SUPREME COURT OF FLORIDA

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

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**COMPTECH INTERNATIONAL, INC.**

Plaintiff/Petitioner,

v.

**MILAM COMMERCE PARK, LTD.**

Defendant/Respondent.

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# BRIEF OF RESPONDENT, MILAM COMMERCE PARK, LTD., ON THE MERITS ON REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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## STATEMENT OF CASE AND FACTS

The respondent accepts the Statement of the Case and Facts as set out in petitioner's initial brief.

## SUMMARY OF THE ARGUMENT

Our position is best stated by focusing on the nature of the rationale underlying the Economic Loss Rule and its exceptions. The ELR, as an articulation of the common law, precludes the recovery of economic loss in tort to contractual parties. When economic loss is occasioned in a contractual setting by reason of damage to "other property", or is the result of "independent torts," whether based on statute or otherwise, the ELR will give way and a negligent breach of contract action will survive. In the instant case Comptech has not alleged any such requisite degree of independence either by way of a statutory cause of action under §553.84 Fla. Stat. or by alleging damage to "other property". The key concept underlying the exceptions to the ELR is the notion of independence. Where a truly "independent tort" occurs in a

commercial setting a cause of action in tort will be available. Comptech, however, has failed to sufficiently allege a cause of action for a truly "independent tort", whether stemming from a statutory violation or arising from damage to "other property". This key element of independence is missing from Comptech's claim which would substantiate an abrogation of common law principles and warrant a cause of action for negligent breach of contract entitling Comptech to a recovery for economic loss in tort.



## ARGUMENT

**WHETHER THE ALLEGATIONS AGAINST MILAM AMOUNT TO AN INDEPENDENT TORT ENTITLING COMPTECH TO ECONOMIC DAMAGES.**

### I. COMPTECH IS NOT ENTITLED TO A STATUTORY CAUSE OF ACTION UNDER §553.84 FLORIDA STATUTES

The fundamental premise underlying our position in this dispute relates to duty; "but for" the lease agreement at issue there would have been no duty from Milam to Comptech for the build-out. The alleged breach of duty which could give rise to a cause of action under Comptech's third amended complaint is a breach of contractual duty. Absent the agreement there never would have been damages. The point being that the entire cause of action as alleged is dependent on the contract and, in the words of the Third District's opinion in Comptech Int'l, Inc. v. Milam Commerce Park,

Ltd., 711 So.2d 1255 (Fla. 3d DCA 1998) is "inseparably connected" to both the alleged breach and resulting damages.

Comptech essentially argues that there are coexisting parallel duties flowing both from the agreement as well as from §553.84 Fla. Stat. (1989) and that a cause of action can be brought stemming from a breach of either set of duties.[1] Underpinning this position is the argument that the legislature has created a separate "private right" in derogation of the common law as manifested in §553.84 Fla. Stat. (Comptech Br. p.7). This suggestion misses



the mark. The Economic Loss Rule ("ELR") does not contemplate any such coextensive duties and recognizes that Florida law allows but one reality; that economic damages are unobtainable in a contractual setting absent an "independent tort" or damage to "other property". There being no independent tort alleged by way of distinct elements and unique damages, the ELR precludes tort recovery for an action which most certainly should have been brought under the contract. Comptech's tort claim is barred by the ELR.

> Where the parties to an agreement negotiate within a contractual setting the same duties as occasioned by the statute, a breach of which would lead to the same

[1]Comptech pressed its contract claim up through its second amended complaint (R. 49-65) only to abandon it with the filing of its third amended complaint (R. 448-459).

> economic losses involving identical elements to the claim, the Economic Loss Doctrine prevails.

Comptech Int'l, Inc., 711 So.2d at 1257.

Does the ELR really constitute inappropriate judicial interference with legislative authority to create a "private right" under §553.84 as Comptech argues? We believe not. Let us take a closer look at §553.84 Fla. Stat. (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 a person or party who committed the violation.



Comptech suggests that this statute entitles it to maintain a tort cause of action for economic loss in addition to whatever contractual remedy it had, and abandoned, under the lease agreement. Placing heavy emphasis on the introductory language "notwithstanding any other remedies available" Comptech argues that a private right has been created abrogating the longstanding common law of Florida wherein economic damages in a contract action can only be recovered where there is personal injury or "other property" damage.

With this Court's decision in Florida Power & Light Company v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987) the articulation of the ELR was endorsed and the following pronouncement made:

> We hold the Economic Loss Rule approved in this opinion is not a new principal of law in Florida and has not changed or modified any decisions of this Court.

Florida Power & Light Company, 510 So.2d at 902.

In this context then §553.84 Fla. Stat. was enacted in 1974 as part of Chapter 553 Building Construction Standards. Part VII, State Minimum Building Codes, required local governments to adopt one of four proposed recognized model codes.[2] The South Florida Building Code was adopted by Dade County.

Section 553.84 Fla. Stat. follows in written order in Chapter 553, Part VII, §553.83 Fla. Stat., Injunctive Relief, which allows a code enforcing agency to seek such relief. We suggest that the



injunctive relief of §553.83 Fla. Stat. is the reference intended by the legislature when it indicated, in §553.84 Fla. Stat. "notwithstanding any other remedies".

Comptech argues, however, that a de novo "private right" of action was created which modified the existing law of Florida with regards to the recovery of economic loss with the enactment of this section. For this proposition there is scant support.

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[2]§553.73(2) Fla. Stat.

One commentator has reviewed the origins of §553.84 Fla. Stat. and found the legislative history on its enactment wanting.[3] Certainly there is no reported reference to any legislative intent to modify the then current state of the law on recovery for economic loss.

What then of the statutory language itself; what "private right" does it create? More than likely this section implicates a "statutory tort" based on a negligence theorem. A duty of care is therefore created, but for whom? According to the language of the statute, the cause of action lies against the person "who committed the violation". While appearing to be a simple proposition, the operative wording of "who committed the violation" is not a straightforward question.[4] Without getting too bogged down in the interpretive complexities of this section, we suggest that the duty occasioned under Part VII, State Minimum Building Codes falls on



the party against whom the cause of action under §553.84 Fla. Stat. lies, i.e. the "person who committed the violation". Under the facts of this case that "person" refers to the contractors who had the obligation to pull the permits and complete the build-out. Comptech's "private right" therefore lies against parties no longer

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[3]Byron G. Peterson and Steven S. Goodman Section 553.84: Remedy Without a Cause? 17 Nova L. Rev. 1111 (1993).

[4]See Section 553.84: Remedy Without a Cause?, id.

part of this litigation.[5]

Our position on this issue is supported by the Third District's opinion in Sierra v. Allied Stores Corp., 538 So.2d 943 (Fla. 3d DCA 1989). At issue was whether §553.84 Fla. Stat. created strict liability against a property owner for an alleged violation of the South Florida Building Code. That court observed that:

> Liability under the code, and in accordance with common-law principles, is imposed on "the person or party who committed the violation". §553.84 Fla. Stat. (1987).

Sierra, 538 So.2d at 944.

In so ruling the court held that there was no duty, nor breach of duty, on behalf of the property owner to the injured party.[6] Sierra, id. at 944.



The duty owing to Comptech from Milam here is that duty arising from the obligations of the lease agreement. Arguably,

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[5]Comptech's second amended complaint contained both a negligence and breach of contract claim against D & M Remodeling, Inc., one of the contractors (R. 49). See also Comptech's third amended complaint wherein it is alleged that the contractors caused damage to its property (R. 452, 453)

[6]In Casa Clara Condominium Association, Inc. v. Charley Topino & Sons, Inc., 588 So.2d 631 (Fla. 3d DCA 1991) the court found no duty under the code applicable to a concrete supplier. Accord Casa Clara Condominium Association, Inc. v. Charley Topino & Sons, Inc., 620 So.2d 1244 (Fla. 1993).

even if Milam owed Comptech a duty stemming from the South Florida Building Code, that duty would be, in the Third District's characterization, "subsumed" by the agreement since the damages are identical to what could be recovered under the contract.[7]

Getting back to §553.84 Fla. Stat. and whether a private right of action, or remedy, has been created, this Court in ADY v. American Honda Finance Corp., 675 So.2d 577 (Fla. 1996) noted with reference to issues involved in the interpretation of statutes the following:

> It is a rule of statutory construction that a statute in derogation of the common law must be strictly construed. See Southern Attractions Inc. v. Grau, 93 So.2d 120 (Fla. 1956). A court will presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute. See Carlisle v. Game and Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1997).

Or, as the First District expressed in Law Offices of Harold Silver, P.A. v. Farmers Bank and Trust Company of Kentucky, 498 So.2d 984 (Fla. 1st DCA 1987) when asked whether a statutory remedy under Chapter 56 was intended to be exclusive of any common law remedy:



[7]The Code in §304.2(d) indicates "notwithstanding other provisions of this code, compliance with this code shall be the responsibility of the owner".

> Statutes ordinarily should be construed in such a way as to harmonize them with the existing common law. Vanner v. Goldshin, 216 So.2d 759 (Fla. 3d DCA 1968), and statutes designed to alter the common law must speak in unequivocal terms. Borklin v. Willis, 97 So.2d 129 (Fla. 1st DCA 1957).

Law Offices of Harold Silver, P.A., 498 So. 2d at 985.

Comptech's suggestion to this Court that §553.84 Fla. Stat. effectively altered the course of Florida's law with regards to the recovery of economic damages in a contractual setting does not hold water. The statute's remedy activates an unclear substantive right. It is a remedy which, if applied as Comptech suggests, would be in derogation of the common law with respect to tort recovery for economic damages. The requisite showing by way of legislative history, legislative intent, and the plain wording of the statute fails to give support to Comptech's reading. Simply stated, the ELR is not abrogated by §553.84 Fla. Stat. and longstanding Florida law on the recovery of economic loss should not be undermined by an extreme reading of that statute.

A few final words here to comment on the dissenting opinion in Comptech Int'l, Inc. and the Fifth District's opinion in Stallings v. Kennedy Electric, Inc., 710 So.2d 195 (Fla. 5th DCA 1998). The dissenting voice in Comptech Int'l Inc. expressed concerns that §553.84 Fla. Stat. would essentially be made void by the majority opinion and that, as a general proposition, the ELR should never be invoked to barr a statutory cause of action. (See Comptech Int'l,

Inc., 711 So.2d at 1268). The Fifth District shared this concern.



(See Stallings 710 So.2d at 196). These reservations are unwarranted when considered in light of the following propositions; the ELR, as a longstanding pronouncement of law, was available for legislative consideration when enacting §553.84 Fla. Stat. and there is no concominant clear and explicit intent reflected in that remedial section that could be considered to change longstanding legal precedent. Whether the ELR will barr a statutory cause of action depends on the particular statute. If the legislative intent is expressed so as to set aside recognized legal principles then the legislative will should take precedent.[8] Legislative intent, however, is more than words taken out of context.

The court in Stallings misquotes §553.84 Fla. Stat. by inserting the word "civil" before "remedies". This literal expansion reflects, in our opinion at least, the court's overbroad

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[8]For example, in Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602 (Fla. 2d DCA 1997), the issue was whether the ELR eliminated a consumer's cause of action brought under the Florida Deceptive and Unfair Trade Practices Act. After discussing the legislative background, the clear legislative intent to expand remedies, and the fact that the legislature clearly intended to establish a new cause of action, the court found that the ELR, as a matter of legislative will, did not barr the claim. There is no such indicia of legislative intent associated with §553.84 Fla. Stat. See also Facchina v. Mutual Benefits Corp., 23 Fla. L. Weekly D2185b (Fla. 4th DCA, September 23, 1998), where the statutory tort of "unauthorized publication" found in §540.08 Fla. Stat. (1997) was not barred by the ELR where the legislative intent was clear and explicit as to whether the claim would be subject to being barred by common law.

reading of the statute. The Fifth District invoked the legislative will as the basis for reversing the trial court's dismissal of a §553.84 Fla. Stat. action. This is, however, not a case of courts "willy nilly" striking down legislative pronouncements. This is a



case of longstanding common law precedence interacting with a vague statute creating a remedy with unclear parameters. The requisite legal threshold of clear and unequivocal legislative intent to set aside the common law is missing.

Additionally, §553.84 Fla. Stat. has not been eviscerated by the majority opinion.[9] This section has continued viability in circumstances where no duties have been created by negotiations and agreement that mirror the same duties as occasioned under Part VII of Chapter 553 State Minimum Building Codes. Florida law requires an "independent" wrong to occur before economic damages can be recovered in tort. That "independence" can be engendered by a statutory based action or common law tort. There must exist, however, the requisite degree of uniqueness and independence to remove the claim from the confines of the contractual context.[10] Tort law should not serve as an "escape valve" for a poorly bargained-for result.

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[9]See note 3, Comptech Int'l, Inc., 711 So.2d at 1258.

[10]See note 2 Comptech Int'l, Inc., 711 So.2d at 1257 and Rubio v. State Farm & Casualty Co., 662 So.2d 956 (Fla. 3d DCA 1995) where statutory tort of first party bad faith action against insurance carrier not barred by ELR since no alternate remedy available.

This notion of independence as the threshold for allowing tort recovery for economic damages in a contractual setting was most



recently reiterated by this Court in HTP, Ltd., vs. Lineas Areas Costarricenses, S.A., 685 So.2d 1238 (Fla. 1996). In that decision which involved whether a settlement agreement was occasioned by fraudulent inducement, this Court repeated that the ELR will barr tort claims, whether for intentional or negligent acts, unless those acts are independent from acts that breach the contract. We would argue that this pronouncement holds forth for "statutory torts" as well.[11]

In summary then, "statutory torts" will not be barred by action of the ELR where the legislative intent is clearly and unequivocally expressed or where the cause of action has the requisite degree of independence, i.e. where the claim involves unique duties, elements, and damages. A statutory tort claim in a contractual setting will be barred, however, where the same duties so imposed by statute arise under the contract and the economic

[11]See e.g. Sarkis v. Pafford Oil Company, Inc., 697 So.2d 524 (Fla. 1st DCA 1997) where, in the context of a commercial lease, statutory torts of civil theft and civil racketeering were barred by ELR since economic damages claimed were no different from damages which could have been recovered in contract action.

damages sought are identical to those which could have been brought in an action pursuant to the agreement.

## II. COMPTECH HAS ALLEGED NO "OTHER PROPERTY" DAMAGE WHICH WOULD CONSTITUTE AN EXCEPTION TO THE ELR

We obviously agree with the Third District's emphasis on the dependent nature of Comptech's claim stemming from the agreement and the observation that an "independent tort" will support a claim for negligent breach of contract warranting economic damages. This



particular claim involves a "services application" of the ELR. We therefore look to AFM Corporation v. Southern Bell Telephone and Telegraph Company, 515 So.2d 180 (Fla. 1987) for guidance. That decision discussed the issue of whether Florida law permitted a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage. This Court, in rejecting that proposition, stressed that no tort "independent" of the breach of contract itself was committed and found no basis for recovery in negligence. Comptech finds itself in the same circumstance; it has alleged no tort independent of the contractual breach itself which would allow for a recovery in negligence. As will be argued below, there was no damage to "other property" which would constitute the requisite independent tort.

The concept of the "other property" exception to the ELR is an articulation of the underlying premise supporting tort recovery in a contractual setting, i.e. the notion of an "independent tort".

"Other property" constitutes this concept of independence since damage is occasioned to property unrelated and unconnected to the parties' bargained-for agreement.

The "other property" exception stems from that line of cases dealing with the "products application" of the ELR; when damage was done to property other than the "product itself" it was done to "other property". Since the parameters of the parties' agreement concerning the "product itself" were exceeded, the independent nature of the tort was established.



Extrapolating the "other property" concept to the instant case, a commercial lease providing for services, is somewhat convoluted. Applying the underlying principle of an "independent tort" is not so similarly tortured. Comptech has alleged no cause of action or damages which could be considered to be independent of the negotiated agreement.

Comptech insists that the damage incurred to its computers and databases meets the legal threshold for "other property".[12] Comptech draws this distinction in that the damage occurred to computer equipment that it had "brought onto" the premises.

[12]While Comptech alleged injury and damages to the leasehold premises and its business good will, in addition to its equipment, it appears that the only damage it considers to be to "other property" consists of damage to the computers and databases. See (R. 448) and Comptech Br. p.22 and 32.

(Comptech Br. p.22, 26, 32). Comptech so argues in order to gain support from Saratoga Fishing Company v. Jay Martinac and Company, ___ U.S. ____, 117 S. Ct. 1783 (1997). In that case the Court summed up their task as follows:

> This case asks how this corner of tort law treats the physical destruction of extra equipment (a skiff, a fishing net, spare parts) added by the initial user after the first sale and then resold as part of the ship when the ship itself is later resold to a subsequent user.

Saratoga Fishing Company, id., at 1785 (emphasis in original).

In addressing that particular issue the Court concluded that such "extra equipment, added" to the original product did in fact constitute "other property". Thus, Comptech suggests by analogy



that the computers and data it "brought onto" the property are akin to the "extra equipment, added" to the Saratoga Fishing Company fishing boat.

It is worth pointing out that Comptech's computers and their applications were in place on the property and preexisted the lease negotiations. Therefore such preexisting property should not be considered as analogous to the "extra equipment, added" to the fishing vessel following its original purchase and sale. (See e.g. note 9, Comptech Int'l Inc., 711 So.2d at 1262).

In 2-J Corp. v. Tice, 126 F. 3d 539 (3d Cir. 1997) the court considered the issue of whether a commercial purchaser of a pre-engineered warehouse could recover in tort from the manufacturer

for damage caused to inventory when the warehouse collapsed. Relying on Saratoga Fishing Company the court held that the damaged inventory was "other property". That court rejected the district court's reasoning that the inventory had become integrated into the original product as a result of the foreseeable utilization of the storage of inventory in the warehouse. The damaged inventory was therefore "other property" and the fact that its storage was foreseeable was not persuasive. In so ruling the court relied on its reading of Saratoga Fishing Company for the following observation:

> That analysis ultimately established the time of sale to the initial user as the critical point for determining whether added features are part of "the product itself" or "other property".

2-J Corp. v. Tice, id., at 542 (Footnote omitted).



We disagree that Comptech Int'l Inc. should be read as establishing a "foreseeability test" for application in this scenario of the ELR. While it certainly was foreseeable that sensitive computer equipment might suffer damage in a construction environment, this is not the crux of the Third District's opinion. If forced to analogize our commercial lease setting with a "products application" of the ELR we would suggest that the "time of sale" notion should be observed as more readily applicable. As the "product itself" includes all components added before the sale to the initial user, the preexisting nature of Comptech's business

plan with its component computers provided the impetus for the build-out. The computers were thus not so much "foreseeably utilized" pursuant to the lease, but were part of the business itself and not "extra equipment, added" to the negotiated bargain. Thus while computer damage was certainly foreseeable (and arguably should have been protected by negotiation) it is not the foreseeability of the damage itself that is significant; the significance lies in the fact that the computers were business property which constituted part of the bargained-for commercial agreement. Comptech's computers were inherent to the bargain and inseparable from it. The computer equipment was neither "extra" nor "added" to the bargain; it was an inherent element to the agreement.

> Obviously the computers constituted an essential part of the business endeavor. Likewise, the purpose for entering the lease and the build-out agreement was to benefit the business endeavor. Thus, the computers were directly related and connected to furthering Comptech's business, which was also the object of the lease and build-out agreement.

Comptech Int'l Inc., 711 So.2d at 1261.

This Court recently approved of the Fourth District's decision in Jarmco Inc. v. Polyguard Inc., 668 So.2d 300 (Fla. 4th DCA 1996), Rev. granted, 678 So.2d 339 (Fla. 1996), and decision approved by, Polyguard Inc. v. Jarmco Inc., 684 So.2d 732 (Fla.

1996). At issue in the Fourth District's opinion was whether the ELR barred certain negligence claims arising in an action by a dealer of resin products against the supplying distributor. (The allegedly defective resin was used to manufacture a defective product, a boat.) In upholding the trial court's summary judgment in favor of the distributor the court reflected on this Court's opinion in Casa Clara v. Charley Topino & Sons, Inc.

> The fundamental basis of the ELR as applied in Florida by Casa Clara is not found in subtle distinctions among products purchased and the usages and roles of the product with other property it will come in contact with after the sale. In short, the other property exception argued by appellee in this case is not the central teaching of Casa Clara. Rather, the holding is that, when the essential claim is by the purchaser of a product against the manufacturer, distributor or seller for non-personal injury damages arising from some purely economic wrong, Florida will not use its tort law to provide remedies to the purchasers of products that they,



> themselves, did not bargain for in their contracts of sale.

Jarmco, Inc., 668 So.2d at 304. (Footnote omitted).

That being said, the Fourth District characterized the "other property" exception by expressing the following concept:

> The ELR does not apply to personal injury claims or to property damage claims for property unrelated and unconnected in any way to the

product sold.

Jarmco, Inc., 668 So.2d at 303. (Emphasis supplied).

We feel this concept in need of reiteration; Comptech's computers were undoubtedly related to its business venture (were they not the heart of its endeavor?) and without question connected both to the purpose of the agreement (enhancement of the business) and nature of the enterprise. Comptech's suggestion to this Court that a conceptualization of property "brought onto" the premises constitutes the legal threshold for abrogation of the common law in this scenario is misplaced. The pertinent conceptualization is whether the requisite degree of independence is present that would warrant a distinct cause of action.

Comptech's computers were inherent to its business purpose and preexisted the lease agreement. At the risk of being repetitive here, but for the lease agreement there never would have been damage to this equipment.

Of no small significance is the context of this dispute; sophisticated commercial parties, dealing at arm's-length, with full exposure to free market risk allocation options and remedies should not be allowed recourse to the tort system when one party's



failure to adequately bargain for a contingency eventually presents a loss. As this Court has repeated on numerous occasions, contract law is more appropriate for dealing with issues regarding economic loss than is the law of tort. The character of the loss does

dictate the remedy. This case presents no factual distinction which would warrant a reversal of that generally recognized principle.

Furthermore, it is a fact in this case that such risk allocation concerns were addressed by the parties. Contained in the lease agreement is an indemnity provision.[13]

While the Third District wrote on the issue of the indemnity provision far more cogently than perhaps we ever could (See Comptech Int'l Inc. at 1261 and especially note 6) a portion of that provision bears repeating; Comptech agreed to hold Milam harmless for:

> TENTH: INDEMNITY
> (b) . . . all claims of every kind, including loss of life, personal bodily injury, damage to 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 any present or future condition or state of repair thereof.

See indemnity provision (R.60), (emphasis supplied).

Here is the point; while perhaps the parties never intended the reference to "other property" as reflected in the indemnity



provision to relate to the concept of "other property" under the

[13]See lease agreement at (R.56), indemnity provision at (R.60).

ELR, Comptech did in fact consider and negotiate the contingency of equipment damage. Without repeating all of the various incarnations of the indemnity provision, the essential fact is that the contingency of damage to the business concern, its equipment and operations was negotiated for in a commercial context and agreed to by the parties in an arms-length transaction. Without belaboring the issue of the validity of this provision, its significance is one of res ipsa loquitor. The parties agreed to allocate the foreseeable risks of the build-out. This was certainly a matter of negotiation and although construction related damage may have occurred to Comptech's computer equipment, this is the type of economic loss that is better served through the law of contract than the law of tort.

One of the prime tenants of contract law is to enforce the intent of the parties to an agreement. The indemnification provision provides convincing evidence of the parties' intent to negotiate the allocation of construction related losses which were ". . . caused or by resulting from any defect or negligence in the occupancy, construction, operation or use of any building or improvements in the demised premises . . .". (See Indemnity provision (d), (R.60) emphasis supplied).

Here is the next point:

> Essentially, Comptech could have contended with the potential risks to its business computers by negotiating to supply its own contractors, negotiating a more favorable indemnification provision,

> or calling for more protective measures to equipment it must have known were at risk in the construction environment.

Comptech Int'l Inc., 711 So.2d at 1261 (Footnote omitted).

Comptech's suggestion that the decision in Comptech Int'l Inc. relied upon a novel approach, a "foreseeability test", in deciding this matter is futile. The approach utilized in that decision has been the same construct that runs throughout the Third District's many pronouncements on the ELR.[14] The recurring theme, consistently applied, in the Third District's many opinions dealing with the ELR is the notion of whether in the commercial context potential economic losses were a proper subject of negotiation and risk allocation. If so, and if no independent tort contributed to the loss, the law of contract should then apply. The suggestion that a "foreseeability test" was the foundation of the Third District's decision is myopic. The foundation of this opinion is the notion of independence; Comptech has not alleged any operative set of facts which would entitle it to maintain a cause of action in tort for negligent breach of contract. The requisite nature of an

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[14]See discussion of Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc., 653 So.2d 412 (Fla. 3d DCA 1995); Standard Fish Company, Ltd. v. 7337 Douglas Enterprises, Inc., 673 So.2d 503 (Fla. 3d DCA 1996); Florida Bldg. Inspection Services, Inc. v. Arnold Corp., 660 So.2d 730 (Fla. 3d DCA 1995); McDonough Equipment Corp. v. Sunset Amoco West, Inc., 669 So.2d 300 (Fla. 3d DCA 1996); as summarized at Comptech Int'l Inc., 711 So.2d at 1260. This line of cases stands for the proposition that commercial parties have the ability to protect their own interests through negotiation and contractual bargaining or insurance.

"independent tort" has not been alleged and it is that element of independence which establishes a distinct cause of action.



Whether that cause of action is the result of a "statutory tort", or damage to "other property", the essence of that independence has not been alleged in this context which would preclude the operation of the ELR. This is not a case of "subtle distinctions" about products nor the "usages and roles" a particular product may play in interacting with other property. It is, however, a case of whether an independent tort occurred ouside the confines of a commercially negotiated agreement. Did Comptech suffer an economic loss which constitutes a separate, independent cause of action? We maintain it did not and recommend that this Court approve the opinion of the Third District.

## CONCLUSION

The opinion of the Third District should be approved by this Court and the trial court's rulings on the third amended complaint affirmed.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this _____ day of November, 1998, to: Joseph Pardo, Esquire, P.O. Box 398646, Miami Beach, FL 33239, Jeffrey Pardo, Esquire, P.O. Box 399116, Miami Beach, FL 33239-9116, and Stuart M. Gold, ESQ., 8180 N.W. 36th Street, Suite 100, Miami, Florida 33166; and Charles M. Auslander, Esquire, 201 South Biscayne Blvd., 10th Floor-Miami Center, Miami, Florida 33130.

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By: _____
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