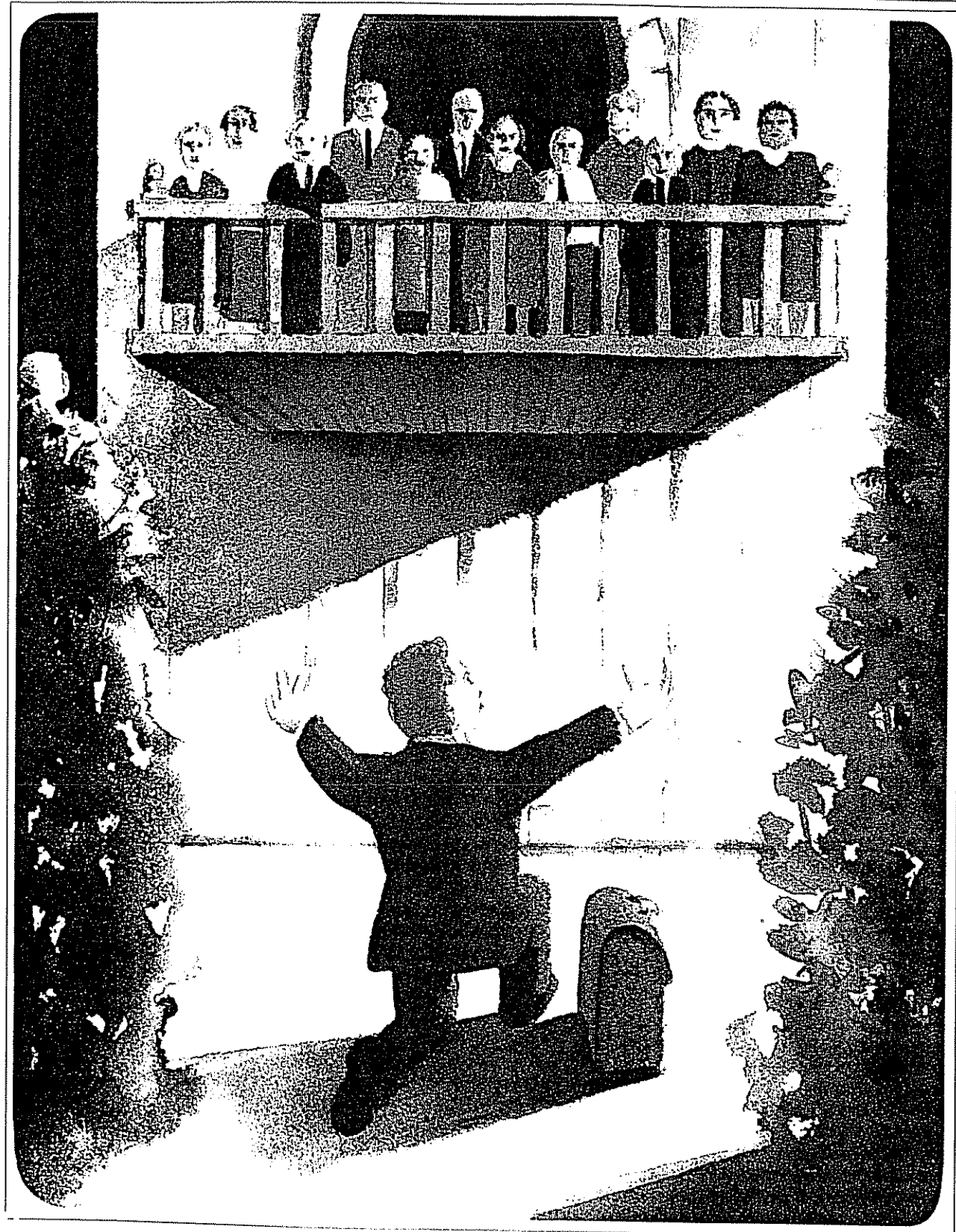


# BAR JOURNAL

ADVANCING THE COMPETENCE AND PUBLIC RESPONSIBILITY OF LAWYERS



**Closing Argument:**  
*Boom to the Skilled, Bust to the Overzealous*

## Architects' Relief Act of 1993: The Legacy of *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons*

In *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973), the Florida Supreme Court pierced the doctrine of privity of contract and thereby exposed architects to negligence claims for economic losses sustained by noncontracting parties. *A.R. Moyer* effectively created yet another exception to the then-faltering economic loss rule. Nearly two decades later, however, the Supreme Court in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons*, 620 So. 2d 1244 (Fla. 1993), summarily limited *A.R. Moyer* "strictly to its facts." Although some recent decisions have construed the cursory limitation rigidly, logic and caution dictate otherwise. This article addresses whether *Casa Clara* truly heralds the death of *A.R. Moyer* and a corresponding diminishment of tort liability for architects.<sup>1</sup> The analysis illustrates that *Casa Clara*, though certainly injecting new vigor into the economic loss rule, is not the panacea many purport it to be.<sup>2</sup>

### And the Walls Came Tumbling Down

For the greater part of the 20th century, architects in Florida enjoyed certain protections from tort claims involving economic losses sustained by third parties.<sup>3</sup> This protection from liability was grounded in the doctrine of privity of contract, a "theoretical device of the common law that recognizes limitation of liability commensurate with compensation for contractual acceptance of risk."<sup>4</sup> While the strictures of privity of contract were significantly relaxed in the context of personal injuries by the precedent-setting case of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), Florida courts were slow to modify the doctrine in the context of economic loss.

*Although Casa Clara fails to shield them completely from liability in tort, architects are in a much better position than they were prior to the Supreme Court's decision*

by Robert Alfert, Jr.

In the landmark decision of *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973), the Supreme Court pierced the doctrine of privity of contract and held an architect liable in tort to a noncontracting party. *A.R. Moyer* involved a suit by a general contractor against an architect seeking recovery for economic losses. The general contractor specifically alleged that the architect negligently prepared and corrected plans, designs, and specifications, negligently caused delays, and negligently exercised control and supervision. No contract existed between the architect and the general contractor. There was a contract between the architect and the owner, however, in which the architect expressly assumed supervisory power over the general contractor and the progress of construction.

The architect contended that the

liability of professionals for negligence claims extends only to those sharing privity of contract.<sup>5</sup> The court rejected the architect's position, finding that none of his authorities involved the element of direct supervision and control which extended the participation of the architect beyond mere draftsmanship. The court placed particular emphasis on a factually similar federal case which stated:

Considerations of reason and policy impel the conclusion that the position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner. . . . Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.<sup>6</sup>

The court held that "a third party general contractor, who may foreseeably be injured or sustain an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity."<sup>7</sup>

Subsequent cases significantly expanded the scope of *A.R. Moyer* to establish a cause of action in negligence for economic loss sustained by "foreseeable" third parties. These cases include: *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So. 2d 689 (Fla. 2d DCA 1979); *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So. 2d 976 (Fla. 4th DCA 1979); *Luciani v. High*, 372 So. 2d 530 (Fla. 4th DCA 1979). The courts in

*Navajo Circle* and *Parliament Towers* recognized that subsequent purchasers are parties that could foreseeably be damaged by the negligence of an architect.<sup>8</sup> The supervisory element, which had been a critical predicate to liability in *A.R. Moyer*, was overlooked. The limited breach *A.R. Moyer* established in the economic loss rule effectively opened the floodgates to a wide range of factual scenarios creating a right of action against architects for losses sustained by third parties.

### Shoring Up the Breach

In *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993), the Supreme Court injected new vigor into the economic loss rule. The court sweepingly disapproved six cases decided in the wake of *A.R. Moyer*, including *Parliament Towers* and *Navajo Circle*,<sup>9</sup> and limited *A.R. Moyer* "strictly to its facts."<sup>10</sup>

*Casa Clara* involved a suit brought by homeowners against a concrete supplier for concrete that contained a high content of chloride (salt). The salt caused the concrete's reinforcing steel to rust which, consequently, caused the concrete to crack and break off. In the absence of a contractual relationship, the homeowners sued under theories of negligence, products liability, implied warranty, and violation of applicable building codes.

The Supreme Court in *Casa Clara* recognized that recovery in tort requires a showing of harm greater than mere disappointed expectations. A purchaser's interest in enjoying the benefit of a bargain is not an interest protected under tort law.<sup>11</sup> Rather, such an interest is protected under contract law. The homeowners in *Casa Clara* simply failed to demonstrate any injury cognizable under tort law. The action sought recovery for purely economic damages. The plaintiffs had not suffered any physical injury or property damage other than to the homes built with the concrete.

The court made an interesting distinction between damage to property which is the subject of the contract and "other" property, that which is outside the contract. The owners argued that the concrete damaged other property—*i.e.*, the homes. Opining that "one must look to the product purchased by the plaintiff, not the product sold by the

defendant" to determine whether there has been "other" property damage to support a negligence claim, the court ruled that each home, not the concrete, was the relevant property under the economic loss rule. The concrete was an integral part of the finished home and, thus, did not injure "other" property.

The *Casa Clara* court also foreclosed an interesting argument that had been discussed in *Sandarac Association, Inc. v. W.R. Frizzel Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d DCA 1992). The *Sandarac* court, in dicta, noted that the economic loss rule arguably could be modified "when the economic expense cures a latent building defect that creates an immediate and substantial risk of bodily injury or damage to property other than the building."<sup>12</sup> The homeowners in *Casa Clara* adopted a similar argument that the possibility the exploding concrete will cause physical injury provides a ground for avoiding the economic loss rule. The Supreme Court disagreed:

This argument goes completely against the principle that injury must occur before a negligence action exists. Because an injury has not occurred, its extent and the identity of injured persons is completely speculative. Thus, the degree of risk is indeterminate, with no guarantee that damages will be reasonably related to the risk of injury, and with no possibility for the producer of a product [or provider of a service] to structure its business behavior to cover that risk.<sup>13</sup>

The ruling in *Casa Clara*—specifically, its limitation of *A.R. Moyer*—is consistent with two prior appellate decisions: *Sandarac Association, Inc. v. W.R. Frizzel Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d DCA 1992), *review denied*, 626 So. 2d 207 (Fla. 1993); and *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Electric, Inc.*, 582 So. 2d 47 (Fla. 2d DCA 1991), *review dismissed*, 587 So. 2d 1327 (Fla. 1991). In *McElvy, Jennewein*, an electrical subcontractor brought suit against an architectural firm for negligently interpreting provisions of a construction contract between the firm's client and the general contractor. The architectural firm, by allegedly applying an incorrect standard for requests to switch suppliers, advised its client not to allow the subcontractor to switch its lighting supplier. The appellate court distinguished *A.R. Moyer* on its facts. Unlike *A.R. Moyer*, which was underscored by a supervisory duty, the con-

tract in *McElvy, Jennewein* did not vest responsibility in the architects to supervise construction or any of the contractors. The court held that "since the appellees here are subcontractors, one step further removed from the architect than was the general contractor in [*A.R.*] *Moyer*, we have difficulty in extending the duty. . . ."<sup>14</sup>

Similarly, in *Sandarac*, the same appellate court one year later refused to extend the duty to a third party even further removed from the architect than a subcontractor. *Sandarac* involved a suit brought by a condominium association against an architect for negligently preparing plans and specifications which did not permit proper anchorage of the masonry wall as required by the building code. The resulting damage included only repair costs. The court affirmed dismissal of the complaint on the ground that *A.R. Moyer* is limited "to circumstances in which the defendant architect has supervisory powers over the plaintiff."<sup>15</sup> Such power over the condominium association simply did not exist.

### Architects' Liability After *Casa Clara*

*Casa Clara*'s impact on the rule articulated in *A.R. Moyer* arguably is relatively clear, but may not be conclusive. What is certain, however, is that architects' liability in negligence for purely economic losses has been limited to a large degree.

#### • The Supervisory Role

As of this writing, *Spancrete, Inc. v. Ronald E. Frazier & Associates, P.A.*, 630 So. 2d 1197 (Fla. 3d DCA 1994), is the only case thus far to apply the *Casa Clara* limitation in the context of architects' negligence liability. In *Spancrete*, a subcontractor sought to recover from an architect economic losses resulting from change orders in the construction project. The complaint alleged that the losses were caused by the architect's negligent supervision. The court held that the subcontractor had no cause of action against the architect under *A.R. Moyer* and, therefore, dismissed the suit. The court acknowledged that a narrow distinction supported its decision: "*A.R. Moyer* recognized a duty of care owed by a supervising architect to a general contractor. *Spancrete* in this case is a subcontractor. Because *A.R. Moyer* has been confined strictly to its facts, the

duty of care there recognized does not extend to a subcontractor.<sup>16</sup>

The court in *Spancrete* also identified another ground that supported its decision. *A.R. Moyer* was decided in the context of a "supervising" architect with the power to stop work and exercise some control over the contractor. The role of the architect in *Spancrete* was governed by the American Institute of Architects Document A201. Under that contract, the architect does not have the right to stop work; that power is reserved to the owner. AIA Document A201 also does not confer upon the architect supervisory responsibility over the contractors. Thus, the court held that the architect did not qualify as a supervisory architect within the meaning of *A.R. Moyer*.

It is unclear whether the *Spancrete* court's ancillary argument regarding the supervisory status of an architect will gain unanimous acceptance. Taken to its logical extreme, the argument suggests that an architect can never be held liable to a general contractor for economic losses unless the owner and the architect were governed by a contract which expressly vested in the architect the power to stop work and supervise the contractor. Arguably, the Supreme Court did not intend this result. Nevertheless, some commentators adopt this interpretation and suggest that, as a practical matter, *A.R. Moyer* is dead. This view is premised on the fact that the standard AIA contract does not vest supervisory responsibility with the architect. This view, however, glosses over the fact that many architects perform work without a written contract or use their own variant of the AIA contract, which may or may not address supervisory duties.

Contractual responsibilities aside, an architect who assumes a supervisory role during the course of construction may also constitute a de facto supervisor. It is not uncommon for architects to assume roles or duties that extend beyond the four corners of their contract. Under such a scenario, a court may find the architect liable in tort without being inconsistent with the rulings in *A.R. Moyer* and *Casa Clara*.

Nevertheless, the *Spancrete* decision is a positive ruling for architects and other design professionals. Courts probably will continue to protect professionals from negligence liability for eco-

nomical losses. The decision, however, also implicitly heralds a warning to architects who expand, either expressly or by their actions, the scope of their contractual responsibilities. Such an expansion probably carries with it a commensurate increase in potential negligence liability.

#### • *The Independent Tort Concept*

Other decisions create additional avenues for holding architects liable in tort for economic losses, notwithstanding the economic loss rule. For instance, negligent violations of applicable building codes may still form the basis for liability in tort for purely economic losses. F.S. §553.84 expressly provides:

Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the state minimum building codes, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation.

Violations of §553.84 or other local building codes constitute negligence per se.<sup>17</sup>

The Second DCA recently held that the violation of a building code could form the basis for tort liability against an architect. *Edward J. Seibert, A.I.A., P.A. v. Bayport Beach & Tennis Club Ass'n*, 573 So. 2d 889 (Fla. 2d DCA 1991). In *Seibert, A.I.A.*, a condominium association sued, among others, an architect for various acts of alleged negligence and violation of the applicable building code. The latter allegation involved a claim that the architect designed a fire exit system which failed to comply with the building code. The association sought recovery for the costs of modifying the structure to comply with the code. The court expressly held that the architect had a duty to design the fire exits in a manner that complied with the applicable building code, and failure to use due care in that regard creates liability.<sup>18</sup> However, the *Seibert* court found that the architect was not negligent. The architect used his professional judgment in interpreting the code, the building inspector approved the design, and the architect relied upon such approval.

The *Seibert, A.I.A.*, case, however, was decided under pre-*Casa Clara* law where a tort that was independent of or distinguishable from a contract could provide the basis for recovering purely economic losses.<sup>19</sup> The viability

of the independent tort theory is not so clear now. *Casa Clara* appears to suggest,<sup>20</sup> and some recent commentators seem to concur,<sup>21</sup> that any tort claim seeking recovery for purely economic damages is foreclosed. One might question, however, whether the Supreme Court meant to sweep so broadly; otherwise, well-established tort claims such as defamation, tortious interfer-



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ence, civil theft, and fraud in the inducement, to name a few, would be eviscerated. The recent post-*Casa Clara* decisions in *Community Bank of Homestead v. Boone*, 164 B.R. 167 (Bankr. S.D. Fla. 1994); *Greenberg v. Mount Sinai Medical Center*, 629 So. 2d 252 (Fla. 3d DCA 1993); and *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492 (Fla. 2d DCA 1993), all clearly hold that the "independent tort" theory survives *Casa Clara*.

It would appear, then, that negligence per se claims also survive *Casa Clara*. As stated in *Sierra v. Allied Stores Corp.*, 538 So. 2d 943, 944 (Fla. 3d DCA 1989), §553.84 creates an independent cause of action. Under the rationale of *Boone*, *Greenberg*, and *GNB*, such a claim avoids the economic loss rule. Any other construction might be questionable from a policy perspective. The legislature enacted the minimum building code for the primary purpose of protecting the public safety, health, and welfare.<sup>22</sup> Allowing a party to avoid the consequences of violating a safety regulation arguably contravenes and undermines the legislative purpose of §553.84.

## AUTHOR



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This column is submitted on behalf of the Trial Lawyers Section, Ronnie Hugh Walker, chair, and Brett Preston, editor.



# The law surrounding architects' liability in tort for economic losses suffered by third parties is still somewhat unsettled . . . and the Casa Clara decision fails to provide a definitive guidepost for lower courts

## Conclusion

In summary, the law surrounding architects' liability in tort for economic losses suffered by third parties is still somewhat unsettled. As to certain issues, the *Casa Clara* decision fails to provide a definitive guidepost for lower courts. Architects, however, can rely on certain points. First, consistent with *A.R. Moyer*, courts will hold architects who assume express supervisory roles accountable to general contractors for negligently performing those roles. Second, architects must be leery of assuming supervisory roles above and beyond the role set forth in the contract. Courts may well conclude that *Casa Clara*'s limitation of *A.R. Moyer* does not extend to supervisory duties that architects voluntarily, though not contractually, undertake. Third, liability will likely be limited to the general contractor, and will not extend to other third parties such as subcontractors and condominium associations. Fourth, violations of building codes probably still form the basis for liability for economic losses.

Although *Casa Clara* fails to shield them completely from liability in tort, architects are in a much better position than they were prior to the Supreme Court's decision. Architects must be aware, however, that the law is dynamic. Reliance on the current status of the law should never supplant the high standards of professionalism en-

gendered by the American Institute of Architects. □

<sup>1</sup> This article does not address, nor does *Casa Clara Condominium Assoc., Inc. v. Charley Toppino & Sons*, 620 So. 2d 1244 (Fla. 1993), appear to foreclose, professional malpractice claims against an architect by a client. See, e.g., *Southland Construction, Inc. v. The Richeson Corp.*, 642 So. 2d 5 (Fla. 5th D.C.A. 1994).

<sup>2</sup> See, e.g., Lynn E. Wagner & Richard A. Solomon, *Finally a Concrete Decision: The Supreme Court of Florida Ends the Confusion Surrounding the Economic Loss Doctrine*, 67 FLA. B.J. 46 (May 1994).

<sup>3</sup> See, e.g., *Sickler v. Indian River Abstract & Guaranty Co.*, 195 So. 195 (Fla. 1940).

<sup>4</sup> *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 399 (Fla. 1973).

<sup>5</sup> Relying on *Sickler*, 195 So. 2d 195, and *Investment Corp. of Fla. v. Buchman*, 208 So. 2d 291 (Fla. 2d D.C.A. 1968).

<sup>6</sup> *U.S. v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958).

<sup>7</sup> *A.R. Moyer*, 285 So. 2d 402.

<sup>8</sup> *Parliament Towers Condominium v. Parliament House Realty*, 377 So. 2d 976, at 978 (Fla. 4th D.C.A. 1979); *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So. 2d 689, at 692 (Fla. 2d D.C.A. 1979). See also *Luciani v. High*, 372 So. 2d 530, at 531 (Fla. 4th D.C.A. 1979) (holding an engineer liable under negligence law for economic losses sustained by homeowners).

<sup>9</sup> The court also disapproved of *Latite Roofing Co. v. Urbanek*, 528 So. 2d 1381 (Fla. 4th D.C.A. 1988); *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 (Fla. 1982); *Adobe Bldg. Ctrs., Inc. v. Reynolds*, 403 So. 2d 1033 (Fla. 4th D.C.A. 1981), *rev. dismissed*, 411 So. 2d 380 (Fla. 1981); *Simmons v. Owens*, 363 So. 2d 141 (Fla. 1st D.C.A. 1978).

<sup>10</sup> *Casa Clara*, 620 So. 2d at 1248 n.9.

<sup>11</sup> *Id.* at 1146.

<sup>12</sup> *Sandarac Association, Inc. v. W.R. Frizell Architects, Inc.*, 609 So. 2d 1349, at 1354 (Fla. 2d D.C.A. 1992).

<sup>13</sup> *Casa Clara*, 620 So. 2d at 1247.

<sup>14</sup> *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Electric, Inc.*, 582 So. 2d 47, at 49 (Fla. 2d D.C.A. 1991).

<sup>15</sup> *Sandarac*, 609 So. 2d at 1354.

<sup>16</sup> *Spancrete, Inc. v. Ronald E. Frazier & Associates, P.A.*, 630 So. 2d at 1197 (Fla. 3d D.C.A. 1994) (emphasis in original).

<sup>17</sup> See *Brown v. South Broward Hosp. Dist.*, 402 So. 2d 58 (Fla. 4th D.C.A. 1981).

<sup>18</sup> *Edward J. Seibert, A.I.A., P.A. v. Bayport Beach & Tennis Club Ass'n*, 573 So. 2d 889, at 892 (Fla. 2d D.C.A. 1991).

<sup>19</sup> See, e.g., *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So. 2d 180 (Fla. 1987).

<sup>20</sup> *Casa Clara*, 620 So. 2d at 1246 (stating that "[f]or recovery in tort, 'there must be a showing of harm above and beyond disappointed economic expectations'")

<sup>21</sup> Lynn E. Wagner & Richard A. Solomon, *supra* note 2.

<sup>22</sup> FLA. STAT. §553.72 (1994).