

Chipping Away at the Economic Loss Rule

The Supreme Court Decides *Moransais v. Heathman*

by Steven B. Lesser

In its decision of *Philippe H. Moransais v. Paul S. Heathman, et al.*, 24 Fla. L. Weekly S308 (Fla. July 1, 1999),¹ the Florida Supreme Court held the Economic Loss Rule (ELR) to be inapplicable to negligence actions against engineers and other professionals. This sudden but welcome detour arrived after more than a decade of case law which stretched, sculpted, and misapplied a product liability doctrine to bar causes of action for negligent professional services. Consequently, the application of the ELR became the focus of countless articles and CLE lectures which acknowledged confusion as to its scope and application.² The practical result of all the debate and controversy led to the ultimate distillation of the ELR to a simpler premise: The plaintiff always loses.

The Supreme Court's anticipated retreat from prior ELR rulings became evident during oral argument in *Moransais*, where several Justices expressed their views on a topic that has confused the judiciary as well as practitioners of construction and commercial litigation.³ As Justice Charles Wells pointed out: "It looks to me that the whole notion of the economic loss rule has gotten way out of kilter . . . Why isn't it just applicable to products? Where is it that we've expanded the economic loss rule to professional liability?"⁴ Justice Barbara Pariente expressed she has "really got problems" with the idea that negligence cannot apply in commercial situations where only economic damages exist.⁵ Most notably, Justice Harry Lee Anstead asked, "How did the economic loss rule get tangled up in this in terms of determining the legal liability" of a professional?⁶

Justice Anstead answered his own question in a well

crafted majority opinion that reviewed the history of the ELR and proceeded to realign it closer to its origin in product liability cases. In this context, the opinion may be credited with bringing the runaway train carrying the ELR to a sudden halt. However, the opinion leaves the construction practitioner with certain unresolved issues. These issues likely will generate continued debate over the scope and application of the ELR in future litigation. This article will explore the *Moransais* decision, the unresolved issues, and the future of the ELR as it relates to construction claims.

The Facts of *Moransais*

Philippe H. Moransais entered into a contract with an engineering corporation, Bromwell & Carrier, Inc. (BCI), to conduct an inspection of a single-family home that he contemplated purchasing. BCI sent two of its engineers to perform the inspection, Lennon Jordan and Larry Sauls, who were not parties to the contract between Moransais and BCI. Jordan and Sauls performed a structural inspection of the home and wrote a report, which BCI issued. The report concluded that the "residence appears to be in sound structural condition." Based upon the report, Moransais purchased the home only later to discover the existence of significant structural deficiencies. Faced with the cost of rectifying the structural deficiencies, Moransais initiated a lawsuit against BCI for breach of contract and against Jordan and Sauls for professional malpractice based on F.S. Ch. 471, which regulates engineers who practice in a professional corporation.⁷ The statute requires engineers to be held "personally liable and accountable for negligent acts,

wrongful acts or misconduct committed . . . while rendering professional services on behalf of the corporation”⁸ The complaint sought recovery for purely economic damages consisting of the cost to correct the deficiencies; but did not seek damages for personal injury or property damage. The trial court dismissed the action against the individual engineers, with prejudice, based upon the ELR, which bars claims for economic damages asserted by those not in privity with the negligent party. In so ruling, the trial court *reluctantly* relied upon the Second District opinion of *Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d DCA 1992), which barred a condominium association’s right to pursue recovery of economic loss damages from an architect who designed a condominium building. However, the trial court recognized a conflict with the Fifth District decision in *Southland Construction Co. v. The Richeson Corp.*, 642 So. 2d 5 (Fla. 5th DCA 1994), which permitted a contractor to assert a negligence claim against individual engineers, employed by a corporation, for economic loss notwithstanding the absence of privity. On appeal, the Second District affirmed the dismissal but recognized a conflict with *Southland*.⁹ This conflict served as the basis for the Supreme Court to answer two certified questions dealing with the application of the ELR to professional services where the damages are purely economic.¹⁰ In a 5-1 decision, the Supreme Court held that the ELR is inapplicable to services rendered by a professional engineer employed by a corporation and that a cause of action for professional malpractice exists to recover purely economic damages.¹¹

The Impact of *Moransais*

Economic loss has been defined as “damages for inadequate value, costs of repair and replacement of defective product or consequent loss

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of profits—without any claim of personal injury or damage to other property.”¹² As applied to construction disputes, the ELR prohibits tort recovery when a product damages itself, causing economic loss, but not causing personal injury or damage to any property other than to itself. For example, damages to correct a defective roof where no physical injury and/or property damage has occurred other than to the roof itself constitutes “economic loss.” As case law emerged to extend the ELR to bar negligence actions in a construction setting, owners suddenly became deprived of a traditional cause of action to recover economic loss arising from improperly designed buildings.¹³

In *Moransais*, the Supreme Court recognized that a cause of action for negligence exists against professionals who proximately cause economic loss.¹⁴ In reaching its decision, the court reflected upon the legislative history permitting attorneys to practice in professional corporations.¹⁵ Against this backdrop, the court concluded that engineers and other professionals could not hide behind the walls of a professional service corporation to escape liability for their negligent conduct. As the majority pointed out, the existence of a contract is irrelevant:

The fact that neither man signed the contract between *Moransais* and the

engineering firm is of no moment where, as here, both Jordan and Sauls were responsible for performing professional services to a client of their company whom they knew or should have known would be injured if they were negligent in the performance of those services.¹⁶

On this score the court recited with approval those decisions which support recovery of economic loss damages by recipients who rely upon professionals who supply expert information for the purpose of guiding others in business transactions.¹⁷ The cornerstone of liability is predicated upon §552 of the Restatement (Second) of Torts which established that economic losses may be recovered from accountants,¹⁸ title companies,¹⁹ attorneys,²⁰ architects,²¹ engineers,²² and others.²³ Throughout the majority opinion, the court appeared to deliberately sidestep overruling *Sandarac*, 609 So. 2d 1349 (Fla. 2d DCA 1992), *review denied*, 626 So. 2d 207 (Fla. 1993), *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973), or any prior appellate decision that applied the ELR to negligent services. In reaction to the *Moransais* opinion, owners, general contractors, professionals, and others may resort to litigation in order to clarify the breadth of this opinion.

As we struggle to understand the boundaries of *Moransais*, the strongly worded dissent by Justice Overton becomes instructive in analyzing the scope of the majority opinion.²⁴ According to Justice Overton, economic damages arising from negligent services and defective products, including the spalling concrete of *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, et al.*, 620 So. 2d 1244 (Fla. 1993),²⁵ now fall beyond the reach of the ELR. Moreover, *Moransais* suggests that professional service corporations become exposed to breach of contract, as well as negligence causes of action.²⁶ Consequently, limitation of contractual liability clauses for professional services essentially become inapplicable if a negligence cause of action can be pursued against the corporation and its individual professionals.²⁷ As Justice Overton lamented

in his dissenting opinion: "It appears to me that the majority has substantially obliterated the distinction between contract and tort causes of action, and in addition, has effectively overruled our rather recent decision in *Casa Clara* without saying so."²⁸

A reasoned interpretation of the majority opinion suggests that the ELR applies only to cases involving defective products. In this context, decisions such as *Casa Clara* survive *Moransais*, but *Sandarac* and *Moyer* have been implicitly overruled.²⁹ *Sandarac* barred a condominium association from pursuing a claim against a negligent architect, hired by the developer, for economic loss damages to repair condominium building deficiencies.³⁰ *Moyer* stands for the proposition that the architect must have "supervisory duties" including the power to stop work before a nonprivity contractor may pursue the owner's architect to recover economic damages.³¹ In reaching its conclusion, the court condensed the complexity of the ELR to a simple rule, namely, negligent conduct committed by professionals that results in economic damage to foreseeable parties will be actionable.³² Although recognizing *Moyer* as a reminder of "the distinct limitations of the economic loss rule,"³³ the court essentially put to rest the supervisory architect exception which has now become a casualty at the hand of its own creator. From a practical standpoint, the architect's negligent conduct in specifying the shallow placement of reinforcing steel in a concrete slab is no less egregious than the same act committed by a supervising architect. Based upon this broad holding, the most persuasive view is that both *Sandarac* and *Moyer* have become irrelevant as neither can coexist with *Moransais*.

Accordingly, economic loss may be recovered from negligent engineers and other design professionals who cause another to sustain economic damage. By this ruling, owners as well as contractors may recover eco-

nomical damages arising from a design professional's improper review of pay requisitions submitted by the contractor during construction, untimely or improper review of shop drawings, deficient or ambiguous design documents, inaccurate engineering reports, or other activities which delay the contractor's progress during construction.

Practically speaking, *Moransais* suggests that homebuyers may purchase a residence with greater security by retaining professionals such as engineers and architects to provide prepurchase home inspection services. Although professional services may be more expensive, *Moransais* establishes individual liability for professional negligence, which serves as a deterrent to malpractice.³⁴ On the other hand, the nonprofessional home inspector practicing on behalf of a corporation remains insulated from individual liability. As nonprofessionals provide inspection services on behalf of corporations, limitation of liability clauses will be enforced, making the individual that performed the negligent inspection essentially untouchable.³⁵ In bold contrast with the facts of *Moransais*, the owner may be without recourse should the inspection service corporation be without sufficient assets to satisfy a judgment.

Court Acknowledges AFM Was Over-Expansive

The court boldly acknowledged that the ELR had previously been misapplied.³⁶ Further, the court recently declined opportunities to extend the doctrine to actions based on fraudulent inducement³⁷ as well as negligent misrepresentation.³⁸ In the process of clearing up the confusion surrounding the liberal application of the ELR, the majority opinion embraced its landmark decision of *FP&L v. Westinghouse Electric Corp.*, 510 So. 2d 899 (Fla. 1987), by stating: "Our holding in Florida Power & Light remains sound in its adherence to the fundamental principles of the precedents we relied upon in applying the so-called economic loss rule."³⁹

This comment is instructive as the court discusses *AFM Corp. v. Southern Bell Telephone & Telegraph Company*, 515 So. 2d 180 (Fla. 1987), the progeny to *FP&L*. In *AFM*, a contract existed between AFM and Southern Bell for a referral service for AFM's customers. Southern Bell mistakenly listed the wrong telephone number in the Yellow Pages and disconnected the referral system by providing a different customer with AFM's old telephone number. AFM sued for breach of contract and negligence in rendering of services.⁴⁰ The court, on the heels of its ruling in *FP&L*, held that a purchaser of services who sustains purely economic loss would be limited to contractual remedies and be barred from recovery in negligence based upon the ELR.⁴¹ In the course of discussion, the court suddenly serves up *AFM* as its unwanted stepchild by stating as follows:

Unfortunately, however, our subsequent holdings (to *FP&L*) have appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent.⁴²

By this statement, the court cast into doubt the continued precedential value of *AFM*, which barred a cause of action arising from the negligent rendering of services resulting in economic loss. Recognizing the confusion created by *AFM*, the court humbly acknowledged that perhaps its holding ran amok:

While we continue to believe the outcome of that case is sound, we may have been *unnecessarily over-expansive* in our reliance on the economic loss rule as opposed to fundamental contractual principles.⁴³

In fact, although founded on sound analysis, the application of *AFM* went astray and simply became very bad law.⁴⁴ While the court clarified that *Moransais* excludes professional services from the application of the ELR, it intimated that other services may also fall outside its perimeter:

[T]he rule was primarily intended to limit actions in the *product liability context* and its application should generally

be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis. We hesitate to speculate further on situations not actually before us. The rule, in any case, should not be invoked to bar well established causes of action in tort, such as professional malpractice.⁴⁵

In so ruling, the court deliberately left open the question as to whether other services may also fall beyond the reach of the ELR.⁴⁶

Court Defines a Profession: Opportunities for Debate

In describing those professional services beyond the reach of the ELR, the court defined "professions" as those requiring a four-year college degree before qualifying for a license.⁴⁷ This qualifying statement may have provided contractors and other nonprofessionals with a heightened sense of relief, although this optimism may be short lived. The majority opinion suggests that other occupations which fail to achieve "professional" status likewise may be beyond the grasp of the ELR. This argument gains momentum when considered in conjunction with the concurring opinion of Justice Wells: "[I]t is my view that the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product."⁴⁸

As design and construction industries move toward use of innovative methods of performing construction, general contractors, as well as construction managers, may become exposed to claims asserted by third parties with whom privity does not exist.⁴⁹

Design-build contractors and construction managers frequently perform professional services traditionally reserved for design professionals. Recently published national standardized contracts for design, construction, construction management, and design-build shift traditional design responsibility to general contractors for certain tasks, such as shop drawing review.⁵⁰ As nonprofessionals and their corporations proceed to render traditional professional design ser-

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vices, the rationale for barring ELR claims against nonprofessionals, but allowing claims against professionals, becomes a distinction without a difference. This is especially true relative to termite inspectors and routine home inspection services performed by general contractors.⁵¹

This inequity is best illustrated by a scenario involving a commercial building owner who discovers that hurricane roof clips were improperly omitted during the original installation of the building roof. During a hurricane, the roof tiles blow off as a result of this omission. Under these circumstances, the absence of privity would preclude the owner from recovering economic damages from the negligent subcontractor that installed the roof. Following the teachings of *Moransais*, depriving an owner of a right to assert a cause of action against the negligent subcontractor to recover the cost to repair the roof cannot be justified, especially since installation of the roof constitutes a *service* as opposed to a *product*. Against this backdrop, why should a distinction exist between a design or engineering professional and others who participate in building construction? What difference does it make whether the architect omitted to specify hurricane clips in the design documents it prepared as compared to a subcontractor's negligence in failing to install them? Under either scenario, the ultimate

result to the owner is the same: The roof blows away during a hurricane, resulting in economic loss.

Although sufficient rationale exists to extend *Moransais* to nonprofessional construction services, the Supreme Court's prior holding in *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994), would appear to preclude such a cause of action. In *Murthy*, the court discussed the legislative intent of F.S. Ch. 489, which regulates qualifying agents of general contracting corporations. While acknowledging that Ch. 489 provides administrative remedies against a qualifying agent, the court held it did not give rise to a civil cause of action.⁵² This decision rested upon the court's interpretation of the statutory language of Ch. 489, which can be distinguished from the applicable language of F.S. Ch. 471 regulating engineers.⁵³

Impact Upon Construction Delay and Defect Claims

Moransais will have the most profound impact in public construction, where successful low bid contractors may now sue design professionals who delay them in completing construction projects. In public construction, owner/contractor agreements often include limitation of liability clauses as well as risk-shifting provisions such as "no damage for delay" clauses, indemnification and other similar provisions.⁵⁴ These provisions typically limit or extinguish a contractor's delay claims against the owner arising from the negligence of its design professional, including the deficient preparation of plans, specifications, improper administration of the construction documents, untimely preparation of punch lists, and failure to timely review submittals.

Moransais has created immediate heartburn for individual engineers and architects by virtue of their increased exposure to claims brought by nonprivity participants to the construction process. In the aftermath of *Moransais*, contractors may pursue the owner's design professional to recover economic damages without suffocating risk shifting

provisions contained in the owner/contractor agreement and without having to prove that the design professional supervised construction. Absent the historic supervisory hurdle associated with *Moyer*, contractors may elect to pursue relief directly from the design professional, leaving the owner on the sidelines.

Increasing risks often create demand for expanded insurance which, in turn, may serve as an additional incentive for contractors to pursue design professionals for damages.⁵⁵ This demand for insurance ultimately will result in a corollary financial impact to owners, as design professionals will purchase insurance policies with higher liability limits. The increased cost of insurance premiums will likely be passed along to the owner. Insurance coverage issues become primarily important when the owner retains a design-build firm. Toward this end, both owners and design-builders should review the applicable insurance policies to determine available coverage for errors and omissions in rendering design services provided in conjunction with the construction. Owners will become concerned as to whether available insurance coverage will be adequate to cover their own claims against design professionals, aside from those asserted by general contractors. This scenario is ironic considering the fact that owners indirectly pay for a design professional's insurance as a component of professional design fees.

Moransais also handed general contractors greater economic opportunities to recover damages for claims previously barred by the doctrine of sovereign immunity. In *County of Brevard v. Miorelli Engineering Inc.*, 703 So. 2d 1049 (Fla. 1997) (*rehearing denied*, Jan. 7, 1998), the Supreme Court barred a contractor's claim against a public owner for extra work performed at the Florida Marlins' training facility in Brevard County. Miorelli had requested compensation for work performed outside of the original contract without an authorized

change order issued by the municipality. The court held that absent an agreement or authorization by the municipality, the contractor's claim for damages would be barred by sovereign immunity. *Moransais* effectively permits a contractor, otherwise barred from recovering damages from a public owner based on sovereign immunity, to recover lost revenue directly from the negligent design professional who directed or caused the contractor to perform the additional work.⁵⁶

Prior to *Sandarac* and *Casa Clara*, nonprivity condominium associations frequently sued negligent design professionals for design deficiencies discovered to exist in common area property operated and maintained by the association.⁵⁷ Those cases suddenly denied the association's right to pursue damages from design professionals.⁵⁸

Moransais represents a stunning victory to homeowners and those residing in multifamily condominiums and homeowner communities. This decision returns valuable rights to condominium associations by authorizing the direct pursuit of negligent design professionals to recover economic damages. This is an especially significant development when considering that prior to *Moransais*, the *Sandarac* and *Casa Clara* decisions limited the association's right to recover design-related damages solely from the developer, which was often an assetless shell corporation. Under these circumstances, condominium associations were left without a remedy, because the statutory implied warranties available pursuant to F.S. §718.203 ("Florida Condominium Act") provide warranties from the developer, contractor, subcontractors, and suppliers to a condominium association, but not from design professionals.⁵⁹ As a result, condominium associations confronted with the cost to correct design deficiencies were faced with pursuing recovery of economic damages either by satisfying one of the narrow, unrealistic exceptions set forth in *Sandarac*,⁶⁰ or by asserting a cause of action for violation of the state minimum building code based

upon F.S. §553.84.⁶¹ However, design professionals have argued that §553.84 has limited application to claims arising from improper design.⁶² The lack of a statutory remedy available to associations highlights the critical importance of *Moransais* to homeowners.

With respect to other construction services, a challenge based upon the ELR and its impact upon §553.84 claims asserted against contractors and subcontractors is pending before the Supreme Court.⁶³ Taking into account the Supreme Court's acknowledgment in *Moransais* that a private cause of action exists based upon Ch. 471 regulating engineers, it is likely that this view may be adopted with respect to §553.84.⁶⁴ Based upon the statutory language of §553.84, it is clear that a private cause of action was contemplated by the legislature. This interpretation gains support from recent decisions which have upheld legislative intent to create a private cause of action.⁶⁵

Practical Considerations for Design Professionals in the Wake of *Moransais*

Deterioration of the ELR permits direct lawsuits by owners and contractors against design professionals. This renewed liability will likely spur a tide of litigation by contractors seeking to recover design-related cost increases resulting from change orders or equitable adjustment procedures. Similarly, owners will pursue recovery for design deficiencies and cost increases due to deficient project design, as well as indemnification for exposure to contractor delay claims. In the wake of *Moransais*, design professionals must conform to the standard of care as described in the regulatory framework governing the rendering of professional services. To decrease exposure to individual liability claims, design professionals must revisit construction documents they generate, and modify their own administrative practices.

Commentators note that design professionals frequently draft con-

struction documents which incorporate self-protection provisions enabling them to control the project and minimize their own exposure.⁶⁶ In the event that these provisions are not properly administered, all project participants may sustain damages resulting in ultimate liability to the design professional. For example, provisions found in the most recent version of the documents sponsored by the American Institute of Architects (AIA) permit the design professional to adjudicate disputes,⁶⁷ evaluate a contractor's performance,⁶⁸ reject work,⁶⁹ and monitor cash flow,⁷⁰ all of which can potentially impact a project adversely, resulting in liability.

In the face of increased individual liability exposure, the design professional must become fully versed in the applicable industry standards. This knowledge will enable the design professional to caution the project owner that overzealous demands requiring contractor performance beyond industry criteria cannot be justified. In this manner, design professionals avoid exposure from contractor claims based upon otherwise unreasonable directives received from the design professional which would have resulted in the needless expenditure of additional time and money.

Significant professional liability frequently results from a failure to perform in accordance with the administrative duties assumed in the construction documents. In this context, a design professional may fail to issue a clarification of its own design for fear that this action may highlight the existence of a design error potentially creating liability.⁷¹ Faced with this dilemma, the design professional may elect to do nothing, which may give rise to a cause of action for breach of contract and/or negligence. Similarly, liability exposure may result from the design professional's use of extreme safety factors in the design of structural components. This conduct often prompts protest from affected contractors attempting to deliver a project within time and budgetary constraints.⁷² In light of this in-

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creased exposure, the design professional should be quick to recognize and correct design errors before they escalate into significant delays that could have been minimized.⁷³

As with any construction project, preconstruction planning is a useful tool in avoiding project disputes among owners, contractors, and design professionals. Through preplanning, design documents can be scrutinized to minimize ambiguity, and project responsibility can be established for various design services, along with a mechanism formulated to resolve project disputes.

A third party neutral dispute resolution process should be utilized during the project to enable design professionals to mitigate liability exposure.⁷⁴ This process is most beneficial when the design professional is accused of being unfair to the contractor. These accusations typically result from approving submittals, creating punch lists, reviewing pay requisitions, or issuing certificates of substantial or final completion. Under these circumstances, a neutral third party can be appointed to swiftly resolve disputes, avoid costly delays, and minimize potential liability exposure to the design professional.

In lieu of shifting traditional design responsibility to contractors and others, the design professional should consider providing com-

plete design services to avoid gaps, and thereby avoid unexpected liability.⁷⁵ As noted above, this concept serves as the foundation of a recent industry effort dedicated toward a design-build delivery format, which recognizes that single-source responsibility may reduce disputes and litigation among project participants.

Preconstruction planning among participants will enhance communication, establish design intent, and delegate design responsibility in an effort to reduce project disputes. Additionally, industry-wide education as to licensing requirements, along with applicable standards of care and utilization of neutral dispute resolution during the project, will mitigate the individual design professional's exposure to liability claims.

Right to Recover Damages From Nonprofessionals Who Participate in Construction

Construction practitioners must be mindful that *Moransais* applies only to professionals and has not yet been extended to nonprofessional services. When dealing with nonprofessional construction services, the written contract will control the rights of the parties, and claims against nonprivity third parties will be barred by the ELR. Counsel must then explore alternative avenues of recourse against other parties, taking care to examine their financial profiles to ascertain whether sufficient assets will be available in the event a judgment is acquired.

In an effort to secure contractor performance, payment and performance bonds should be furnished along with insurance to provide meaningful recovery should the project be abandoned or construction deficiencies be found to exist. Owners must recognize that absent a fiscally sound developer and contractor, actual recovery of damages may not occur, because developers and contractors form shell corporations and deplete all available remaining assets upon selling out of a project. The only recovery against a shell corporation is worthless

stock; likewise, with respect to a defunct contractor, the only available recourse may be a claim against the Florida "Construction Industries Recovery Fund"⁷⁶ or administrative disciplinary proceedings established by the Florida Department of Business and Professional Regulation.⁷⁷ Toward this end, construction contracts should require the contractor to assign warranties from manufacturers, subcontractors, suppliers, and materialmen to the owner.⁷⁸ Absent such warranties, owners may be left without recourse to recover economic damages from nonprivity parties, especially after the general contractor files for bankruptcy or elects to close his or her doors. Acquiring an assignment of rights from a developer or general contractor against nonprivity participants to a construction project may be of value to parties seeking to recover economic damages.

All statutory remedies available against nonprivity participants should be evaluated early in the process. This analysis will enable all statutory claims to be asserted timely and achieve compliance with all warranty and notice prerequisites. Statutory remedies include condominium implied warranty statutes,⁷⁹ the Uniform Commercial Code⁸⁰ and the Magnuson-Moss Warranty Act.⁸¹ Special care should be exercised to acquire warranties from suppliers of building materials, especially in light of the Supreme Court's decision in *Casa Clara*, which held that a cause of action is not available against material suppliers for violation of the state minimum building code.⁸²

Conclusion

In *Moransais*, the Supreme Court restored valuable rights to the consumer in order to recover economic losses directly from individuals that negligently provide professional services. Inevitably, trial and appellate courts will clarify the scope and application of the ELR to decide whether it should be strictly limited to product liability cases. The *Moransais* decision has left open

whether justification exists to exclude other services from the ELR such as general contracting or design-build, which fall outside the "product liability context" announced by the majority. As the construction industry embarks on innovative project delivery systems, courts must carefully examine whether the actual services rendered justify its application. The prior expansive ruling dealing with commercial services in *AFM* generated confusion among the judiciary and construction practitioners. The Supreme Court took more than a decade to return the ELR to its traditional roots; hopefully, further clarification is right around the corner. □

¹ A Motion For Leave To File Amicus Curiae Motion For Rehearing filed by The Florida Institute Of Certified Public Accountants is pending before the court, as well as Phillippe H. Moransais' Motion to Strike.

² See, e.g., H. Hugh McConnell, *Diminished Capacity—Owners' Ability To Sue*

For Construction Defects In Florida, 71 FLA. B.J. 64 (June 1997); F. Malcolm Cunningham, Jr., and Amy L. Fischer, *The Economic Loss Rule: Deconstructing The Mixed Metaphor In Construction Cases*, 33 TORT AND INSURANCE PRACTICE L. J. 147 (Fall 1997); Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J. 34 (Nov. 1995); Lynn E. Wagner and Richard A. Solomon, *Finally A Concrete Decision: The Supreme Court of Florida Ends the Confusion Surrounding the Economic Loss Doctrine*, 68 FLA. B.J. 46 (May 1994); *Condominium, Cooperative And Homeowner Association Law: 1993 Leading Cases In Significant Developments In Florida Law*, 18 NOVA L. REV. 499. Even the Florida Supreme Court acknowledged that its pronouncements on the rule have not always been clear and have been the subject of "legitimate criticism and commentary." *Moransais*, 24 Fla. L. Weekly at S311.

³ The author argued the case before the Supreme Court of Florida on behalf of Phillippe H. Moransais.

⁴ Remarks at the oral arguments in *Moransais* (October 6, 1998) (videotape on file with the Supreme Court of Florida).

⁵ *Id.*

⁶ *Id.*

⁷ FLA. STAT. Ch. 471 was enacted to pro-

protect the life, health, safety, and welfare of the public. Section No. 61G15-19-003, FLA. ADM. CODE ANN. (1995). It is significant to note that the Florida Legislature acknowledged that engineers, if they perform incompetently, will cause economic injury to the recipient of their services, apart from any injury to person or property.

⁸ By rendering a professional engineering opinion concerning the condition of a home, Jordan and Sauls engaged in the practice of engineering. FLA. STAT. §471.005(6).

⁹ *Moransais v. Paul S. Heathman, et al.*, 702 So. 2d 601 (Fla. 2d D.C.A. 1997). The Second District Court of Appeal certified the following question to The Florida Supreme Court as an issue of great public importance: When the alleged damages are purely economic, can the purchaser of a residence, who contracts with an engineering corporation for a pre-purchase inspection, maintain a professional negligence action against the licensed engineer who performed the inspection as an employee of the engineering corporation?

¹⁰ For purposes of analysis, the Supreme Court of Florida rephrased the certified question into two questions: (1) Where a purchaser of a home contracts with an engineering corporation, does the purchaser have a cause of action for professional malpractice against an employee of the engineering corporation who performed the engineering services? (2) Does the Economic Loss Rule bar a claim for professional malpractice against the individual engineer who performed the inspection of the residence where no personal injury or property damage resulted?

¹¹ *Moransais*, 24 Fla. L. Weekly at S309.

¹² See Martha Crandall Coleman, *Liability of Design Professionals for Negligent Design and Project Management*, 33 TORT & INSURANCE L.J. 3 (Spring 1998). Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 916 (1966).

¹³ Before the introduction of *FP&L*, *AFM*, *Sandarac* and *Casa Clara*, Florida courts recognized the ability of nonprivity third parties to pursue engineers and others for improper design and construction. *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd.*, 552 So. 2d 228 (Fla. 5th D.C.A. 1989); *Naranja Lakes Condominium No. One, Inc. v. Rizzo*, 442 So. 2d 1080 (Fla. 3d D.C.A. 1982); *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So. 2d 515 (Fla. 4th D.C.A. 1981) *rev. denied*, 417 So. 2d 328; *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So. 2d 976 (Fla. 4th D.C.A. 1980), *Luciani v. High*, 372 So. 2d 530 (Fla. 4th D.C.A. 1979); *Navajo Circle, Inc. v. Development Concepts Corporation*, 373 So. 2d 689 (Fla. 2d D.C.A. 1979).

¹⁴ *Moransais*, 24 Fla. L. Weekly at S312. The court specifically referred to

§§471.023 and 621.07, which make clear that professionals shall be individually liable for any negligence committed while rendering professional services.

¹⁵ The Supreme Court relied heavily on the purpose behind the enactment of FLA. STAT. Ch. 621, and referred to its decision *In Re: The Florida Bar*, 133 So. 2d 554 (Fla. 1961). The court likened lawyers in a law firm who render legal services for the firm's client to the individual engineers, Jordan and Sauls, who were designated by their employer to perform engineering services for *Moransais*.

¹⁶ *Moransais*, 24 Fla. L. Weekly at S310.

¹⁷ *Id.* at n.5.

¹⁸ *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990).

¹⁹ *First American Title Ins. Co. v. First Title Serv. Co.*, 457 So. 2d 467 (Fla. 1984).

²⁰ *Angel, Cohen, and Rogovin v. Oberon Inv., N.V.*, 512 So. 2d 192 (Fla. 1987).

²¹ *Conklin v. Cohen*, 287 So. 2d 56 (Fla. 1973); *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973); *Greer v. Bennett*, 237 So. 2d 311 (Fla. 4th D.C.A. 1970)

²² *Bay Garden Manor Condominium Association, Inc. v. James D. Marks Associates, Inc.*, 576 So. 2d 744 (Fla. 3d D.C.A. 1991); *Moore v. PRC Eng'g, Inc.*, 565 So. 2d 817 (Fla. 4th D.C.A. 1990); *Luciani v. High*, 372 So. 2d 530 (Fla. 4th D.C.A. 1979).

²³ Application of §552 applies to one who is engaged in a "business, profession or employment" and is not confined to professionals. See, e.g., *First State Savings Bank v. Albright & Associates, Inc.*, 561 So. 2d 1326 (Fla. 5th D.C.A. 1990), *rev. denied*, 576 So. 2d 284 (Fla. 1990) (Section 552 applied to appraiser); *Florida Building Inspection Services, Inc. v. Arnold Corporation*, 660 So. 2d 730 (Fla. 3d D.C.A. 1995), dealt with application of §552 to a nonprofessional roof inspector. In *Florida Building Inspection Services*, the court would have found §552 applicable to information produced by a roof inspector had there been a closer nexus of foreseeability between the roof inspector and the third party that relied on his report. Section 552, RESTATEMENT (SECOND) OF TORTS §552 (1976) serves as an alternative cause of action to provide foreseeable third parties with relief from nonprofessionals such as residential home inspectors, termite inspectors and yacht surveyors.

²⁴ *Moransais*, 24 Fla. L. Weekly at S313 (Overton, J., dissenting).

²⁵ *Casa Clara* eliminated a condominium association's right to recover damages from a supplier of allegedly defective concrete. The only damages were to the building itself.

²⁶ "We never intended to bar well-established common law causes of action, such as those for neglect in providing professional services." *Moransais*, 24 Fla. L. Weekly at S312.

²⁷ Generally, limitation of liability clauses are valid and enforceable; how-

ever, public interest factors may invalidate such clauses. See *Banfield v. Lewis*, 589 So. 2d 441 (Fla. 4th D.C.A. 1991). *Moransais*, 24 Fla. L. Weekly at S313 (Overton J., dissenting).

The *Moransais* court stated: "While the parties to a contract to provide a product may be able to protect themselves through contractual remedies, we do not believe the same may be necessarily true when professional services are sought and provided. Indeed, it is questionable whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting." *Id.* at S312.

²⁸ Although the contract between *Moransais* and the engineering corporation contained a limitation of liability clause, the court did not focus on this issue.

²⁹ The Florida Supreme Court stated the rule was primarily intended to limit actions in the product liability context and its application generally should be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis. *Supra* note 45.

³⁰ *Sandarac*, 609 So. 2d 1349.

³¹ *Moyer*, 285 So. 2d 397.

³² The court specifically stated, "The rule, in any case, should not be invoked to bar well-established causes of action in tort, such as professional malpractice." *Moransais*, 24 Fla. L. Weekly at S312. The Third District Court of Appeal recently followed *Moransais* by holding that breach of fiduciary duty is a well established cause of action in tort and not abolished by the ELR. *First Equity Corporation of Florida, Inc. v. Watkins* 24 Fla. L. Weekly D1758 (Fla. 3d D.C.A. July 28, 1999).

³³ *Moransais*, 24 Fla. L. Weekly at S312. It is important to note here that *Moyer* did not specifically discuss the ELR. Rather, the Supreme Court's decision rested upon the principles of foreseeability as they apply to common law negligence actions.

³⁴ Legislation regulating the engineering profession was enacted to protect citizens of the state from physical and economic injury which would result from engineering services performed by an incompetent engineer. See FLA. STAT. §471.1001, The trial court in *Moransais* noted that deterrence to professional malpractice is a proper function of tort law.

³⁵ Florida courts generally recognize and uphold exculpatory clauses which limit or exempt liability for negligence. *Orkin Exterminating Co., Inc. v. Montagno*, 359 So. 2d 512 (Fla. 4th D.C.A. 1978).

³⁶ *Moransais*, 24 Fla. L. Weekly at S311.

³⁷ *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996).

³⁸ *PK Ventures, Inc. v. Raymond James*

& Assocs., 690 So. 2d 1296 (Fla. 1997).

³⁹ *Moransais*, 24 Fla. L. Weekly at S311.

⁴⁰ The tort action alleged was a "negligent breach of contract" which the court found was not distinguishable from or independent of a breach of contract claim.

⁴¹ The parties in *AFM* were in privity with one another and the contract defined the limitation of liability through bargaining, risk acceptance and compensation. *AFM*, 515 So. 2d at 181. The court could have resolved the issue based upon contract principles without ever involving the ELR. Instead, the ELR became an issue and ultimately was misapplied to professional services.

⁴² *Moransais*, 24 Fla. L. Weekly at S311.

⁴³ *Id.*

⁴⁴ *Id.* The court in *Moransais* essentially declared that applying the ELR to professional services was a mistake.

⁴⁵ *Moransais*, 24 Fla. L. Weekly at S312.

⁴⁶ The court was careful to state, "We hesitate to speculate further on situations not actually before us." *Id.*

⁴⁷ *Moransais*, 24 Fla. L. Weekly at S309.

⁴⁸ *Id.* at S313 (Wells, J., concurring). The concurring opinion of Justice Wells is not surprising based upon his dissent in *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So. 2d 628 (Fla. 1995), which held that the ELR applied to negligence claims where the only damages were to the product itself. Justice Wells indicated that had he been on the court at the time that the *Casa Clara* decision was issued, he would have joined with Justice Shaw in the dissent. He further stated "our commitment to the Economic Loss Rule should not be so total that we permit a manufacturer to proceed 'ostrich like' while knowing that use of a product as it was intended is causing loss to the businesses, computer programmers, homes, vehicles or the like of those who use the product." *Id.* at 633. (Wells, J., concurring in part and dissenting in part).

⁴⁹ See John I. Spengler III and William M. Hill, *The Evolving Liabilities Of Construction Manager*, 19 CONST. L. 1 (1999); James Duffy O'Conner, *On Platypuses and Program Management*, 16 CONSTR. L.11 (1996); Philip H. Partridge and Vincent A. Noletto, *Construction Management: Evolving Roles and Exposure Of Construction Managers And Architects/Engineers*, 12 AM. J. TRIAL ADVOC. 55 (1988).

⁵⁰ American Institute of Architects Document B141-1997; Standard Form Of Agreement Between Owner And Architect With Standard Form Of Architect's Services (1997); AIA A201 General Conditions Of The Contract For Construction (1997). See specifically subparagraph 3.12.10 that deals with design delegation and describes those circumstances when design obligations can be delegated to the general contractor. Further, the subparagraph prohibits delegation of design services to nonprofes-

sionals if such action violates state law. Florida requires that design services be provided by or subcontracted to licensed professionals. FLA. STAT. §§471.031(1)(a) and 481.223(1)(a) (1997). For excellent discussion on this topic, see James R. Case, Thomas G. Librizzi *Delegation of Design Responsibility: Facts and Fables* American Bar Association Forum On The Construction Industry, Annual Meeting, Las Vegas, Nevada 1999. On the other hand, industry documents sponsored by the Associated General Contractors of America ("AGC") and the Engineers Joint Contract Documents Committee ("EJCDC") specifically recognize that the contractor is not liable for design. See paragraphs 3.3.2 of AGC 200 Standard Form of Agreement and General Conditions Between Owner and Contractor (1997) and 6.01 of EJCDC 1910-8 Standard General Conditions of the Construction Contract (1996). Florida has enacted regulatory provisions that specifically address design delegation and contain specific requirements between the delegating engineer of record and the engineer to whom design work is delegated. See FLA. ADMIN. CODE ch. 61, G15-30.005, G15-30.006. A question remains whether a general contractor firm that engages in design/build services can be sued by a nonprivity third party for negligence notwithstanding the fact that the contracting entity is not a professional service corporation. Likewise, construction managers become more vulnerable to claims depending upon their role in controlling safety on the project as well as in managing and supervising construction. See *James McKinney & Sons, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 454 So. 2d 496 (Ala. 1984).

⁵¹ Negligent inspection of commercial or residential property, whether performed by professionals or nonprofessionals, may cause owners and lenders to sustain significant economic loss. As evidence of this fact, standardized real estate contracts contemplate that a pre-purchase inspection be conducted to determine the existence of termites and other deficiencies. See Standard Form of Real Estate Contract approved by The Florida Bar, 1995.

⁵² *Id.* at 985.

⁵³ The statutory language set forth in various provisions of Ch. 471 reflects a legislative intent to hold individual professionals liable for negligence which results in economic injury. FLA. STAT. §471.001 provides as follows: "The legislature finds that, if an incompetent engineer performs engineering services, . . . economic injury to the citizens of the state would result. . . ."

Additionally, §471.023(3) provides "any officer, agent, or employee of a corporation shall be personally liable and accountable only for negligent acts, wrongful acts or misconduct committed by him. . . while rendering professional services on behalf of the corporation. . ." Similar to Ch. 471, the statutory lan-

guage of FLA. STAT. Ch. 481, which regulates architects and design professionals, reflects a legislative intent to hold such professionals individually liable for negligence. See FLA. STAT. §§481.219(11) and 481.319(6) (1997).

The *Murthy* court reasoned that the legislative intent of §489.119 was to secure the safety and welfare of the public, not to create a civil liability against a qualifying agent. The Florida Legislature enacted FLA. STAT. §489.131(12), which confirmed that Ch. 489, Part I shall not be construed to create a civil cause of action.

⁵⁴ Owners often propose contracts containing a provision which precludes a contractor from recovering compensation for delays not withstanding the fact that delays were caused by the owner. Florida recognizes the validity of "no damage for delay" clauses *Marriott Corporation v. Dasta Construction Company*, 26 F.3d 1057 (11th Cir. 1994); *Newbury Square Development Corp. v. Southern Landmark, Inc.*, 578 So. 2d 750 (Fla. 1st D.C.A. 1991); *Harry Pepper & Associates, Inc. v. Hardrives Company*, 528 So. 2d 72 (Fla. 4th D.C.A. 1998). Exceptions to "no damage for delay" clauses include active interference by the owner, delays not contemplated by the parties, and unreasonable delays. Indemnification for an indemnitee's own wrongdoing pursuant to FLA. STAT. §725.06(2)(1997) will be enforced provided that specific consideration is given for the indemnification or if the obligation is for a limited amount. See *Westinghouse Electric Corp. v. Turnberry Corp.*, 423 So. 2d 407 (Fla. 4th D.C.A., 1982), *rev. denied*, 434 So. 2d 889 (Fla. 1993); Murray H. Wright and Edward E. Nichols III, *The Collision of Tort and Contracts in the Construction Industry*, 21 U.RICH.L.REV. 457, 941 (1987).

⁵⁵ Ratterman and Gilles, *supra* note 66; Large architectural and engineering design firms report an average of approximately 2.5 claims per year, at an average annual cost of \$640,000.00. Johnson & Higgins, *Risk Management Study At Large Design Firms* (1996).

⁵⁶ The doctrine of sovereign immunity is inapplicable to a private corporation. See FLA. STAT. §768.28(1996), *Dorse v. Armstrong World Industries*, 513 So. 2d 1265 (Fla.1987). Likewise, although involved in public construction, a professional service corporation that provides design services is not subject to the Florida Public Records Act. See *News & Sun Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 569 So. 2d 1029 (Fla.1992).

⁵⁷ *Supra* note 15. See also *Seibert, AIA, P.A. v. Bayport Beach & Tennis Club Association, Inc.*, 573 So. 2d 889 (Fla. 1990) *rev.denied*, 583 So. 2d 1034 (Fla. 1991).

⁵⁸ This line of cases began with the Florida Third District Court of Appeal decision of *GAF Corporation v. Zack Company*, 445 So. 2d 350 (Fla. 3d. D.C.A.

1984), *rev. denied*, 453 So. 2d 45 (Fla.1984) which dismissed a negligence cause of action brought by a roofing contractor against the manufacturer of defective roofing materials based upon the ELR. *AFM, Sandarac and Casa Clara* followed, which ultimately barred condominium associations from successfully asserting negligence claims against design professionals based upon the ELR.

⁵⁹ FLA. STAT. §718.203 (1997). It should be noted that design professionals briefly had a statutory implied duty under 1991 Fla. Laws Ch. 103 §612 that was subsequently removed by 1992 Fla. Laws Ch. §9, §8. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911 (Fla. 1995) explaining the nature and scope of statutory implied warranties from the developer and contractor in favor of a condominium association. According to *Leisure Resorts*, the developer is liable to a condominium association for design deficiencies.

⁶⁰ These exceptions included that the condominium association be made a third party beneficiary in the developer's contract with the general contractor and architect. To adopt this rationale suggests that an architect or contractor, while negotiating with a developer would volunteer to assume liability when *Sandarac* clearly absolved him from risk. The second exception provides where the economic expense cures a latent defect which creates an immediate and substantial risk to bodily injury or damage to property other than to the building itself.

⁶¹ FLA. STAT. §553.84 (1997) is entitled "Statutory Civil Action." The provision states: "Notwithstanding any remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damages as a result of a violation of this part of the state minimum building codes, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation."

⁶² FLA. STAT. §553.73(2)(d) (1997) provides that the statement of building codes adopted by each local government shall "govern the construction, erection, alteration, repair or demolition of any building." Design professionals often argue that absent actual on-site involvement with construction, erection, alteration, repair or demolition, claims asserted pursuant to §553.84 are inapplicable to them. This issue is subject to debate. *See* H. Hugh McConnell, *Diminished Capacity-Owner's Ability To Sue For Condominium Defects In Florida*, 71 FLA. B.J. 6. (June 1997). *See also Sierra v. Allied Storage Corporation*, 538 So. 2d 943 (Fla. 1989). In *Sierra*, an independent contractor constructed the Omni Development around an already existing Jordan Marsh store. As originally construed, Jordan Marsh's emergency generator was vented outside the store in accordance with the building code requirements. Subsequently, the contractor extended Jordan Marsh's exterior

wall, which ultimately caused the generator's exhaust pipe to be vented through a concealed attic inside the Omni structure. This was a building code violation. Under these circumstances, the court held that the building code does not impose a duty on the owners of the Jordan Marsh store to supervise construction that is undertaken by independent contractor. *See also Brown v. South Broward Hospital District*, 402 So. 2d 58 (Fla. 1981). On the other hand, several cases establish the architect's responsibility to comply with building codes. *See Seibert AIA, P.A. v. Bayport Beach & Tennis Club Association, Inc.*, 573 So. 2d 889 (Fla.1990), *rev. denied*, 583 So. 2d 1034 (Fla.1991); *Robsol, Inc. v. Garris*, 358 So. 2d 865 (Fla. 1978); *Atlantic National Bank of Jacksonville v. Modular Age, Inc.*, 363 So. 2d 1152 (Fla. 1978), *cert. denied*, 372 So. 2d 466 (Fla. 1979).

⁶³ *See Comptech International, Inc. v. Milam Commerce Park, Ltd.* 711 So. 2d 1255 (Fla. 3d D.C.A. 1998), *rev. granted*, 725 So. 2d 1107 (Fla. 1998) (Table No. 93, 336); *Stallings v. Kennedy Electric, Inc.*, 710 So. 2d 195 (Fla. 5th D.C.A. 1998), *rev. granted*, 728 So. 2d 202 (Fla. Nov. 25, 1998) (Table No. 93, 126).

⁶⁴ The statutory language of FLA. STAT. §553.84 expressly contemplates a private cause of action.

⁶⁵ *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984), the judiciary is restricted from diminishing the obvious intent of a statute and held that Florida courts are: "[w]ithout power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. *Holly* at 219."

See Delegado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602 (Fla. 2d D.C.A. 1997) (Florida Deceptive and Unfair Trade Practices not barred by Economic Loss Rule); *Rubio v. State Farm Fire & Casualty Company*, 662 So. 2d 956 (Fla. 3d DCA 1995), *rev. denied*, 667 So. 2d 252 (Fla. 1996) (statutory bad faith claim barred by the Economic Loss Rule). The Third District Court of Appeal in *Rubio* stated: "Courts cannot willy nilly strike down legislative enactments."

⁶⁶ David B. Ratterman and Matthew A. Gilles, *Hardball Tactics By Design Professionals When Does Self-Protection Cross The Line From Fast Ball To Bean Ball?* American Bar Association Forum On The Construction Industry Annual Meeting, Las Vegas, Nevada, April 1999.

⁶⁷ American Institute of Architects Document B-141-1997; Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services §§2.6.1.9, 2.6.1.7.

⁶⁸ *Id* at §2.6.2.

⁶⁹ *Id* at §2.6.2.5.

⁷⁰ *Id* at §2.6.3.1.

⁷¹ Ratterman & Gilles, *supra* note 66, at 390.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ An industry trend toward early resolution of disputes is evident by mediation provisions included in the AIAA201 General Conditions Of The Contract For Construction (1997). *See also* Larry R. Leiby, *Florida Construction Law Manual*, Section 17.09 Mediation Dispute Review Boards (4th Edition 1997); Richard F. Smith, *Dispute Review Boards: An Effective Alternative to Dispute Resolution Procedures That Start Too Late, Take Too Long and Cost Too Much*, American Bar Association Forum on The Construction Industry, Annual Meeting, Charleston, South Carolina 1994; James P. Groton and William R. Wildman, *The Role of Job-Site Dispute Resolution in Improving the Chances for Success on a Construction Project*, 12 CONSTR. L. 3 (1992)

⁷⁵ Ratterman and Gilles, *supra* note 66.

⁷⁶ FLA. STAT. §489.140, (1997)

⁷⁷ Rule 61G4-20.001, FLA. ADMIN.CODE.

⁷⁸ *See Ashley Square, Ltd. v. Contractors Supply of Orlando, Inc.*, 532 So. 2d 710 (Fla. 4th D.C.A. 1988).

⁷⁹ FLA. STAT. §718.203 (1997).

⁸⁰ UCC §2.314 *et seq.* (1962); FLA. STAT. §672.314 *et seq.* (1981). *See also* Home Warranty Association Remedies available pursuant to FLA. STAT. §634.301 *et seq.* (1991).

⁸¹ Magnuson Moss Warranty: Federal Trade Commission Improvement Act of 1975, 15 U.S.C. §§2301-2312 (1982). The Act would apply to the sale of building products to be used in an improvement but does not apply to the sale of real estate. In *Muchisky v. Frederick Roofing Company*, 838 S.W.2d 74 (Mo. App. 1992), the court held that roofing materials utilized in a reroofing of a building would be covered by the Act.

⁸² *Casa Clara*, 620 So. 2d at 1248 (Fla. 1993). *See also Casa Clara Condominium Association, Inc. Charlie Toppino & Sons*, 588 So. 2d 631, 634 (Fla. 3d D.C.A. 1991).

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