In the Supreme Court
State of Florida

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

COMPTECH INTERNATIONAL, INC.

Appellant

vs.

MILAM COMMERCE PARK, LTD.

Appellee

Amended Reply Brief of Appellant Comptech International, Inc.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Statutes **Page**

Other Citations

SUMMARY OF THE ARGUMENT

The Association argues that the Economic Loss Rule should be interpreted so as not to infringe on its members' rights under the U.C.C. to limit their liability. Comptech responds that the Economic Loss Rule ought not abrogate the rights conferred by either statute. The Association members ought have the right to limit their liability, by contract, to the extent of and within the limitations described by the U.C.C.

The United States Supreme Court's interpretation, in *Saratoga Fishing Co. v. J. Martinac & Co.*, ___ U.S. ___, 117 S.Ct. 1783 (1997) controls the application of the object of the bargain test for determining "other property" under the Economic Loss Rule. There is no policy basis for this Court to overrule *Saratoga Fishing*.

The object of the bargain of a retail lease is the leasehold premises itself. Milam's lease does not describe Comptech's computers as part of anything being provided as part of the object of the bargain. Comptech's own property, therefore, cannot have been part of the object of Milam's bargain. Comptech's computers and computer data were "other property." Therefore, Comptech may pursue a tort claim arising from damage to such "other property."

ARGUMENT

Point 1

Protecting the *Florida Building Codes Act* from abrogation by the Economic Loss Rule serves to protect all parties from judicial encroachment on legislative power.

In its Amicus Curiae Brief, the Florida Concrete & Products Association (the "Association") expresses its fear that, by protecting the *Florida Building Codes Act* from abrogation by the Economic Loss Rule, Comptech might compromise the Association members' rights under the Uniform Commercial Code.[1] The Association's fear is unfounded. By protecting the *Florida Building Codes Act* from the onslaught of the Economic Loss Rule, Comptech is also protecting the Association members from having their statutory rights abrogated by this or any other judge-made rule. The Association would be better served by contracts that are enforceable *because* they clearly and unequivocally express the members' intentions than by contracts that are either unenforceable or which require protracted litigation to enforce.

The Association refers to Section 672.719 as if it grants suppliers an unfettered right both to exculpate and limit its liability by contract. However, Section 672.719 illustrates Comptech's argument that both exculpatory clauses and limitations on liability have parameters beyond which they do not operate. As the *Comments* to Section 672.719 state:

> ... [I]t is of the very essence of a sales contract that at least minimum adequate

[1] Amicus Curiae Brief of the Florida Concrete & Products Association, at page 45.

> remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. ...

To accept the statutory benefits, the contracting party must have some minimum adequate remedy. But, contrary to Section 672.719, the Association argues that Comptech should have no remedy. Unlike the Rule, the UCC prohibits leaving a contracting party without *any* remedy. Where a UCC contract fails in its purpose or operates to deprive a party of the substantial value of the bargain, then the statutory limitations must give way to the general remedy provisions of the Code. The Code goes further:

> ... If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

Here, the *Comments* sound like the admonitions of this Court in *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla. 1973) and *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So.2d 487 (Fla. 1979).

Proper application of the Economic Loss Rule does not eviscerate a person's right to disclaim an obligation or limit its liability under a statutory right of civil claim. Comptech does not seek to expand the Economic Loss Rule; rather, Comptech seeks to enforce the existing law of contract construction -- which already requires that, to enforce a self-exculpating provision of a contract[2], such provision must state clearly and unequivocally the

[2] which, presumably, could be argued as an affirmative defense to a tort claim.

fault from which the indemnitee seeks to be relieved. It matters not whether the fault is based on statute or negligence. Neither does it matter whether the indemnitor mentions it by statutory name, number, or descriptive conduct. What does matter is that whatever description is used be crafted so as to provide clear and unequivocal notice to the indemnitee as to the right it is limiting and/or disclaiming. The crafting of such contractual language does not rest on the "fortuity" of whether counsel knows or had the ability to identify every potential cause of action. It rests on the drafter's ability to express the intent of the parties in the contract.

Had Milam wanted its lease to exculpate itself from its own negligence, then its Lease should have said just that. If the Association members should desire to exculpate themselves from their own negligence, then they, too, ought to say just that; and, if they want to limit their liability pursuant to the UCC, then they should "clearly express" such limitations in accordance with the provisions of Section 672.719.

It does not behoove the Association to encourage expansion of the Economic Loss Rule either to trample Legislative authority or to eliminate the exceptions to the Rule for personal injury and damage to "other property." They should argue for a clear, clean line with which to separate the object-of-the-bargain from "other property" so that it can advise its members with greater certainty the confines of potential liability.

The public policies underlying the *Florida Building Codes Act*

preclude any attempt by Milam to limit by contract its liability or damages resulting from a violation of the Act. *See, Rollins v. Heller*, 454 So.2d 580 (Fla. 3rd DCA 1984) (actual damages were recoverable by homeowners in full for the *Florida Deceptive and Unfair Trade Practices Act* violation, notwithstanding contractual limitation of liability); *see also, John's Pass Seafood Co. v. Weber*, 369 So.2d 616 (Fla. 2nd DCA 1979) (it would be contrary to public policy to enforce an exculpatory clause that attempts to immunize one from liability for breach of a positive statutory duty); *Mankap Enterprises, Inc. v. Wells Fargo Alarm Services*, 427 So.2d 332 (Fla. 3rd DCA 1983) (exculpatory clauses relating to fraud or intentional misrepresentation are contrary to public policy and unenforceable). Therefore, Comptech's statutory damages would be recoverable in full for the Building Code violations notwithstanding Milam's attempt to limit its liability.

The Economic Loss Rule was never intended to abrogate or vitiate any person's statutory rights. The Rule does not encroach on the Association's members' right to use the U.C.C. to limit its liability. But, neither ought the Rule encroach on Comptech's right to recover its damages caused by Milam's violation of the *Florida Building Codes Act*.

Point 2

A. *Saratoga Fishing* controls the interpretation of the object of the bargain test for "other property" under the Economic Loss Rule.

The Association argues in favor of the Third District's expansion of the term "product itself" under the Economic Loss Rule

to include all property which is related or connected in any way to the product itself. They conclude that the consumer's own property has become part of the "object of his bargain." Such expansion tortures the principles which underlie the Rule, and cannot be harmonized with the decisions of this Court or with the United States Supreme Court's decision in *Saratoga Fishing Co. v. J. Martinac & Co.*

Justice Traynor explained the public policy underlying the Rule in *Seely v. White Motor Co.*, 403 P.2d 145 (1965) as follows:

> The distinction [between tort recovery for physical injuries and warranty recovery for economic injuries] rests ... on an understanding 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.

Id., at 151 (emphasis added; citations omitted).

In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), the United States Supreme Court adopted the *Seely* view of the Economic Loss Rule and defined "the product itself" to include the component parts of the product (turbine) supplied by Delaval because Delaval supplied them as an "integrated

package," a "single unit." 476 U.S. at 867. *East River* held that, under the Economic Loss Rule, where the only injury is to the object of the bargain, the only remedy should be the contractual benefit of the bargain.

> Obviously, damage to a product itself has certain attributes of a products-liability claim. But the injury suffered - the failure of the product to function properly - is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.

476 U.S. at 868.

Finally, *Saratoga Fishing* refined the object of the bargain test by holding that it should be applied from the vendor's, not the buyer's perspective. So, Martinac's fishing boat, in the condition in which it was sold to its initial user, was the "product itself;" and, the additional equipment added by the initial user and then sold to the second user was "other property."

Nowhere in any of these landmark cases did the Court ever suggest that the "product itself" could include the purchaser's property, nor did it encompass all property "related or connected in any way" to the object of the consumer's bargain. *Saratoga Fishing* suggests a view of the product from the vendor's perspective at the moment at which it is placed into the retail stream of commerce.

The Association just disagrees with the United States Supreme Court decision in *Saratoga Fishing*. The Association would have sided with Justice Scalia's dissent.[3] But, the majority of the

[3] *See*, Association's Amicus Curiae Brief, at page 34-35.

Court did not; and, Justice Breyer's opinion as to the common law Economic Loss Rule is controlling. The Association is incorrect to suggest that *Saratoga Fishing* is inapposite and inconsistent with *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993). The only distinction between *Saratoga Fishing* and *Casa Clara* is that *Casa Clara* assumed the purchaser's perspective while *Saratoga Fishing* requires the vendor's perspective of the object of the bargain. In *Casa Clara*, such a distinction would not have made a difference. The public policy behind tort law, and products liability in particular, is to protect the public from defective products placed into the stream of commerce. For the public in *Saratoga Fishing*, that stream of commerce began was entered when Martinac placed its finished boat onto the retail market. For the public in *Casa Clara*, that stream of commerce was entered when the condominium was placed for sale to the first buyer. The vendor's perspective in *Casa Clara* was still the finished condominium which included the component concrete. However, in *Saratoga Fishing*, the vendor's perspective was the first boat, without the added equipment, sold to its initial user. While *Saratoga Fishing* refined to the definition of the "product itself," had it been decided prior to *Casa Clara*, the outcome of *Casa Clara* would have been the same.

The decision below is contrary to the holding and rationale of *Saratoga Fishing* as to how to apply the object of the bargain test. The Association's answer is to ignore the United States Supreme Court. The Association's argument draws on a dissenting opinion

which states the general proposition that the United States Supreme Court does not control decisions dealing with state law.[4] But, the state laws being interpreted in the Association's cited cases were Rules of Evidence and the Florida Constitution, not common law, judge-made rules. *Id.* Even then, the Association cannot find support in the majority decision of the Court. The doctrine of precedent is basic to our system of justice. It ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular judge. Precedent requires that, when the facts are the same, the law should be applied the same. *Perez v. State*, 620 So.2d 1256, 1259(Fla. 1993)(Florida Supreme Court is bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations). With a case involving the interpretation of a common law, judge-made rule whose articulation arose in the United States Supreme Court, the policy supporting adherence to precedent is very strong.

> The doctrine of *stare decisis* requires a separate examination. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law. Such a separate

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[4] *See*, Association, Amicus Curiae Brief, at page 36, *citing Buccaneer Line, Inc. v. Owens-Illinois InterAmerican Corp.*, 256 So.2d 826, 828 n.1 (Fla. 1st DCA 1972)(State courts are not bound to follow a decision of a federal court,even the United States Supreme Court, dealing with state law); and, *Brown v. State*, 719 So.2d 882 (Fla. 1998)(Wells, J. dissenting)(U.S. Supreme Court decision interpreting Federal Rules of Evidence not binding on Florida Supreme Court interpretation of Florida Rules of Evidence)

> inquiry is appropriate not only when an old rule is of doubtful legitimacy ... but also when an old rule that was admittedly valid when conceived is questioned because of a change in the circumstances that originally justified it.

620 So.2d 1259, citing John P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U.L.Rev. 1, 9 (1983) (emphasis added) (footnotes omitted). *See also*, Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, J.S.Ct. History, 1991, at 13. Therefore, unless there have been any intervening events which might have changed the public policies underlying the Rule, there does not exist any basis upon which to even argue that Saratoga Fishing's interpretation of the Economic Loss Rule should not be followed. Since *Saratoga Fishing*, which was decided while *Comptech* was pending at the Third District, there have not been any changes in public policy. The United States Supreme Court specifically considered and rejected the public policy arguments advanced by the Third District and the Association. To disregard the Court's own interpretation of *East River* would dramatically impact settled expectations. To override *Saratoga Fishing* would risk undermining public confidence in the stability of our basic rules of law.

. **Under the Economic Loss Rule, the "object of the bargain" in a retail lease agreement cannot include the consumer's own property.**

According to *Saratoga Fishing*, the search for the "product itself" is found in the object of the bargain from the vendor's perspective. Most often, that product itself is readily identifiable. Other times, the product itself includes component parts, one of which was defective. *See, e.g., Casa Clara* and *East*

River. In each instance, the line between the "product itself" and "other property" is drawn between that which is sold by the vendor and all of the property of the vendee.

The line is not so cleanly drawn where the vendor-vendee relationship is more fluid or when the transaction is wholesale in nature. In *All American Semi Conductor, Inc. v. Mil-Pro Services, Inc.*, 686 So.2d 760 (Fla. 5th DCA 1977), the Fifth District applied the Economic Loss Rule to the vendor's sale of programmed computer chips. Due to a defect in the machine used to perform that task, the vendee's microchips were destroyed. *Id.* at 761.

> All American merely contracted with Mil-Pro to deliver it programmed microchips. Instead, it received back its microchips unprogrammed and destroyed. It lost the benefit of its bargain with Mil-Pro.

The object of Mil-Pro's bargain was to deliver programmed microchips. But, where the microchips were a necessary component to the object of the bargain being sold by the vendor, the microchips, although the property of the vendee, became part of the object of the bargain, and therefore were held not to be "other property" under the Rule.

The character of the transaction upon which the claim lies plays a role in determining whether the Economic Loss Rule should apply. Justice Scalia's dissent in *Saratoga Fishing* argued that the initial user was more than just a casual retail consumer. He was really in the business of refitting fishing boats for resale. Justice Scalia would have considered the initial user to be more akin to a wholesale distributor rather than a retail consumer.

But, Justice Breyer's description of the *character* of the initial sale prevailed because, from the initial vendor's standpoint, the goods were placed on the market for retail sale. However, had the initial sale been on a wholesale basis, or the initial vendor been a wholesale distributor, would the outcome have been the same?

Milam's lease was a retail contract. It required the payment by Comptech of sales tax. In such a retail transaction, the consumer's own property cannot logically be held to be part of the object of the bargain from the Landlord's perspective. The tenant's own property therefore must be not to be part of the "product itself." It must be "other property" under the Rule, the damage to which is recoverable in a claim filed in tort.

There may be instances where a Landlord might provide a tenant with certain computer and/or telecommunications services as part of its tenancy. In such cases, the Lease would describe such services, and the services and the equipment provided by the tenant for such purpose could have been considered to be a component of the object of the bargain and therefore part of the "product itself." But, such is not the circumstance of this case. The Lease provided for the delivery of specific leasehold premises. There is no mention in the Lease of the tenant's own computers playing any part of the object of the Landlord's bargained-for delivery of its product. Under these circumstances, it would mock the purpose of the Economic Loss Rule to include the consumer's own property as a part of the "product itself."

The Third District's interpretation of the Rule would provoke

inconsistent rulings statewide. It would ask each judge to determine whether and to what extent the consumer's own property was *contemplated* to be part of the overall transaction. Such an amorphic guideline does not yield consistency. Moreover, since the intent of the parties as to the nature and purpose of each transaction would (or should) be a factual determination, each case would remain in the system until the facts were decided. Rather than sail the sea of torts, the Third District decision would have us founder on the shoals of inconsistency.

CONCLUSION

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

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CERTIFICATE OF SERVICE

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