

065

In The Supreme Court
State of Florida

FILED

SID J. WHITE

CASE No. 93236

Third DCA Case No.: 96-01056

JUL 17 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

COMPTECH INTERNATIONAL, INC.

Petitioner,

v.

MILAM COMMERCE PARK, LTD.

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

**ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL**

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INTRODUCTION

Respondent, Milam Commerce Park, Ltd. (Milam), is the operator of a commercial warehouse park in Dade County, Florida. Its tenant, Comptech International, Inc., seeks declaratory review in this Court following the third district's substituted opinion of May 20th, 1998, which upheld the trial court's orders of dismissal and summary final judgment on Comptech's third amended complaint in Milam's favor. For purposes of this brief on jurisdiction, Milam will accept Comptech's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

Our position on jurisdiction is straightforward; undoubtedly there is a sufficient basis for discretionary review. The pertinent issue is, however, whether the Court should accept this case as the vehicle for resolving the larger issue of the interaction of the economic loss rule with statutory causes of action in general. Since this doctrine's primary orientation was developed in a products liability context the instant dispute involving a "services" application of the rule would provide a unique setting to the larger context.

ARGUMENT

Whether this Court should exercise its discretion and accept review

One might argue, and with scant opposition no doubt, that any district court decision which addresses the legal principles underlying the economic loss rule ("ELR") provides an avenue for discretionary review to this Court. We are not going to suggest otherwise. As this Court noted in The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), Article V of the Florida Constitution enables conflict review under broad circumstances:

Thus, it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. The Florida Star at 288.

The defining issue at hand therefore is not whether this Court has discretionary jurisdiction to facilitate review, but rather whether this Court should implement its discretion in this particular instance. Does the third district's decision in Comptech Int'l. Inc. v. Milam Commerce Park, Ltd., 23 Fla. L. Weekly D1257 (Fla. 3d DCA May 20, 1998) really provide the proper platform for the elucidation of the ELR that eventually will be forthcoming from this Court? The Comptech decision does not present a conventional articulation of the ELR in context; the operative setting here involves a commercial lease agreement with damages flowing from the alleged negligent provision of services, not products. Policy pronouncements in this context may have limited utility in strengthening decisional law involving the ELR.

No doubt clarification in general is needed; is this case the vehicle to take us there?

Petitioner suggests numerous bases exist for discretionary conflict review including conflict with the United States Supreme Court. While that particular basis for review may not be recognized by the Florida Constitution, the alleged "conflict" of Comptech with this Court's opinion in Casa Clara Condominium Assn. v. Charley Toppino & Sons, Inc., 620 So.2d 1244 (Fla. 1993), would provide a legitimate basis if valid. There is, however, no such "express and direct" conflict of Comptech with Casa Clara on the same "question of law" and this suggestion should be discounted. Petitioner argues that tension exists between the third district's "foreseeability test" and Casa Clara's "object- of-the- bargain" test. No such distinction exists and the policy reasons supporting both decisions are identical, i.e. the ELR should have broad application and the tort system should not augment the failings of contractual negotiations in a commercial setting. No conflict exists on these consistent positions.

Petitioner's position on the indemnity provision contained in the lease agreement likewise fails to present a direct basis for conflict when considered under the facts of the dispute and the nature of the provision.

This brings us to the real consideration; whether the decision in Comptech with regards to a presumed conflict between the ELR and a statutory cause of action (here an alleged violation of the South Florida Building Code) presents this Court with the appropriate

opportunity to address the interaction of the ELR with statutory causes of action in general.

The fifth district has explicitly stated in Stallings v. Kennedy Electric, Inc., 23 Fla. L. Weekly D1087a (Fla. 5th DCA May 1, 1998), that:

The Economic Loss Rule does not apply to statutory causes of action and should not be used as a sword to defeat them. Stallings at D1088.

Hence the certified conflict of Stallings with the third district's originally published decision in Comptech.¹ The third district's position on the issue of the ELR in relation to this particular statutory cause of action is that:

Simply, the ELR does not permit a cause of action for economic damages brought under the South Florida Building Code where the claims are clearly contractual in nature and the cause of action is inseparably connected to the breaching party's performance under the agreement. (Citations omitted). Comptech at D1258.

The Comptech opinion clearly does not contemplate the abrogation of any and all statutory causes of action by the ELR and certainly not those statutory causes of action which create independent duties outside of the negotiated commercial context. The crux of the Comptech opinion is where "but for" the commercially negotiated bargain there would have been no damages, the disadvantaged party should not be allowed to default to the

¹The opinion substituted on motion for rehearing on May 20, 1998, followed the certification. Original opinion at 22 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1997).

tort system through a statutory mechanism to obtain relief from a poorly bargained-for result.

The first district in Sarkis v. Pafford Oil Company, Inc., 697 So.2d 524 (Fla. 1st DCA 1997) has indicated that:

Florida courts have held that the economic loss rule can be applied to statutory actions, but this line of cases appears to be limited to actions that could be characterized as statutory torts. Sarkis at 527.²

If in fact under the ELR a party to a contract is confined to the negotiated-for contractual remedies for economic losses, and can only sue in tort where there is either personal injury or damage to "other property", the third district's holding is consistent with other Florida cases precluding tort recovery (even those based on statutory causes of action) when these two exceptions are not applicable. Not finding these two exceptions present in the instant case, and unwilling to create a "third" exception, the third district rightly held that when economic damages are inseparably connected to the breaching party's performance under an agreement that party would be prohibited from expanding its remedies beyond the negotiated parameters of risk allocation already agreed to. In this sense the Comptech opinion can be seen as consistent with this Court's prior decisions which

²The Sarkis court noted that the ELR had been found to bar a statutory action for civil theft, See Gambolati v. Sarkisian, 622 So.2d 47 (Fla. 4th DCA 1993) and likewise a claim for civil racketeering. See Ginsberg v. Lennar Florida Holdings, Inc., 645 So.2d 490 (Fla. 3d DCA 1994); Futch v. Head, 511 So.2d 314 (Fla. 1st DCA 1987).

give the ELR a broad application and with the majority of district court opinions on similar interactions of the ELR with statutory causes of action.

CONCLUSION

In summary then, the real issue is whether this Court should accept discretionary review, not whether the basis for such review is apparent. The decision in Comptech is not at odds with this Court's past pronouncements on the ELR and would present this Court with somewhat of a unique context to flesh out the larger issue of the ELR's interaction with statutory causes of action since this essentially "products" based doctrine is being debated in a "services" application.

Respectfully submitted,

BY: _____
DAVID APPLEBY, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 15 day of July, 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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