In The Supreme Court
State of Florida

CASE No.
Third DCA CASE No. 96-01056

COMPTECH INTERNATIONAL, INC.

Petitioner,

v.

MILAM COMMERCE PARK, LTD.

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

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INTRODUCTION

Petitioner Comptech International, Inc. ("Comptech" or "Tenant") seeks review, pursuant to Art. V, § 3(b)(3), Fla. Const., of the decision of the Third District Court of Appeal rendered May 20, 1998. *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 23 Fla. L. Weekly D1257a (Fla. 3rd DCA May 20, 1998). The Third District's decision expressly and directly conflicts with Florida decisions on the same points of law respecting the interpretation of the economic loss rule and its relationship to statutory causes of action. The Third District decision to use a judicially-derived doctrine, which originated as a restriction on the expansion of common law tort remedies, to abrogate a statutorily-derived right of civil claim involves a profound intersection of law with public policy, and raises the specter of a separation of powers conflict.

STATEMENT OF THE CASE AND FACTS

The Tenant, Comptech, leased a warehouse and office facility from the landlord, Milam Commerce Park, Ltd. ("Milam" or the "Landlord") and, after three years, needed additional space to expand. *Comptech International, Inc. v. Milam Commerce Park, supra.*[1] The parties entered into a second lease for an additional 13,000 square feet of warehouse space. In the second lease, the Landlord agreed to build a 2,000 square foot addition to the Tenant's already-occupied office. *Id.* Comptech claims that the Landlord was negligent in handling this construction for several reasons, including that the Landlord

(1) hired an unlicensed contractor,

(2) performed the construction work without architectural plans,

(3) performed the construction work without obtaining any building permits,

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

(5) failed to obtain a certificate of occupancy for the leasehold premises.

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[1] All facts, related here are taken from the decision's four-corners.

During the renovation, the unlicensed construction company released excessive dust and dirt throughout the Tenant's already-occupied office space, which caused physical damage to the Tenant's computers, and overloaded the electrical system in a manner which caused both loss of data and physical damage to the Tenant's computer systems. The contractor damaged existing bathrooms and flooring in the Tenant's original space, as well. The Tenant brought suit against the Landlord for property damage, economic losses, and punitive damages caused by the negligently performed renovation. The Tenant also sought civil remedies pursuant to the *Florida Building Codes Act* § 553.84, Fla. Stat. (1989) (the "Building Code"). The trial court dismissed with prejudice all but the negligent construction claim, and later entered summary judgment for the Landlord on the negligence claim too. The trial court reasoned that the Landlord's construction obligations arose out of a contract and that recovery was barred under the economic loss rule (the "ELR"). On May 20, 1998, in a revised opinion, the Third District affirmed, and held that (1) where claims are contractual in nature, there is no tort action for economic damages under the Building Code, and (2) the "other property" exception does not apply when it was foreseeable and hence should have been contemplated by contract that the Tenant's computers would be damaged.

SUMMARY OF ARGUMENT

Comptech expressly and directly conflicts with decisions of the Florida Supreme Court and other district courts of appeal on two principles of law. It also runs counter to the analysis of the "other property" exception to the ELR recently performed by the United States Supreme Court in *Saratoga Fishing Co. v. J. Martinac & Co.*, 117 S. Ct. 1783 (1997). *Comptech* expressly and directly conflicts with decisions which reason that the ELR was not intended to abrogate statutory provisions that provide civil remedies. In directly addressing the Building Code -- the same statute addressed in *Comptech* -- the Fifth District Court of Appeal in *Stallings v. Kennedy Electric, Inc.*, 23 Fla. L. Weekly D1087a (Fla. 5th DCA May 1, 1998),

certified conflict with the first opinion issued in *Comptech*. The revised opinion in *Comptech* does not extinguish the basis for *Stallings's* certification.

Comptech employs a "foreseeability" test for "other property" that is substantially at odds and hence expressly and directly conflicts with the "object-of the-bargain" test employed by this Court in *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620* So. 2d 1244, 1247 (Fla. 1993). Foresight, applied objectively and retrospectively by the courts, will repeatedly lead to results distinct from the proper application of the object-of-the-bargain analysis. Finally, *Comptech* expressly and directly conflicts with decisions which require that an indemnity provision clearly and unequivocally to state its intention to protect a party from its own, active negligence.

ARGUMENT

A. *Comptech* applies the economic loss rule to abrogate the civil remedies expressly provided by the *Florida Building Codes Act*, in express and direct conflict with a decision otherwise as to that statute and decisions determining that the economic loss rule cannot preclude a statutory claim.

In *Stallings v. Kennedy Electric, Inc.*, 23 Fla. L. Weekly D1087a (Fla. 5th DCA May 1, 1998), the Fifth District reversed the dismissal of a homeowner's claim under the Building Code. There, damages resulted from two fires caused by the allegedly faulty electrical wiring installed by an electrical subcontractor hired by the general contractor of Stallings's home. *Stallings precisely* described the conflict with *Comptech:*

> Notwithstanding the fact that the statute has its basis in a negligent act and violation thereof would require the same proof as a breach of contract, the statute is very clear. It begins "notwithstanding any other remedies available, any party ... damaged as a result of a violation...has a cause of action against the ... party who committed the violation." ... The legislature has clearly set forth that a party can sue under section 553.84 in addition to any other remedy. Affirming the trial court's ruling essentially eliminates the statutory cause of action. The *Comptech* court addressed this issue stating that a statutory right could be brought as long as the claim did not arise under a contract. *Id.*, at D2193. In purchasing a new home, this is a meaningless assurance because homeowners almost invariably buy pursuant to a written contract.

23 Fla. L. Weekly at D1087. The Fifth District decision, in fact, certified the conflict. Subsequently, the revised opinion in *Comptech* recognized the certification of conflict by *Stallings*. *Comptech,* 23 Fla. L. Weekly D1263 at n. 15.

Comptech conflicts, as well, with *Sarkis v. Pafford Oil Co., Inc.,* 697 So.2d 524 (Fla. 1st DCA 1997), *Delgado v. JW Courtesy Pontiac GMC Truck, Inc.,* 693 So. 2d 602 (Fla. 2nd DCA 1997), and *Burke v. Napierzcz,* 674 So.2d 756 (Fla. 1st DCA 1996). In each case, the court determined that the ELR does not abrogate a statutory provision that provides a civil remedy to those injured due to a statutory violation.

The Second District's *Delgado* actually employed the reasoning of the Third District's *Rubio v. State Farm Fire & Casualty Co.,* 662 So. 2d 956 (Fla 3rd DCA 1995), *review denied,* 669 So. 2d 252 (Fla. 1996). In *Delgado,* the court overturned a trial court ruling that the economic loss rule barred a cause of action based on the *Florida Deceptive and Unfair Trade Practices Act,* §§ 501.201-213, Fla. Stat. (1993). *Id.* at 611. In *Delgado,* just as in this case, the statute created an express right of civil action. In *Delgado,* just as in this case, the statute provided that its remedies were in addition to any other remedies. *Delgado* rejected the notion that the economic loss rule eliminates the statutory cause of action:

> [Clourts do not have the right to limit and, in essence, to abrogate, as the trial court did in this case, the expanded remedies granted to consumers under this legislatively created scheme by allowing the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies. In sum, any tension between the legislative policy embodied in the FDUTPA and the judicial policy embodied in the economic loss rule must be resolved under the doctrine of separation of powers in favor of the legislative will so long as the FDUTPA passes constitutional scrutiny.

Id. at 609 (citations and footnote omitted). *Comptech* employs a perceived analytic distinction between "statutory torts" and other statutory claims in an effort to reconcile the cases that have addressed the juncture between statutory causes of action and the ELR. That reconciliation relies on the assumption that parties in contract privity possess only contract-dependent statutory causes of action (statutory torts), the viability of "which in our view would

thwart the manifest purpose of the economic loss doctrine." 23 Fla. L. Weekly at D1258[2] This means used by *Comptech* to distinguish *Stallings* and reconcile the several cases which have addressed statutory claims cannot be the guiding principle. *Stallings* placed no stock in the view that the absence of a contract is a condition precedent for a statutory claim under the Building Code. The better guiding principle is that a claimant who pleads a short and plain statement of facts that satisfies the statutory elements of the claim has a right to proceed -- regardless of whether there is a contract.[3]

In any event, the distinction between the contract and non-contract setting is not a serious reconciliation of the cases. The widow in *Burke v. Napierzcz* had a contract to collect and forward to her mortgage payments and social security checks, but her statutory claim was not foreclosed by the ELR. Napieracz's actions were not merely a failure to perform, but also an affirmative, intentional act of theft of the funds with which he was entrusted, which actions established both a breach of contract and a statutory claim. Similarly, Rubio had the right to assert his bad-faith claim regardless of the fact that he had a contract with State Farm because he *could have* asserted facts that would have stated a statutory claim. Delgado, too, had a contract to buy his car from the auto dealer. That contract did not prevent him from claiming damages as a result of the auto dealer's violation of the FDUPTA. Finally, Sarkis was party to a service station lease and gasoline purchase contract that did not preclude his statutory claim. In sum, the Third District decision expressly and directly conflicts with the decisions of the other district courts of appeal on whether and under what criteria the ELR will

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[2] *Casa Clara* soundly rejected the pertinence of privity to application of the economic loss rule. 620 So. 2d at 1247-48. It is analytically inconsistent that the presence or absence of a contract should resurface as determinative of whether the economic loss rule should restrict a statutory cause of action.

[3] The legal presumption is that the statute forms part of the contract unless negated by terms that are clear and unequivocal. *See generally, Williams v. New England Mut. Life Ins. Co.*, 419 So. 2d 766, 769 (Fla. 1st DCA 1982) (statute forms part of the contract as if expressly referred to in its terms).

abrogate a statutory right of action. *Delgado* (and the Third District's *Rubio*) properly recognized that this disagreement is of the dimension of a dispute over the rightful allocation of powers between two of the coordinate branches of government. *Comptech* expressly asserts that statutes should not thwart the ELR. Presumably, *Delgado, Stallings* and *Rubio* expressly and directly reached the opposite conclusion.

B. *Comptech* applies a new "foreseeability" test that broadens the effect of the economic loss rule, rather than the accepted "object-of-the-bargain" test to determine what constitutes "other property," a further source of express and direct conflict

Florida cases follow the "object-of-the-bargain" test to distinguish between a defective product and "other property" under the economic loss rule. Under this test, one must look to the product purchased or bargained for by the plaintiff to determine whether additions constitute "other property," *See Casa Clara Condominium Assn, v. Charley Toppino and Sons, Inc.,* 620 So. 2d 1244, 1247 (Fla. 1993):

> The character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant. ... [The homeowners] bargained for the finished products, not their various components. The concrete became an integral part of the finished product and, thus, did not injure "other" property.

620 So.2d at 1247. With the exception of *Comptech,* since *Casa Clara* only the "object-of-the-bargain" test has been applied, *See e.g., E.J. DuPont de Nemours & Co. v. Finks Farms, Inc.,* 656 So. 2d 171 (Fla. 2nd DCA 1995) (chemical purchased to apply to plants damaged other property when plants were injured). *See also, Jarmco, Inc. v. Polygard, Inc.,* 668 So. 2d 300, 303 (Fla. 4th DCA) (other property involves property unrelated and unconnected to the product sold, not a component part of product sold), *review denied,* 684 So. 2d 732 (Fla. 1996); *American Universal Ins. Group v. General Mtrs. Corp.,* 578 So. 2d 451, 453 (Fla. 1st DCA 1991) (defective component pump's destruction of engine did not result in damage to other property). *Comptech* conflicts with and substantially compromises Florida's "object-of-the-bargain" test for defining "other property," by setting a more stringent standard for what constitutes "other property."

According to *Comptech*:

(1) there is no damage to "other property" where the damage extends only to property within the confines of the bargain. "Other property" does not include damage to property if those losses are direct and consequential losses that were within the contemplation of the parties and could have been the subject of negotiations between the parties.

(2) The phrase "other property" does not include the type of property that one would reasonably expect, utilizing a foreseeability test, to be damaged as a direct consequence of the failure of the product at issue.

There is a practical significance to the dichotomy between an object-of-the-bargain examination and a mere foreseeability test. In *Finks Farms,* it was absolutely foreseeable that a chemical purchased to treat plants would be sprayed on the plants, yet the plants were considered "other property." In *Casa Clara,* in argument before the Court, it was clear that, if bad, falling concrete debris had damaged a piano within the interior of the condominiums, the piano would have constituted "other property." In *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987), it was clear that damage to parts of the factory, other than component parts of the turbine itself, would have been damage to "other property." In each circumstance it was surely foreseeable that "other property" could be damaged; yet, the "object of the bargain" evaluation did not reject the tort claim. Contrariwise, a mere foreseeability test would surely have expanded the ELR to preclude the tort damaging such "other property." In Florida, the test for "other property" has never before been transmogrified into the question of whether harm merely could have been foreseen when the product or service was purchased.[4]

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[4] In *Saratoga Fishing Co. v. J. Martinac & Co.*, 117 S, Ct. 1783 (1997), the Supreme Court further refined the term "other property." In *Saratoga Fishing,* a manufacturer built a fishing boat and sold it to a buyer. The buyer then added extra equipment and resold the boat and the extra equipment as a package to a subsequent purchaser. Owing to a defect, the boat caught fire and sank, and damaged both the boat and the extra equipment. The question posed was whether the extra equipment should be considered part of the boat -- the product itself -- or other property. The Court held that the extra equipment was "other property," and made a further statement which is pertinent here:

Of course, nothing prevents a user/reseller from offering a warranty. But

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

The lease contained an indemnity provision by which the Tenant agreed to indemnify the Landlord from "all claims resulting from any negligence." The district court concluded that this provision indemnified the Landlord from its own, active negligence, and advocated that the indemnification from "all claims resulting from any negligence" clearly expresses the parties' intent that the Landlord be held harmless for any acts of its own negligence. 23 Fla. L. Weekly D1263 at n. 6, *citing Winn Dixie Stores, Inc. v. D & J Constr. Co.,* 633 So. 2d 65 (Fla. 4th DCA 1994); *Etiole Intl N.V. v. Miami Elevator Co., Inc.,* 573 So. 2d 921 (Fla. 3rd DCA 1990); and *Middleton v. Lomaskin,* 266 So. 2d 678 (Fla. 3rd DCA 1972).

This is yet another source of express and direct conflict -- with *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). Florida law requires *clear and unequivocal* contract terms to establish a self-exculpating indemnity provision for a party's own wrongful acts.

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

272 So. 2d at 511. *Accord, Charles Poe,* 374 So. 2d at 488. Judge Cope's dissenting opinion points out that the indemnity provision simply failed to state that it was intended to hold the

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> neither does anything prevent a Manufacturer and an Initial User from apportioning through their contract potential loss of any other items - say, added equipment or totally separate physical property - that a defective manufactured product, say an exploding engine, might cause. **No court has thought that the mere possibility of such a contract term precluded tort recovery for damage to an Initial User's other property.**

117 S. Ct. at 1787-88. (Emphasis added). *Comptech* diverges from this analysis as well.

Landlord harmless from *its own negligence.* 23 Fla. L. Weekly at D1261.

The majority unduly relied upon cases where the indemnity provision was clear and unequivocal, and hence expressly and directly now conflicts with these decisions. *See, Joseph L. Rozier Machinery Co. v. Nib Barge Line, Inc.,* 318 So. 2d 557 (Fla. 2nd DCA 1975); *Winn Dixie Stores, Inc. v. D & J Constr. Co.,* 633 So.2d 65 (Fla. 4th DCA, 1994); *Etiole Int'l N.V. v. Miami Elevator Co., Inc.,* 573 So.2d 921 (Fla. 3rd DCA 1990); *Middleton v. Lomaskin,* 266 So. 2d 678 (Fla. 3rd DCA 1972). Compare the Milam Lease provision with the language of these cases: *Winn Dixie,* which indemnified "notwithstanding such accident or damage may have been caused in whole or in part or negligence of you [Winn Dixie] or any of your servants, agents or employees," 573 So.2d at 921; *Middleton,* which indemnified "whether caused by negligent acts of LANDLORD, its agents or servants or otherwise," 266 So. 2d at 678; *Joseph L. Rozier Machinery Co.,* which indemnified against "property damage due or claimed to be due to any negligence of Lessor, employees or agents of Lessor or any other person," 318 So. 2d at 558; or *Etiole,* which indemnified against "damages on account of any such actions or claims, regardless of the cause of said actions and regardless of any negligence upon the part of MIAMI ELEVATOR COMPANY." 573 So.2d at 922. The provisions in these cases make a clear, unequivocal, and express reference to the indemnitee's own negligence from which it intends to indemnify. Milam's indemnification provision distinguishes itself by failing to mention of the Landlord's own negligence. The Third District decision expressly and directly conflicts with each of the cited cases.

Charles Poe extended the holding *of University Plaza* to cases where the indemnitee's negligence was not the sole cause of damages. 374 So.2d 489-90. *Comptech's* effort to avoid *Charles Poe* by stating that Comptech's damages did not arise strictly from the Landlord's sole negligence is no distinction at all. 23 Fla. L. Weekly D1263 at n.6. While the substandard work may have been physically done by the unlicensed contractors, Comptech's claim against the

Landlord is based on the Landlord's own negligent acts, which included its hiring the unlicensed contractors, constructing without architectural plans or permits, and occupying the premises without a certificate of occupancy. Here, too, *Comptech* cannot avoid an express and direct conflict.

CONCLUSION

The conflicts registered here are both express and direct. Moreover, they implicate public policy to a degree warranting review by the Court pursuant to Art. V, § 3(b)(3), Fla. Const.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief on Jurisdiction was served by first class mail, postage prepaid, on June 29, 1998 to

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