). The courts of Michigan, including its highest court in *Neibarger*, have squarely recognized that the "other" property exception cannot be interpreted in such a way as to negate the ability of a product manufacturer or seller to disclaim liability for consequential damages under the UCC, which includes damage to "property proximately caused" by a warranty breach and would encompass Petitioner's alleged losses. See section 672.715.

Some might suggest that Michigan has eliminated the "other" property exception in the commercial context. The Association, however, respectfully submits that the courts of Michigan have merely recognized that the UCC will be rendered meaningless if the "other" property exception is interpreted to allow the tort-based recovery of disclaimable consequential losses that naturally, foreseeably, and proximately flow from the failure of a product to perform as expected. Simply put, the courts of Michigan are correct.

This should come as no surprise to this Court, however, because it already reached the same conclusion in *Florida Power & Light*, noting "the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view." *Florida*

Power & Light, 510 So. 2d at 902. Consistent with this analysis, this Court should clarify that "other property" means property that would not meet the definition of "consequential losses" under the Uniform Commercial Code.

The Eighth Circuit recognized this truth in *Dakota Gasification v. Pascoe Building Systems,* 91 F. 3d 1094 (8th Cir. 1996). In that case, materials supplied by the defendant for use in the construction of roof proved to be defective, causing the roof to collapse. This, in turn, caused major damage to the contents of the plaintiff's structure and to the structure itself.

In rejecting the notion that plaintiff suffered damage to "other" property under the Rule, the Eighth Circuit, applying North Dakota law, held that "the modern trend in many jurisdictions holds that tort remedies are unavailable for property damage experienced by the owner where the damage was a foreseeable result of a defect at the time the parties contractually determined their respective exposure to risk." *Id.* at 1099. The court further recognized that under the UCC, injury to a product itself cannot meaningfully be separated from possible injury to "other" property because:

> [I]t is difficult to imagine a scenario in which the natural consequence of an installed structural component's failure would be damage only to the structural component itself without any damage to the surrounding property. If such economic damage is a foreseeable consequence to the parties in the commercial relationship governed by the UCC, then it is a proper subject for negotiation and contract law, not for tort remedies.

91 F. 3d at 1100.

This reasoning is particularly applicable to Petitioner's claim because the losses Petitioner experienced not only were "foreseeable," they were expressly contemplated by the parties in their agreement. To hold that Petitioner can nevertheless sue Respondent in negligence would be to hold that the parties' contract is a meaningless piece of paper.

A similar conclusion recently was reached in *Factory Market, Inc. v. Schuller International, Inc.*, 987 F. 2d 387 (E.D. Penn. 1998). In that case, a tort action was filed against the manufacturer of a roofing system that leaked, causing damages to the contents of a tenant's store (like the Petitioner in this case). In rejecting the argument that damage to the contents of the rental space constituted damage to other property, the court reasoned:

> [T]he economic loss doctrine precludes claims for property that one would reasonably expect to be injured as a direct consequence of the failure of the product at issue. In this case, [the parties] must have both reasonably expected that if the roof was not watertight, any property in the building could be injured by leaks. This is just plain common sense.

Id. at 397.

It is also "plain common sense" that the performance of dust creating construction in and around Petitioner's property might be harmful to that property. Surely the Petitioner was free to negotiate with the Respondent for warranty or contract-based protection in the event Respondent caused damage to that property. Indeed, and as repeatedly noted above, Petitioner and Respondent did contemplate such damage, with Petitioner agreeing that it would not hold Respondent liable for that damage. A finding that Petitioner suffered damage to "other" property under these circumstances would all but eliminate the continued viability of the economic loss rule in Florida and, for that matter, the law of contracts.

The Virginia Supreme Court reached the same conclusion in *Sensennbrenner v. Rust, Orling & Neale Architects, Inc.*, 236 Va. 419 374 S.E.2d 55 (1988), which this Court cited favorably in *Casa Clara.* In that case, the court rejected arguments similar to those advanced by Petitioner, holding that:

> The plaintiffs here alleged nothing more than disappointed economic expectations. They contracted with a builder for the purchase of a package. The package included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective - one or more of its component parts was sufficiently substandard as to cause damage to other parts. The effect of the failure of the substandard parts to meet the bargained-for level of quality was to cause a diminution in the value of the whole, measured by the cost of repair. <u>This is purely economic loss, for which the law of contracts provides the sole remedy.</u>

374 S.E.2d at 58 (emphasis added).

Sensenbrenner was followed by the Fourth Circuit in *Redman v. John D. Brush & Company*, 111 F.3d 1174 (4th Cir. 1997). In that case, the plaintiff purchased a safe to protect his coin collection. The safe subsequently failed and the coin collection was stolen. Plaintiff contended the loss of his coin collection constituted damage to "other" property. *Id.* at 1183. The Fourth Circuit rejected this contention, holding:

> The essence of [his] claim is that the safe did not meet his expectations of burglar deterrence and burglary protection... Although his claim is based on harm to property other than the safe itself, his loss arose because the safe did not protect the coin collection from burglars in accordance with his expectations. Under these circumstances, the extent of [defendant's] liability...is controlled by [defendant's] warranty. [Plaintiff] is not permitted to circumvent [that] warranty simply by alleging a negligence claim.

111 F. 3d at 1182-1183.

In short, the rationale of the modern trend in defining "other" property can be summarized as follows:

> Injury to the product itself cannot be completely divorced from possible injury to other property because poor product performance "will necessarily cause" injury to other property.... Obviously, a material factor enunciated by the courts in determining whether other property has been injured is whether the defect was such a risk as would be encompassed in a commercial transaction as contemplated by the Uniform Commercial Code. . . . [L]oss to property belonging to the plaintiff flowing from a product or service within the contract's contemplation and reasonably foreseeable as a result should the product or service prove defective will not support recovery in tort because injury to such property is contemplated, or should have been, by the parties to the agreement. As a corollary, therefore, the term "other property" appears to be subject to the construction that it is property belonging to plaintiff the risk to which is outside the reasonable contemplation of the contract.

Myrtle Beach Pipeline Corp. v. Emerson Electric Co., 843 F.Supp. 1027, 1058-60 (D.S.C. 1993), *aff'd* 46 F.3d 1125 (4th Cir. 1995) (emphasis added).

The Association respectfully requests this Court to join this modern trend and to clarify once and for all that "other property" means just that: property that is unrelated and unconnected to the intended object of a plaintiff's bargain and that cannot be defined to constitute "consequential losses" under the UCC.

C. *Saratoga Fishing* and *Finks Farm* Do Not Support Petitioner's Position

1. Petitioner's Reliance on *Saratoga Fishing* is Misplaced

Petitioner relies heavily on the United States Supreme Court's recent decision in *Saratoga Fishing Co. v. J. Martinac & Co.*, _____ U.S. _____, 117 S.Ct. 1783 (1997) to

support its literalist interpretation of the Rule. In some senses, *Saratoga Fishing* can be read to support that view. However, Petitioner's reliance on *Saratoga Fishing* is misplaced because the case is factually inapposite and inconsistent with *Casa Clara*.

First, the instant case does not involve damage to equipment added to Petitioner's space after Respondent and its contractors completed their construction efforts like in *Saratoga Fishing*. Rather, the so-called "other" property alleged to have been damaged in this case was present and on-site before Respondent performed any of the damage-causing construction in question.

Secondly, the Supreme based its decision, in part, on the fact that the plaintiff and defendant were not in privity of contract or in a position to apportion fault or allocate risk for the losses in question. The Petitioner and Respondent in this case, however, are in privity of contract and, moreover, expressly allocated risk for damage to the very property at issue in this case. Thus, an important premise underlying the majority's opinion in *Saratoga Fishing* is missing in this case, rendering *Saratoga Fishing* inapposite.

In addition, the majority based its opinion in *Saratoga Fishing*, in part, on the critical (but clearly erroneous) concession by the manufacturer/defendant that its privy, the "initial user," could have sued it in tort for damage the defective ship caused to the extra equipment the "initial user" added to complete the ship's construction prior to resale. 117 S.Ct. at 1787. The "initial user" in *Saratoga Fishing*, however, was not a casual boat purchaser as the majority opinion implies. Rather, it is clear from Justice Scalia's dissenting opinion that

the "initial user" was in the business of building boats for resale like the general contractor in *Casa Clara*. As a result, no member of the Association would ever have conceded that the "initial user" (or general contractor) in that case could sue the boat manufacturer (or concrete supplier) in tort because that "initial user" or general contractor was free to bargain for greater warranty protection or to forego same, purchasing the partially completed vessel "as is" in exchange for a lower price.

In the final analysis, the Association respectfully submits that *Saratoga Fishing* is inapposite and, moreover, inconsistent with *Casa Clara* for the reasons discussed in Justice Scalia's dissent. Indeed, Petitioner concedes this fact at footnote 19 of its brief, effectively conceding that this Court would have to overrule *Casa Clara* in violation of the doctrine of stare decisis in order to follow *Saratoga Fishing*.

This is true for several reasons. For example, under *Casa Clara's* "object of the bargain" test, the object of the plaintiff's bargain in *Saratoga Fishing* clearly was a fully completed vessel, including the equipment added by the general contractor/"initial user" in that case. Under the sound and UCC supporting reasoning of *Casa Clara*, damage caused by any component of that completed vessel to any other component thereof, including the added equipment, would not constitute damage to "other" property under the Rule.

A contrary conclusion would render the risk allocation provisions of the contract between the manufacturer/defendant and its privy (the "initial user"), and the "as is" contract between the "initial user" and its privy (the plaintiff), utterly meaningless. Indeed,

it was precisely this anomaly that led this Court to deny the non-privity homeowners a tort remedy in *Casa Clara.*

Moreover, the Supreme Court's opinion in *Saratoga Fishing* did not take into account that if the subsequent purchaser in that case is free to sue the non-privity, remote manufacturer of the primary vessel in tort, that manufacturer would be free to turn around and sue the initial user/assembler who sold the completed vessel to the plaintiff under a tort-based contribution theory of recovery, the very entity the Supreme Court agreed could not be sued in tort under the Rule. "The effect of such a claim, if successful, would visit ultimate tort liability for defects in the vessel on the manufacturer and seller and would nullify the objective of *East River* to limit the seller's liability in this type case to that assumed by contract." *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F. 2d 925, 930 (5th Cir. 1987), a case which the S*aratoga Fishing* court ironically cited with approval. *Id.*

In short, it is respectfully submitted that *Saratoga Fishing* is inconsistent with *Casa Clara* and is not binding on this Court. See *Buccaneer Line, Inc. v. Owens-Illinois InterAmerica Corp.,* 258 So. 2d 826, 828 n.1 (Fla. 1st DCA 1972) (state courts are not bound to follow decisions of the United States Supreme Court dealing with state law). Rather, under the principles of stare decisis, this Court should adhere to its interpretation of the "other" property exception in *Casa Clara* and the modern trend. See *Brown v. State*, ____ So.2d ___, 1998 WL 716709 (Fla. 1998) (Wells, J., dissenting).

One final point about *Saratoga Fishing* merits discussion. On page 28 of its brief, Petitioner seizes on the Supreme Court's statement that "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" to support its contention that "foreseeability" is not a factor to consider in assessing whether "other" property has been damaged. Quite the contrary is true, however, because the underlying premise of the Rule has always been that parties are encouraged to negotiate for contract or insurance protection, but may forego such protection in exchange for the lowest possible price.

Thus, the "mere possibility" that parties may take steps to protect themselves through contract or insurance has always been viewed as enough to justify application of the Rule even if a party, in fact, fails to protect itself through contract or insurance. *See Casa Clara,* 620 So.2d at 1247 (where this Court held the consuming public should not have to "bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies"); *Florida Power & Light,* 510 So.2d at 902 (where this Court noted that parties may protect themselves through risk allocation provisions but may forego such protection in order to obtain a lower price); *Jarmco*, 668 So.2d at 304(where the court, in an opinion later affirmed by this Court, noted that "Florida will not use it's tort law to provide remedies to the purchasers of products that they, themselves, did not bargain for in their contracts of sales."); and *Neibarger*, 486 N.W. 2d at 620 ("where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within

the contemplation of the parties to the agreement, the occurrence of such damage could have been the subject of negotiations between the parties.").

In others words, a purchaser's ability to protect itself through contract or insurance is enough to defeat its ability to sue in tort even if it does not actually do so because "these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery through purely economic losses." *Casa Clara,* 620 So.2d at 1247. Petitioner can only blame itself for agreeing to release its claims against Respondent for the losses in question.

2. *Finks Farms* also Conflicts with *Casa Clara*

Unfortunately, Petitioner also cites *E. I. DuPont de Nemours & Co. v. Finks Farms*, 656 So.2d 171 (Fla. 2d DCA 1995) in support of its "literalist" approach to the "other" property exception. *Finks Farms,* however, conflicts with *Casa Clara* and should be disapproved.

In that case, a commercial farmer purchased an agricultural chemical designed to prevent plant diseases from injuring or otherwise destroying his tomato crop. When the chemical allegedly failed and damaged his crop, the farmer sued the chemical manufacturer in tort to recover his purely economic losses.

The chemical manufacturer argued the farmer's tort claims were barred by the Rule because the farmer suffered only disappointed economic expectations in the form of lost profits. Like the oil pump in *American Universal* and the concrete in *Casa Clara*, the object

of the farmer's bargain was not the chemical itself, but a healthy tomato crop. Since the farmer only suffered damage to the tomato crop and concomitant lost profits, it followed his claims were barred by the Rule.

The farmer countered by arguing that under *Casa Clara*, "the product purchased by the plaintiff" dictates whether it has suffered damage to "other property". Since he purchased an agricultural chemical, and not a pre-treated tomato crop, his case fell within the "other property" exception even though he purchased the chemical for the exclusive purpose of applying it to his crop to maximize his profits.

The Second District agreed with this "literalist" reading of *Casa Clara,* reasoning:

> In contrast to the facts in *Casa Clara* and *American Universal*, the appellee in the instant case bargained for Benlate as a finished product, and the finished product, not just a component of it, damaged other property. The other property consisted of the tomato plants and/or the land upon which the Benlate was sprayed.

656 So.2d at 172.

It should be plain to the Court that *Finks Farms* cannot be reconciled with *Casa Clara* and should be disapproved. This is true because the object of the farmer's bargain when he purchased the chemical was a healthy tomato crop, not the chemical. He lost the benefit of that bargain when the chemical allegedly failed, causing harm to his crop.

Like the general contractors in *Casa Clara* and *GAF Corp.*, *supra*, and the farmer in *Monsanto Agricultural Products v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982), *infra*, the farmer in *Finks Farms* purchased a series of components (seed, water, fertilizer, soil,

pesticides, etc.) in commercial, arms-length transactions governed by the Uniform Commercial Code with one goal in mind - the production of tomatoes for resale at a maximum profit.

The farmer had no more interest in the agricultural chemical than the homeowners or general contractors had in the concrete or steel in *Casa Clara*. In each case, the allegedly defective product was designed to become "an integral part of [another] finished product" (a home in *Casa Clara* and a tomato plant in *Finks Farms*). In each case, the product allegedly injured that "finished product," causing the plaintiff to suffer "disappointed economic expectations" in the process. *Casa Clara*, 620 So.2d at 1246. Since the farmer was free to protect himself through contract or insurance, the court in *Finks Farms* should have treated the farmer like the homeowners in *Casa Clara* or the contractor/farmers in *GAF Corp.* and *Monsanto* and held that his tort claims were barred by the Rule.

Indeed, the Fourth District recognized in *Jarmco* that *Finks Farms* conflicts with *Casa Clara*, noting "we thus have grave doubts that the Second District's decision is in harmony with *Casa Clara.*" 668 So. 2d at 303. Thus, it should come as no surprise that the majority of courts that have analyzed facts like those in *Finks Farms* have reached a contrary conclusion.

In *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), for example, a farmer purchased seed potatoes that had been treated with an agricultural chemical designed to prevent the seed potatoes from sprouting during the off-season. The sprout suppressant

worked better than expected; it killed two-thirds of the seed potatoes to which it had been applied and severely injured the remaining one-third, resulting in a total crop loss. The farmer sued in tort to recover his lost profits. 855 F.2d at 1047-1051.

The Third Circuit (in an opinion approved by this Court in *Casa Clara*) held that damage caused to the seed potatoes by the sprout suppressant did not constitute damage to "other property." *Id.* at 1051. In reaching this conclusion, the court focused on the farmer's bargained-for expectations in purchasing the treated seed potatoes. This expectation, which the court called "the end result," was

> intended to be a single product - in this case a disease-free, pest-free seed potato that is capable of producing healthy plants. The Kings lost the expected performance of the seed potatoes, no more and no less.

855 F.2d at 1052.

Like the farmer in *King v. Hilton-Davis*, the farmer in *Finks Farms* applied the agricultural chemical to its plants with the expectation of producing live, disease-free plants to maximize his profits. The chemical became an integral part of the plants and when it allegedly injured them (like the sprout suppressant in *King* and the concrete in *Casa Clara*), the farmer suffered "disappointed economic expectations," the core concern of contract law.

Likewise, in *Monsanto, supra,* which this Court cited favorably in *Casa* Clara and *Florida Power & Light*, a farmer purchased a herbicide designed to kill weeds that were threatening to smother and destroy his vegetable crop. *Monsanto*, 426 So.2d at 575-577. Unfortunately, the herbicide failed to kill the weeds, which, as anticipated, destroyed his

crop. The First District, in one of the earliest applications of the Rule in Florida, held that the farmer's tort claims were barred because "tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers." [2]

The Sixth Circuit reached the same conclusion in *Bailey Farms, Inc. v. Nor-Am Chemical Co.*, 27 F.3d 188 (6th Cir. 1994). There, a commercial farmer filed tort claims against a manufacturer of a soil fumigant designed to kill weeds. The fumigant, instead, destroyed his watermelon crop. Despite recognizing the truism that the plaintiff's watermelon crop "literally" was property "other" than the chemical purchased by the plaintiff, the Sixth Circuit refused to allow the tort claims because the object of the farmer's bargain when he purchased the chemical was a healthy watermelon crop. When he lost that crop, he suffered purely economic losses and nothing else. *Id.* at 189-90.

This point is further made in *Ringer v. Agway, Inc.*, 13 U.C.C. Rep. Serv. 2d 114, 1990 W.L. 112091 (E.D. Pa. 1990). In that case, the plaintiff operated a small potato farm, which experienced impaired yields when seed potatoes it purchased proved to be infected with a bacterial ring rot. Damages were claimed not only for the loss of the seed potatoes

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[2] In a strained effort to distinguish *Monsanto*, the court in *Finks Farms* relied on dictum in *Monsanto* implying that the *Monsanto* court might have reached a different conclusion if the herbicide had caused direct damage to the crop instead of indirect harm by failing to kill the weeds. *Finks Farms*, 656 So.2d at 173. This "direct/indirect" distinction, however, is legally unsound and, in any event, was rejected in *Casa Clara*, where the concrete caused direct and devastating damage to the steel reinforcing bars and other components of the plaintiffs' homes. Moreover, the complained-of losses in *Finks Farms* and *Monsanto* were identical; lost profits arising from a lost crop. There is no logical or rational basis to justify a conclusion that the farmer in *Finks Farms* may sue in tort because the agricultural chemical applied to his crop directly damaged that crop, while the farmer in *Monsanto* may not sue in tort because the agricultural chemical in that case indirectly damaged his crop. In each case, the crop was lost due to a failure of the chemical to perform as expected.

purchased, but also for damage the ring rot caused to other, previously healthy potatoes, and for an "extensive eradication program to clear the pathogen from [the farmer's] machinery, facilities and land in order to protect future crops". *Id.* at 119-120. Relying, like this Court in *Casa Clara*, on *King v. Hilton-Davis*, the court held the "other property" exception did not apply because losses incurred by the farmer were:

> [An] ordinary commercial risk of a transaction in the potato industry. Other courts have consistently held that those aspects of damage which involve items or facilities obviously involving the bargain between the parties is not damage to "other property".

Id. at 120 (emphasis added).

That is, damage to the previously healthy seed potatoes and damage attributable to eliminating the ring rot infection from machinery, buildings and soil did not constitute damage to other property under the Rule because such losses constituted consequential losses under the UCC and were nothing more than an outgrowth of the purchase of an unsatisfactory product, resulting in disappointed commercial expectations. In short, they were classic "economic losses" resulting from failed contractual expectations; damages which represent the "failure of the purchaser to receive the benefit of its bargain - traditionally the core concern of contract law." *East River*, 476 U.S. at 870. Since *Finks Farms* conflicts with *Casa Clara*, it should be quashed.

Once again, the lesson to be learned from these cases is that Petitioner has not suffered damage to "other" property under the Rule. Rather, the losses it suffered were nothing more than "disappointed economic expectations" arising out of a contractual breach

by the Respondent to perform construction work in and around the very property at issue, damage which the parties contemplated in their agreement.

This is not to say that Petitioner had no remedy for its alleged losses. To the contrary, it was free to negotiate with Respondent for warranty protection and could have purchased insurance to protect its economic interests. It could have simply removed its property from the premises while the construction was ongoing or taken other steps to safeguard that property from the disruptive, dust-creating construction performed by Respondent. In the end, it was free to sue Respondent in contract to recover its complained of losses, subject only to the terms and conditions it accepted. "[T]hese protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses." *Casa Clara*, 620 So.2d at 1247.

II. CONTRACTING PARTIES SHOULD BE FREE TO DISCLAIM OR LIMIT LIABILITY FOR STATUTORY CLAIMS

The Petitioner concedes that the Association's members, as material suppliers only, have no duty to comply with the Florida Building Codes Act as a matter of law. *Casa Clara,* 620 So. 2d at 1248. Thus, the question whether the Rule bars a claim for violation of that Act is better left to the parties to this appeal and the Association defers to the positions taken by the Third District below, by the Respondent in this case, and by the Petitioner in *Stallings v. Kennedy Electric, Inc.,* Case No. 93, 126 on this issue.

Two points about the Petitioner's statutory/separation-of-powers argument and its interplay with the risk allocation provisions of the Uniform Commercial Code merit

additional comment, however. First, and as noted above, if a judge-made rule like the economic loss rule cannot be applied to bar or otherwise limit Petitioner's statutory rights under the Florida Building Codes Act without violating the separation-of-powers doctrine, that same judge-made rule and its exceptions cannot be applied to abrogate the statutory rights of the Association's members to disclaim liability for consequential losses under Section 672.719 of the Uniform Commercial Code.

Secondly, many members of the Association include clauses in their contracts that provide, for example, that "purchaser agrees its exclusive remedy against seller under any theory of recovery shall not exceed the purchase price paid for the goods in question." These clauses, of course, are intended by their express terms to apply to claims asserted under "any theory of recovery," including statutory claims for violation of the applicable building codes.

Petitioner concedes, and the Association agrees, that such clauses conceptually are valid and enforceable under Florida law in the absence of an express statement by the Legislature in the relevant statute that said rights are not subject to contractual limitation or modification. See footnote 16 and Point III of Petitioner's initial brief. It contends, however, that such clauses must mention a specific statute by name to be valid.

On this point, the Association disagrees. Such a requirement would result in the creation of unduly onerous, unnecessarily-long limitation of liability clauses, the inclusion of which might rest on the fortuity of whether the drafter or its counsel knew of or had the

ability to identify every potential statutory cause of action in Florida allowing the award of purely economic losses. Rather, if a purchaser of goods or services contractually agrees that "Seller [or Service Provider] hereby disclaims liability for any statutory claim arising from a breach of this agreement" (except where the Legislature expressly forbids such a disclaimer) or includes a limitation of damages clause under Section 672.719 that provides "Purchaser agrees that Seller's maximum liability under any theory of recovery shall be the refund of the purchase price paid…", etc., such clauses should be valid and enforceable under Florida law.

To avoid the onslaught of litigation and appellate review that no doubt will follow if this Court holds that the Rule does not bar statutory claims, this Court should clarify that commercial entities may contractually disclaim and/or limit liability for statutory claims by using language like the clauses set forth in the preceding paragraph of this brief unless expressly forbidden by the Florida Legislature in the relevant statute.

CONCLUSION

The Petitioner cannot escape the fact that it seeks to recover purely economic losses in tort because it failed to protect its own economic interests through contract or insurance. In effect, it has asked this Court to rewrite its contract with Respondent so that it can avoid the ramifications of its own bad bargain.

The judiciary should refrain from injecting itself into this type of economic decision-making. Neither the citizens of Florida, nor product manufacturers, should be forced to bear the economic losses of those who fail to protect themselves. If the contrary were true, the law of contracts would surely "drown in a sea of tort," taking the Uniform Commercial Code with it to a watery grave. *Casa Clara*, 620 So.2d at 1247 *quoting East River*, 476 U.S. at 866.

For these reasons, the Florida Concrete & Products Association respectfully requests the Court to end the confusion surrounding the "other" property exception by affirming the decision of the Third District below and by holding that "other" property means property that would not qualify as being "consequential losses" under the UCC.

Respectfully submitted,

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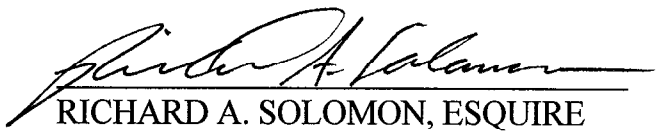
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 13th day of November, 1998 to **Jeffrey J. Pardo**, Esq., PARDO & PARDO, P.A., Post Office Box 399116, Miami, Florida 33239; **David C. Appleby**, Esq., WOMACK, APPLEBY & BRENNAN, P.A., 7700 North Kendall Drive, Suite 705, Miami, Florida 33156-7591; and **Charles M. Auslander**, Esq., ST. LOUIS, GUERRA & AUSLANDER, P.A., 201 South Biscayne Blvd., 10th Floor, Miami, Florida 33130.



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