April 2018

Post Hurricane Litigation: Private Liability Under Florida Law for Personal Injury, Loss of Life and Property Damage Resulting from Major Coastal Storms

Richard Hamann
University of Florida College of Law

Follow this and additional works at: https://ir.law.fsu.edu/jluel

Part of the Environmental Law Commons

Recommended Citation
Available at: https://ir.law.fsu.edu/jluel/vol4/iss1/3
Post Hurricane Litigation: Private Liability Under Florida Law for Personal Injury, Loss of Life and Property Damage Resulting from Major Coastal Storms

Cover Page Footnote
This article was developed under the auspices of the Florida Sea Grant College Program with support from the National Oceanic and Atmospheric Administration, Office of Sea Grant, U.S. Department of Commerce, Grant No. R/C-P- II. The author gratefully acknowledges the research and writing assistance of Caron Balkany, Rick Jackson, Dennis Bayer and John Tucker.
POST HURRICANE LITIGATION: Private Liability Under Florida Law for Personal Injury, Loss of Life and Property Damage Resulting From Major Coastal Storms

RICHARD HAMANN*

I. INTRODUCTION

The potential devastation resulting from a major hurricane in Florida is a matter of increasing concern to government officials, property owners, the construction industry, and inhabitants of Florida's coastal zone. The recurrence of hurricanes is certain. In the period from 1871 to 1982 there were only two years, 1907 and 1914, in which no hurricanes formed in the North Atlantic Ocean, the Caribbean Sea, or the Gulf of Mexico.¹ In the period from 1900 to 1982, an average of five hurricanes every three years made landfall along the United States' Gulf and Atlantic Coasts and approximately 40 percent of these were major hurricanes.² Between 1900 and 1982, fifty-one hurricanes, twenty-one of which were classified as major hurricanes, made landfall in Florida.³

In the past, hurricanes have resulted in enormous property damage and loss of life. The 1935 Labor Day hurricane killed over 400 people in the Florida Keys, at a time when those islands were sparsely settled.⁴ Hurricane-driven waters drowned 1,800 inhabitants of the low-

* Executive Director, Center for Governmental Responsibility, University of Florida College of Law, Gainesville, FL 32611. B.A. 1971, University of Florida; J.D. 1976, University of Florida. This article was developed under the auspices of the Florida Sea Grant College Program with support from the National Oceanic and Atmospheric Administration, Office of Sea Grant, U.S. Department of Commerce, Grant No. R/C-P-11.

The author gratefully acknowledges the research and writing assistance of Caron Balkany, Rick Jackson, Dennis Bayer and John Tucker.


2. Id. at 8, Table 4. A major hurricane is a hurricane in category 3, 4, or 5 of the Saffir/ Simpson Hurricane Scale. Id. at 1 n.1. A major hurricane has winds greater than 110 miles per hour and a surge of at least nine feet. Id. at 2, Table 1. The weakest classification for a hurricane is category 1, which would have winds of at least 74 miles per hour and a surge of at least four feet. Id.

3. Id. at 14, Table 9.

lying areas adjacent to Lake Okeechobee in 1928, and in 1900 a hurricane surge killed 6,000 people on Galveston Island, Texas. Although improved observation and warning systems have reduced the loss of life from recent storms, property damage has escalated dramatically. Hurricane Donna, in 1960, caused losses of $387 million, while in 1979 Hurricane Frederic caused $2.3 billion in damages. Much greater losses are expected in the future. Planners at the South Florida Regional Planning Council predict that a Class 3 storm (111 mph winds) would result in $1.99 billion in damages to Dade County alone, and that damages from a Class 5 storm (155 mph) might be as high as $7.7 billion.

Additionally, many experts fear an increased risk of personal injury and loss of life, as populations increase on barrier islands. These islands cannot be evacuated in the time provided by current forecasting techniques. Forecasters can give a reasonably accurate hurricane warning twelve hours before landfall. Yet, evacuation of the Florida Keys would take thirty-five hours, Sanibel Island would take fifteen to nineteen hours, and low-lying coastal lands in the Tampa Bay area would take twelve to eighteen hours. Rising waters and winds would cut off escape routes hours before the actual hurricane landfall. This risk is further compounded by the occasional storm that develops strength, changes direction or moves ashore much more quickly than normal. The 1938 hurricane that devastated New England, for example, traveled from the Bahamas to that northeastern region in less than forty-eight hours. The recurrence of such a storm would result in an extraordinary disaster.


8. *South Fl. Regional Planning Council, South Florida Region Hurricane Loss Study* 91 (Feb. 1987).

9. *Id.*


13. *Id.*
Although historically there have been few private liability cases arising from damage caused by hurricanes, the future may bring a torrent of private lawsuits for damages under either tort or contract liability. At present, the common practice is to have insurance companies and the government provide the means for individuals to recover at least some of their losses. But what about those victims who do not have insurance? Further, given the dramatic increase in monetary damages, it is reasonable to expect the insurance companies to seek to diminish their costs. Thus, it appears likely that post-hurricane litigation will be the wave of the future as the victims, the insurance companies and the government work to establish the liability of others in an effort to reduce their costs and still provide a means of compensation for loss.

Many individuals and institutions bear the economic losses and human suffering that result when a major hurricane strikes a heavily populated area. Individuals and institutions that might be held liable include: government officials who allow or even promote development of hazardous sites and who refuse to enact and enforce strict building and land development codes; land owners, developers, and lenders who build on unsafe locations; engineers and architects who design structures that will not withstand hurricane forces; builders, contractors, and workers whose work is structurally unsound; real estate brokers and sellers who market unsafe structures and fail to disclose the hazards; consumers who invest their savings and their lives in an environment they do not understand.

In the aftermath of a major hurricane, those who suffer losses are likely to seek compensation from those who cause or contribute to their damages. This paper examines the potential liability of those private parties involved with siting, designing, constructing and marketing structures vulnerable to hurricane damage. The emphasis is on Florida law, although case law from other jurisdictions is examined when necessary to understand issues likely to arise in Florida. The information presented is intended to assist parties in making decisions before a storm strikes.

II. THEORIES OF RECOVERY

Following a major hurricane, the vast majority of victims will attempt to recoup their losses through insurance and government aid. However, given the escalating costs arising from hurricane damage, it is necessary to use alternate forms of recovery when they are available. In a suit for damages which result from a hurricane, the plaintiff might have an action for negligence, breach of contract, or breach of warranty. Potential defendants include architects, engineers, suppliers, construction contractors, developers, sellers, brokers, lenders,
owners and occupiers. Each theory of liability, and its applicability to potential defendants, will be analyzed in the following sections.

A. Negligence

Negligence is a widespread and powerful remedy in the construction context. Liability under the negligence theory may be imposed for behavior that is unreasonable under the circumstances. The plaintiff must establish: 1) the defendant owed a duty of care to the plaintiff; 2) the defendant breached that duty; 3) the plaintiff suffered damages; and 4) the defendant's breach of duty was the proximate cause of the plaintiff's damages.

1. Design Professionals

Design professionals—primarily architects and engineers—may be sued for negligent design by parties to whom they owe a duty of care. Clearly, the designer owes a duty of care to the client, but does the duty extend to users of a building or to the owners of neighboring buildings that might be injured by wind- or wave-driven debris in the event of a collapse during a hurricane?

Whether a duty exists is primarily a question of foreseeability: one owes a duty of care to another if failure to exercise reasonable care foreseeably will cause harm to the other.14 The courts have adopted this view in the context of design professionals.15 For example, in Tiede v. Little,16 an architect was sued when he allegedly designed a wall without the supports required by the building codes, causing the wall to collapse and kill a pedestrian when hit by an automobile. The concept of foreseeability, however, is subject to interpretation, and many courts employ a balancing approach in which foreseeability is

14. See Green Springs, Inc. v. Calvera, 239 So. 2d 264, 265-66 (Fla. 1970)(quoting Heaven v. Pender, 11 Q.B.D. 503 (1883))(The Heaven court examined the standard of care or duty owed to potential plaintiffs in attractive nuisance cases. Heaven provides:

Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

[Footnote omitted.]


16. 502 So. 2d 923 (Fla. 3d DCA 1987).
one of several factors weighed to determine whether the professional owes a duty to third parties.17

a. In general

Whether a designer has breached the duty of care depends on the standard of care imposed, usually reasonableness.18 A design professional is "expected to possess the technical expertise and judgment sufficient to perform the services he has undertaken, and to utilize these abilities reasonably and without neglect."19 The standard of care is generally dependent upon the circumstances of each case. Furthermore, the standard is generally determined by local practice.20 Whether there is in fact a breach of duty is a question for the jury, but only after expert testimony raises the question of a breach.21 Thus, an architect can make an error in judgment and still meet the standard of care.

Where an architect's duty involves supervision rather than design, expert testimony is typically not required to raise the issue of negligence because it falls within the "common knowledge" exception.22 In fact, some courts have held an architect liable for negligent supervision even where the architect had no notice of the contractor's deviation from the design, and where discovery of such deviation was impossible.23 Florida, however, rejects this absolutist view. In Mai Kai, Inc. v. Colucci,24 the Florida Supreme Court held that a supervisory architect could not be held liable for an independent contractor's

17. Architectural Liability, supra note 15, at 221; Commenting on a California case, Bikanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958), in which the court developed a multi-factor balancing approach to determine that an architect owed a duty of care to the purchasers of a condominium. The court also noted the following considerations: 1) the extent to which the transaction was intended to affect the plaintiff, 2) the degree of certainty of injury, 3) the closeness between conduct and injury, 4) moral blame, and 5) prevention of future harm.


20. See Paxton v. Alameda County, 119 Cal. App. 2d 393, 406, 259 P.2d 934, 942 (1953); Comment, Architect Torli Liability in Preparation of Plans and Specifications, 55 CALIF. L. REV. 1361, 1379 (1967)(strict liability does not apply to architects, rather they are held to a standard of due care—i.e., they can make mistakes so long as it is within the local standard of care); Architectural Liability, supra note 15, at 229 (discussion of the Paxton case).


22. Id. at 24-25.

23. Architectural Liability, supra note 15, at 237-38. Architects often assume a contractual duty to supervise construction to insure conformity with the design.

24. 205 So. 2d 291 (Fla. 1967).
defective work where the architect had no notice or knowledge of the defect.\textsuperscript{25}

As regards the owner, Florida maintains that there is a nondelegable duty to exercise a standard of reasonable care. The court stated that delegation of that duty will not necessarily eliminate an owner’s responsibility nor will the court impose absolute liability for a contractor’s negligence.\textsuperscript{26}

b. Violation of Statutes or Building Codes

One of the most important issues in determining whether a design professional has met the required standard of care is whether the professional is in compliance with or violating applicable statutes or building codes. In all jurisdictions, the violation of a building code is evidence of negligence,\textsuperscript{27} and in some situations, a statutory violation may be treated as negligence per se.\textsuperscript{28} In \textit{de Jesus v. Seaboard Coast Line R.R.},\textsuperscript{29} the Florida Supreme Court clarified Florida’s position on statutory negligence. The court explained that statutes “designed to protect a particular class of persons from their inability to protect themselves”\textsuperscript{30} are referred to as strict liability statutes and violation of such a statute is negligence per se. They further held that it is negligence per se to violate a “statute which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury.”\textsuperscript{31} When a defendant has violated such a statute, the plaintiff does not need to establish causation.\textsuperscript{32} In cases involving negligence per se, contributory negligence is a defense,\textsuperscript{33} and the plaintiff must establish “that he is of the class the statute was intended to protect, that he suffered injury of the type the statute was

---

\textsuperscript{25} \textit{Id.} at 293.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Tamiami Gun Shop v. Klein}, 116 So. 2d 421 (Fla. 1959).
\textsuperscript{28} Our research discloses that the almost universal American and English attitude is that where legislation prescribes a standard of conduct for the purpose of protecting life, limb, or property from a certain type of risk, and the harm to the interest sought to be protected comes about through breach of the standard from the risk sought to be obviated, then the statutory prescription of the standard will at least be considered in determining civil rights and liabilities.
\textsuperscript{29} \textit{Id.} at 423.
\textsuperscript{30} \textit{Id.} at 423.
\textsuperscript{31} \textit{281 So. 2d 198} (Fla. 1973).
\textsuperscript{32} \textit{Id.} at 201.
\textsuperscript{33} \textit{Id.}.
\textsuperscript{34} \textit{Sloan v. Coit Int'l}, 292 So. 2d 15, 16 (Fla. 1974).
\textsuperscript{35} \textit{281 So. 2d at 201} (proximate cause of his injury).
designed to prevent, and that the violation of the statute was the prox-imate cause of his injury."\textsuperscript{34}

In Florida, a defendant may avoid the negligence per se argument by showing that the statute or [building] code was intended to protect the general public, rather than a particular class of potential plaintiffs.\textsuperscript{35} However, violation of a fire code which leads to increased damages during a fire has consistently been held to be negligence per se.\textsuperscript{36} In \textit{Concord Florida, Inc. v. Levin},\textsuperscript{37} plaintiffs were injured during a fire in defendant's restaurant. Plaintiffs alleged that the defendant violated the local fire code by its "failure to provide ample emergency fire exits, failure to clearly designate the location of the present fire exits and failure to provide a reasonably safe place for its patrons."\textsuperscript{38} Applying the \textit{de Jesus} test, the court held that violation of the fire code was negligence per se because the code was "clearly designed to protect a particular class of persons (patrons within a building) from a particular type of injury (burns and smoke inhalation caused by fire to that building). . . ."\textsuperscript{39}

Building code violations are sometimes held to constitute negligence per se, and sometimes to be merely prima facie evidence of negligence. In \textit{Brown v. South Broward Hospital District},\textsuperscript{40} the court held that a section of a building code requiring the use of scaffolds was designed to protect a particular class of persons (construction workers) from a particular type of injury (falling), therefore, violation of the building code was negligence per se where a worker was injured by falling.\textsuperscript{41}

A recent case from Florida's Third District Court of Appeal held that violations of sections of building codes which dealt with design features rather than construction safety procedures constituted prima

\textsuperscript{34}  Id.
\textsuperscript{35}  Williams v. Youngblood, 152 So. 2d 530, 533 ( Fla. 1st DCA 1963)(statute which prohibits allowing a child to use a BB gun without adult supervision is intended to protect the public generally); Richardson v. Fountain, 154 So. 2d 709, 711 (Fla. 2d DCA), \textit{cert. denied}, 157 So. 2d 818 (Fla. 1963)(ordinance regulating minimum height of awnings over sidewalks is intended to protect public at large); \textit{cf.} Wilson v. Florida Airlines, 449 So. 2d 881, 882 (Fla. 2d DCA 1984)(ordinance requiring airport lessees to "keep floor free from fuel or oil" was intended to benefit the plaintiff, who was an employee of a different airline and who slipped on a puddle of hydraulic fluid which the defendant airline allegedly allowed to accumulate).
\textsuperscript{36}  \textit{Concord Florida, Inc. v. Levin}, 341 So. 2d 242 (Fla 3d DCA 1976), \textit{cert. denied}, 348 So. 2d 946 (Fla. 1977)(violation of fire code is negligence per se, regardless of intervening cause); John's Pass Seafood Co. v. Weber, 369 So. 2d 616 (Fla. 2d DCA 1979)(exculpatory agreement did not prevent liability for failure to comply with fire code).
\textsuperscript{37}  341 So. 2d 242.
\textsuperscript{38}  \textit{Id.} at 243.
\textsuperscript{39}  \textit{Id.} at 246.
\textsuperscript{40}  402 So. 2d 58 (Fla. 4th DCA 1981).
\textsuperscript{41}  \textit{Id.} at 260.
facie evidence of negligence rather than negligence per se.\textsuperscript{42} The \textit{Grand Union} court stated broadly that "building code violations do not fit into the second de Jesus category because the building code is designed to protect the general public rather than a particular class of individuals."\textsuperscript{43} The court based its decision in part on the broad "general welfare" statement contained in the statute which mandated the adoption of building codes in Florida\textsuperscript{44} and on the language of the building code itself.\textsuperscript{45} The court also relied on dicta in an earlier case that violation of a building code is "[a]t most ... only prima facie evidence of the negligence,"\textsuperscript{46} and on two cases which held that a zoning ordinance\textsuperscript{47} and a statute requiring adequate lighting of hotels and restaurants\textsuperscript{48} were for the benefit of the general public.\textsuperscript{49}

In \textit{H.K. Corporation v. Estate of Miller},\textsuperscript{50} it was held that violation of a regulation requiring a minimum depth of a swimming pool with a diving board was negligence per se. "[T]his rule obligated the hotel to protect a particular class of persons (swimming pool divers), from a particular type of harm (hitting the bottom of the pool)."\textsuperscript{51}

In 1985 the Florida Legislature passed a growth management bill\textsuperscript{52} which includes the Coastal Zone Protection Act of 1985.\textsuperscript{53} The new law sets minimum performance standards for new structures built within a certain distance of the coast.\textsuperscript{54} New buildings to which the Act applies must be able to withstand winds with speeds up to 110 miles per hour;\textsuperscript{55} wind speed of such magnitude would be classified as a major hurricane. Whether a violation of these provisions resulting in structural failure caused by a hurricane would be deemed negligence per se or only evidence of negligence remains to be seen.

The type of injury that these provisions are intended to prevent is readily apparent: structural failure during a storm. At issue is the

\textsuperscript{42} Grand Union Co. v. Rocker, 454 So. 2d 14 (Fla. 3d DCA 1984).
\textsuperscript{43} Id. at 16.
\textsuperscript{44} Id.; \textit{FLA. STAT.} § 553.72 (1987) provides that the state will impose minimum building code standards which will allow reasonable protection for public safety, health, and general welfare for all the people of Florida at the most reasonable cost to the consumer.
\textsuperscript{45} Id. Of course, sweeping statements that a law is for the benefit of the people of the state can be found in almost any legislation, so reliance on such language is not very persuasive.
\textsuperscript{46} Morrison Cafeterias Consol. v. Lee, 215 So. 2d 491, 493 (Fla. 1st DCA 1968).
\textsuperscript{47} Groh v. Hasencamp, 407 So. 2d 949 (Fla. 3d DCA 1981).
\textsuperscript{48} Schulte v. Gold, 360 So. 2d 428 (Fla. 3d DCA 1978), cert. denied, 368 So. 2d 1367 (Fla. 1979).
\textsuperscript{49} 454 So. 2d at 16.
\textsuperscript{50} 405 So. 2d 218 (Fla. 3d DCA 1981).
\textsuperscript{51} Id. at 219.
\textsuperscript{52} Ch. 85-55, 1985 Fla. Laws 207 (codified at \textit{FLA. STAT.} §§ 161.52-161.58 (1987)).
\textsuperscript{53} \textit{FLA. STAT.} §§ 161.52-161.58 (1987).
\textsuperscript{54} \textit{FLA. STAT.} § 161.55 (1987).
\textsuperscript{55} \textit{FLA. STAT.} § 161.55(1)(d) (1987). A 115 mph standard applies in the Florida Keys. Id.
scope of protection the courts will accord the statute. Will they de-
clare the purpose to be the protection of a particular class of persons,
such as the owners or occupants of the buildings, or the protection of
the public generally? The statement of legislative intent contains the
typical language concerning the promotion of the "public health,
safety, and welfare of the citizens of the state . . . ." 56 The legislature
further declared that natural coastal areas "perform valuable protec-
tive functions for public and private property, and that placement of
permanent structures in these protective areas may lead to increased
risks to life and property and increased costs to the public." 57 The
legislature acknowledged the "tremendous cost to the state for postdi-
saster redevelopment in the coastal areas," 58 and concluded it was nec-
essary "that the most sensitive portion of the coastal area be managed
through the imposition of strict construction standards in order to
minimize damage to the natural environment, private property, and
life." 59

These statements, particularly the one expressing concern over costs
to the state for postdisaster redevelopment, indicate a legislative em-
phasis on protecting the general public rather than any discrete class.
Thus, the courts may treat violations of the Act as mere evidence of
negligence as the Third District Court of Appeal treats violations of
building codes 60 or zoning ordinances. 61 On the other hand, the
Coastal Zone Protection Act may be found analogous to a fire code,
because standards are set to minimize the harm to persons and prop-
erty in the event of a severe storm. 62

The Coastal Zone Protection Act states that it is intended to mini-
mize the damage to the natural environment, private property, and
life. 63 However, the Act's provisions do not make clear that it is spe-
cifically intended to protect the lives and property of the owners or
occupiers of the buildings. Since the Act seems intended to benefit the
public generally, it is likely that the courts will conclude that the Act
was not intended to protect any particular class. Thus, a violation of
the Act's design performance requirements would probably be prima

60. Grand Union Co. v. Rocker, 454 So. 2d 14 (Fla. 3d DCA 1984).
62. See supra notes 36-39 and accompanying text. See John's Pass Seafood Co. v. Weber,
369 So. 2d 616 (Fla 2d DCA 1979).
facie evidence of negligence, but would not constitute negligence per se.\textsuperscript{64}

Whether held to be prima facie evidence of negligence or negligence per se, violation of a building code, statute or regulation is a powerful piece of ammunition in the hands of a litigator. A plaintiff would thus be able to base its entire case on a violation which is evidence of negligence; expert testimony would not even be required.

c. Compliance with statutes or building codes

A related question on the determination of the degree of care required to be exercised by the defendant is the effect of compliance with government regulations. Section 288C of the Restatement (Second) of Torts declares, "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."\textsuperscript{65} The comment to this section explains that even if the statutory standard is accepted as the standard of conduct for negligence, it is normally a minimum standard which applies to the "ordinary situations contemplated by the legislation."\textsuperscript{66} The existence of special circumstances may call for additional precautions. Thus, it is unclear whether the requirements of Florida’s recent Coastal Zone Protection Act\textsuperscript{67} will be accepted by the trier of fact, or by the court as a matter of law, as the standard of due care.\textsuperscript{68} If a "reasonable person" would take additional precautions, the standard of due care may not be met by compliance with the statute. Special circumstances, such as the use of a building as an emergency hurricane shelter, may require greater precautions. Compliance with the statute, however, is always evidence of due care.

Even in the absence of special circumstances, the requirements of a statute, ordinance or regulation might not be accepted as the standard of due care.\textsuperscript{69} Two statutory provisions dealt with requirements for fire exits in an Ohio case, Mitchell v. Hotel Berry Co.\textsuperscript{70} One section required a minimum number of fire exits, while the other required

\begin{flushleft}
\textsuperscript{64} Although probably not pertinent in the building design context, it should be noted that where it appears without dispute that compliance with a statute was impossible, that violation will be excused whether prima facie evidence of negligence or negligence per se. Ivaran Lines, Inc. v. Waicman, 461 So. 2d 123, 126 (Fla. 3d DCA 1984).

\textsuperscript{65} Restatement (Second) of Torts § 288C (1965).

\textsuperscript{66} Id. at § 288C comment a. See also Prosser & Keeton, supra note 18, at § 36.

\textsuperscript{67} See supra notes 52-59 and accompanying text.

\textsuperscript{68} Restatement (Second) of Torts § 288C comment a (1965).

\textsuperscript{69} Id. at § 286 comment d.

\textsuperscript{70} 34 Ohio App. 259, 171 N.E. 39 (1929).\
\end{flushleft}
that the owner provide "convenient exits from the different upper stories, easily accessible in case of fire."\(^{71}\) The Ohio court noted that the latter section was no more definite than the common law duty of the innkeeper,\(^{72}\) and declared by way of dicta that compliance with the former provision did not preclude a finding of negligence.\(^{73}\) That provision "only fixes a minimum below which negligence per se arises. The particular building and its use may require more than this minimum to reach the requirements of [the latter provision] and the requirements of the common law."\(^{74}\) Where a statute does not establish the standard of care, compliance with the statute will still be evidence of due care.\(^{75}\) However, if the building being constructed is to be used as an emergency hurricane shelter, this fact may be a "special circumstance" requiring greater precautions than those necessary for buildings which are to be evacuated during a hurricane.

To determine the liability for negligence of any other construction industry participant, the analysis is the same as in the case of the design professional's negligence. It is useful to examine the types of negligent acts or omissions which may subject each class of defendants to liability, and to highlight any special considerations which may arise in the various scenarios.

2. Suppliers

Those who supply defective materials may have breached their duty to use reasonable care in manufacturing.\(^{76}\) Of course, the fact that the materials are defective does not necessarily indicate negligence on the part of the defendant. One may exercise due care while causing or failing to discover the defect. In such a case, although the defendant would not be liable for negligence, there might be liability on another theory. For example, liability may be premised on a theory of products liability. Recovery could be had where components supplied by others were damaged due to defects in the former's components.

3. Contractors

Those who are involved in the physical construction of the building may be liable for negligence in their workmanship or in their use of

\(^{71}\) Id. at 265-66, 171 N.E. at 41.
\(^{72}\) Id. at 266, 171 N.E. at 41.
\(^{73}\) Id.
\(^{74}\) Id. See also Burch v. Amsterdam Corp., 366 A.2d 1079 (D.C. 1976)(label on extremely flammable tile adhesive complied with federal labeling requirements. Court held, while compliance is some evidence of due care, it does not preclude a finding of negligence for failure to give adequate warning.).
\(^{75}\) Prosser & Keeton, supra note 18, § 36, at 233.
materials which they should know are defective or otherwise inappro-
priate. Prosser and Keeton declare that

[jt is now the almost universal rule that the contractor is liable to all
those who may foreseeably be injured by the structure, not only
when he fails to disclose dangerous conditions known to him, but
also when the work is negligently done. This applies not only to
contractors doing original work, but also to those who make repairs,
or install parts, as well as supervising architects and engineers.

The plaintiff in Navajo Circle, Inc. v. Development Concepts Corp. sued the architects for negligent supervision and the construction contractors for negligent construction of the roof of a condominium building. The court stated that the defendants’ duties were defined by a standard of reasonableness.

Where it is foreseeable that the plaintiff will suffer the injury sued on, the supplier of the service has a legal duty to use reasonable care to avoid unreasonable risks to that plaintiff in performance of his service. Foreseeability, the standard of care, and the character of the risk are determined by the reasonable-man test.

The construction contractor is generally not responsible for problems with plans and specifications which were prepared by someone else. However, where the design is obviously defective, the contractor may be held negligent for following clearly defective plans.

4. Developers

The duties of a developer are broad in scope, thus a developer may be found negligent on several grounds. Florida's Fourth District Court of Appeal approved the following statements from a condominium association’s complaint against the developer acknowledging that

77. Biscayne Roofing Co. v. Palmetto Fairway Condominium Ass’n, 418 So. 2d 1109 (Fla. 3d DCA 1982). Cf. Wood-Hopkins Contracting Co. v. Masonry Contractors, 235 So. 2d 548 (Fla. 1st DCA 1970)(where contract called for particular type of brick, and masonry contractor bought and used that type of brick, masonry contractor was not negligent for using defective bricks where defect was latent).
78. PROSSER & KEETON, supra note 18, at § 104A (footnotes omitted).
79. 373 So. 2d 689 (Fla. 2d DCA 1979).
80. Id. at 691 (citations omitted).
81. PROSSER & KEETON, supra note 18, § 104A, at 723.
6.2 At all times material hereto, the Developers . . . , by themselves and through their agents, servants and employees, designed, constructed, supervised, inspected and approved for occupancy the Condominium building and improvements, and were under a duty to the members of the Association to use reasonable care in so doing.

6.3 At all times material hereto, the Developers, by themselves and through their agents, servants and employees, undertook to construct the Condominium building and improvements, and were under a duty to members of the Association to do so in accordance with the South Florida Building Code, proper and approved plans and specifications, and proper design, engineering and construction practices. 84

The developer may also be negligent in the selection of the building site. The beginning trend in other state courts is to hold developers liable for negligent site selection or negligent failure to provide reasonable warnings. In ABC Builders, Inc. v. Phillips, 85 the plaintiffs' house was damaged in a landslide. The Wyoming Supreme Court reasoned that "[p]roviding a safe site goes like hand and glove with construction." 86 The court then held developers have a duty to "furnish a safe location for a residential structure and [that] it may be negligence to not do so." 87

In reaching its conclusion, the ABC court relied upon Village Development Co. v. Filice. 88 The developer knew of the lot’s susceptibility to flooding and therefore presumed construction would be on the highest ground. Regardless of this knowledge, the developer approved plaintiffs' plans to build on low ground and failed to warn plaintiffs of possible flooding. The house was subsequently destroyed in a flood, and judgment was entered against the developer based on negligence in failing to warn the purchasers of the flood hazard. 89

By analogy, when a building is damaged in a hurricane, the owner may be able to look to the developer for damages or for rescission of the sale if the developer negligently or fraudulently failed to disclose a defective condition. For instance, the developer may have known that the roof would be destroyed in winds over sixty miles per hour. Recovery against the developer may also be based on negligently or fraudulently made false assertions about the structure or the sur-

84. Id. at 730.
86. Id. at 935.
87. Id. at 938.
89. Id. at 315, 526 P.2d at 89.
rounding area. For example, the developer may have stated that the structure is built on higher ground than is the case.

Further, in Florida a developer may be found negligent for building in low coastal areas that are subject to flooding in the event of a hurricane if the structures are not designed to withstand tremendous forces of wind and water. It is common knowledge that the higher tides, storm waves and excessive rains brought by a hurricane can cause extensive flooding. Thus, a structure which would be appropriate further inland or on higher ground may be inappropriate for low coastal areas and the decision to locate such a structure where it is likely to be destroyed in a hurricane may constitute negligence.

5. Real Property Sellers and Brokers

Liability for negligence may also arise from the sale of the building. If sellers make factual representations about the realty being sold with the intent to defraud, they may be liable for fraud. 90 If sellers make false factual statements without the intent to defraud or remain silent while they know or should know of a material latent defect, they may be liable either for "constructive fraud" 91 or for "negligent misrepresentation." 92

Failure to disclose a material fact may be actionable if there was a duty to speak. Such a duty may arise if there is a confidential or fiduciary relationship. 93 In the case where the seller has superior knowledge, 94 he may be held liable even if there is no duty to disclose the truth. 95

In *Ramel v. Chasebrook Construction Co.*, 96 the plaintiffs had purchased a home from the builders, who stated that the house was well constructed. 97 In fact, the foundation was defective, causing the pool and patio to sink away from the house and causing cracks and other

---

90. The elements of fraudulent misrepresentation are "(1) that defendant made a representation on which plaintiff was meant to act, (2) that the representation was false and defendant knew that fact, and (3) that plaintiff relied on the representation to his injury." *American Int'l Land Corp. v. Hanna*, 323 So. 2d 567, 569 (Fla. 1975).


93. *Keeton, supra* note 91, at 34. The relation of vendor to purchaser does not, by itself, constitute a fiduciary or confidential relation.


95. 135 So. 2d at 882.

96. 135 So. 2d 876 (Fla. 2d DCA 1961).

97. *Id.* at 878.
deformities in the walls. The defendants claimed they had made no representations specifically concerning the foundation of the house and pool. The court held that the builder's statement constituted fraud, noting that a statement by a party having superior knowledge will more readily be deemed a factual assertion than if the parties were dealing on equal terms. The court also noted that the defendants were guilty of actionable nondisclosure. While recognizing the general rule that nondisclosure is not actionable absent a fiduciary relationship or concealment, the Second District Court of Appeal develops two exceptions to the rule and applies them to this case. First, "nondisclosure of a material fact may be deemed fraudulent where the other party does not have equal opportunity to become apprised of the fact." Second, "even though a party to a transaction owes no duty to disclose facts within his knowledge, or to answer inquiries respecting such facts, if he undertakes to do so he must disclose the whole truth."

In Johnson v. Davis, the Florida Supreme Court rejected the general rule referred to by the Ramel court.

These unappetizing cases are not in tune with the times and do not conform with current notions of justice, equity and fair dealing. One should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance.

The court then held

that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used.

In so holding, the Johnson court joined a growing national trend recognizing an affirmative duty to disclose.

98. Id.
99. Id. at 879.
100. Id. at 882.
101. Id. (The defect in the foundation was not discoverable by diligent inspection).
102. Id. (Defendants had asserted that the house was well constructed and well built.)
103. 480 So. 2d 625 (Fla. 1985)(Florida Supreme Court did not approve the general rule which holds that nondisclosure is not actionable unless there is a fiduciary or confidential relationship).
104. Id. at 628.
105. Id. at 629.
106. See also Linsch v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963); Posner v. Davis, 76 Ill. App. 3d 638, 395 N.E.2d 133 (1979). Other states following this trend include Nebraska, West Virginia, Louisiana, New Jersey and Colorado, see Johnson, 480 So. 2d at 629.
Where there is a latent dangerous condition of which the builder-vendor knows or reasonably should know, courts are more likely to impose a duty to disclose. Support for imposing liability may be based on section 353(1) of the Restatement (Second) of Torts, which states:

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know the condition or the risk involved, and
(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.\(^{107}\)

The rules relating to the liability of vendors for misrepresentation or failure to disclose apply to vendors other than developers and their agents. Private individuals who sell their own homes may be liable for negligence or fraud, although the courts are apt to be more lenient with such vendors than with a developer who "has expertise in the construction business and expects profits from his building activity."\(^{108}\)

Typically, courts which have held builder-vendors liable for misrepresentation are influenced by the builders' expertise and knowledge of the structure.\(^{109}\) Yet, even without possessing any special knowledge of construction practices and without having been associated with a particular building's construction, a lay vendor may obtain special knowledge of latent conditions by virtue of ownership or occupancy. Where knowledge is established, the growing trend is to impose a duty of disclosure,\(^{110}\) especially if the latent condition is dangerous.\(^{111}\)

Real estate brokers may be held liable for negligence or fraud for their misrepresentations or failure to disclose material latent defects, but the courts have not always agreed on the extent of the broker's

---

107. Restatement (Second) of Torts § 353(1) (1965).
109. Ramel v. Chasebrook Constr. Co., 135 So. 2d at 879, 882 (the court emphasized the defendant's expertise as developers and knowledge of the particular structure).
110. See supra notes 103-07 and accompanying text.
111. Restatement (Second) of Torts § 353 (1965).
duty. 112 While most courts require disclosure only if the broker has actual knowledge of the condition, 113 some courts have held brokers liable for failing to discover and disclose defects that a reasonable inspection would reveal. 114

Florida's First District Court of Appeal has adopted the former view and will not hold the broker liable unless he has actual knowledge of a defective condition. 115 In the event of a hurricane, if the roof were to detach from the house, the broker may be held liable if he had "actual" knowledge of this condition. Yet, if a screen porch blew in as a result of the storm, there would be no basis for liability. This is because there is a presumption that the roof is a secured part of the house; whereas, a screened porch is not presumed to have a high degree of stability.

6. Lenders

Traditionally, "the construction lender was liable to a home purchaser only if it could be established that the lender was engaged in a joint venture with the builder-developer." 116 If a joint venture is established, the lender will be jointly and severally liable with the builder as if a formal partnership existed. 117 However, the courts have been reluctant to find a joint venture between a lender and a builder. 118

Liability for negligent performance of an independent duty of care owed to prospective purchasers was imposed on a construction lender in Connor v. Great Western Savings & Loan Association. 119 Plaintiffs were purchasers of single-family homes in a large development; they

117. Id.
118. Id. at 415. Typically three requirements must be met in order to have a joint venture:
   (1) There must be joint interest in the property by the parties sought to be held as partners; (2) there must be agreements, express or implied, to share in the profits and losses of the venture; and (3) there must be actions and conduct showing co-operation in the project. None of these elements alone is sufficient.
   Id. at 414 (quoting White v. A.C. Houston Lumber Co., 179 Okla. 89, 91, 64 P.2d 908, 910 (1937)).
sued various parties including the construction lender, Great Western, for rescission or damages when the homes’ foundations cracked. After determining that no joint venture existed, the court applied the balancing test of \textit{Biakanja v. Irving}\textsuperscript{121} to determine whether Great Western owed a duty of care to the plaintiffs.\textsuperscript{122} The court concluded that “Great Western was clearly under a duty to the buyers of the homes to exercise reasonable care to protect them from damages caused by major structural defects.”\textsuperscript{123}

In reaching this conclusion the court focused on the pervasive activities of Great Western which made it “much more than a lender . . . ”\textsuperscript{124} The court also noted that “Great Western knew or should have known that Conejo [one of the developers] was operating on a dangerously thin capitalization, creating a readily foreseeable risk that it would be driven to cutting corners in construction.”\textsuperscript{125}

A year later, the second Appellate Court of California\textsuperscript{126} “limited the holding in \textit{Connor} to a situation where a construction lender acted beyond its normal capacity and the borrower was undercapitalized.”\textsuperscript{127}

In addition, the California Legislature reacted to \textit{Connor} by passing a statute which insulates a construction lender from liability for dam-

\textsuperscript{120} \textit{Id.} at 863, 447 P.2d at 615, 73 Cal. Rptr. at 375.

\textsuperscript{121} 49 Cal. 2d 647, 320 P.2d 16 (1958).

\textsuperscript{122} 69 Cal. 2d at 865, 447 P.2d at 617, 73 Cal. Rptr. at 377. The Biakanja test involves the balancing of various considerations, including:

[1] the extent to which the transaction was intended to affect the plaintiff; [2] the foreseeability of harm to him; [3] the degree of certainty that the plaintiff suffered injury; [4] the closeness of the connection between the defendant's conduct and the injury suffered; [5] the moral blame attached to the defendant's conduct; and [6] the policy of preventing future harm.

\textsuperscript{123} 69 Cal. 2d at 866, 447 P.2d at 617, 73 Cal. Rptr. at 377.

\textsuperscript{124} \textit{Id.} at 864, 447 P.2d 616, 73 Cal. Rptr. at 376.

Great Western voluntarily undertook business relationships with South Gate and Conejo to develop the Weathersfield tract and to develop a market for the tract houses in which prospective buyers would be directed to Great Western for their financing. In undertaking these relationships, Great Western became much more than a lender content to lend money at interest on the security of real property. It became an active participant in a home construction enterprise. It had the right to exercise extensive control of the enterprise. Its financing, which made the enterprise possible, took on ramifications beyond the domain of the usual money lender. It received not only interest on its construction loans, but also substantial fees for making them, a 20 percent capital gain for “warehousing” the land, and protection from loss of profits in the event individual home buyers sought permanent financing elsewhere.

\textsuperscript{125} \textit{Id.} at 866, 447 P.2d at 617, 73 Cal. Rptr. at 377.


\textsuperscript{127} Note, \textit{supra} note 108, at 416 (footnote omitted).
ages due to defects and for any losses due to the borrower’s negligence. However, a construction lender is not immune from liability if "such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money or [if] the lender has been a party to misrepresentations with respect to such real or personal property." Florida courts have consistently held that "[a] lender owes no duty to others to supervise the construction and development of projects which it has financed." In *Armetta v. Clevtrus Realty Investors*, condominium unit purchasers intervened in a lender’s foreclosure action against the developer. In addition to the claims against the developer, the purchasers filed several counterclaims against the lender. The trial court dismissed several of the counterclaims which alleged that the lender was negligent in supervising the developer. The appellate court affirmed, distinguishing the case from *Dunson v. Stockton, Whatley, Davin & Co.* The court reasoned that in *Dunson*, the lender assumed complete control of the developer-borrower’s building operations so that the separate identities of lender and developer merged into one.

Where the lender has foreclosed on a construction project and has completed construction and sold units to purchasers, it may be held liable as a developer. In *Chotka v. Fidelco Growth Investors*, the court held that the lender "became more than just a lender when they took title to the condominium project, completed construction, and, holding themselves out to be the developer and owner of the project, advertised and sold units to purchasers." The court held that the lender "became a developer of the project to the extent that they may be held liable for performance of express representations made to the buyer, for patent construction defects in the entire condominium project and for breach of any applicable warranties due to defects in the portions of the project completed by [them]."

129. *Id.*
131. 359 So. 2d 540.
132. *Id.* at 542.
133. 346 So. 2d 603 (Fla. 1st DCA 1977) (*held that where mortgagee took over operation of a construction company, it was bound by the terms of the construction contract to which the mortgage was then subordinated*).
134. 359 So. 2d at 542.
135. 383 So. 2d 1169 (Fla. 2d DCA 1980).
136. *Id.* at 1170 (citation omitted).
137. *Id.*
It recently has been asserted that a lender should be liable for failing to perform the duties imposed by the National Flood Insurance Act. This contention was rejected by the Fourth and Fifth Circuit Courts of Appeal. In both cases, plaintiffs were purchasers whose homes were damaged during floods. Under the National Flood Insurance Act, the lending institutions are obliged to notify purchasers that the property is located in a flood hazard area and to reject loan applications on such property unless the property is covered by flood insurance. The lenders in these cases had not fulfilled these duties; however, the courts found the Act did not provide a private cause of action against lenders. The Fifth Circuit noted that there may be common law actions against the lender based on fraud, negligence or contract. Whether these actions exist independently of any implied statutory cause of action is a question of state law.

7. Owner/Occupier

People who are injured as the result of a storm may seek compensation from the owner or occupier of the building or land where the injury occurred. Traditionally, the duty of care owed by a land owner or occupier to persons on the premises depended on whether the plaintiff was an invitee, a licensee, or a trespasser. Today, many jurisdictions partially or completely reject these classifications in favor of a standard of reasonable care. While Florida still recognizes some distinctions, it does not strictly adhere to the traditional view.

Florida courts emphasize that "it is the relationship established between persons which must be the criterion for the duty owed." The

139. Arvai v. First Fed. Sav. & Loan Ass'n, 698 F.2d 683 (4th Cir. 1983)(held no private right of action existed against lenders who failed to comply with the Act's requirements that federally regulated lenders could not make loans secured by realty in flood hazard areas unless they were covered by insurance and notice was given to purchasers that property is in flood area.).
140. Till v. Unifirst Fed. Sav. & Loan Ass'n, 653 F.2d 152 (5th Cir. 1981)(held that no private damage action existed under the Act).
142. 42 U.S.C. § 4012a(b) (1982).
143. Arvai, 698 F.2d at 684; Till, 653 F.2d at 161.
144. Till, 653 F.2d at 161.
145. Id.
147. See id.
148. See infra notes 149-54.
highest standard of care imposed is "reasonable care in the circumstances" to protect invitees and licensees.\textsuperscript{150} Under this standard, an owner or occupier of land is not liable for latent defects of which they do not know or have reason to know.\textsuperscript{151} Thus, it is unlikely the owner of a building would be held liable for damages resulting from a concealed structural weakness. However, lack of actual knowledge will not relieve the owner or occupier of liability, if the owner had reason to know of a latent danger.

In \textit{Welch v. Auto Owners Insurance Co.},\textsuperscript{152} for example, the plaintiffs were injured when a store's plate glass window exploded during high winds. Plaintiffs sued the owners of the building and the lessees who operated the store. The defendants contended that they had relied on the architect and the contractor to meet the building and safety code requirements; yet it was undisputed that the defendants inspected and approved the plans.\textsuperscript{153} The trial court granted the defendant's motion for summary judgment, stating that they had no reason to know of any defect in the window.\textsuperscript{154}

The appellate court reversed:

The affidavit, that the windows were incapable of withstanding wind loads that could be expected in the area, is not rebutted in the record. Coastal residents possess common knowledge that glass windows will explode or shatter during high winds, which may be expected from time to time, unless precautions are taken . . . . The defendants were not required to have the knowledge of an engineer to foresee that thin plate glass in windows with an area of approximately 130 sq. ft. [sic] could be very hazardous, particularly in coastal areas which are frequently subjected to high winds.\textsuperscript{155}

In summary, Florida's premises liability standards are as follows: one who controls property owes a duty of reasonable care to invitees and licensees by invitation to keep the property reasonably safe and to protect them from hidden dangers which are or should be known to the owner or occupier. The duty owed to trespassers and to licensees not by invitation is to avoid willful and wanton harm to them and to warn them of hidden dangers about which the controlling party actually knows.

\textsuperscript{150} 284 So. 2d at 694.
\textsuperscript{151} Hickory House v. Brown, 77 So. 2d 249 (Fla. 1955); Mai Kai, Inc. v. Colucci, 205 So. 2d 291 (Fla. 1967).
\textsuperscript{152} 369 So. 2d 449 (Fla. 1st DCA 1979).
\textsuperscript{153} Id. at 450.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 450-51. The plaintiffs were held to be invitees.
B. Breach of Contract

A breach of contract is a failure to perform the terms of any agreement, verbal or written, or the failure to properly perform those terms. A person not a party to the contract usually may not enforce a nonconforming condition, but if that person is injured as a result of a breach, he may sue the nonconforming party. This type of action is brought in negligence; however, if a party can establish that he is the intended beneficiary of a contract, he can sue for breach of contract.

At least one court has held that a homeowner as a third-party beneficiary could maintain an action against a builder who had contracted with the city to repair the plaintiff’s home in exchange for the city’s agreement not to prosecute the builder for building code violations on the plaintiff’s premises. Some courts have also held that a member of the public may sue a contractor as a third-party beneficiary of a contract which contains provisions expressly for the safety of the public.

When the breach of a contractual duty is a proximate cause of damages, the one who breached may be liable to the other party to the contract on a theory of breach of contract. It is not necessary that the breach of contract be the sole cause of the damages so long as it is a substantial factor in causing the injury.

If the construction of a building is defective in materials, workmanship, or substantial deviation from the design, the general contractor, the subcontractors, and materialmen may be liable for breach of contract. Architects may also be liable on a breach of contract theory for defective construction if they breached a promise to supervise the construction in order to insure that the structure conforms to the design. In conclusion, one who has been victimized by a hurricane may be able to find relief by suing for inadequate performance of a contract.

156. Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 179, 441 N.E.2d 324, 328 (1982).
157. Hogan v. Hill, 229 Ark. 758, 318 S.W.2d 580 (1958). This was a negligence case in which the courts were attempting to avoid the strict privity rule. See Architectural Liability, supra note 15, at 219; Note, supra note 19, at 1223. Research has not disclosed any breach of contract cases holding a member of the public an intended beneficiary of a construction contract itself, rather the public can base its claim on failure to comply with public safety provisions in contracts.
158. 5 Corbin on Contracts § 997 (1964).
159. Id. at § 999.
161. Architects often assume a contractual duty to supervise construction to insure conformity with the design. Architectural Liability, supra note 15, at 237-38.
C. Express Warranty

Virtually any party in the construction process, from design and construction professionals to sellers and lessors of the building, may be found to have expressly warranted their services or product.\textsuperscript{162} Most construction contracts contain warranties from the general contractor to the owner stipulating all materials will be free from defects and in conformance with the contract documents,\textsuperscript{163} and all work will be done in a workmanlike manner.\textsuperscript{164} Typically, these warranties are repeated in the contracts between the general contractor and the subcontractors.\textsuperscript{165}

In \textit{Window Master Corp. v. Home Federal Savings \\& Loan},\textsuperscript{166} the defendant manufacturer/installer of sliding glass doors had guaranteed the water tightness of the installation. When Hurricane Betsy forced water under and around the doors, the plaintiff sued for the costs of alterations, additions and cleaning. The trial court granted judgment for the plaintiff and the district court of appeal affirmed, per curiam, without opinion, with one judge dissenting.\textsuperscript{167} The majority reasoned that a guarantee of water tightness should be strictly construed. Whereas, the dissenting judge argued that "reason and common sense would dictate that under severe hurricane conditions you would necessarily expect water seepage around any and all movable glass windows."\textsuperscript{168}

It is not necessary for the words "warranty" or "guaranty" to be used in order to create an express warranty; in fact, the specifications in the contract may be held to create express warranties.\textsuperscript{169} Yet, not all of the representations concerning the property or services one is selling give rise to a warranty. Statements of opinion, intention, prediction, or "puffing" must be distinguished from factual assertions or promises on which a plaintiff may justifiably rely.\textsuperscript{170} For example, a

\begin{itemize}
\item \textsuperscript{162} A lender who forecloses on a construction project and becomes the developer is liable to the purchaser based on (1) express representations it made to the purchaser; (2) all patent construction defects; and (3) breach of any warranties resulting from defects in the portions completed by the lender. \textit{Chotka v. Fidelco Growth Industries}, 383 So. 2d 1169 (Fla. 2d DCA 1980).
\item \textsuperscript{163} Pierce, \textit{Enforcing Warranties of Subcontractors and Materialmen}, 15 \textit{FORUM} 993 (1980).
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} 244 So. 2d 524 (Fla. 4th DCA 1970).
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.} at 525.
\item \textsuperscript{169} Pierce, \textit{supra} note 163, at 995.
\item \textsuperscript{170} \textit{See}, e.g., \textit{Stanford v. Owens}, 46 N.C. App. 388, 393, 265 S.E.2d 617, 621 (1980)(representations that filled lot is fit for construction of restaurant held to be merely opinion).
\end{itemize}
statement that a building is free from termites or built in accordance with accepted building practices is probably a warranty. A statement that a building is hurricane proof may not be.

D. Implied Warranty

Implied warranty is a device developed by the courts to impose strict liability upon the seller of defective goods. While first limited to food sales, its applicability soon spread to other products. This warranty is considered to be made directly to the consumer and is "imposed by law, in tort, as a matter of policy."

1. Design Professionals

In general, the courts have been unwilling to impose an implied warranty on the services of an architect or engineer. In Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc., Florida's Second District Court of Appeal explained:

[a]n engineer, or any other so-called professional, does not "warrant" his service or the tangible evidence of his skill to be "merchantable" or "fit for an intended use." . . . Rather, in the preparation of design and specifications as the basis of construction, the engineer or architect "warrants" that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this "warranty" occurs if he was negligent. Accordingly, the elements of an action for negligence and for breach of the "implied warranty" are the same. The use of the term "implied warranty" in these circumstances merely introduces further confusion into an area of law where confusion abounds.

Nevertheless, some courts have held that by undertaking to furnish plans and specifications, a design professional "impliedly warrant[s]"

171. See Ederer v. Fisher, 183 So. 2d 39 (Fla. 2d DCA 1965).
172. Cf. Association of Bay Area Governments, Private-Sector Tort Liability, Safety Incentives and Earthquakes, in Liability of Private Businesses and Industries for Earthquake Hazards and Losses 13 (Sept. 1984) (whether a representation that a building is "earthquake proof" would be regarded as a statement of fact rather than an opinion or prediction for purposes of tort liability for fraud or misrepresentation is uncertain).
174. Id. at 801.
176. 168 So. 2d 333 (Fla. 2d DCA 1964), cert. denied, 173 So. 2d 146 (Fla. 1965).
177. Id. at 335.
the sufficiency and adequacy of the plans and specifications to reasonably accomplish the purpose for which they were intended . . . .”

2. Contractors and Suppliers

Implied warranties of merchantability and of fitness for an intended purpose have been imposed on construction contractors and suppliers where the seller has reason to know of the intended use. Under the Uniform Commercial Code (U.C.C.) implied warranties apply if the contract can be viewed as the sale of goods, but if the contract is viewed as primarily a contract for services, then the U.C.C. may not apply.

Even where the U.C.C. does not apply, the courts may find implied warranties of merchantability and fitness for an intended purpose. In Biscayne Roofing Co. v. Palmetto Fairway Condominium Association, a roofing subcontractor was held liable for breach of both of these implied warranties, as well as for negligence and breach of express warranty, for damages resulting from its unauthorized substitution of materials. In Greenway Village South Condominium Associations v. Roach, the court stated, “[i]n Florida a contractor is responsible for breach of warranty for defective work.”

3. Developers

Implied warranties are of the greatest importance in the construction context in their application to developers. Although vendors of realty were long protected by the common law doctrine of caveat emptor, this protection has eroded in recent years, at least as applied to the sale of new residences.

183. Pierce, supra note 163, at 994.
184. 418 So. 2d 1109 (Fla. 3d DCA 1982).
185. 397 So. 2d 954 (Fla. 4th DCA 1981).
186. Id. at 956 (citation omitted).
a. New residences

In 1972, Florida joined the rapidly growing minority of states which rejected the rule of caveat emptor in the sale of new residences. In *Gable v. Silver*, the court surveyed the writings on the subject and quoted numerous sources detailing the reasons for recognizing an implied warranty accompanying the sale of new residences. Cases rejecting caveat emptor emphasize the injustice of the old rule in the context of modern home buying practices.

The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of caveat emptor . . . in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice . . . .

The *Gable* court quoted the Texas Supreme Court, which recognized that the new home purchaser ordinarily is not able to ascertain defects in the design or construction of the house. The Texas court added that the rule of caveat emptor "does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work."

*Gable* was one of numerous implied warranty cases which quoted the following passage from the Arkansas case of *Wawak v. Stewart*, emphasizing the anomaly of the caveat emptor rule as applied to new housing.

One who bought a chattel as simple as a walking stick or a kitchen mop was entitled to get his money back if the article was not of merchantable quality. But the purchaser of a $50,000 home ordinarily had no remedy even if the foundation proved to be so defective that the structure collapsed into a heap of rubble.

The implied warranty which accompanies new housing, which had been termed a warranty "of habitability, sound workmanship, or proper construction," "of fitness," "or reasonable workmanship

---

188. 258 So. 2d 11 (Fla. 4th DCA), aff'd 264 So. 2d 418 (Fla. 1972). In affirming, the Supreme Court of Florida adopted the district court's opinion as its own. *Id.* at 419.
189. 258 So. 2d at 15 (quoting Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966)).
190. *Id.* (quoting Humber v. Morton, 426 S.W.2d 554 (Tex. 1968)).
191. *Id.*
193. *Id.* at 1093, 449 S.W.2d at 923.
194. 258 So. 2d 11, 16 (Fla. 4th DCA 1972).
195. *Id.* at 15.
and habitability,”196 is not a warranty of no defects. “The builder is not required to construct a perfect house and in determining whether a house is defective the test is reasonableness and not perfection.”197

An implied warranty of habitability is now recognized in a vast majority of American jurisdictions. One commentator catalogued each state’s position on the implied warranty of new housing in 1980.198 He found that thirty-six states and the District of Columbia had held that such a warranty does exist; two states, Georgia and Virginia, had directly held that no such warranty would be recognized; one state, Tennessee, had indirectly indicated that no such warranty applies; one implicitly denied these warranties applicability to new houses; and the remaining ten states had not yet addressed the issue.199 In addition to, or perhaps as part of, the implied warranty of fitness and merchantability, Florida courts have recognized an implied warranty that the building is constructed in “substantial compliance with plans and specifications approved by the governmental authority and in compliance with applicable building codes.”200 However, the courts have not been so quick to impose implied warranties on the sale of realty other than residences,201 or to extend the warranty to protect subsequent purchasers.202

b. Commercial and investment property

One writer reports that six cases have denied extension of implied warranty protection to commercial purchasers.203 Some of these cases emphasize the consumer protection justification for extending implied warranties to new homeowners, whose relative lack of sophistication, bargaining power, and resources force them to rely heavily on thebuilder-vendor’s expertise and good faith.204 In contrast, these courts

---

197. Id.
198. Shedd, supra note 187, at 303-06 (Table 1).
199. Id. at 302.
201. See Chan, supra note 187, at 201; Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983).
203. Chan, supra note 187, at 202. Few courts have specifically held that implied warranties do not extend to commercial property. While the doctrine originally developed out of concern for the unsophisticated home buyer, the fact that a commercial purchaser is more knowledgeable about building practices should not by itself preclude the implied warranty protection. See id. at 2021-22.
204. Id. at 2021-22.
reasoned, businessmen and investors do not need this type of protection.\textsuperscript{205}

For example, in \textit{Conklin v. Hurley},\textsuperscript{206} the Supreme Court of Florida declined to impose an implied warranty for the benefit of investors who purchased vacant waterfront lots improved by a seawall. The seawall proved defective when it collapsed following unusually heavy rains. The court traced the history of implied warranties in the real estate context, and determined that due to the complexity of modern houses and the mass production and mass marketing of modern houses, homebuyers are unable to detect flaws and are in an inferior bargaining position.\textsuperscript{207} Furthermore, the purchase of a house is analogous to the purchase of a chattel, since the buyer is usually more concerned with the manufactured product, the house, than with the real estate which is incidentally transferred.\textsuperscript{208} But these considerations were held not to apply to the purchase of relatively unimproved land. "Purchasers of such relatively unimproved realty may more reasonably be expected to inspect the property knowledgeably before purchase and may more likely be able to bargain for an express warranty than those who buy as complex a structure as a modern home.").\textsuperscript{209}

The court went on to state that since the plaintiffs were investors, the consumer protection rationale of the cases adopting the implied warranty was not persuasive. "Those who speculate in land, as a class, simply do not need the sort of protection which \textit{Gable} affords homebuyers."\textsuperscript{210} Investors are presumed to have more knowledge of the risks involved in real estate and a greater capacity to weather the losses in the event of defective construction.\textsuperscript{211}

A few cases have extended an implied warranty to the purchase of commercial or investment buildings. Iowa and Minnesota courts have held that the builder of a nonresidential building impliedly warrants its fitness for the intended use.\textsuperscript{212} A California case held that there was an implied warranty to the purchaser of an apartment building.\textsuperscript{213} There the court spoke of the inability to discover defects, and did not

\textsuperscript{205} \textit{Id.}
\textsuperscript{206} 428 So. 2d 654 (Fla. 1983).
\textsuperscript{207} \textit{Id.} at 658.
\textsuperscript{208} \textit{Id.} at 657-58 (construing DeRoche v. Dame, 75 A.D.2d 384, 387, 430 N.Y.S.2d 390 (1980)).
\textsuperscript{209} \textit{Id.} at 658.
\textsuperscript{210} \textit{Id.} at 659.
\textsuperscript{211} \textit{Id.} For a critique of the assumptions and justifications inherent in the court's reasoning, see \textit{id.} at 659-61 (Adkins, J., dissenting), and \textit{Chan}, supra note 187.
\textsuperscript{212} Shedd, supra note 187, at 296.
mention the fact that the structure was purchased for investment rather than residential purposes.\(^{214}\)

c. Subsequent purchasers

Florida is among the jurisdictions which have expressly refused to extend the implied warranty of habitability to subsequent purchasers. In *Strathmore Riverside Villas Condominium Association v. Paver Development Corp.*,\(^{215}\) plaintiffs were condominium unit owners who sued the condominium developers for breach of implied warranties of fitness and merchantability, and for breach of implied warranties of compliance with plans and specifications of applicable building codes. The court held that those plaintiffs who were not in privity of contract with the developer could not maintain actions based on breach of implied warranties.\(^{216}\) The court relied in part on the reasoning of a Mississippi case,\(^{217}\) which held that an original purchaser may have been satisfied with the building or waived defects for economic or any other reasons, or may be estopped from complaining of the quality of construction.\(^{218}\) The Florida court decided that if the warranty is to be extended to subsequent purchasers, the legislature is the proper body to make that change.\(^{219}\)

4. Lenders

A construction lender may not be liable under an implied warranty for construction defects.\(^{220}\) However, if the lender has foreclosed on a construction project and completes the project itself, it may be deemed to be the developer.\(^{221}\) In *Chotka v. Fidelco Growth Investors*,\(^{222}\) the construction lender foreclosed on and took title to a condominium development after it had almost been completed. The lender completed construction, held itself out as the developer and advertised and sold units to the purchasers. The plaintiffs were unit owners who sued for damages for defects or omissions in the construction of the building and common areas on a theory of implied

\(^{214}\) Id.
\(^{215}\) 369 So. 2d 971 (Fla. 2d DCA), cert. denied, 379 So. 2d 210 (Fla. 1979).
\(^{216}\) Id. at 973.
\(^{217}\) Oliver v. City Builders, Inc., 303 So. 2d 466 (Miss. 1974).
\(^{218}\) 369 So. 2d at 973 (quoting Oliver, 303 So. 2d at 468).
\(^{219}\) Id. See also Drexel Properties v. Bay Colony Club Condominiums, 406 So. 2d 515 (Fla. 4th DCA 1981).
\(^{220}\) Chotka v. Fidelco Growth Investors, 383 So. 2d 1169, 1170 (Fla. 2d DCA 1980).
\(^{221}\) Id.; See also Port Sewall Harbor and Tennis Club Owners Ass'n v. First Fed. Sav. & Loan Ass'n, 463 So. 2d 530 (Fla. 4th DCA 1985).
\(^{222}\) 383 So. 2d 1169 (Fla. 2d DCA 1980).
warranty. The trial court dismissed the implied warranty claims. The appellate court reversed, holding that the lender

became a developer of the project to the extent that they may be held liable for performance of express representations made to the buyer, for patent construction defects in the entire condominium project and for breach of any applicable warranties due to defects in the portions of the project completed by [the lender].

5. Implied Warranty Summary

In summary, if a Florida building is damaged in a hurricane, and the design, construction, or materials used were a substantial factor causing the damage, the availability of a cause of action based on breach of implied warranty will depend on the knowledge or expertise of the defendant, the knowledge or expertise of the plaintiff, and the character of the building. While the Florida courts will not hold a design professional liable under an implied warranty, the plaintiff may sue the contractor or supplier if the workmanship or materials prove to be unmerchantable or unfit for their intended use. The Florida courts will hold a developer liable for breach of warranty of habitability if the structure is a new residential premise which the plaintiff purchased directly from the developer. Some jurisdictions have held that these warranties are limited to latent defects which become manifest within a reasonable time after purchase. Florida has not expressly limited the warranty to latent defects, but one of the chief justifications for adopting the implied warranty is "the inability of the ordinarily prudent homebuyer to detect flaws in the construction of modern houses ...." A construction lender who becomes a developer may be liable on an implied warranty theory only for defects in the portions of the project which it completed.

223. Id. at 1170.
224. See supra notes 174-78 and accompanying text.
225. See supra notes 179-86 and accompanying text.
226. See supra notes 187-221 and accompanying text.
229. See supra notes 222-23 and accompanying text.
E. Strict Liability in Tort

Strict product liability theory has gradually been gaining acceptance in the construction context. As codified in section 402A of the Second Restatement of Torts, one who is engaged in the business of selling a product is liable for physical harm to the ultimate users or their property caused by a defect in the product if the defect rendered the product unreasonably dangerous and if the product was intended to and did reach the consumer without substantial change in condition. If these requirements are met, the defendants will be liable even if they had “exercised all possible care” and even if there is no privy of contract.

Justifications commonly offered for imposing strict product liability include: (1) that the seller or manufacturer is in the best position to equitably distribute the costs of damages by charging higher prices; (2) that the seller or manufacturer is in the best position to reduce the risks and that the imposition of strict liability would induce greater care on those who would be held liable; and (3) the seller or manufacturer is often the one at fault, but in the modern manufacturing and marketing context the burden of proving such negligence is tremendous and would constitute a waste of judicial and economic resources.

1. Design Professionals

As with implied warranty theory, strict liability in tort is generally not applicable to professionals such as architects and engineers. Several reasons are offered for this rule. First, it is not at all clear that a design professional can properly be said to have sold a product as opposed to having rendered a service. Second, even if the designer’s plans, drawings and specifications are deemed products, the occupiers of the building may be denied recovery on a strict product liability theory for failing to establish that the “products” were intended to or did reach them in substantially the same condition as when they were...

231. Restatement (Second) of Torts § 402A(1) (1965).
232. Restatement (Second) of Torts § 402A(2) (1965).
233. See Prosser & Keeton, supra note 18, at § 98. The merits of these justifications are beyond the scope of this paper. They are presented because they have been used by courts in determining whether to apply strict products liability in particular cases.
234. Note, supra note 162, at 246.
235. See, e.g., K-Mart Corp. v. Midcon Realty Group, 489 F. Supp. 813, 816-17 (D. Conn. 1980)(citations omitted); Manzi, supra note 21, at 24. However, courts today are more willing to abandon the virtual immunity from liability that these professionals formerly enjoyed. Id. at 32.
In *K-Mart Corp.* the Connecticut district court held that even if the architect’s plans and specifications were products, the tenant used these products, if at all, only after they had been substantially changed by being transformed into a built structure by the owner and general contractor and their agents. The “owner and the general contractor were the intended and actual recipients and users” of the architect’s products, while the tenant was an “intended and actual user of the building . . . .”

It thus appears the differences between product manufacturing and building design outweigh the similarities. One such difference that is frequently emphasized is that in the case of defective building design, there is typically no mass production of goods or a large body of distant consumers whom it would be unfair to require to trace the article they used along the channels of trade to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even from their ability to inquire.

Perhaps the most important distinction is that between a manufactured product and a design professional’s services. In *Stuart v. Crestview Mutual Water Co.*, a California court reasoned that engineers who rendered a professional service “are in no sense analogous to manufacturers who place products on the market and who are, therefore, in the best position to spread the cost of injuries resulting from defective products.” As stated by Justice Traynor of the California Supreme Court in his widely quoted opinion in *Gagne v. Bertran*, “[t]hose who hire [experts] are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.”

---

236. 489 F. Supp. at 817.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 818-20; La Rossa v. Scientific Design Co., 402 F.2d 937 (3rd Cir. 1968); Architectural Liability, *supra* note 15, at 246-50. *But see* 207 A.2d 314 (N.J. 1965)(defendant who was the designer, contractor and vendor of mass-produced homes, was held strictly liable for dangerously defective design); *Comment,* *supra* note 20 (the author argues that spreading the loss caused by building failure due to nonnegligent defective design is a compelling social policy).
241. 402 F.2d at 942 (3rd Cir. 1968)(footnote omitted).
243. *Id.* at 811, 110 Cal. Rptr. at 549 (citations omitted).
244. 43 Cal. 2d 481, 275 P.2d 15 (1954).
245. *Id.* at 489, 275 P.2d at 21.
2. Suppliers

Manufacturers of materials or component parts which are used in the construction of a building are subject to strict liability. For example, in Lonzrick v. Republic Steel Corp., a construction worker was able to assert a strict liability claim against the manufacturer of steel bar joists which collapsed and fell on the plaintiff after they had been installed in the roof. In another case, the developer of a shopping mall successfully sued and recovered against the manufacturer of defective steel joists for damages to the building when part of the roof collapsed.

Florida's Fourth District Court of Appeal held a distributor of construction materials strictly liable to construction contractors and developers for defects in the materials. The defendant was a distributor, but not the manufacturer of a mortar mix used to make stucco. The plaintiffs had hired plasterers who used the mix, which proved defective when numerous holes popped out of the stucco. At the time of trial, one plaintiff held title to a home with the defective stucco, and the others had extended express warranties to the home buyers. The court held that the plaintiffs were users or consumers within the meaning of section 402A, and so had standing to sue on a strict liability theory and that the defendant was a seller under 402A. Thus, the defendant was liable.

In City of La Crosse v. Schubert, Schroeder & Associates, Inc., the Supreme Court of Wisconsin held that the manufacturer of an aluminum roof could be held strictly liable in tort for damages to the building caused by the defective roof and for damages to the roof itself. Kaiser Aluminum manufactured and sold an aluminum roof to the roofing subcontractor on the plaintiff's project. The roof leaked and part of it blew off, causing damage to the eaves of the building. The court held that the complaint stated a cause of action in strict liability. "Kaiser was engaged in the business of selling the product (roof), the product was unreasonably dangerous and the product reached the plaintiff without substantial change,"

In discussing the type of damages which can be recovered in a strict liability action, the court in City of La Crosse concluded:

249. Id. at 1033.
250. Id. at 1034-35.
251. 72 Wis. 2d 38, 240 N.W.2d 124 (1976).
Damages to other property and to the product itself are recoverable in a cause of action based on strict liability in tort. . . . In the case at bar the damages to the product itself (the roof) are associated with damages to other property (the eaves). We are also of the opinion that a strict-liability claim for pure economic loss involving only the cost of repair or replacement of the product itself and loss of profits is likewise not demurrable. 253

In support of its reasoning, the court cited several strict liability cases from other jurisdictions. 254

Apparently, there is considerable confusion as to whether pure economic loss damages, for example, damage to the product itself, or diminution in value of the structure in which the product was used may be recovered in a tort action. 255 In GAF Corp. v. Zack Co., 256 Florida’s Third District Court of Appeal held that there is no tort remedy for purely economic harm. GAF manufactured defective roofing materials which it sold to a building supply company, which sold them to the plaintiff roofing contractor. The plaintiff used the materials on two projects and as a result became liable to the owners of those projects. The plaintiff sued GAF for negligence in the manufacture of the materials and breach of implied warranty.

The court held that in the absence of any personal injury or property damage, the plaintiff had no claim for negligence, nor for implied warranty, assuming, without deciding, that the warranty claim sounded in tort. 257 If the warranty claim sounded in contract, then the plaintiff would be barred from asserting it by lack of privity. 258 This same court held that a strict liability action would be precluded in the absence of personal injury or property damage. 259

Florida’s Fourth District Court of Appeal reached a contrary result in Drexel Properties, Inc. v. Bay Colony Club Condominium. 260 This was a negligence case against a developer. The court rejected the theory that there can be no recovery in negligence absent proof of per-

253. 72 Wis. 2d at 44, 240 N.W.2d at 127.
256. 445 So. 2d 350 (Fla. 3d DCA 1984).
257. Id. at 351.
258. Id. at 352.
260. 406 So. 2d 515 (Fla. 4th DCA 1981).
sonal injury or property damage. "We hold that there can be recovery for economic loss. Why should a buyer have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects?"\textsuperscript{261}

3. \textit{Contractors}

Most courts do not impose strict liability on a construction contractor.\textsuperscript{262} Some courts have allowed such a cause of action when a contractor is viewed as having provided a product. In Hamilton Fixture Co. \textit{v. Anderson},\textsuperscript{263} damage to a house was caused by excess moisture due to a malfunctioning humidifier. The owner sued the subcontractor who designed and installed the air-conditioning, heating, and humidifying system in strict liability in tort. The court stated "the system, including the humidifier, was the finished product..."\textsuperscript{264} of the defendant; it reached the owner without substantial change; and if the jury found that the product was in "such defective condition that it was unreasonably dangerous to the user or his property,"\textsuperscript{265} then the defendant would be strictly liable.

In a New York case the court stated, "[i]t appears established that a contractor who undertakes to construct additions to real property may be considered a manufacturer for purposes of strict products liability."\textsuperscript{266} This case involved a contractor's installation of an in-ground swimming pool which collapsed. The court held that where the owner is in privity with the manufacturer, the strict liability claim would not be available.\textsuperscript{267}

Prosser and Keeton state that "the courts have not agreed about whether strict liability principles should be applied to installers."\textsuperscript{268} Prosser and Keeton reason that a seller who installs his own product should be strictly liable for defects in installation as well as for defects in the product, but they recognize this would lead to varying con-

\textsuperscript{261} \textit{Id.} at 519.
\textsuperscript{262} Shepherd & Bourque, \textit{supra} note 230, at 23. While strict liability may be imposed on one who engaged in an "ultrahazardous activity," a contractor's possible liability on that ground is beyond the scope of this paper. Here we are concerned with defects in the end product of construction, not hazards of the construction process.
\textsuperscript{263} 285 So. 2d 744 (Miss. 1973).
\textsuperscript{264} \textit{Id.} at 747.
\textsuperscript{265} \textit{Id.}
\textsuperscript{267} 375 N.Y.S. 2d at 658-59. The court suggested in dicta that the plaintiff may have a strict liability claim against the prefabricator of the pool. \textit{Id.} at 658.
\textsuperscript{268} \textit{PROSSER & KEETON, supra} note 18, § 104, at 720. \textit{See also}, \textit{Id.} at 720 n.45 which cites cases which do and do not impose strict liability for defective installation.
sumer protection according to whether the product was installed by the seller or by an independent contractor, because the latter would have no liability.\textsuperscript{269}

In \textit{Neumann v. Davis Water and Waste, Inc.},\textsuperscript{270} a child fell into a sewage treatment tank and drowned. Plaintiff's wrongful death action sought to assert strict liability on the defendant contractor "as the installer or assembler of a defective product, the treatment tank, \ldots an integral part of the sewage facility. \ldots"\textsuperscript{271} The Florida appellate court refused "to extend the strict liability principle \ldots to structural improvements to real estate."\textsuperscript{272}

In \textit{Alvarez v. DeAguirre},\textsuperscript{273} the lessees of a house attempted to sue the owner of a house and the contractor who built the house for damages arising from a fire caused by a faulty electrical box. As to the contractor, the court simply stated no cause of action for strict liability or breach of implied warranty would lie.\textsuperscript{274}

\textit{Neumann} and \textit{Alvarez} were distinguished by the First District Court of Appeal in \textit{Vaughn v. Edward M. Chadbourne, Inc.}\textsuperscript{275} \textit{Vaughn} was a wrongful death case in which the plaintiffs claimed that the defendant paving contractor should be held strictly liable for an accident caused by a two-inch drop-off in the center of a two-lane public road. The drop-off was apparently due to defective sand-asphalt mix manufactured and used by the defendant in resurfacing the road. \textit{Neumann} and \textit{Alvarez} were distinguished on the basis that the contractors in those cases did not manufacture the products which were defective.\textsuperscript{276}

The court noted that "no Florida case has explicitly discussed whether a product first manufactured and then incorporated into an improvement to real property falls under section 402A coverage \ldots ."\textsuperscript{277} They further held that the defendant may be subject to strict liability as the manufacturer of the defective product.\textsuperscript{278}

On appeal, the Supreme Court of Florida reversed, holding the public road was not a product. Instead, the court reasoned that the

\textsuperscript{269} Id. at 720-21.
\textsuperscript{270} 433 So. 2d 559 (Fla. 2d DCA 1983).
\textsuperscript{271} Id. at 561.
\textsuperscript{272} Id. (citations omitted).
\textsuperscript{273} 395 So. 2d 213 (Fla. 3d DCA 1981).
\textsuperscript{274} Id. at 216; \textit{See also}, Strathmore Riverside Villas Condominium Ass'n v. Paver Dev. Corp., 369 So. 2d 971 (Fla. 2d DCA 1979)(developer not liable to remote purchasers for the diminished value of a home caused by defects in construction); Simmons v. Owens, 363 So. 2d 142 (Fla. 1st DCA 1978)(contractor liable in negligence to subsequent purchaser for latent defects which are not discoverable by reasonable inspection).
\textsuperscript{275} 462 So. 2d 512 (Fla. 1st DCA 1985), \textit{rev'd}, 491 So. 2d 551 (Fla. 1986).
\textsuperscript{276} Id. at 514-15.
\textsuperscript{277} Id. at 515.
\textsuperscript{278} Id.
paving material was the product and that the defect in the product was not the proximate cause of the injury. The court explicitly left open the possibility that in some narrow circumstances strict liability might apply to materials such as asphalt mix or to private roadways. However, a majority of American jurisdictions do not hold contractors strictly liable for construction defects.

Thus, it appears that a contractor in Florida probably will not be held strictly liable for construction defects. It is not clear whether the reasons for this result are that the contractor's work does not fit within section 402A, or that there are special considerations which would make the application of strict products liability to contractors undesirable, or both.

4. Developers

The first case to impose strict liability on a developer was Schipper v. Levitt & Sons. The defendant in Schipper designed, constructed and sold homes on a mass scale. Suit was brought when the child of a lessee of one of the homes was severely burned by hot water from a bathroom sink. The hot water heater was installed without a mixing valve, so water from the tap could reach temperatures in excess of 190 degrees. The court held that negligence, strict products liability, and implied warranty of habitability applied. The court reasoned that "there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same."

In response to the argument that "the imposition of warranty or strict liability principles on developers would make them virtual insurers of the safety of all who thereafter come upon the premises," the court pointed out that the plaintiff must establish "that the house was defective when constructed and sold and that the defect proximately caused the injury. In determining whether the house was defective, the test admittedly would be reasonableness rather than perfection."
Strict liability has occasionally been imposed on a developer for damage to property in the absence of personal injuries. After reviewing the cases, Shepherd and Bourque concluded:

[c]ourts across the country are reluctant to apply strict liability principles to cases against builder-developers involving only property damage to the building itself. In spite of such reluctance some jurisdictions may apply strict liability theories if there is a showing that the builder-developer mass produced the building or, alternatively, if it mass produced some defective component part of the building. As a general rule, courts seem to apply strict liability principles for construction defects only when they can reasonably attribute manufacturer-like qualities to builder-developers.

At present, there are no Florida cases on point. However, language in the cases refusing to extend strict liability to construction contractors, stating that strict liability principles are not applicable to improvements to realty, may indicate that the Florida courts would not hold a developer strictly liable.

5. Sellers Other Than Developers

Strict product liability has generally been rejected as to vendors of realty who are not developers. Prosser and Keeton note that there is "as yet no case applying the strict liability to any vendor who has not constructed the building; and it appears unlikely that there will be one, for the reason that he is not engaged in the business of selling." Similarly, it has been argued that a construction lender who forecloses on a project and then sells it should not come within section 402A's definition of one who is "in the business of selling" since the construction lender is "in the business of lending money at a set rate of interest, and is not normally involved in marketing real estate." On the other hand, in the context of implied warranty a lender who foreclosed on the uncompleted construction project has been treated as a developer at least as to those portions of the project which the lender completed. Thus, the courts may be expected to treat a lender

286. See generally, Shepherd & Bourque, supra note 230.
287. Id. at 25.
289. Prosser & Keeton, supra note 18, § 104A, at 721.
291. See supra notes 220-23 and accompanying text.
who completed construction as they would treat a developer for strict liability purposes as well. \(^\text{292}\)

6. \textit{Strict Liability Summary}

It appears the use of a strict liability theory for damage arising from a hurricane would offer little if any recovery. Although some jurisdictions have moved toward imposing strict products liability on developers, there are no signs of such a trend in Florida. In all probability, the only building construction defendant in Florida who may be held strictly liable for causing a building failure is the manufacturer or supplier of defective materials and component parts.

\textbf{F. Vicarious Liability}

Even where a defendant has not been negligent, there may be vicarious liability for the negligent work of others. Where the negligent actor is the employee or agent of the defendant, the defendant may be held liable on the theory of respondeat superior. \(^\text{293}\) Where the negligent actor is an independent contractor, the general rule is that there is no vicarious liability, although there are many exceptions to this rule. \(^\text{294}\)

Florida cases on this subject are not always clear. \textit{Atlantic National Bank v. Modular Age, Inc.} \(^\text{295}\) was a suit by a lender against a contractor based on his inadequate performance level. It was alleged that the walls between tenancies of a motel were not in compliance with the fire resistance requirements of the local building code. The case turned on whether the walls' compliance with the code was a design requirement for which the architect—hired by both the owner and the lender—was responsible, or a construction requirement for which the defendant contractor was responsible. The walls were designed and manufactured by an independent manufacturer. The court held that it was the architect's function and responsibility to design walls which will meet code requirements . . . . Though he did not personally design the walls in question, he delegated that responsibility to others. This duty of an architect cannot be avoided by delegating the

\[^{292}\] If the lender is treated as a developer in that situation, it still would probably not be held strictly liable in Florida because developers would not be held strictly liable in Florida. See supra note 298 and accompanying text.

\[^{293}\] \textit{Prosser & Keeton, supra note 18}, at §§ 69-70.


\[^{295}\] 363 So. 2d 1152 (Fla. 1st DCA 1978), \textit{cert. denied}, 372 So. 2d 466 (Fla. 1979).
responsibility of insuring that portions of this design comport with the applicable laws and regulations.\textsuperscript{296}

Since the court needed only to determine that the walls were the responsibility of the plaintiff's own architect and not of the defendant contractor, this case failed to establish whether an architect could use a defense that he exercised due care in selecting an independent contractor to perform the duty. It is likely, however, that the duty would be held nondelegable.

In \textit{Mastrandrea v. J. Mann, Inc.},\textsuperscript{297} a subcontractor accepted delivery of building materials, cement blocks, which were stacked in violation of the local building code. The plaintiff sued the general contractor for injuries he received when the cement blocks toppled and struck him. While recognizing the general rule of nonliability for the negligence of an independent contractor, the court applied the exception that "a duty imposed by Statute or Ordinance, such as the building Code involved in this case cannot be delegated to an independent contractor."\textsuperscript{298} The court, relying on \textit{American Jurisprudence}, found that where a statute or ordinance imposes a clear duty for the protection of persons on or near the property, liability cannot be avoided by delegating the duty to an independent contractor if the contractor fails to perform the duty.\textsuperscript{299}

In \textit{Mai Kai, Inc. v. Colucci},\textsuperscript{300} the court held that the owner of a restaurant has a nondelegable duty to provide a safe place for its business invitees. The plaintiff was a customer who was injured when a counterweight fell from a ceiling fan due to a defective wall. The defect was not discoverable by inspection. The court held that the owner's duty was to use reasonable care to keep the premises safe.\textsuperscript{301}

The duty to exercise . . . reasonable care is nondelegable in the sense that a contract for its performance by another will not necessarily eliminate an owner's responsibility. The duty, however, remains one of due care or reasonable care in preventing or correcting an unsafe condition, as opposed to absolute liability for a contractor's negligence.\textsuperscript{302}

The plaintiff, a condominium association, sued the owner-developer, the general contractor, and the roofing contractor for damages.

\textsuperscript{296} Id. at 1155.
\textsuperscript{297} 128 So. 2d 146 (Fla. 3d DCA), \textit{cert. denied}, 133 So. 2d 320 (Fla. 1961).
\textsuperscript{298} Id. at 148.
\textsuperscript{299} Id. (quoting 27 \textit{AM. JUR. Independent Contractors § 49 (1951)}).
\textsuperscript{300} 205 So. 2d 291 (Fla. 1967).
\textsuperscript{301} Id. at 293.
\textsuperscript{302} Id.
related to the replacement of a roof by the roofing contractor. The court found that the owner-developer was vicariously liable to the plaintiff for the roofer’s negligence and that the general contractor was vicariously liable to the owner-developer for the roofer’s negligence. The court gave no reasons for imposing vicarious liability.

While the parameters of liability for the negligence of an independent contractor are not entirely clear, it is established that where such liability is imposed, it is not absolute. When one has a non-delegable duty, there may be liability if the duty is not properly performed. Similarly, liability may exist if a dangerous condition could have been prevented or corrected through the exercise of reasonable care.

III. DEFENSES

Legal theories which formerly protected construction industry participants from liability are frequently unavailable today. The trend of expanding the rights to compensation for injured persons is furthered as exceptions diminish the role of traditional defenses. This section will discuss the owner acceptance rule, comparative or contributory negligence, the act of God defense, and special statutes of limitation.

A. The Owner Acceptance Rule

The owner acceptance rule relieves the design or construction professional from liability to third persons once the owner accepts the completed work. Justifications for the rule include the fact the defendant owes no duty to third persons. Further, once the owner gains control of the premises, his negligence in failing to correct the defect becomes the proximate cause of his injuries.

The demise of the owner acceptance rule began with the creation of exceptions to the rule. Exceptions were recognized when there was deliberate concealment, or where the structure was a nuisance. The owner acceptance rule is inapplicable where a latent defect exists.

303. Biscayne Roofing Co. v. Palmetto Fairway Condominium Ass’n, 418 So. 2d 1109 ( Fla. 3d DCA 1982).
304. Id. at 1110. However, since the owner-developer and the general contractor were without fault, they were each entitled to indemnification from the roofer. Id.
305. Mai Kai, Inc. v. Colucci, 205 So. 2d 291 (Fla. 1967); Green Springs, Inc. v. Calvera, 239 So. 2d 264 (Fla. 1970).
306. Note, supra note 189, at 222.
307. Id.
308. Id.
309. Id. at 223.
While most jurisdictions reject the rule, Florida retains the owner acceptance rule, but with the potent exception that a latent defect may be actionable against a construction participant, even after owner acceptance.

B. Comparative Negligence

The plaintiff’s negligence may be asserted as a defense to an allegation of the defendant’s negligence. For example, plaintiffs suing to recover for personal injuries sustained by the collapse of a building in a hurricane may themselves be held negligent by remaining at the dangerous location. The traditional rule of contributory negligence barred recovery if the negligence of the plaintiff contributed to the losses. Florida follows the comparative negligence rule by which fault is apportioned and plaintiffs’ recoveries are reduced in proportion to their own comparative fault.

Florida no longer recognizes assumption of the risk as an affirmative defense. Rather, a plaintiff’s conduct in assuming a risk is evaluated in terms of comparative negligence and does not automatically bar recovery. Due to the over development of coastal zone areas, bridge and road traffic become subject to heavy congestion in times of emergency preparedness, such as hurricane warnings. Thus, a plaintiff can argue it was safer to remain in the structure rather than being trapped on a bridge or in a traffic jam.

C. The Act of God Defense

The traditional Act of God defense is unlikely to prove useful in the aftermath of a hurricane. Where extraordinary natural forces, such as a hurricane, cause damages, the defense of Act of God is theoretically available to a defendant whom it is alleged negligently caused the

311. Architectural Liability, supra note 15, at 223. The demise of the owner acceptance rule was paralleled by the fall of the privity requirement. Id.


313. 491 So. 2d at 554. Of course, the owners themselves may be liable for damage resulting from a patent defect.


315. Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977)(held the affirmative defense of implied assumption of the risk is merged into the defense of contributory negligence and the principles of comparative negligence shall apply in all cases where such a defense is asserted.).

316. Id.
damages. The Act of God defense is essentially an application of the rules of proximate causation in the context of unusually severe natural forces. If the natural forces were so extraordinary or unprecedented that they were unforeseeable, then the defendant will not be charged with anticipating them.\textsuperscript{317} Also, if the natural forces were so severe that the damage would have occurred even if the defendant had exercised due care, then the defendant will not be held liable.\textsuperscript{318}

Practically speaking, this defense is usually unavailable, because where the damages were proximately caused by the negligence of the defendant in unison with severe natural forces, the defendant will not be relieved of liability.\textsuperscript{319} Where "the results or natural consequences of an act of God . . . may be foreseen, and guarded against . . . by the exercise of reasonable diligence and prudence, a failure to do so would be negligence . . . ."\textsuperscript{320}

For example, in \textit{Rubin v. Appel},\textsuperscript{321} a tropical storm knocked defendant’s trees onto plaintiff’s house. In rejecting the asserted defense of Act of God, the court noted that "it is within the knowledge of all who have long resided in this area that we are occasionally subjected to winds of hurricane force, and that these winds have a tendency to topple trees, break limbs, and send unsecured objects flying about. These storms are not beyond reasonable anticipation."\textsuperscript{322} The Act of God defense only applies when the defendant is not negligent or when the defendant’s negligence is not a proximate cause of the injury. Under modern case law, it is difficult to conceive of such a situation.

\textbf{D. Special Statutes of Limitations}

Finally, some of the possible defendants may have the statutory protection of a special statute of limitations. In reaction to the rapid expansion of liability of design professionals and others in the construction process, most legislatures have enacted statutes which limit

\begin{itemize}
\item \textsuperscript{317} Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 55 Fla. 514, 529, 46 So. 732, 737 (1908).
\item \textsuperscript{318} \textit{Id.}; Starling v. City of Gainesville, 90 Fla. 613, 616, 106 So. 425, 426 (1925)(held that if the defendant could show that the natural forces would have caused the damage regardless of whether the defendant was guilty, he would be relieved of liability.).
\item \textsuperscript{319} Benedict, 55 Fla. at 535, 46 So. at 737; Starling, 90 Fla. at 616, 106 So. at 426; Davis v. Ivey, 93 Fla. 387, 408, 112 So. 264, 271 (1927); Atlantic Coast Line R. Co. v. Hendry, 112 Fla. 391, 150 So. 598 (1933); City of West Palm Beach v. Pittman, 62 So. 2d 27 (Fla. 1952); Rubin v. Appel, 194 So.2d 318, 319 (Fla. 3d DCA 1967); Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1198-99 (5th Cir. 1975).
\item \textsuperscript{320} Davis V. Ivey, 93 Fla. at 408, 112 So. at 271 (1927)(quoting Smith v. Western Ry., 91 Ala. 455, 8 So. 754 (1891)).
\item \textsuperscript{321} 194 So.2d 318 (Fla. 3d DCA 1967).
\item \textsuperscript{322} \textit{Id.} at 319.
\end{itemize}
the time within which an action may be brought against an architect, engineer or contractor.\textsuperscript{323} Strictly speaking, these statutes are not statutes of limitations since they bar suits after a given period of time regardless of whether a cause of action has accrued.\textsuperscript{324} Thus, they may be referred to as statutes of repose\textsuperscript{325} or as improvement statutes.\textsuperscript{326}

Typically, these statutes begin running when professionals complete their services or when the structure is substantially completed.\textsuperscript{327} The time period varies from four to twenty years.\textsuperscript{328} Florida’s statute bars suits which are not commenced within four years from the date of actual possession by the owner, the date of abandonment of construction if not completed, the date of termination of the contract between the engineer, architect or contractor and his employer, or from the date the defect is or should have been discovered where the defect is latent, whichever is later.\textsuperscript{329} In any event, the action must be commenced within fifteen years of the date of possession, certificate of occupancy, abandonment of construction, or termination of contract.\textsuperscript{330}

Special statutes of limitations have frequently been subject to constitutional attack. The Alabama statute was struck down by the Alabama Supreme Court on the grounds that it violated the state constitution’s requirement that legislation have a single subject with a clear title.\textsuperscript{331} The New Mexico courts rejected a similar challenge,\textsuperscript{332} while dicta in a Michigan case suggested that the title of the Michigan statute ought to be clearer.\textsuperscript{333}

Courts in Kentucky and Florida have held these statutes unconstitutional as violating the state constitutional guarantees of access to courts.\textsuperscript{334} In Overland Construction Co. v. Sirmons,\textsuperscript{335} the Florida Supreme Court declared that Florida’s statute of repose had abolished a

\textsuperscript{325} Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 575 (Fla. 1979).
\textsuperscript{326} Sisson & Kelley, supra note 323, at 245.  
\textsuperscript{327} Id. at 244.  
\textsuperscript{328} Id.  
\textsuperscript{330} Id.  
\textsuperscript{331} Sisson & Kelley, supra note 323, at 245.  
\textsuperscript{332} Id.  
\textsuperscript{333} Id.  
\textsuperscript{334} Id. at 246.  
\textsuperscript{335} 369 So. 2d 572 (Fla. 1979).
common law right without providing a reasonable alternative. The court held that this practice violated article I, section 21, of the Florida Constitution and unless the legislature can show both an overpowering public necessity and an absence of any less onerous alternative, it must be struck down. Four justices held that the statute failed this test, relying on the lack of any express legislative findings. The three dissenters argued that the required justifications were apparent even though they were not expressed. Following Overland, the Florida Legislature reenacted the statute with a rather lengthy preamble establishing the great public necessity for such a statute. Similar challenges to special statutes of limitation were rejected by the courts of Oregon and Montana. In Oregon, the statute was found permissible because it was in the public interest, and Montana held its statute permissible because it eliminated rights which have not yet vested or accrued.

The most common type of challenge to these special statutes is that they constitute special class legislation or that they violate equal protection. Some states have struck down these statutes based on constitutional provisions specifically prohibiting special or class legislation. Others have held that such legislation violates the equal protection clauses of the federal and state constitutions.

At least seven states have struck down their special statutes of limitations on equal protection grounds, while at least seven have rejected such challenges. The success or failure of constitutional challenges often turns on a determination of what people are covered by the statute. A court may invalidate a statute which excludes certain classes, such as those who are in control of the improvement, from its protection. Sometimes the courts will broadly construe a statute as

336. Id. at 574.
337. Fla. Const. art. I, § 21. "Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."
338. 369 So. 2d at 573.
339. Id. at 575.
340. Id. at 575-77.
341. Ch. 80-322, 1980 Fla. Laws 1389 (codified at Fla. Stat. § 95.11(3)(c)(1987)). A few minor changes were made to the text of the statute in addition to the inclusion of a preamble.
342. Sisson & Kelley, supra note 322, at 246.
343. Id. at 246-47.
344. Id. at 247.
345. Id. at 247-48. Illinois and Wyoming are among these states.
346. Id.
347. Illinois, Hawaii, Wisconsin, Oklahoma, Minnesota, South Carolina, and Wyoming. Id. at 247 n.60.
348. Arkansas, New Jersey, Washington, Montana, New Mexico, Louisiana, and Pennsylvania. Id. at 248 n.65.
349. Id. at 247.
protecting even landscape gardeners and well drillers in an effort to uphold the statute. 350 Some courts have upheld the statutes by distinguishing between those who have direct control, such as materialmen, suppliers, owners and occupiers, and those who have less control, such as architects, engineers, and contractors. 351

These special statutes have been described as “the architect’s most effective weapon against the perpetual liability resulting from application of the time of discovery rule.” 352 The time of discovery rule tolls the statute of limitations until the injury is or should be discovered. 353 Under the traditional rule, the statute of limitations would begin to run from the date of the negligent act. 354 However, a word of caution is in order due to the possible constitutional infirmity of these statutes. 355

IV. Conclusion

Tremendous injury to people and damage to property may result when a hurricane strikes the coast. These storms arise quickly and threaten severe damage to life and property. Florida is particularly threatened, due to its rapidly growing population concentrated along hundreds of miles of vulnerable coastline. In the aftermath of a destructive storm, attempts to assess liability for the damage are likely.

In the past the federal government has exercised its discretionary powers and authorized disaster assistance programs to help hurricane victims and reduce property losses. Further relief has been provided by insurance companies. However, due to the dramatic increase in monetary damages arising in the aftermath of coastal storms, it appears likely that both the government and insurance companies will seek ways to curtail costs. The likely result will be an increase in private lawsuits for damages under either tort or contract liability. The resulting litigation will be governed by principles of law that have evolved significantly since the last major hurricane tragedy. The rights of injured persons to receive compensation for their damages have generally been expanded, while the available defenses have been weakened.

Defendants in Florida may be held liable for negligence and breach of either express or implied warranty. Florida defendants could possi-

350. Id. at 248.
353. Id. at 224.
354. Id.
355. See supra text accompanying notes 331-51.
bly even be held to a strict liability standard. When a building is damaged or destroyed in a hurricane, someone involved in the construction process may have breached a legal duty which was the proximate cause of the building failure. Liability may even be imposed on someone who was not involved in the design or construction of the structure, but who had a duty to disclose known or potential latent conditions to a purchaser. Anyone involved in the design, construction, or sale of realty may be held liable for express, and in some cases implied, warranties. Implied warranty liability may be imposed on materialmen, contractors, developers, and, under certain circumstances, lenders. Materialmen are probably the only parties who are subject to strict product liability. Architects, engineers, contractors, developers and owners may, in some circumstances, be held vicariously liable for the negligence of their independent contractors.

Although the potential for liability has grown, it is not absolute. Liability arises in most cases only if the defendant’s conduct or product created an unreasonable or undisclosed danger. Liability is best avoided by well designed, suitably sited and soundly constructed buildings. Design limits and location hazards should be fully disclosed. If stronger buildings and better informed residents are the result, then the prophylactic effect of the law will have been realized.