IN THE
SUPREME COURT OF FLORIDA

CASE NO. 68,540

FLORIDA POWER & LIGHT COMPANY,
a Florida corporation,
Plaintiff, Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a Pennsylvania corporation qualified
to do business in Florida,
Defendant, Appellee.

ON CERTIFICATION FROM
THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

INITIAL BRIEF OF APPELLANT FLORIDA POWER & LIGHT COMPANY

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STATEMENT OF THE CERTIFIED QUESTIONS

Pursuant to Section 25.031, Florida Statutes, and Rule 9.150, Florida Rules of Appellate Procedure, the United States Court of Appeals for the Eleventh Circuit has certified to this Court the following questions of law:

I. Whether Florida law permits a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or property damage to property other than the allegedly defective goods.

II. If Florida law precludes recovery for economic loss in tort without a claim for personal injury or property damage to other property, whether this rule should be applied retroactively to this case.

STATEMENT OF THE CASE

WESTINGHOUSE ELECTRIC CORPORATION (Westinghouse), appellee, designed, manufactured and delivered to FLORIDA POWER & LIGHT COMPANY (FPL), appellant, two nuclear powered electrical generating plants which were intended to operate for thirty to forty years each. (V. 5 at 628). Shortly after commencing commercial operation they began to fail. (V. 5 at 628). For purposes of the pending appeal, that failure was caused by Westinghouse's negligence. As a result of that negligence, FPL was compelled to replace six steam generators in those units at a cost of approximately $160 million. (V. 5 at 628). During the period of replacement FPL had to generate electricity by other, more costly means at a cost of approximately $500,000-

$700,000 per day per unit. (V. 5 at 628). In the pending lawsuit, FPL seeks to recover from Westinghouse the natural, direct and foreseeable consequences of Westinghouse's negligence.

Proceedings And Dispositions In The Federal Courts

On May 10, 1978, FPL sued Westinghouse in the United States District Court, Southern District of Florida. FPL's five count complaint sought to recover damages caused by the defective steam generators on theories of breach of warranty and negligence. (V. 1 at 1-8). On March 6, 1979, Judge Atkins denied Westinghouse's motion to dismiss the complaint. (V. 1 at 105-06). Westinghouse answered the complaint (V. 1 at 109-13), and then moved for partial summary judgment on Counts III (breach of implied warranty of merchantability), IV (breach of implied warranty of fitness for particular purpose) and V (negligence) of the complaint. (V. 3 at 461-62). On June 22, 1982, summary judgment was granted by Judge Eaton on the implied warranty counts and denied as to negligence. (V. 5 at 751-58). This ruling also limited damages in a manner not germane to the pending appeal.

After limited discovery, confined to legal rather than factual issues, Westinghouse filed its Second Motion for Partial Summary Judgment. (V. 6 at 771-72). The second motion, a portion of which is the basis for the pending certified questions, challenged Count II (breach of express warranty), as it relates to one of the plants and, for a second time, Count V (negligence). On October 18, 1984, the trial court denied

summary judgment as to express warranty and granted summary judgment as to negligence. (V. 7 at 1091-94). The trial court determined that the judgment on the negligence count was appropriate for certification to the Eleventh Circuit for immediate appellate review under the provisions of 28 U.S.C. §1292(b). (V. 7 at 1094).

On December 12, 1984, the Eleventh Circuit granted FPL's October 29, 1984 petition for interlocutory appeal. (V. 7 at 1096).

Following the submission of briefs and oral argument, the Eleventh Circuit, on April 2, 1986, certified to this Court the two questions of law presented.

Statement Of The Facts

In November 1965, FPL entered into a Plant Equipment Contract (Contract) with Westinghouse under the provisions of which Westinghouse agreed to design, manufacture and furnish two nuclear steam supply systems, including six steam generators, for use at FPL's Turkey Point power generation facility in Dade County, Florida. (V. 1 at 37).1/ The parties also entered into

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1/ Steam generators boil water into steam, which then drives a turbine and electric generator. Highly pressurized, radioactive water is heated to about 600°F by the nuclear core and is then pumped into the steam generators, where it flows through thousands of small diameter tubes. Lower pressure, non-radioactive water is heated to boiling as it passes by the outside of these tubes. For safety and operational reasons, it is extremely important to avoid any significant leakage of the high pressure radioactive water inside the tubes into the lower pressure non-radioactive water outside the tubes.

a companion fuel contract effective that same date.2/(V. 1 at 37).

At the time the Contract was negotiated the "nuclear industry was at an early stage in its evolution." Florida Power & Light Company v. Westinghouse Electric Corporation, 517 F.Supp. 440, 443 (E.D. Va. 1981). The sale of plants such as those to be built at Turkey Point "was in its infancy, and Westinghouse ... was most anxious to enter into a contract with Florida [FPL]." Id. "At the time, there were no nuclear plants operating in the [S]outh." Id. Nuclear reactor sales "were not abundant and few negotiations for nuclear power plants were in

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2/ This is the third federal proceeding required by FPL to enforce those contracts. The first, which followed Westinghouse's announcement to FPL and thirteen other utility customers that it did not intend to perform its nuclear fuel and uranium supply contracts, was tried for 108 days in the United States District Court for the Eastern District of Virginia. In October 1978, the Court determined that Westinghouse was, in fact, in breach of its fuel and uranium contracts, including its contract with FPL, and would be required to perform or to pay appropriate damages.

The second proceeding, which was originally part of FPL's first complaint, involved Westinghouse's refusal to remove spent nuclear fuel from the Turkey Point site. On June 25, 1981, the United States District Court for the Eastern District of Virginia ruled that Westinghouse was again in breach of its contract with FPL and would be required to pay damages or perform. FPL's relationship with Westinghouse and the historical and commercial setting out of which it arose were examined in exhaustive detail by the parties and by the Court in Florida Power & Light Company v. Westinghouse Electric Corporation, 517 F.Supp. 440 (E.D. Va. 1981). (This decision was quoted at length and incorporated into the record of the proceedings below at V. 4 at 543-44 & n.2). The damage portion of the spent fuel dispute was concluded on November 8, 1984, and is reported at Florida Power & Light Company v. Westinghouse Electric Corporation, 597 F.Supp. 1456 (E.D. Va. 1984).

(footnote continued on following page)

progress." Id. The sale to FPL was viewed by Westinghouse as "a vote of confidence" and as "an incentive for other utilities." Id. at 444.

At this same time FPL had "no expertise in nuclear power, a fact well known to Westinghouse. Indeed in March of 1965 Florida [FPL] notified Westinghouse that it (Florida) [FPL] lacked the manpower and knowledge needed to develop specifications and evaluate proposals for a nuclear plant. ... Westinghouse actually encouraged Florida [FPL] to rely on Westinghouse's professed nuclear knowledge and capability." Id. Those contracts were of "extreme importance" to Westinghouse, which "had full knowledge of Florida's [FPL's] hesitancy to use nuclear power but ultimately convinced Florida [FPL]" that nuclear power would, on balance, "inure to the benefit of Florida's [FPL's] rate payers." Id. at 444-45.

(footnote continued from previous page)

Westinghouse's appeal to the United States Court of Appeals for the Fourth Circuit, Florida Power & Light Company v. Westinghouse Electric Corporation, 597 F.Supp. 1456 (E.D.Va. 1984), appeal docketed, No. 85-1089 (4th Cir. Jan. 23, 1985), is scheduled for oral argument on June 4, 1986 in Richmond, Virginia.

Due to the limited discovery conducted to date in the present proceeding, the Order to which the pending certified questions relate contains no factual findings. The 1981 Virginia decision contains a straightforward exposition of the intricacies of a highly-regulated, emerging industry, the nature and impact of government regulation, the operating and planning needs of two complex, publicly-held companies, their negotiating strategies and objectives, their efforts at risk allocation and the subtle interrelationship between the FPL-Westinghouse contracts and the aspirations of the industry as a whole. It is a guidebook to a meaningful understanding of the issues now before this Court.

Westinghouse, "in its eagerness to construct the power plants," was "willing to accept risks which Florida [FPL] was not willing to take." Id. at 447. It "sought benefits beyond whatever profits it may have anticipated from the [Turkey Point] contracts." Id. at 453. "As a giant in the then-nascent nuclear industry, it [Westinghouse] had a powerful interest in promoting both the viability of nuclear power, and its own position in the industry." Id. at 456.

The two units, known as Turkey Point Unit No. 3 and Turkey Point Unit No. 4, were completed at a cost exceeding $100 million and commenced commercial operation on December 14, 1972 and September 7, 1973, respectively. (V. 1 at 37). They were intended to be a major source of FPL's electric power generation for thirty to forty years. (V. 1 at 37). Before Turkey Point No. 4 had completed even a single year of operation, significant leakage was discovered in the Westinghouse steam generators in both nuclear units. (V. 1 at 37-38). Westinghouse was notified immediately and undertook steps to repair the leakage and prevent its recurrence. (V. 1 at 38). Those efforts, intended to preserve the operational integrity of the nuclear units, continued well into 1977. (V. 1 at 38). They failed. This litigation followed.

As the tubes in the Turkey Point steam generators lost or threatened to lose their integrity, they were plugged and eliminated from service. (V. 6 at 824). When the corrosion-induced defects had caused 21% of the tubes in Turkey Point No. 3 and 25% of the tubes in Turkey Point No. 4 to be plugged,

the steam generators themselves had to be replaced at a cost of approximately $160 million. (V. 6 at 824). The nuclear units were out of service for nearly one year each to permit the replacement. FPL was required to rely on significantly more expensive sources of power during this period to fulfill its obligations to its customers. The cost of generating equivalent power from fossil-fired units was $500,000-$700,000 more per day per unit.

The problems encountered by FPL with its Westinghouse steam generators are not unique to Turkey Point. Since their commercial introduction, Westinghouse steam generators have experienced tube degradation in a variety of forms caused by corrosion or mechanical problems. (V. 6 at 823). They range from thinning of the tube walls to ruptures of the tubes themselves with the consequent leakage of radioactive water into the steam generators. (V. 6 at 823). Corrosion-induced deformation of the tubes in the generators has in turn led to distortion, cracking and destruction of other elements of the units. (V. 6 at 823). As of November 1981, 25 of the 32 operating Westinghouse nuclear reactors in the United States had been found to have one or more forms of tube degradation. (V. 6 at 823 & n.1). Overseas units have experienced similar problems.

The Turkey Point steam generator defects were presaged at Westinghouse's Shippingport Atomic Power Station as early as 1957, and in other Westinghouse-built units in the years prior to the start-up of Turkey Point. (V. 6 at 824 & n.2). The problems were of sufficient gravity and occurred with such

regularity that Westinghouse was required to create a "Steam Generator Task Force" to address them in an orderly fashion. (V. 6 at 824 & n.3).

The United States Nuclear Regulatory Commission has determined that the causes of the damage such as that experienced by FPL, include the manufacturer's thermal-hydraulic design, the manufacturer's materials selection, the manufacturer's fabrication methods and the manufacturer's water chemistry specifications. (V. 6 at 824 & n.4). These are the precise causes which serve as the foundation for the FPL negligence claim at issue here.

SUMMARY OF THE ARGUMENT

POINT I. FPL purchased two nuclear power plants from Westinghouse. The steam generators in those plants were defective, because of Westinghouse's negligence, and had to be replaced. FPL sued in tort and in contract. Its negligence claim is at issue in the pending certified questions. The federal district court determined that the injuries suffered by FPL as a consequence of Westinghouse's negligence were in the nature of an "economic loss" and were not recoverable in Florida on a negligence theory.

The Florida Supreme Court has not addressed the economic loss issue under the precise circumstances which prevail in this case. There is ample Florida law, however, to establish that Florida does not distinguish between economic loss and any other kind of loss in permitting negligence recoveries. Whatever the injury, whether personal, property damage or economic, it will give rise to liability if the traditional elements of a negligence cause of action are established. If the economic loss was foreseeable and was proximately caused by the negligent acts of a defendant, the plaintiff will be made whole.

Florida has not, and need not, import into its negligence law, limitations having their foundation in strict liability in tort, which differs theoretically, philosophically and conceptually from a common law negligence action. Limitations essential to confine the impact of the strict liability doctrine within reasonable boundaries are not germane to negligence, which has its own traditional concepts of duty,

proximate cause and foreseeability to achieve the same result. Accordingly, the "economic loss" limitation of strict liability is unsuited to negligence law. Early cases which initially blurred these obvious distinctions between negligence and strict liability are being abandoned and the same court which authored the seminal case precluding recovery of economic losses has recently permitted recovery of these losses in a negligence action.

POINT II. Even if "economic loss" limitations could be said to have some place in negligence law generally, they have no place here. The economic loss doctrine was not in existence in Florida when the contract at issue in this dispute was negotiated. The parties could not and did not rely on its prospective development in those negotiations. Retrospective application of that doctrine to these parties two decades after the negotiations would constitute an intolerable and unequitable judicial re-design of those contract rights.

ARGUMENT

I.

FLORIDA LAW PERMITS RECOVERY IN A NEGLIGENCE ACTION OF ALL DAMAGES PROXIMATELY CAUSED BY AND FORESEEABLY RESULTING FROM TORTIOUS CONDUCT

A. Introduction

This case invites the Florida Supreme Court into a restless, doctrinal morass created by the gratuitous, unthinking importation of strict liability concepts into the law of negligence. The invitation may properly be declined. The first

question certified by the Eleventh Circuit requests this Court to analyze and illuminate Florida negligence law principles regarding the recovery of economic losses sustained as a result of a defendant's negligence. The "economic loss rule," precluding recovery of purely economic losses, is a notion of relatively recent judicial creation which has not been addressed expressly by this Court. It has its roots in strict liability in tort, which differs significantly in concept, application and philosophy from traditional negligence theories. Moreover, the law relating to "economic loss," mercurial since its first exposition, has been characterized by persistent, contradictory, fundamental change. The landmark "economic loss" decisions, which, it is essential to recognize, were "strict liability" decisions, have been obliterated by later courts, obviously struggling to reconcile the incompatible theories. The most dramatic and most recent illustration of the ephemeral quality of these "landmarks" is the fact that California courts, which gave birth to the idea that "economic loss" was not recoverable in tort, 3/ have recently authored decisions expressly permitting such recoveries, 4/ and New Jersey, which originally permitted

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3/ See Seely v. White Motor Company, 63 Cal. 2d 9, 403 P.2d 145 (1965).

4/ California's recent express rejection of Seely in the negligence context occurred in Ales-Peratis Foods International, Inc. v. American Can Co., 164 Cal. App. 3d 277, 209 Cal. Rptr. 917 (1985), pet. for hearing denied, Civ. B002714 (Cal. April 25, 1985), Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984) and Pisano v. American Leasing, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983), each relying on the California Supreme Court's decision in J'Aire Corporation v. Gregory, 157 Cal. Rptr. 407, 598 P.2d 60 (1979), to explain away Seely in negligence actions.

recovery of economic loss, 5/ has now apparently adopted a limited version of the economic loss rule.6/ With these recent developments in mind, it is clear that the economic loss rule does not reflect a reliable "doctrine" at all. It is more correctly characterized as an experiment in allocating the risks and burdens of defective products in the context of liability without fault. These unsettling metamorphoses emphasize the compelling need for this Court to continue to adhere to the

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5/ See Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

6/ New Jersey modified its long-standing rejection of the economic loss doctrine in Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (N.J. 1985), holding that the New Jersey Uniform Commercial Code is the exclusive remedy for a commercial consumer's claim of economic loss against a remote seller. But cf. JIG The Third Corporation v. Puritan Marine Insurance Underwriters Corporation, 519 F.2d 171, 175 (5th Cir.), rehearing en banc denied, 522 F.2d 1280 (5th Cir. 1975), cert. denied, 424 U.S. 954 (1976) (holding that the U.C.C. was not intended to supplant the law of negligence, and permitting an action in negligence for recovery of economic loss). See also West v. Caterpillar Tractor Co., 336 So.2d 80, 88 (Fla. 1976) (wherein this Court concluded that Florida's Uniform Commercial Code does not supplant the law of torts in products liability cases).

Further attesting to the unsettled and essentially uninstructive nature of the economic loss rule, more recently the New Jersey Supreme Court authored a comprehensive, analytical opinion strongly endorsing recovery of economic losses in negligence and advocating that the traditional tort law principles of duty, foreseeability and causation serve as the appropriate standard for resolving liability for negligently-caused economic losses. See People Express Airlines, Inc. v. Consolidated Rail Corporation, 100 N.J. 246, 495 A.2d 107 (1985).

Adding to the confusion and emphasizing the volatility of the economic loss concept, most recently the Third Circuit, applying New Jersey law, held that commercial plaintiffs can recover in strict liability or negligence for accidental damage to the defective product itself, without a claim for personal injury or property damage to other property. Consumers Power Company v. Curtiss-Wright Corporation, 780 F.2d 1093, 1098 (3d Cir. 1986).

consistent, analytical and time-honored body of Florida decisions which hew carefully to the fundamental, traditional concepts of duty, causation and foreseeability in resolving negligence claims, irrespective of the type, or manner, of damage sustained.

B. The Existence Of A Contractual Relationship Imposes No Limitations On The Availability Of Tort Remedies

In this action, FPL is seeking recovery for breach of warranty and for negligence. It seeks compensation for the damages incurred as a result of Westinghouse's negligent design and manufacture of the steam generators as well as for the negligent provision of operating instructions and the negligent failure to warn of potential problems of which Westinghouse was aware.

At the outset, it is important to recognize the neither the existence of a contract generally nor the terms of the FPL-Westinghouse Contract specifically excuse Westinghouse from liability for the consequences of its tortious conduct. FPL's right to pursue contract and tort remedies simultaneously is consonant with well-established Florida law. Since at least 1932 tort and contract remedies have co-existed in Florida under circumstances in which, as in the instant case, the defendant commits a tort in attempting to perform contractual duties. In Florida, as well as in numerous other jurisdictions, contract law remedies, whether common law or U.C.C., are not perceived as the exclusive vehicle of recovery when the performance of contractual duties is not simply omitted, but is characterized

by a "positive act of malfeasance." See Banfield v. Addington, 104 Fla. 661, 140 So.893, 896 (1932).7/

This Court described the relationship between the "concurrent remedies" in contract and tort, in Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932):

> Where a transaction complained of has its origin in a contract for service which places the parties in such a relation to each other that in attempting to perform the promised service a tort is committed, then the breach of the contract is not the gravamen of the suit brought to recover damages for the tort. And in such case the contract is considered mere inducement, creating the state of things which furnishes the occasion of the tort, but not the basis of recovery for it, and in all such cases the remedy is an action ex delicto on the case.
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> * * *
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> The reason for this is the firmly established rule that for injuries resulting from the unskillful or otherwise negligent performance of a thing agreed to be done, an action ex delicto will lie, notwithstanding the injury complained of would also be ground for an action ex contractu. In such cases the distinction made is that the action ex delicto can be maintained where the action is founded on something more than mere nonfeasance in the performance of an alleged contract. Id. at 896-97 (citations omitted).

7/ The Eleventh Circuit has likewise refused to read the U.C.C. as barring application of the law of negligence between contracting parties, recognizing that torts are neither governed by nor considered to constitute a part of any contractual relationship. See JIG The Third Corporation v. Puritan Marine Insurance Underwriters Corporation, 519 F.2d 171, 174-75 (5th Cir.), rehearing en banc denied, 522 F.2d 1280 (5th Cir. 1975), cert. denied, 424 U.S. 954 (1976). See also Miller Industries v. Caterpiller Tractor Co., 733 F.2d 813, 818 (11th Cir.), rehearing en banc denied, 738 F.2d 451 (11th Cir. 1984) (holding that the law of sales did not preclude a negligence action, even when no physical damage occurred).

Parrish v. Clark, 107 Fla. 598, 145 So. 848 (1933), is another early decision in which this Court explicitly acknowledged the right of a plaintiff to proceed simultaneously on tort and contract theories:

> The right of action on the contract and the right to sue for the breach of the collateral duty are distinct, the only limitation on a suit for either or both being that the same party cannot be compensated twice over for the same wrong, once for the breach of contract and again for the tort. Id. at 850 (citation omitted).

Florida courts have never strayed from their adherence to the doctrine enunciated in Banfield and Parrish. 8/ These decisions are cited almost invariably whenever a litigant elects to proceed on or has available both tort and contract remedies

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8/ Numerous other Florida decisions illustrate that tort actions may arise from the negligent performance of a contractual duty. The right to recover in negligence is limited only by the traditional tort concepts of duty, foreseeability and causation. See, for example, Tampa Electric Company v. Stone & Webster Engineering Corporation, 367 F. Supp. 27 (M.D. Fla. 1973) (permitting suit against Westinghouse for breach of contract, breach of implied warranty and negligence arising out of the sale of a major item of plant equipment); Manning v. Serrano, 97 So.2d 688 (Fla. 1957), (permitting suit in tort rather than contract, because contractual remedies were barred by statute of limitations); Milteer v. Seaboard Air Line Ry. Co., 66 Fla. 17, 62 So. 831 (1913), (permitting an action for common law liability for injury to perishable freight and not requiring suit on existing contract or bill of lading); Gallichio v. Corporate Group Services, Inc., 227 So.2d 519 (Fla. 3d DCA 1969) (extending right to negligence action to third parties injured by the negligent performance of contract). See also Arvida Corporation v. A.J. Industries, Inc., 370 So.2d 809 (Fla. 4th DCA 1979); Luciani v. High, 372 So.2d 530 (Fla. 4th DCA 1979); Navajo Circle Inc. v. Development Concepts Corporation 373 So.2d 689 (Fla. 2d DCA 1979); Kroon v. Beech Aircraft Corp., 628 F.2d 891 (5th Cir. 1980).

in one lawsuit. The reasons for pursuing both are immaterial. They are available and may be employed.

Indeed, alternative recovery, in tort or in contract, is a fundamental aspect of Florida products liability law. In 1976, this Court first permitted recovery in products liability cases pursuant to the doctrine of strict liability in tort. Describing the comprehensive scope of Florida products liability law, this Court stated:

> Products liability deals with recourse for personal injury or property damage resulting from the use of a product and, in the past, has covered actions for negligence, breach of express warranty, breach of implied warranty, and fraud. These theories of recovery have been refined and consolidated to such an extent that the distinctions frequently have more theoretical than practical significance.

West v. Caterpillar Tractor Co., 336 So.2d 80, 84 (Fla. 1976). West rejected the notion that the Uniform Commercial Code (U.C.C.) supplanted the law of torts in products liability cases. This Court recognized two parallel but independent bodies of products liability law, and concluded that U.C.C. warranty remedies were not the exclusive means of recovery in products liability cases. Id. at 88.9/

As recently articulated by a Florida district court of appeal, a defendant "cannot hide behind its contract to avoid ... [a] claim for damages arising out of its negligence." Shada

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9/ See also Nicolodi v. Harley-Davidson Motor Company, Inc., 370 So.2d 68 (Fla. 2d DCA 1979) ("a given set of facts can support alternative theories of recovery in a products liability case, in tort for negligence or strict liability, and in contract for breach of implied warranty." Id. at 72.)

v. Title & Trust Company of Florida, 457 So.2d 553, 557 (Fla. 4th DCA 1984), pet. for rev. denied, 464 So.2d 556 (Fla. 1985). Rather than providing Westinghouse an escape from all liability for its tortious conduct, the existence of the Contract establishes the very threshold element of a negligence action -- that the defendant, Westinghouse, owed a legal duty, to the plaintiff, FPL, to use reasonable care in its performance.10/ See Navajo Circle, Inc. v. Development Concepts Corporation, 373 So.2d 689, 691 (Fla. 2d DCA 1979) and infra at pp. 23-24, 29-30.

Of equal and compelling significance here is the fact that the FPL-Westinghouse Contract does not address or limit FPL's tort remedies. (V.4 at 599; V.5 at 755). It is essential that the Court be aware that Westinghouse did enter into contracts with other utility companies contemporaneously with the FPL Contract in which negligence was specifically considered and negligence and tort remedies were expressly limited by the

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10/ Although the Contract creates the legal duty owed by Westinghouse, it is important to recognize that Westinghouse's breach of contract is not the basis for FPL's negligence claim. The gravamen of the negligence count is that Westinghouse negligently designed and manufactured the steam generators and that Westinghouse failed to warn of known defects. As recognized by the former Fifth Circuit, "there is a great deal of difference between proving that a product does not work [breach of warranty] and that it has been negligently designed or manufactured." JIG The Third Corporation v. Puritan Marine Insurance Underwriters Corporation, 510 F.2d 171, 175 n.5 (5th Cir.), rehearing en banc denied, 552 F.2d 1280 (5th Cir. 1975), cert. denied, 424 U.S. 954 (1976). See also Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813, 818 (11th Cir.), rehearing en banc denied, 738 F.2d 451 (11th Cir. 1984) ("A duty to warn of a product's defects of which the seller becomes aware goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy.")

contract language itself. See American Electric Power Company, Inc. v. Westinghouse Electric Corporation, 418 F.Supp. 435 (S.D.N.Y. 1976) and Potomac Electric Power Company v. Westinghouse Electric Corporation, 385 F.Supp. 572 (D.D.C. 1974), rev'd without opinion, 527 F.2d 853 (D.C. Cir. 1975). In vivid and dispositive contrast to the instant case, in each of these other situations the buyer contractually and explicitly waived its right to common law tort relief. Potomac Electric Power Company, 385 F.Supp. at 575-76, 580; American Electric Power Company, 418 F.Supp. at 440-41, 452-53 & n.25. FPL did not.

These authorities confirm Westinghouse's obvious knowledge at the time of the FPL negotiations that its steam generator customers had available to them both tort and contract remedies. Tellingly, in the course of all of its memoranda on this subject in this litigation, Westinghouse was never contended that it was surprised at the assertion of FPL's negligence claim or that it was powerless at the time of the contract to protect against tort exposure if the negotiations had permitted this advantage to be achieved. In the face of the stronger, more protective language in Westinghouse's other contracts at this time, it is clear that the availability of tort remedies to FPL was a consciously bargained-for position. In the absence of contract language to the contrary, both were available if the equipment failed. When it was able to achieve that result in its negotiations, Westinghouse inserted the necessary limiting language in its contracts. It was unable to

obtain this concession from FPL and no exculpatory language appears in this Contract.

B. Florida Law Permits Recovery In Negligence For Economic Loss

Under traditional Florida tort doctrine, a party who breaches a duty owed to another is responsible to the injured party for "all the consequences that reasonably and naturally flow from or follow his wrongful act whether these consequences were actually contemplated or not. The tortious act being established, the liability extends to all of the consequences that normally, proximately, and reasonably follow or result from such act." Briggs v. Brown, 55 Fla. 417, 46 So. 325, 330 (1908). The boundaries of the duty and the foreseeability of the consequences are factual issues to be determined by the jury. There are no arbitrary constraints imposed upon the type of damages recoverable.

Having been injured by Westinghouse's negligent performance of contractual duties, FPL is seeking to recover the damages incurred as a result. The costs of replacing the defective equipment and the costs of alternative power while the nuclear units were inoperative are manifestly consequences which normally, proximately, reasonably and inevitably flowed from the breaches of the duties alleged.11/

11/ The trial court has ruled that the replacement fuel costs are not recoverable. Although FPL respectfully disagrees with that ruling and will seek appellate review at a later time, it is not the subject of the pending, narrow interlocutory review or this certification proceeding.

Tampa Electric Company v. Stone & Webster Engineering Corporation, 367 F.Supp. 27 (M.D. Fla. 1973), is unusually instructive on this point because of the obvious similarities it bears to the instant litigation, including the appearance of Westinghouse as a defendant charged with negligent design, manufacture and installation of a major piece of equipment for an electric generating plant. In that diversity action, which relied upon Florida law, Westinghouse contracted to furnish a turbine generator to Tampa Electric for the price of $6,216,999.02. It was delivered and installed. Thereafter, during routine operation, a fracture occurred in a high-pressure oil line in the turbine generator causing a fire to erupt. Substantial damages occurred and the unit was inoperative for nearly nine months. Tampa Electric sued Westinghouse for breach of contract, breach of implied and express warranties, negligence and gross negligence.12/

A number of issues were presented to the court for resolution prior to trial. Among them was the question of whether Tampa Electric could recover the loss of $1,953,978 it would have received for energy it would have sold to another utility company had the defective unit not been put out of operation because of Westinghouse's negligence. Interestingly, Westinghouse did not invoke its "economic loss" theory, but met the claim on conventional tort grounds by asserting that the

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12/ Tampa Electric also sued Stone & Webster Engineering Corporation in negligence, breach of contract and breach of implied warranties for services relating to the erection of the turbine generator.

damage to the turbine generator was not the "natural, direct and proximate result of the fire." Id. at 35. The court disagreed:

> Clearly when Westinghouse agreed to sell the turbine generator it must have foreseen that TECO [Tampa Electric] would enter into contracts to sell the electric power to be generated. If Westinghouse were negligent, the loss of such contracts would be the natural and proximate result of that negligence. TECO may claim the loss of the capacity charges as an element of its damages in the instant case. Id. at 36.

The court also permitted, as a proper element of tort recovery, lost profits during the time the generator was not functioning and interest on the property damages incurred until the time of entry of judgment. It would be difficult to imagine a more straightforward exposition of Florida's traditional negligence concepts. The court held that the plaintiff-purchaser could recover all damages which were the "natural and proximate result" of the alleged negligence, whatever those damages might be.

The Tampa Electric decision is a consistent and logical reflection of the many Florida state court cases which have permitted recovery of "economic loss," in those precise terms, for negligent performance of contractual duties.

In Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc., 168 So.2d 333 (Fla. 2d DCA 1964), cert. denied, 173 So.2d 146 (Fla. 1965), the Second District considered liability in negligence for economic losses -- damage to business reputation, lost profits and repair costs -- occasioned by negligent design and specifications of wooden trusses for

residential construction. In affirming the right of the plaintiff to pursue its negligence theory, the court determined that:

> In every instance duty must be defined in terms of the circumstances and the theories advanced to sustain liability. In our view the extent of appellee's [designer's] duty may best be defined by reference to the foreseeability of injury consequent upon breach of that duty. Id. at 335 (emphasis supplied by court).

Audlane was followed by this Court's decision in A. R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). In Moyer, the Court was presented with the question of whether a supervisory architect could be liable for negligence causing economic damage to a third party general contractor.13/ Relying in part on Audlane and characterizing it as a products liability case in which considerable "economic loss" resulted, this Court ruled that:

> a third party general contractor, who may foreseeably be injured or sustain an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity. Id. at 402 (emphasis added).

The Court considered determinative the fundamental negligence concepts of foreseeability and proximate cause. The fact that it was dealing solely with an economic loss gave the Court no pause.

13/ The damage to the general contractor in that case was purely economic, rather than property damage or personal injury. The defendant architect was alleged to have negligently prepared plans and specifications resulting in costly delays to the contractor.

Numerous district courts of appeal in Florida, relying on this Court's decision in Moyer, have recognized a cause of action in negligence for economic loss resulting from the negligent performance of a contractual duty. For example, in Kovaleski v. Tallahassee Title Company, 363 So.2d 1156 (Fla. 1st DCA 1978), modified on other grounds in First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984), a case involving a negligence action against an abstract company for purely economic losses, the court held:

> We think a fair interpretation of Moyer is that so long as one may reasonably foresee that the plaintiff would sustain an economic loss proximately caused by the negligent performance of a contractual duty ... the plaintiff may bring an action in tort against the alleged negligent [tortfeasor]. Id. at 1160 (emphasis added).

Likewise, in Luciani v. High, 372 So.2d 530 (Fla. 4th DCA 1979), the Fourth District, relying on Audlane and Moyer, recognized a cause of action for "economic loss proximately caused by the negligent performance of a contractual duty." Id. at 531.

Consistent with this firmly established line of authority in Florida, in Navajo Circle, Inc. v. Development Concepts Corporation, 373 So.2d 689 (Fla. 2d DCA 1979), the Second District recognized a cause of action in negligence against an architect and contractor. The plaintiffs alleged that the architect negligently supervised the construction and subsequent repairs of a condominium building roof and that the

contractor negligently constructed the roof resulting in damage to the roof, damage to the exterior and interior walls, and loss of rental receipts. Holding that the plaintiff alleged a cause of action in negligence, the court reiterated that:

> The issue in any negligence action is whether the injury resulted from defendant's violation of a legal duty owed to the plaintiff.
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> * * *
>
> The duty owned by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract.
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> * * *
>
> The defendant would be liable for the plaintiff's injury if the defendant's affirmative conduct in performance of a contractual obligation to provide services to another was the proximate cause of a foreseeable injury. Id. at 691.

The rationale for permitting recovery in tort for economic loss resulting from the negligent performance of contractual duties was clearly articulated in Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515 (Fla. 4th DCA 1981), pet. for rev. denied, 417 So.2d 328 (Fla. 1982). Negligent performance of a contractual duty was determined to give rise "to liability for damage to an intangible economic interest." Id. at 519 (emphasis supplied by court). In a suit for negligent condominium construction, the Fourth District adopted the position urged here by FPL:

> We reject the contention by appellant that there can be no recovery in negligence absent proof of personal injury or property damage. We hold that there can be recovery for economic loss. Why should a buyer have to wait for personal tragedy to occur in order to recover

> damages to remedy or repair defects? In the final analysis, the cost to the developer for a resulting tragedy could be far greater than the cost of remedying the condition. Id. at 519.

The same or similar holdings have been reached in many Florida district court of appeal decisions.14/

This Court's most recent discussion of Florida tort law permitting recovery for economic loss was in First American Title Insurance Company, Inc. v. First Title Service Company of

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14/ See, e.g., Safeco Title Ins. Company v. Reynolds, 452 So.2d 45, 49 (Fla. 2d DCA 1984) (reaffirming that in cases of tort arising in a contractual setting, a plaintiff may recover special damages such as lost profits); Biscayne Roofing Co. v. Palmetto Fairway Condominium Association, Inc., 418 So.2d 1109 (Fla. 3d DCA 1982)(allowing negligence action for damages related to the replacement of a roof); Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA 1985) (confirming that lost profits are recoverable in both tort and contract actions); Arvida Corporation v. A.J. Industries, Inc., 370 So.2d 809 (Fla. 4th DCA 1979)(tort action for economic loss). But see GAF Corporation v. Zack Company, 445 So.2d 350 (Fla. 3d DCA), pet. for rev. denied, 453 So.2d 45 (Fla. 1984), discussed in Section I D, infra.

This Court's decision in Conklin v. Hurley, 428 So.2d 654 (Fla. 1983), is also instructive here. In that case, plaintiffs-purchasers of vacant waterfront lots sought to recover economic losses (diminished land value) resulting from the collapse of a defective seawall abutting their lots on a theory of implied warranty of fitness. The Court, ruling that the doctrine of implied warranty does not extend to purchasers of unimproved land, specifically stated:

> Our refusal to extend the doctrine of implied warranty to the facts of this case in no way precludes petitioners from recovering any losses they may be able to prove. . . . [P]etitioners may still pursue an action in negligence against the builders of the seawall. Nothing in our opinion shall be construed to preclude such an action. Id. at 659.

the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984).15/ In First American this Court reaffirmed and clarified the principles applied in Moyer.16/ The Court explained that the imposition of liability in Moyer for "negligence causing financial loss" was derived from the application of "products-liability tort principles to the negligent provision of professional services." Id. at 469, 472 (emphasis omitted). The Court also discussed Florida's focus on foreseeability, rather than privity, in products liability tort cases, expressly recognizing that:

> manufacturers and distributors release products into the commercial marketplace which the ultimate users and consumers thereof are in no position to test, examine or evaluate for design safety or fitness. The ultimate consumer relies on the manufacturer for assurance that the product is safe and the manufacturer knows of this reliance. The consumer has no other alternative but reliance on the manufacturer for the fitness of the product. Id. at 471 (emphasis added).

First American's discussion is particularly instructive in this case for two reasons. First, liability can be imposed for economic loss in tort. Second, tort law is intended to provide protection as to the safety of a product and as to its fitness.

15/ The Court's opinion in First American became final on October 29, 1984, eleven days after the trial court rendered its order granting Westinghouse's motion for partial summary judgment on FPL's negligence count.

16/ The focal issue presented in First American was whether an abstractor's liability for the negligent preparation of an abstract extends to persons with whom there is no privity of contract. The plaintiff urged the Court to apply products liability tort principles and hold the abstractor liable in negligence to any foreseeably injured person, notwithstanding the absence of privity. Although the Court rejected this effort, it did so with a particularly useful recapitulation of Florida's products liability tort law.

In the Eleventh Circuit Westinghouse attempted to trivialize the numerous Florida decisions permitting recovery of economic loss for negligent performance of contractual duties, by classifying them as "services cases" and arguing that "Florida law clearly distinguishes between service cases and products cases." (Westinghouse Brief (11th Cir.) at 20). To the contrary, they share a common foundation. This Court has expressly stated that the tort law principles applied in the Florida service cases are derived from and are "a natural extension of" Florida's products liability tort cases. Moyer, 285 So.2d at 399. Indeed, in First American this Court explained that the Court's imposition of liability in Moyer for "negligence causing financial loss" was derived specifically from the application of "products liability tort principles to the negligent provision of professional services." 457 So.2d at 469, 472 (emphasis omitted).17/

17/ Likewise, in Navajo Circle, supra, another Florida case imposing liability in negligence for economic losses, the district court explained that "[t]he products negligence line of cases was relied on by our supreme court to expand liability in negligence to those who supplied services rather than products." 373 So.2d at 691 (citing to Moyer and its citation to Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., Inc., 168 So.2d 333 (Fla. 2nd DCA 1964), cert. denied, 173 So.2d 146 (Fla. 1965)).

The extension of products liability tort principles to suppliers of services occurred in Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., Inc., 168 So.2d 333 (Fla. 2d DCA 1964), cert. denied, 173 So.2d 146 (Fla. 1965). Relying on the products liability negligence law principles developed in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and recognized in Florida in Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956), the court imposed liability in negligence for economic losses arising from an engineer's negligent design and specification of building materials. Id. at 335.

Furthermore, "there is no magic in the generality 'professional service'." Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., Inc., 168 So.2d at 335. There is no rational distinction to be made between the imposition of liability in negligence where (a) an engineer's negligent design and specification of construction materials causes economic loss to a construction contractor, Audlane, supra, (b) a condominium developer's negligent design and construction of condominium units causes economic loss to condominium owners, Drexel, supra, 18/ (c) a supervisory architect's negligent design and specification of building plans causes economic loss to a general contractor, Moyer, supra, or (d) an architect's and a contractor's negligent supervision and construction of a building causes economic loss to condominium owners, Navajo Circle, supra, and the instant case, where Westinghouse's negligent design and manufacture of steam generators causes economic loss to FPL. In each instance, the defendant's negligent conduct resulted in foreseeable economic injury to a person to whom a legal duty was owned. The key in each of these negligence actions, and the consistent focus in all the Florida cases recognizing liability in negligence for economic loss, is "whether the injury resulted from the defendant's violation of a legal duty owed to the

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18/ Indeed, Drexel dealt with negligence during the construction of a structure, "which is as close to manufacture as it is to services." See Ales-Peratis Foods International, Inc. v. American Can Co., 164 Cal. App. 3d 277, 209 Cal. Rptr. 917, 921, pet. for hearing denied, Civ. B0021714 (Cal. April 25, 1985).

plaintiff." See Navajo Circle, 373 So.2d at 691, See also First American, 457 So.2d at 469, 472-73; Moyer, 285 So.2d at 399, 401-402; Luciani v. High, 372 So.2d 530, 531 (Fla. 4th DCA 1979). When the plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff, and the defendant violates that legal duty, the defendant is liable in negligence for all the foreseeable injuries suffered by the plaintiff. Navajo Circle, 373 So.2d at 691.

A defendant's tort liability is not unlimited. A predicate legal duty is required. Here, the Contract establishes that independent, concurrent tort law duty to use reasonable care in the performance of the contract.19/ Even in the absence of a contractually derived duty, Westinghouse, because of the nature of its relationship with FPL in this transaction, would have a duty otherwise imposed by tort law to avoid harm to FPL. See Navajo Circle, 373 So.2d at 691. Westinghouse's undertaking to design and manufacture steam generators for FPL was intended to and manifestly did directly affect FPL; Westinghouse knew that FPL was required to rely

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19/ See Parrish, 145 So. at 850 (an action may arise in tort "for the positive tort committed by the violation of a duty arising out of the assumption of the contractual relation."); Banfield, 140 So. at 895, 896 ("when a duty is imposed by the contract, or grows out of it by legal implication, and injury results from the violation or disregard of that duty, an action on the case will lie to recover damages, although an action of assumpsit might also be maintained for the breach of duty"; "if a legal duty arises independently of or concurrently with the contract, a breach of the legal duty may be a tort"). See also Navajo Circle, 373 So.2d at 691 ("Existence of a contract may uncontrovertibly establish that the parties owed a duty to each other to use reasonable care in performance of the contract.")

exclusively on Westinghouse's professed expertise in the design and manufacture of nuclear powered generators; Westinghouse knew far better than FPL the types and extent of harm that FPL would suffer from negligently designed or manufactured generators or if Westinghouse failed to warn of known defects; and Westinghouse's negligent conduct was the direct cause of FPL's injuries. Whatever test is applied, whether privity, reliance, foreseeability, "special relationship," or proximate cause, Westinghouse had a sufficient duty to FPL to expose it to independent tort liability.

FPL's theory of recovery is based on well-established and well-reasoned Florida precedent. Westinghouse was negligent in the performance of its duties to design and manufacture properly the steam generators, to provide proper operating instructions, and to warn properly of potential problems of which Westinghouse was aware. FPL has been damaged and seeks to recover the natural, direct and proximate losses which resulted from that negligence. Ample Florida authority permits it to do so. All of the decisions cited enunciate the same straightforward rule: when assessing responsibility for negligence, recovery is limited not by the nature of the damages incurred, but by the foreseeability of the injury resulting from the breach of the particular duty involved. Negligent performance of a contractual duty is no different than any other form of negligence. It requires no separate or distinct principle of recovery. If the damages incurred were foreseeable, they are recoverable.

D. There Is No Basis In Florida Law For Precluding Recovery Of Economic Losses In Negligence

There is no body of Florida law contrary to that discussed in Section I C, supra. Westinghouse has emphasized one anomalous district court of appeal decision, to which the trial court also adverted. It cannot support the burden placed upon it by Westinghouse. In that decision, GAF Corporation v. Zack Company, 445 So.2d 350 (Fla. 3rd DCA), pet. for rev. denied, 453 So.2d 45 (Fla. 1984), a roofing contractor was barred from recovering economic losses in a negligence action against the manufacturer of defective roofing materials because there were no personal injuries or property damage. GAF is neither representative of Florida law nor consistent with the principles enunciated in the numerous decisions cited above.20/

GAF cites no case law to support its holding.21/ Indeed, the only authority of any kind relied upon in GAF for the view that purely economic losses cannot be recovered in negligence actions, W. Prosser, Handbook on the Law of Torts, §30 at 143 and §101 at 665 (4th Ed. 1971), abandoned that proposition at about the time of the decision. The 1984 edition

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20/ The parties did not even address the issue of recovery of economic losses in negligence actions in their briefs to the Third District Court of Appeal in GAF.

21/ The one case cited in GAF, McIntrye v. McCloud, 334 So.2d 171 (Fla. 3d DCA 1976), stands only for the general proposition that liability cannot be established in tort without proof of damage.

of that treatise excised the statements apparently relied upon in GAF. Prosser and Keeton on Torts, §101 at 707-09 (5th Ed. 1984).

The trial court also relied upon Monsanto Agricultural Products Company v. Edenfield, 426 So.2d 574 (Fla. 1st DCA 1982), to support its prediction that the Florida Supreme Court would permit the type of damages sustained to be determinative of the availability of a negligence cause of action. Monsanto, however, is consistent with the Florida cases cited in the preceding section and simply demonstrates Florida's adherence to the traditional tort concepts of duty, foreseeability and causation, and the care which courts invest in their efforts to allocate commercial losses.

The product complained of in Monsanto was herbicide which failed to control weeds. The weeds diminished the value of the plaintiff's crop. The appellate court reversed the negligence award against the manufacturer because (1) the plaintiff failed to allege or prove that the defendant's actions were the "legal cause" of any damage sustained by the plaintiff and (2) the plaintiff did not allege the violation of a duty imposed by tort law.22/ 426 So.2d at 576. Monsanto is not novel, nor did it preclude, or even address, recovery in negligence for economic losses. Liability was denied based upon

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22/ The court declined to impose a duty to manufacture only such products as will "meet the economic expectations of purchasers." 426 So.2d at 576.

application of the traditional tort concepts of causation and duty.23/

In Monsanto the product complained of had no apparent flaw or defect, it simply did not achieve a result consistent with the purchaser's expectations. Id. at 576. In the absence of a manifest failure in the product itself, the court was unwilling to bind the manufacturer to the unknown objectives of a remote purchaser. In vivid contrast to Monsanto, the Court here is faced with a product replete with defects that destroyed the machine itself, while it was being operated under specifications and controls established by the manufacturer. Moreover, FPL's negligence count is not predicated simply upon Westinghouse's manufacture of a product that failed to meet FPL's private expectations or that achieved a poor level of performance. Westinghouse negligently designed and manufactured a product which literally began falling to pieces under normal operation, and negligently failed to warn FPL of that prospect, resulting in substantial damage to the product itself and extensive, foreseeable out-of-pocket losses to FPL. Westinghouse's responsibilities will be determined as such responsibilities have always been determined under Florida law,

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23/ The court also observed Florida's long-standing recognition of the "risks and uncertainties of agricultural ventures," and the reluctancy to impose liability on a producer of seed who has "no knowledge of the field or weather conditions which will obtain when its product is put to use, and certainly has no control over the manner in which its product is applied." Id. at 577.

by the foreseeability of the losses suffered as a result of Westinghouse's negligence, not the fortuitous extent or type of damage resulting from that negligence.

The only other Florida authority cited by the trial court and Westinghouse is Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, Inc., 444 So.2d 1068 (Fla. 3d DCA 1984). Cedars provides no guidance or precedent for this case. Cedars only addressed the recovery of economic loss in a strict liability action. As discussed in Section I E, infra, whatever the restrictions upon a strict liability action, FPL's negligence action is not derived from or limited by strict liability doctrines.24/

E. The Economic Loss Concept Is Not Compatible With The Historical Bases And Traditional Goals Of Florida's Negligence Law

As noted in Section I A, supra, the economic loss rule was a creation of strict liability in tort. It is a doctrine tailored for and apposite only to strict liability actions, in

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24/ It should also be noted that in GAF, Monsanto and Cedars there was no privity of contract between the parties. The existence of privity in the instant case favors the maintenance of a negligence action, as both the duty of Westinghouse to FPL and the foreseeability of the damages suffered by FPL are certain. Cf. State for use of Smith v. Tyonek Timber, Inc., 680 P.2d 1148 (Alaska 1984) (tort recovery for economic losses is not available to one not in privity with the supplier of a defective product); Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local No. 226 v. Stern, 98 Nev. 409, 651 P.2d 637, 638 (1982) ("absent privity of contract or an injury to person or property, a plaintiff may not recover in negligence for economic loss").

which remote, unknown purchasers of mass-produced consumer goods are suing manufacturers with whom they have no contractual relationship whatsoever.

Count V of FPL's complaint is based on negligence, not strict liability. There are vast, fundamental differences between the two doctrines. Seely and Santor, 25/ were strict liability cases, not negligence cases.26/ They dealt with the rights of and liability to remote purchasers not in privity with the product manufacturer. Whether Florida would follow Seely or Santor or neither in dealing with strict liability in tort is of no consequence in this lawsuit and is not encompassed within the issues certified to this Court.

Strict liability in tort is a convenient legal device, of relatively recent creation, intended to "accomplish some recourse" for a remote purchaser injured by a defective product. West v. Caterpillar Tractor Company, Inc., 336 So.2d

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25/ Seely v. White Motor Company, 63 Cal. 2d 9, 403 P.2d 145 (1965), is generally recognized and cited as the progenitor of the "economic loss rule," which precludes recovery in tort for economic losses. The opposite view was adopted in a series of decisions beginning with Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). For the current confused posture of these lines of authority see also notes 3-6, supra, and accompanying text.

26/ The issue of whether purely economic losses were recoverable in a negligence suit was not before the Court in Seely. The Court, nonetheless, while explaining why consumers could not collect for economic losses on a strict liability theory issued dictum on the negligence question. The California Supreme Court has never applied the Seely dictum to a negligence cause of action.

80 (Fla. 1976). The doctrine, which permits liability without fault, has its roots in common law implied warranty theories. Implied warranty was relied upon to provide this relief initially because it permitted the consumer "to sidestep the very burdensome proof required to charge a remote manufacturer with negligence." Berg v. General Motors Corporation, 87 Wash.2d 584, 555 P.2d 818, 823 (1976).

However, implied warranty was burdened by conceptual baggage of its own. Distant purchasers were unable to meet warranty-type requirements of privity, notice and disclaimer and ran afoul of statutes of limitations. Accordingly, courts refashioned the remedy, this time relying on a tort rather than a contract description, to avoid these "booby-traps" for the unwary purchaser. Cline v. Prowler Industries of Maryland, Inc., 418 A.2d 968 (Del. 1980).

The result is the present day doctrine of strict liability in tort. It is a mechanism which reflects a conscious effort to allocate the risks resulting from a defective product in such a manner as to discourage the marketing of products that are hazardous to public safety, without imposing unreasonably on the manufacturer. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). In permitting recovery without a showing of fault, courts have engaged in elaborate and essential efforts to balance the need to recompense an injured consumer with the obvious burdens imposed on a manufacturer held liable without fault to an unknown remote purchaser. The results of

these frequently confusing balancing efforts can be found in Santor and Seely and in legions of other decisions which fit neatly in neither camp.

The factors which compelled the development of the doctrine of strict liability in tort, and which justify the application of its arbitrary constraints, are not present in this negligence action.27/ First, Westinghouse will be liable to FPL, with whom it is in contractual privity, only if Westinghouse is shown to be at fault. Second, Westinghouse held itself out as an expert and a leader in the commercial nuclear power industry and, as Judge Merhige found, aggressively encouraged its long-time customer FPL to commit to nuclear plants in reliance on that self-proclaimed Westinghouse expertise.28/ Westinghouse was infinitely more aware than FPL of the myriad elements of a nuclear plant and the consequences

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27/ Even in the strict liability in tort context, several courts have imposed liability on manufacturers for economic losses. See, e.g., Fordyce Concrete, Inc. v. Mack Trucks, Inc., 535 F.Supp. 118 (D. Kan. 1982); C & S Fuel, Incorporated v. Clark Equipment Company, 524 F.Supp. 949 (E.D. Ky. 1981); Berkeley Pump Company v. Reed-Joseph Land Company, 279 Ark. 384, 653 S.W.2d 128 (1983); Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975); Verdon v. Transamerica Insur. Co., 187 Conn. 363, 446 A.2d 3 (1982) (by statute); Gauthier v. Mayo, 77 Mich. App. 513, 258 N.W.2d 748 (1977); Thompson v. Nebraska Mobile Homes Corporation, 198 Mont. 461, 647 P.2d 334 (1982); Russell v. Ford Motor Company, 281 Or. 589, 575 P.2d 1383 (1978); Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848, 855 n.7 (1968); City of LaCrosse v. Schubert, Schroeder & Assoc., Inc., 72 Wis.2d 38, 240 N.W.2d 124 (1976).

28/ See text at pp. 4-6, supra, quoting from Florida Power & Light Company v. Westinghouse Electric Corporation, 517 F.Supp. 440 (E.D. Va. 1981).

of a failure of any of the component parts. It had been a principal vendor in the utility industry for decades. This case is as far removed as possible from the situation encountered in strict liability, where a manufacturer becomes aware of the consequences of a failure of its product only after the failure occurs, at the expense of a customer whom the manufacturer had never even heard of before the damage occurred. Third, Westinghouse had the opportunity, and manifestly had the knowledge, to ameliorate any responsibility it might bear for its negligence through the negotiating process which preceded the contract. Finally, Westinghouse received significant industry-wide benefits from its sale to FPL, well beyond the anticipated profits of its plant and fuel contracts with FPL, and enjoyed favorable national publicity as a leader in the new technology.

Superimposing strict liability limitations on a negligence theory, particularly in the circumstances described, is conceptually and logically repugnant. A number of courts have analyzed and rejected the insinuation of the strict liability "economic loss rule" into negligence claims. The rationale enunciated in these cases is consistent with both the historical development and current substantive doctrines of Florida's negligence law.

The most instructive, and clearly the most dramatic, rejection of the economic loss rule in negligence is that of the California courts, which have now turned their back on their own creation. In the pivotal decision of J'Aire Corporation v.

Gregory, 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1979), the California Supreme Court held that:

> Recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs. 598 P.2d at 64.

The plaintiff in J'Aire, a restaurant lessee, sued the defendant general contractor for loss of prospective economic advantage (loss of business and resulting loss of profits) caused by delays in the completion of improvements to the restaurant premises. The Court refused to permit the type of damage sustained to be determinative of the availability of a negligence cause of action, recognizing that:

> injury to a tenant's business can often result in greater hardship than damage to a tenant's person or property. Where the risk of harm is foreseeable, as it was in the present case, an injury to the plaintiff's economic interests should not go uncompensated merely because it was unaccompanied by an injury to his person or property. Id. at 64.

Focusing on the traditional concepts of duty, foreseeability and proximate cause as the key components necessary to establish liability in negligence, the Court held that a defendant "is liable if his lack of ordinary care caused foreseeable injury to the economic interests" of the plaintiff. Id. at 64. Properly discounting the concern expressed in Seely, that recovery for economic loss might impose excessive liability for remote consequences, the Court reasoned that:

> judicial attention on the foreseeability of the injury and the nexus between the defendant's conduct and the plaintiff's injury. ... and ordinary principles of tort law such as proximate cause are fully adequate to limit recovery without the drastic consequences of an absolute rule which bars recovery in all such cases. Id. at 65.29/

Numerous other state and federal courts have criticized the expansion of Seely beyond its strict liability birthright. That criticism is based on the obvious doctrinal conflict

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29/ The compelling impact of J'Aire and its progeny on Seely was addressed specifically in several recent decisions of the California Courts of Appeal. See, e.g., Pisano v. American Leasing, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983) (holding that the plaintiff, to whom the manufacturer had supplied a defective sander, could recover lost profits and lost business opportunities in negligence); Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984) (allowing recovery of economic losses in negligence, but not in strict liability). Most recently, in Ales-Peratis Foods International, Inc. v. American Can Co., 164 Cal. App. 3d 277, 209 Cal. Rptr. 917, pet. for hearing denied, Civ. B002714 (Cal. April 25, 1985), another California appellate court held that a commercial consumer can recover solely economic loss caused by a negligently manufactured product which the manufacturer knew was destined for a particular consumer and a particular use. The court's comprehensive opinion traced the history of the much traveled economic loss doctrine from Seely to J'Aire. Embracing J'Aire's willingness to permit recovery for purely economic losses, the Court observed that "[i]t is in keeping with the much older [than Seely] standard of measuring duty by the foreseeability of the risk." Id. at 923. The court rejected the manufacturer's suggestion that permitting tort recovery in cases involving equally powerful commercial entities would undermine the U.C.C., determining that:

> This suggestion is at odds with the policies underlying tort and contract principles. A purchaser has a right to a usable product and should not have to bargain for it. Id. at 924.

But cf. Sacramento Regional Transit District v. Grumman Flexible, 158 Cal. App. 3d 289, 204 Cal. Rptr. 736 (1984) (denying recovery of economic losses in negligence).

involved. First, the Seely doctrine regards economic loss as inherently different from property loss or personal injury. J'Aire rebuts that notion. It is not difficult to illustrate the illogic of the distinction. If A buys a machine for $10,000 and it doesn't work because of negligent design, A has suffered a $10,000 loss. If B buys a $5.00 lantern, which malfunctions because of negligent design, and sets fire to B's $10,000 barn, B has suffered a $10,000 loss. A and B have suffered identical losses at the hands of negligent designers. Under Seely, B may collect, A may not.

It is only in a strict liability setting that there exists a rationale for such distinctions. Prior to the existence of that judicially created doctrine, remote consumers had no remedy. In providing a new means of recovery courts were justified in providing accompanying limitations which achieved the societal objective of protecting remote purchasers without unduly burdening the manufacturer.

Negligence remedies existed prior to Seely, they have a long and well-documented history under English and American common law. Limitations on negligence recoveries have a similarly long and well-developed history based on the concepts, logic and purposes of negligence law. Those limitations are found in notions of duty, proximate cause and foreseeability. It is through these limitations that the balance has been struck between litigants when "fault" is the issue. The damage component of the law of negligence is much broader in scope and purpose than the damage component in strict liability.

Negligence is intended to redress "all consequences that normally, proximately, and reasonably follow" from the tortious conduct of another. Briggs, 46 So. at 330. In negligence there is and has been no historical or inherent substantive basis for distinguishing between economic loss and other types of damages proximately caused by the defendant's negligent conduct. As recently recognized by the Ninth Circuit in Emerson G.M. Diesel v. Alaskan Enterprise, 732 F.2d 1468, 1474 (9th Cir. 1984):

> Economic loss is no different from personal injury or property damage in the sense that it is a loss proximately caused by the defendant's conduct.

The Supreme Court of Utah addressed this issue in detail in W.R.H., Inc. v. Economy Builders Supply, 633 P.2d 42 (Utah 1981), where plaintiffs purchased defective exterior siding for apartment complexes. The Utah Supreme Court rejected the argument that "purely economic losses are not entitled to protection against mere negligence," allowing recovery in situations:

> such as the present where the alleged defective manufacture results in the deterioration of the product. Where some damage to the product results from the negligence of the manufacturer, the consumer's damages are not "purely economic," or economic loss alone, and actions to recover all damages resulting from the product's deterioration should be allowed under a negligence theory. Id. at 44.

The Court, in allowing recovery for negligent manufacturer, explicited the distinction between strict liability and negligence, admonishing that:

> Expansion of the strict liability doctrine and the attention it has received from both courts and commentators has obscured other approaches to products liability actions sounding in tort. However, some courts have recognized the valid distinction which remains between strict liability and negligent manufacture actions. Id. at 45 (footnote omitted).

W.R.H., Inc. relied heavily upon both the holding and the reasoning of State v. Campbell, 250 Or. 262, 442 P.2d 215 (1968), cert. denied, 398 U.S. 1093 (1969), which involved the purchase of defective sugar-beet seed resulting in diminished crop profits. There was no damage to plaintiffs' land, but they were constructively deprived of its effective use. The Supreme Court of Oregon, permitting plaintiffs to proceed under traditional tort rules, aptly explained the basis for application of classic negligence concepts to protect a purchaser from economic losses:

> Where the other elements of a negligence case are present, we see no reason why the availability of a tort remedy should depend upon whether the harm was traumatic. The manufacturer should have a duty of exercising due care to avoid foreseeable harm to the users of his products. As stated by one writer, economic loss from defective products is "within the range of reasonable manufacturer foresight * * * [and this foreseeability] should raise at least a duty of due care unless some compelling economic or social or administrative reason dictates otherwise." Not being aware of any such reasons, we hold that [the] complaint states a cause of action in tort. Id. at 218 (citation omitted).

The Supreme Court of Washington reached a similar conclusion in Berg v. General Motors Corporation, 87 Wash.2d 584, 555 P.2d 818 (1976). Berg was a commercial fisherman who sued for lost profits resulting from the negligent manufacture

of a diesel engine and clutch. The Court could "find no compelling reasons for denying lost profits, per se, in negligence actions," reasoning that, "there is nothing in the tort of negligence which prevents lost profits from being a specie of recompensable harm which is actionable against the ... manufacturer." Id. at 822-23.30/

The economic loss rule requires another distinction which is foreign to Florida's negligence law. Strict liability in tort commonly permits recovery of economic losses even when

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30/ The dissent in Seely, which has now become the majority position in California with respect to negligence actions, likewise criticized the "arbitrary" distinction between personal injuries and economic losses:

> In Greenman we allowed recovery for "personal injury" damages. It is well established that such an award may include compensation for past loss of time and earnings due to the injury, for loss of future earning capacity, and for increased living expenses caused by the injury. There is no logical distinction between these losses and the losses suffered by plaintiff here. All involve economic loss, and all proximately arise out of the purchase of a defective product. I find it hard to understand how one might, for example, award a traveling salesman lost earnings if a defect in his car causes his leg to break in an accident but deny that salesman lost earnings if the defect instead disables only his car before any accident occurs. The losses are exactly the same; the chains of causation are slightly different, but both are "proximate." Yet the majority would allow recovery under strict liability in the first situation but not in the second. This, I submit, is arbitrary. 403 P.2d at 153-54 (citations, footnotes and emphasis omitted).

Accord J'Aire, 598 P.2d at 64 ("injury to a tenant's business can often result in greater hardship than damage to a tenant's person or property"); Monsanto Company v. Alden Leeds, Inc., 130 N.J.Super. 245, 326 A.2d 90, 97 (1974) ("[i]njuries to a man's business can be as detrimental in our society as injuries to his person"). See also Drexel, 406 So.2d at 519, quoted supra at p. 24-25.

the only damage is to the defective product itself, if the defect causes a collision with an external object or the product is damaged or destroyed in a sudden and calamitous accident. No recovery is allowed if the identical defect is evidenced only by gradual deterioration of the product.31/ The suggested rationale for this distinction is that a defect which causes a sudden or violent accident creates a greater safety hazard and thus strict liability principles can appropriately be extended to govern injuries caused by a dangerous event. See Pennsylvania Glass, 652 F.2d at 1169-70.

Recovery in negligence, however, is not confined solely to hazardous products.32/ Negligence law imposes upon manufacturers a duty of due care to avoid all foreseeable damages to the users of its products, irrespective of whether the defect manifests itself dramatically or remains quietly latent in the product. See, e.g., State v. Campbell, 442 P.2d at 218; Berg, 555 P.2d at 822-23. Waiting for a catastrophe before imposing a duty of due care in negligence deprives the

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31/ See, e.g., Pennsylvania Glass Sand Corporation v. Caterpillar Tractor Company, 652 F.2d 1165 (3d Cir. 1981); Moorman Manufacturing Company v. National Tank Company, 91 Ill.2d 69, 435 N.E.2d 443 (1982); Sanco, Inc. v. Ford Motor Company, 579 F.Supp. 893 (S.D. Ind. 1984), aff'd, 771 F.2d 1081 (7th Cir. 1985); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982).

32/ See Navajo Circle, Inc. v. Development Concepts Corporation, 373 So.2d 689, 692 (Fla. 2d DCA 1979) (the concepts of "inherent danger" or "unreasonable risk of injury" are appropriate when a plaintiff is relying on a strict liability theory, but not when the cause of action is based upon negligence).

concept of foreseeability, one of the fundamental underpinnings of negligence recovery, of all meaning. The manner in which damages are inflicted has never been considered a determinative factor in negligence actions in Florida. In Audlane, Moyer and Drexel, the damages that resulted were not occasioned by a sudden or violent accident, but were due to negligent design, construction or supervision. In each of these cases, economic damages were held to be recoverable under a negligence theory based upon the application of Florida's traditional tort concepts of duty, foreseeability and causation. There is no commercial, legal or common sense in a rule that predicates liability on the purely fortuitous manner in which a complex piece of machinery elects to manifest its defects.

Another frequent construction of the strict liability rule compensates otherwise uncompensable economic losses if the plaintiff has also suffered personal injury or property damage. See, e.g., Hales v. Green Colonial, Inc. 490 F.2d 1015 (8th Cir. 1974). This mutant of the economic loss rule is also based on a rationalization misplaced in products liability negligence cases. Rejecting any limitations on economic loss resulting from negligent manufacture, the Washington Supreme Court properly viewed such a distinction as "specious":

> A distinction that would allow recovery if the product in question destroyed the property of another, yet would deny recovery were the same product merely to disintegrate, is a specious one. The proper function of equipment owned by a plaintiff, from which that plaintiff plans to derive income is of great concern to him. To suggest that a breakdown in production is not serious is naive. Berg, 555 P.2d at 822.

"Requiring recovery for economic losses to depend on the presence of personal injury or property damage is an arbitrary distinction leading to opposite results in cases that are virtually the same." Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1474 (9th Cir. 1984). For instance, if FPL had not detected the deterioration of the Turkey Point steam generators while it was still possible to confine the damage to the steam generators themselves and the undiscovered deterioration had damaged other facilities or injured FPL employees, FPL could recover lost profits under the Hales rationale. Yet, because FPL's vigilance and prompt action confined the damage to the steam generators, the economic loss rule precludes lost profits, even though the defect, the proximate cause, and the foreseeability in both situations are essentially identical. That would be a bizarre reward for competence. See also Emerson, 732 F.2d at 1474.

In strict liability in tort, liability attaches once a consumer in the protected class establishes an injury stemming from the product at issue, whether the manufacturer was at fault or not and regardless of the manufacturer's ignorance of the existence of the injured consumer or the consumer's use of the product. To cap in some manner this otherwise limitless liability and to avoid exposing manufacturers to "damages of unknown and unlimited scope," Seely, 403 P.2d at 150-51, the courts that devised and implemented the doctrine arbitrarily precluded recovery of economic losses. That provided at least some boundary of protection. Since its inception, negligence

law has always provided its own methods of avoiding damages of "unknown and unlimited scope." When a defective product is challenged in a negligence action, the manufacturer can be held liable only if the plaintiff establishes fault, i.e., that the manufacturer breached a duty owed to the plaintiff, and that the breach was the proximate cause of foreseeable damages sustained by the plaintiff. In the instant case, where the parties are in privity and the purchaser's needs and intended uses of the product were explored through months of face-to-face meetings and site visits, the manufacturer was in a position to determine within a reasonable range of predictability the ramifications of a product failure for the purchaser. See also Emerson, 732 F.2d at 1474. That is to say, the protection against uncapped liability provided by the economic loss doctrine in strict liability cases is already provided by other, historically satisfactory, qualifications in negligence law.

Westinghouse's negligence damaged FPL's property so extensively that it required replacement. The damage and the losses which flow from it were manifestly foreseeable consequences of Westinghouse's negligence. They are recoverable under traditional, uniformly accepted concepts of Florida negligence law.

II.

LIMITATIONS ON ECONOMIC LOSS
RECOVERY MAY ONLY BE APPLIED PROSPECTIVELY

Should the Court determine that Florida law now encompass some version of the economic loss rule, that rule may

not be fairly applied retrospectively in this case. The economic loss rule had no role whatever in structuring the contractual relationship between FPL and Westinghouse. That doctrine emerged and evolved after the Turkey Point contract was negotiated and signed. It was not, and could not have been, considered by the negotiators in allocating the burdens and the risks of the Turkey Point contract. Therefore, that doctrine may not be employed as a prism through which the rights created under an antecedent contract are now to be viewed. It is commercial nonsense to suggest that contracts have no more permanence or certainty than that.

For purposes of resolving the second question certified to this Court by the Eleventh Circuit, the Court must have in mind the pivotal fact that the contract at issue here was negotiated in 1964 and 1965. At that time, the U.C.C. had not yet been adopted in Florida. At that time, the law of contract and the law of tort co-existed in Florida.33/ At that time, the parties to the contract neither intended nor negotiated any limitation on FPL's access to a full range of negligence remedies.34/ (V.6 at 851-52). At that time, the theory which

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33/ The co-existence of, and the right to simultaneously pursue, contract and tort remedies still prevails in Florida. See text at pp. 13-17, supra, and accompanying footnotes.

34/ Given FPL's well documented objectives in that negotiation, any such limitation, leaving FPL exposed to the unknown hazards of an untried technology, would have precluded the execution of the contract. See Florida Power & Light Company v. Westinghouse Electric Corporation, 517 F.Supp. 440, 443-56 (E.D. Va. 1981).

Westinghouse now espouses was not the law in Florida or in any other jurisdiction. At that time, the only two decisions according special treatment to economic losses were Santor, decided in New Jersey in February of 1965, and Seely, decided in California in June of 1965. Both were strict liability cases, not negligence cases, which dealt with the rights of remote purchasers. They adopted diametrically opposed doctrines.

At the time the parties entered into this contract, under established Florida law, there were no limitations whatsoever on FPL's negligence remedies against Westinghouse, should Westinghouse's performance be characterized by negligence. There was no law in Florida which precluded recovery of "economic loss" or any other foreseeable loss occasioned by negligence. The fortuitous later development of a patently contradictory, exception-riddled doctrine cannot alter rights existing at the time of the contract. Courts may not re-write the terms of a contract entered into by the parties after comprehensive, good faith negotiations. Nor may a court achieve the same results by measuring the rights of the parties against a body of law which did not exist at the time of the contract. To do so destroys the balance struck in the contract as surely as varying the terms of the contract itself.

In these circumstances, the Court should protect and preserve the justified expectations of FPL from retroactive application of the economic loss rule. See Lemon v. Kurtzman, 411 U.S. 192, 198-203 (1973); Chevron Oil Co. v. Huson, 404 U.S. 97, 105-107 (1971); Incollingo v. Ewing, 444 Pa. 263, 282 A.2d

206, 230 (1971). "The power of a court to make its decisions operate only prospectively 'whenever injustice or hardship will thereby be averted' is undoubted." Safarik v. Udall, 304 F.2d 944, 950 (D.C.Cir.), cert. denied, 371 U.S. 901 (1962).35/ Courts no longer "indulge in the [Blackstonian] fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights."36/ Today there is an acute judicial sensitivity to the reliance interests of parties, based upon the pragmatic recognition, expressed by the Supreme Court, that "judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of life underpins our modern decisions recognizing a doctrine of nonretroactivity." Lemon, 411 U.S. at 199.

Although as a general rule a decision of a court establishing a new principle of law is prospective as well as retrospective in its operation, this general rule is subject to a well-settled exception. Courts ordinarily will give a decision establishing a new principle of law only prospective

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35/ Retroactive application of a particular ruling is purely a matter of judicial discretion and is neither mandated nor prohibited by the federal or Florida constitution. Linkletter v. Walker, 381 U.S. 618, 629 (1965); Benyard v. Wainwright, 322 So.2d 473, 474 (Fla. 1975); see also Jones v. Watson, 98 Idaho 606, 570 P.2d 284, 286 (1977).

36/ Chevron Oil Co. v. Huson, 404 U.S. at 107, quoting Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring). Accord Mendes v. Johnson, 389 A.2d 781, 787-89 (D.C.Cir. 1978).

effect where persons may have contracted, acquired rights, or acted in reliance on the prior decision, and the operation of the later decision retrospectively would result in substantial harm to such persons. Safarik v. Udall, 304 F.2d at 949-50.

While a variety of factors are weighed in analyzing the prospective-retrospective issue, see e.g., Mendes v. Johnson, 389 A.2d 781, 789-91 (D.C.Cir. 1978), the United States Supreme Court has focused on three criteria in particular:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the equity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Chevron Oil Co. v. Huson, 404 U.S. at 106-07 (citations omitted). 37/

These factors preclude invocation of the economic loss doctrine in this case. First, not only was Seely itself a strict liability case of first impression, but its later

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37/ See also Rogers v. Lockheed-Georgia Company, 720 F.2d 1247, 1249 (11th Cir. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 292 (1984); International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119, 1121 (Fla. 4th DCA 1982), pet. for rev. denied, 430 So.2d 451 (Fla.), cert. denied, 464 U.S. 895 (1983).

excursions into the law of negligence were not "clearly foreshadowed" in 1965. At the time the contract was negotiated and the risks were allocated, the Seely doctrine had not been applied in Florida, California or any other state to causes of actions sounding in negligence. To the extent that Seely can be said to have found voice in Florida to any degree, that occurred more than seventeen years after the execution of the contract. It would be illogical to assume that FPL, or, indeed, Westinghouse, foresaw or could have foreseen a subsequent extension of the Seely doctrine to negligence cases in Florida. "The most ... [FPL] could do was to rely on the law as it then was." Chevron Oil Co., 404 U.S. at 107.38/

The second factor of the Chevron test applies as well. Its application is obviously affected by the compelling fact that the "rule" at issue is no longer the "rule" in even that jurisdiction which spawned it.39/ There are many disparate views on the subject and they travel overburdened with contradictions, exceptions and exclusions. The "prior history of the [particular] rule in question" is chaos. No "ultimate justice" could be served and no rule furthered by retroactively consigning FPL to that morass of doctrinal uncertainty.

38/ Cf. Humphreys v. State, 108 Fla. 92, 145 So. 858 (1933) (The law in effect at the time of the contract is incorporated into and becomes a part of the contract). Accord General Development Corp. v. Catlin, 139 So.2d 901 (Fla. 3d DCA 1962).

39/ See pp. 11-12 and 38-40, supra, and accompanying notes.

See Incollingo v. Ewing, 444 Pa. 263, 299, 282 A.2d 206, 230 (1971).40/

The purpose of what remains of the "rule" is to protect manufacturers from unfettered strict liability claims from remote purchasers of their product. Obviously nonretroactive application of that rule in this case will have no impact of any kind on that purpose. Manufacturers will not find themselves exposed to more rigorous strict liability claims from third-party purchasers if FPL is permitted to recover the foreseeable losses caused by Westinghouse's negligence. The "rule," accordingly, will be neither furthered nor retarded, which satisfies the second factor in Chevron. See International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119, 1122 (Fla. 4th DCA 1982), pet. for rev. denied, 430 So.2d 451 (Fla.), cert. denied, 464 U.S. 895 (1983).

40/ The second factor of the Chevron test was framed in Linkletter v. Walker, 381 U.S. 618 (1965), a criminal case analyzing the propriety of retrospectively applying a new Fourth Amendment search and seizure rule. As a consequence, analysis of the second factor in Chevron is somewhat attenuated in the civil, nonconstitutional area. In cases in which uncertainty exists as to whether retroactive application would further or retard the operation of a new rule, courts have emphasized a balancing test in applying the second factor in Chevron. Ingle v. Illinois Central Gulf Railroad Company, 608 S.W.2d 76, 83 (Mo. App. 1980), cert. denied, 450 U.S. 916 (1981). "They have weighed such factors as reliance upon existing applicable law, the need for stability, resulting hardship and injustice, against the benefits to be gained by applying a new rule retroactively." Id. (citations omitted). See also Lemon, 411 U.S. 192 (applying equitable considerations in deciding whether to apply a new rule retroactively). Accord Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla. 1973).

Nonretrospective operation of the rule has no measurable effect on Westinghouse's interests or expectations. When Westinghouse entered into this contract in 1965 it could not have prophetically expected that a doctrine would subsequently be developed which limited FPL's right to recover against Westinghouse in negligence. Westinghouse necessarily expected that the contract would govern its contractual relations with FPL, and that the tort law, as it existed in 1965, would govern its future tortious conduct, if any. Cf. JIG The Third Corporation v. Puritan Marine Insurance Underwriters Corporation, 519 F.2d 171, 174 (5th Cir.), rehearing en banc denied, 522 F.2d 1280 (5th Cir. 1975), cert. denied, 424 U.S. 954 (1976).

Finally, analysis of the third Chevron criteria -- the inequity that would be imposed by retroactive application -- crystalizes the need for nonretroactive operation in the instant case. The fulcrum of analysis "in deciding whether and to what extent a judicially changed rule of law should be given retroactive effect" in the civil context is "the degree to which the prior rule may have been justifiably relied on," Keltner v. Keltner, 589 S.W.2d 235, 240 (Mo. 1979) (citation omitted), by persons entering into "contracts and other business relationships." State Farm Mutual Insurance Company v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002, 1003

(1972).41/ As explained by the District of Columbia Court of Appeals:

> Where retroactive application of a new rule would result in substantial disruption of settled transactions and/or injustice to a party because of reliance on the continued validity of the prior legal rule -- especially one of long standing -- courts are extremely reluctant to accord retroactive effect to overruling decisions. Mendes v. Johnson, 389 A.2d 781, 789 (D.C. 1978).at 789.42/

41/ See also Lemon v. Kurtzman, 411 U.S. 192, 198-199 (1973); N.L.R.B. v. Beech-Nut Life Savers, Inc., 406 F.2d 253, 258 (2nd Cir. 1968), cert. denied, 394 U.S. 1012 (1969) ("There is nothing anomalous about a prospective change in a legal rule occurring in an adjudicatory setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another.") Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206, 230 (1971); Manturi v. V.J.V., Inc., 179 N.J. Super. 300, 431 A.2d 859, 861 (1981). See generally Annot., 10 A.L.R.3d 1371 (1966); Annot., 14 L.Ed.2d 992 (1966).

42/ Courts have freely ordered prospective application only of overruling decisions where justice and fairness require. Representative of these cases is Keltner v. Keltner, 589 S.W.2d 235 (Mo. 1979), where the defendant relied on 110 years of judicial precedent in structuring a complex marital property settlement agreement. When the law was modified to permit imprisonment for failure to make alimony payments, the court refused to order retroactive application of the new law.

In a similar fashion, courts will not prejudice a party who, by relying on previously valid judicial authority, failed to enter into contractual arrangements to protect its interests. In Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11,163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960), the Illinois Supreme Court overturned the state's long-standing school district tort immunity doctrine. The Court refused to apply the abolition of the immunity doctrine to the case at bar, reasoning that retroactive application would impose undue hardship on the defendant school district which, in reliance on the immunity doctrine, failed to adequately insure itself against liability. See also Darling v. Charleston

(footnote continued on following page)

FPL's position is simply this: When the contract was negotiated, FPL had the right to rely on, and did rely on, the law then existing in Florida.43/ That law included the unfettered right to pursue negligence actions against vendors regardless of the existence of a contract. Limitations on that right had to be explicitly stated in the contract if they were to be said to exist.44/ In structuring the bargain and in allocating the risks, FPL was obligated to take into account any limitations on its rights imposed by the law of Florida. It could then design the terms of the contract accordingly. FPL could not be expected to anticipate -- and presciently draft around -- theories of judicial law not yet created. It had at the time the right to seek damages in negligence for any foreseeable loss it sustained, including Westinghouse's oft-defined "economic loss." FPL, therefore, had no reason to address this issue in the contract itself. It had no basis for anticipating the eventual application of a strict liability doc-

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(footnote continued from previous page)

Community Memorial Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966) (no retrospective application of decision overruling doctrine of charitable immunity because hospitals, relying on prior decisions, failed to carry adequate insurance). Accord Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W.2d 1 (1960).

43/ FPL's reliance in 1965 on existing Florida precedent which permitted recovery of economic losses as a result of the negligence of another party can be characterized as nothing but reasonable, which is all that the law requires. See Manturi v. V.J.V., Inc., 179 N.J.Super. 300, 431 A.2d 859, 861 (1981).

44/ Westinghouse clearly understood at the time of the contract that FPL had a right to pursue both contract and tort actions in the event of Westinghouse's negligent performance. See supra at pp. 17-18.

trine developed in California for a remote purchaser to a negligence action against a direct vendor in Florida. Under these compelling circumstances, courts have consistently held that "[a] decision of first impression or one of novel or unexpected impact, or one representing a significant change in the law, may well require prospective application." Board of Education of the Township of Willingboro v. Employees Assoc. of Willingboro Schools, 178 N.J. Super. 477, 429 A.2d 429, 430 (1981).

CONCLUSION

FPL respectfully requests that this Court answer the first question certified by the Eleventh Circuit in the affirmative, confirming that liability in negligence is governed by Florida's traditional and contemporary tort law concepts of duty, foreseeability and causation, irrespective of the type of damage sustained. Alternatively, should the Court now adopt some version of the economic loss rule, FPL respectfully requests that this Court answer the second question certified by the Eleventh Circuit in the negative, preserving the justified reliance of FPL on the law as it was in 1965 and applying the new rule only prospectively.

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