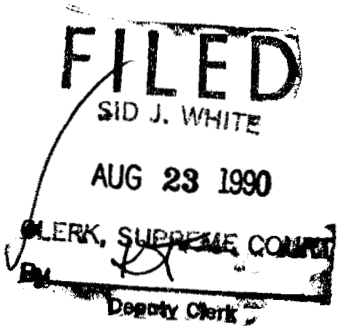
IN THE SUPREME COURT OF FLORIDA



CASE NO.: 75,991

WILLIE J. HIGH and
FLORIDA POWER & LIGHT COMPANY,

Petitioners,

-vs-

WESTINGHOUSE ELECTRIC CORPORATION, et al.

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT WESTINGHOUSE ELECTRIC CORPORATION

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PRELIMINARY STATEMENT

The issue presented in this case is whether a manufacturer's duty under products liability law to protect against injuries caused by its product should be extended beyond injuries occurring during the use or even misuse of its product to injuries occurring during the process of destruction or dismantling of what was once the manufacturer's product. Every court in other jurisdictions to consider the issue has held that such a "use" of the product is unforeseeable as a matter of law and, therefore, no duty is owed to the injured party upon which a claim against the manufacturer under negligence or strict liability can be sustained. In accordance with these uniform decisions, which are consistent with Florida law, the trial court entered the final summary judgment which led to these appellate proceedings.

The Petitioner and Plaintiff below, WILLIE J. HIGH ("HIGH"), filed a multi-count complaint against Petitioner FLORIDA POWER & LIGHT COMPANY ("FPL"), PEPPER'S STEEL & ALLOYS, INC. ("PEPPER'S") and Respondent WESTINGHOUSE ELECTRIC CORPORATION ("WESTINGHOUSE"), among others. HIGH sought recovery for alleged personal injuries which resulted from his contact with scrap transformers and the scrap dielectric fluid contained therein which had been sold by FPL to PEPPER'S, a scrap dealer. Final summary judgment was entered in favor of WESTINGHOUSE in light of the undisputed fact that HIGH's alleged injuries occurred during the process of destruction and dismantling junk transformers, which the trial court held to be an unforeseeable "use" as a matter of law from the perspective of WESTINGHOUSE, a manufacturer of functioning transformers. The

Third District Court of Appeal affirmed. Both HIGH and FPL have petitioned this Court for review of the Third District Court of Appeal's decision which that court certified as passing upon a question of great public importance.

The Record on Appeal will be referenced (R.[page]); HIGH's Appendix will be referenced (A.[page]); WESTINGHOUSE's Appendix will be referecned (W.A. [page]).

STATEMENT OF THE CASE AND OF THE FACTS

The relevant factual background of this case is undisputed. For more than 50 years, FPL has been purchasing functioning electrical transformers from a number of transformer manufacturers, including WESTINGHOUSE. These electrical transformers are manufactured and designed to raise and lower voltages, and FPL has purchased them for use in its day-to-day operations and business of supplying electrical power to businesses and consumers in Florida. The average useful life of a transformer is in the range of 40 years, after which it must be replaced. (R.1180-91)

During the 1970s, FPL disposed of its junk transformers, those retired from service, by selling them as scrap to PEPPER'S. (R.154) PEPPER'S was a scrap metal salvage business which purchased unwanted and obsolete metal equipment and stripped it to recover various metals for resale. (R.154) Upon receipt of the junk transformers from FPL, PEPPER'S employees would tear apart the transformers, dump the mineral oil dielectric fluid on the open ground or into a pit, and strip the transformers to recover any valuable metals inside, specifically the copper cores and aluminum. (R.154) While it has been alleged that the mineral oil in some of

the transformers scrapped at PEPPER'S contained traces of PCBs, there is absolutely no evidence in the record to establish that the oil with which HIGH allegedly came into contact contained PCBs, that HIGH ever came into contact with a **WESTINGHOUSE** transformer, or that any **WESTINGHOUSE** transformer sent to PEPPER'S contained PCBs. (**See** R.1111, 1174)

In a letter dated November 22, 1976, WESTINGHOUSE advised the entire industry, including FPL, that recent investigations indicated that "**some** oil-filled transformers **may** contain varying concentrations of PCB's." (R.1012; A.4)[1] Norton Bloom, president of PEPPER'S, testified that FPL did not convey the information it had received from WESTINGHOUSE to PEPPER'S and, in fact, FPL continued to deny to PEPPER'S the possibility that PCBs might be present in the junk transformers FPL had sold and was selling to PEPPER'S as scrap. (R. 45-49, 128-29) Nevertheless, by 1977, PEPPER'S was aware from inspections and discussions with officials

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[1]This letter does not suggest that a "substantial number" of transformers, much less those WESTINGHOUSE transformers scrapped at PEPPER'S, contained PCBs, as asserted by HIGH. (HIGH Brief at 7,22) The letter also does not suggest and was not intended to suggest that in those transformers in which PCBs were found, the PCBs were introduced during the manufacturing process as opposed to during use or maintenance by users or third parties after the transformers left the manufacturers' plants, as suggested by Petitioners; in fact, the letter suggests that the transformer users check their own transformer oil storage and handling systems for the presence of PCBs. (R.1012;A.4) WESTINGHOUSE objects to Petitioners' and Amici's reliance on regulations, statutes, or court decisions in cases in which WESTINGHOUSE was not even a party to support assertions of "fact" which are completely unsupported by any competent record evidence in this case. For instance, there is no evidence in the record to support the assertion that "many" or "substantial number[s]" of unidentified and irrelevant mineral oil transformers contain PCBs introduced during the manufacturing process. (FPL Brief at 12-13; HIGH Brief at 7, 22)

from Dade County Environmental Resources Management that PCBs existed on the site and that the suspected source of the PCBs was the junk transformers it was purchasing from FPL. (R.7-8, 128-29) Despite this knowledge, PEPPER'S allegedly did not advise HIGH or the other PEPPER'S employees of the situation. (R. 154, 156-59; **but see** R.12)

HIGH was employed at PEPPER'S for a number of years, primarily as a truck driver. HIGH would drive a truck, hauling scrap, including junk transformers, from all over the state to the PEPPER'S scrap yard. (R.309) HIGH, however, was not just a truck driver; he was an "all around man" who did "[w]hatever. . . needed to be done." (R.603) HIGH sometimes would assist other PEPPER'S employees unload the junk transformers from the truck with a forklift; if the forklift was not available, the scrap transformers would simply be rolled off the truck, crashing to the ground. (R.315-18) HIGH also assisted in tearing apart transformers when he did not have other things to do. (W.A. 4-5 (Tr. 92-93); **see** R.315-18) During these occasions, HIGH sometimes would be splashed with "a tiny drop or . . . a big drop" of the dielectric fluid on his leg. (R.347, 315-16)[2]

In 1983, HIGH commenced this action seeking recovery for personal injuries allegedly caused by exposure to PCBs in trans-

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[2]As the foregoing demonstrates, FPL's statement of the facts is inaccurate in that it suggests the "evidence is uncontradicted that HIGH had nothing to do with the dismantling of transformers." (FPL Brief at 7, 23) HIGH's deposition testimony and brief before this Court demonstrate the inaccuracy of this assertion. The statement of the facts in the Amici's brief is identical to that in FPL's brief and, therefore, suffers the same inaccuracies.

former mineral oil during his employment with PEPPER'S.[3] In October 1986, HIGH served his "Corrected Second Amended Complaint" in which he sued FPL, PEPPER'S and WESTINGHOUSE, among others. (R.153-77) In this complaint, HIGH asserted four theories of recovery against WESTINGHOUSE: negligence, breach of implied warranty of merchantability, breach of implied warranty of fitness for particular purpose, and strict liability in tort. (R.172-76)

The trial court dismissed HIGH's implied warranty claims and they are not involved on this appeal. (R.247-49) WESTINGHOUSE then served its motion for summary judgment on the remaining counts of negligence and strict liability. WESTINGHOUSE's motion was based solely upon a legal position -- that the destruction and dismantling of the junk transformers was an unforeseeable "use" as a matter of law from the perspective of the original manufacturers of working transformers. WESTINGHOUSE relied upon existing principles of Florida products liability law as well as three cases from other jurisdictions. (R.1180-91) HIGH filed a response to WESTINGHOUSE's motion, but did not cite any contrary authority.

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[3]A number of HIGH's co-workers at PEPPER'S filed nearly identical claims at or about the same time. Summary judgment has been entered against two of these co-workers based on the complete lack of any evidence of a causal relationship between their alleged exposure to PCBs at PEPPER'S and their alleged injuries. These summary judgments have been summarily affirmed by the Third District Court of Appeal. **See Blake v. Florida Power & Light Co.**, 528 So.2d 1195 (Fla.3d DCA 1988); **Smith v. General Electric Co.**, 514 So.2d 366 (Fla. 3d DCA 1987). In addition, seven others chose to voluntarily dismiss all their claims against WESTINGHOUSE.

(R.988-1054)[4] FPL did not file any papers in opposition to WESTINGHOUSE's motion.

At the hearing on WESTINGHOUSE's motion, HIGH essentially argued that a factual issue existed as to whether a duty existed and was breached and that the cases relied upon by WESTINGHOUSE should not be followed. (R.1096-1105) FPL did not oppose WESTINGHOUSE's motion at the hearing.[5] (R.1110-11) Ultimately, the trial court found the logic and reasoning in the cases relied upon by WESTINGHOUSE persuasive and granted WESTINGHOUSE's motion. (R.1112) Accordingly, the trial court entered a final summary judgment in favor of WESTINGHOUSE. (R.1199-1200)

Eight days after the entry of the summary judgment, FPL filed a motion for rehearing and for the **first time** sought to oppose the summary judgment. (1171-76) In its motion, however, other than raising irrelevant destruction versus handling distinctions for the first time, FPL simply reargued the position asserted by HIGH at

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[4]HIGH's reliance on a memorandum of law filed by FPL's counsel in the United States District Court in another case to establish "the culpability of WESTINGHOUSE in this case" is highly improper. (HIGH Brief at 10-11) The portions of the memorandum quoted by HIGH merely amount to unsupportable legal arguments which have been rejected by the federal district and appellate courts in finding appropriate the entry of summary judgment in favor of WESTINGHOUSE (and the other transformer manufacturers in that case) on FPL's (and other plaintiffs') contribution claims under the Comprehensive Environmental Response, Compensation and Liability Act and Chapter 403, Florida Statutes, relating to the clean up of the Pepper's Steel site. **See Florida Power & Light Co. v. Allis Chalmers Corp.**, 893 F.2d 1313 (11th Cir. 1990).

[5]The trial court invited FPL to take a position on WESTINGHOUSE's motion for summary judgment during the hearing. In response, FPL expressly declined to oppose WESTINGHOUSE's motion. (R.1110-11) Accordingly, FPL has waived any arguments it now attempts to raise on appeal.

the hearing. (R.1171-76) FPL's motion was ultimately denied. (R.1177) Both HIGH and FPL appealed to the Third District Court of Appeal. (R.1178-79)

The Third District Court of Appeal affirmed the summary judgment, agreeing with the trial court that the factually analogous cases from other jurisdictions relied upon by WESTINGHOUSE were consistent with Florida products liability law of negligence and strict liability. **High v. Westinghouse Electric Corp.**, 559 So.2d 227, 227-29 (Fla. 3d DCA 1990). (R.1201-08) The court held:

> Liability exists under section 402A [or[6]] for a negligent failure to warn **only** if there is a use of the product reasonably foreseeable to the manufacturer. The dismantling and recycling of products after they have been destroyed have been held to be product uses not reasonably foreseeable to manufacturers. [citations omitted]
>
> Although courts in Florida have yet to address this precise issue, there appears to be no reason to reach a contrary result in the present case. Westinghouse's transformers were destroyed prior to the alleged injuries. While the transformers were sealed and intact there was no harm. Rather, the alleged damage occurred after the contents of the devices were exposed through the dismantling process. Westinghouse's product as it had originally been sold to FP&L, for practical purposes, had ceased to exist at the time the alleged injuries occurred.
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> Where it is undisputed that a product defect

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[6]WESTINGHOUSE submits that the word "or" was mistakenly deleted from this sentence due to a scrivener's error as the sentence is otherwise a verbatim quote from the opinion in **Kalik v. Allis-Chalmers Corp.**, 658 F. Supp. 631, 634 (W.D. Pa. 1987), which is cited immediately thereafter.

> has been created by subsequent alteration (i.e., destruction) and not by the actions of the manufacturer, the manufacturer is properly exonerated of liability as a matter of law. [citations omitted]
>
> * * * *
>
> We find that the decisions cited by the trial court in its order in this case provide a persuasive basis for concluding that the actual products supplied by Westinghouse were the electrical transformers, not the contaminated dielectric fluid. As a matter of law, the unsealing, stripping, and dumping of the contents of Westinghouse's product in order to salvage junk components were not reasonably foreseeable "uses" of the product nor was Willie High an intended "user" within the meaning of section 402A.

559 So.2d at 228-299. (R.1202-04) HIGH and FPL filed motions for rehearing, for rehearing *en banc,* and for certification of specific questions, all of which were denied. (R.1214-15) The appellate court, however, certified to this Court that its decision passed upon a question of great public importance. **Id.** at 229 n.2. (R. 1214-15) HIGH and FPL have petitioned this Court for review, seeking to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its jurisdiction and deny review in this case because it does not involve matters of great public importance. Rather, the district court and the trial court merely applied existing and well-established principles of Florida products liability law in rendering their decisions. No suggestion was made by the lower courts that any change in the law would be appropriate under the facts of this case.

HIGH sued WESTINGHOUSE on theories of negligence and strict

liability. In order for a defendant to be liable to a plaintiff under such theories, it must first be determined that the defendant stands in such a relation to the plaintiff that the law of negligence or strict liability will recognize a legal duty owed by the defendant to the plaintiff. This determination presents a question of law for the court.

It is a general principle of law that a manufacturer owes no duty, and thus is not liable, to a person injured during an unforeseeable use of its product. Under Florida law, a manufacturer owes a legal duty under negligence or strict liability principles only to persons who are injured during a **use** of the manufacturer's product which is foreseeable to the manufacturer. In other words, the scope of a manufacturer's duty under products liability law is defined by the reasonably foreseeable and intended **use** of the product. A manufacturer is not an insurer against injuries that might be caused by the component parts of its product after the product's useful life has expired and the product has been disposed of or resold as a different product, i.e., scrap. Public policy, therefore, dictates that a manufacturer's potential tort duty with regard to its product ends when that product ceases being used, stored or handled as the original product and becomes a different product, i.e., scrap, which is sold for purposes of recycling, destroying, or salvaging the components which once made up the manufacturer's product.

Prior to the instant case, no Florida court had been squarely presented with this issue on facts similar to those involved here. A number of courts in other jurisdictions, however, have decided

the issue in cases involving analogous or substantially similar facts. The uniform rule established by these decisions is that the process of recycling or destroying a product for salvage is not a reasonably foreseeable use of the original product as a matter of law. Thus, every court to consider the issue has determined, as a matter of law and policy, that the manufacturer of a product is not liable to a person injured during such a process under either negligence or strict liability theories. Accordingly, the Third District's decision in this case simply aligns Florida with every other jurisdiction which has considered this precise issue.

It is undisputed in the present case that HIGH was allegedly injured not during a use of WESTINGHOUSE's products, but rather during the process of destroying and dismantling what were once WESTINGHOUSE's products. HIGH never even came into contact with WESTINGHOUSE's products, functioning sealed electrical transformers. Rather, his injuries were allegedly caused by contact with hunks of scrap metal and oil which once may have been component parts of WESTINGHOUSE's products. Under these circumstances, no legal duty is owed by WESTINGHOUSE to HIGH under which a negligence or strict liability claim can be sustained. Accordingly, the final summary judgment in favor of WESTINGHOUSE was properly affirmed by the Third District Court of Appeal, and this Court should approve the appellate court's decision.

ARGUMENT

I. THIS COURT SHOULD DENY REVIEW IN THIS CASE BECAUSE MATTERS OF GREAT PUBLIC IMPORTANCE ARE NOT INVOLVED.

Pursuant to art. V, § 3(b)(4), Fla. Const., this Court "[m]ay

review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." (emphasis added) Thus, this Court's jurisdiction in this case is purely discretionary. Fla.R.App.P. 9.030(a)(2)(A)(v). While the certification by the district court of appeal was necessary to invest this Court with jurisdiction to review the decision below, this Court is not bound to decide the merits of the question presented and has absolute discretion to deny review if it deems such appropriate. **See Stein v. Darby**, 134 So.2d 232, 237 (Fla. 1961); **Zirin v. Charles Pfizer & Co.**, 128 So.2d 594, 596-97 (Fla. 1961).

As discussed in more detail in the following Parts of this brief, the district court's decision does not create any new law, nor does it expand, restrict or alter any existing principles of Florida law. Rather, the decision of the district court, as well as that of the trial court, merely applies traditional, existing and long-standing principles of Florida products liability law to a factual situation not previously encountered by Florida courts. Furthermore, the district court did not even suggest that it would be appropriate to alter existing law to permit the claim asserted in this case. This case simply does not present the Court with a proper vehicle for expanding products liability law in Florida beyond its existing boundaries as requested by Petitioners. Accordingly, since the lower courts merely applied existing principles of Florida law, this case does not involve a question of great public importance and this Court should deny review.

Furthermore, for a decision to implicate a question of great

public importance, it is necessary that the **legal** issues determined have a significant impact outside the parameters of the case at bar so as to affect the public at large. **Lake v. Lake**, 103 So.2d 639, 642 (Fla. 1958). It follows that the legal questions determined below are those certified by the district court to this Court for review.[7] The relevant facts are undisputed and are stated in the district court's opinion. Yet, for the most part, Petitioners, most notably FPL, ignore the legal questions and base their challenge (which is without merit) upon purely **factual** arguments. This provides additional grounds for this Court to decline to exercise jurisdiction and to deny review in this case.

II. A MANUFACTURER IS NOT LIABLE TO A PERSON WHO IS INJURED BY WHAT WAS ONCE A COMPONENT PART OF ITS PRODUCT AFTER THE PRODUCT HAS ENTERED THE PROCESS OF DESTRUCTION FOR SALVAGE.

HIGH asserted products liability claims against WESTINGHOUSE under theories of negligence and strict liability in tort. In order for WESTINGHOUSE to be liable to HIGH pursuant to either theory, it must first be determined that WESTINGHOUSE owed a legal duty to HIGH under the circumstances. Since the process of destruction and dismantling of **junk** transformers, as a matter of law, is not a "use" of **functioning** transformers reasonably

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[7]Undoubtedly, the district court's decision and certification were made pursuant to the dictates of **Gilliam v. Stewart**, 291 So.2d 593 (Fla. 1974), which require the district court to apply existing law and to certify cases to this Court for determination of whether the present law should be altered or expanded to create or recognize a new cause of action as asserted in the case at bar which is not cognizable under existing law. Of course, unlike the situation in **Gilliam**, the district court below did not suggest that a change in Florida law would be appropriate in this case.

foreseeable to a manufacturer of **functioning** transformers, WESTINGHOUSE owed no legal duty to HIGH under either negligence or strict liability theories. Accordingly, the appellate court properly affirmed the final summary judgment in favor of WESTINGHOUSE.

A. Whether WESTINGHOUSE Owed A Duty To HIGH To Protect Him Against The Harm Claimed Is A Question Of Law For The Court.

It must be emphasized at the outset that the "foreseeable use" issue raised by WESTINGHOUSE below and involved on this appeal is purely one of law as to whether a duty existed between WESTINGHOUSE and HIGH in the first instance. Foreseeability as a determining factor of whether a duty exists must be distinguished from foreseeability as related to the question of proximate cause. **See Cassel v. Price**, 396 So.2d 258, 265 (Fla. 1st DCA), **review denied**, 407 So.2d 1102 (Fla. 1981). Issues relating to the former aspect of foreseeability (concerning duty), involve the question of whether the defendant stands in such a relationship to the plaintiff that the law will impose upon him any obligation of reasonable conduct for the benefit of the plaintiff. **See Westchester Exxon v. Valdes,** 524 So.2d 452, 454 (Fla. 3d DCA 1988).

It is axiomatic that to sustain a cognizable cause of action, a relationship between the parties must exist which gives rise to a legal duty on the part of the defendant to protect the plaintiff from the injury of which he complains. **Rishel v. Eastern Airlines, Inc.**, 466 So.2d 1136, 1138 (Fla. 3d DCA 1985); **Ankers v. District School Board**, 406 So.2d 72, 73 (Fla. 2d DCA 1981). The existence of a legal duty is in turn dependent upon the existence of a

relationship between the plaintiff and the defendant which imposes upon the defendant the legal obligation to conform to a standard of conduct so as to protect the plaintiff (and those in a similar relationship with the defendant) "from foreseeable and unreasonable risks of harm." **Florida Power & Light Co. v. Lively**, 465 So.2d 1270, 1273 (Fla. 3d DCA) (en banc), **review denied**, 476 So.2d 674 (Fla. 1985). Thus, a legal determination of foreseeability is a prerequisite to the imposition of a duty upon the defendant. **See Firestone Tire & Rubber Co. v. Lippincott**, 383 So.2d 1181, 1182 (Fla. 5th DCA), **review denied**, 392 So.2d 1376 (Fla. 1980).

Of course, if no duty exists, there can be no cognizable cause of action. **Rishel**, 466 So.2d at 1138. The threshold question in any case, therefore, is whether the defendant owes a legal duty to the plaintiff. **Price v. Morgan**, 436 So.2d 1116, 1119 (Fla. 5th DCA 1983), **review denied**, 447 So.2d 887 (Fla. 1984). This issue and the subsidiary issues related thereto concerning the relationship between the parties and foreseeable use are **always** questions of law to be determined by the court.[8] **Banat v. Armando**, 430 So.2d 503, 504 (Fla. 3d DCA 1983), **review denied**, 446 So.2d 99 (Fla. 1984); **see Westchester,** 524 So.2d at 455; **Lively**, 465 So.2d at 1273. **See also Department of Transportation v. Anglin**, 502 So.2d 896, 899 (Fla. 1987) (quoting from Prosser & Keeton, *Law of Torts* 272-73

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[8]HIGH's suggestion that the existence of a legal duty presents a question of fact for the jury is contrary to the law in this state and most other jurisdictions. Even the dissenting judge below acknowledged this by removing language from the original dissenting opinion which had suggested that the existence of a duty presented a factual question. (R.1209-13) **Compare** 14 F.L.W. at 2877 **with** 559 So.2d at 231.

(5th ed. 1984)). **See, e.g., Sakon v. Pepsico, Inc.**, 553 So.2d 163 (Fla. 1989) (holding as a matter of law and policy that defendant owed no duty to support a negligence action). It is this purely legal aspect of foreseeable use which requires affirmance.

B. Florida Products Liability Law Imposes Liability On A Manufacturer Only Where An Injury Occurs During A Foreseeable Use Of The Manufacturer's Product. Since High Was Not Injured During A Use Of Westinghouse's Product, Summary Judgment Was Properly Entered For Westinghouse.

Under Florida law, a person injured during the use of a product can assert an action against the manufacturer under theories of negligence and strict liability in tort. The manufacturer is potentially liable, however, only when the injury occurs during a **use** of the product which is reasonably foreseeable to the manufacturer. In other words, the scope of a manufacturer's duty under products liability law is defined by the intended and reasonably foreseeable **use** of the product as sold by the manfacturer. If the injury occurs during an unforeseeable use of the product, or -- as in this case -- not during a **use** of the product at all, no legal duty is owed by the manufacturer, and the injured person cannot maintain an action against the manufacturer under either negligence or strict liability theories. **High**, 559 So.2d at 228. **See Rishel**, 466 So.2d at 1138; **Price**, 436 So.2d at 1116; **Firestone**, 383 So.2d at 1182. **See also Sakon**, 553 So.2d at 166-67.

1. Negligence.

This concept is recognized in the law of negligence in a products case by conditioning the defendant-manufacturer's liability on a requirement that the plaintiff be injured by the

product while the product is being used in a foreseeable and intended manner. In **Matthews v. Lawnlite Co.**, 88 So.2d 299 (Fla. 1956) -- the seminal products liability case in Florida against a remote manufacturer -- the plaintiff was injured by a concealed dangerous device in a lounge chair he was examining and trying out in a retail store. In holding that a cause of action in negligence existed in favor of the plaintiff against the manufacturer, this Court adopted section 398 of the Restatement of Torts and held:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the **uses for which it is manufactured** is subject to liability to others whom he should expect to **use the chattel lawfully or to be in the vicinity of its probable use**, for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design. [emphasis added].

Id. at 300.

This same limitation on the scope of a manufacturer's potential liability under a negligence theory exists in cases involving inherently dangerous products -- which are not involved in the present case.[9] The Second Restatement imposes liability on

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[9]Derived from negligence principles adopted in **Tampa Drug Co. v. Wait**, 103 So.2d 603 (Fla. 1958), a "strict duty to warn" has been recognized by Florida courts in cases involving "inherently dangerous" products or, in the words of the Restatement, "unavoidably unsafe" products. **See generally Lollie v. General Motors Corp.**, 407 So.2d 613 (Fla. 1st DCA 1981), **review denied**, 413 So.2d 876 (Fla. 1982); **American Motors Corp. v. Ellis**, 403 So.2d 459 (Fla. 5th DCA 1981), **review denied**, 415 So.2d 1359 (Fla. 1982); **Dayton Tire & Rubber Co. v. Davis**, 348 So.2d 575 (Fla. 1st DCA 1977), **rev'd on other grounds**, 348 So.2d 575 (Fla. 1978). Unlike the present case, **Tampa Drug** and its progeny involve products which are inherently dangerous when being used in their ordinary, intended manner and injuries which occur during the ordinary, intended use of the products -- not because of some alleged defect in the product. As the district court recognized, inclusion of

the supplier of an inherently dangerous product only where "physical harm [is] caused by the use of the chattel in the manner for which and by a person for whose use it is supplied." Restatement (Second) of Torts § 388 (1965). This Court adopted a rule of law substantially equivalent to section 388 of the Restatement in **Tampa Drug Co. v. Wait**, 103 So.2d 603 (Fla. 1958), **receded from in part sub nom., Felix v. Hoffman-LaRoche, Inc.**, 540 So.2d 102 (Fla. 1989). In **Tampa Drug**, this Court held that the measure of the duty of the distributor of an inherently dangerous product is the reasonable foreseeability of injury that might result from the **use** of the product. 103 So.2d at 607. Thus, this Court held:

> It is with regard to this type of product that the law imposes upon the distributor a duty to the **using public**. This duty simply is to take reasonable precautions to supply **users** with an adequate warning notice that would place them on their guard against the harmful consequences that might result from **use** of the commodity. [emphasis added]

Id. at 608. This Court then emphasized that its ruling was not meant to make the distributor of an inherently dangerous product an insurer of the safety of that product. **Id.** at 608-09.

As these well-established principles of Florida products liability law indicate, a manufacturer owes a legal duty under a negligence theory only to those persons who are injured while **using** or while being in the vicinity of the **use** of the manufacturer's

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PCBs in mineral oil transformers does not render them inherently dangerous for their intended use -- intact units used to raise and lower voltages. **See infra** at p. 29-30. While this case does not involve an inherently dangerous product, the stricter principles and duties imposed on manufacturers of such products are used for analysis here to illustrate the lack of merit in Petitioners' arguments.

product.[10] It necessarily follows that where, as here, the plaintiff is allegedly injured not during a **use** or in the vicinity of a **use** of the product, but rather during the process of destroying and dismantling what was once the defendant's product, the plaintiff is in no sense a "user" of the original product and no duty is owed by the defendant manufacturer under negligence law to the plaintiff -- even if the transformers here were deemed "inherently dangerous" products, which they are not. **See Tampa Drug; Matthews.**

2. **Strict liability in tort.**

This same concept of foreseeable use limits the scope of a manufacturer's potential liability under the theory of strict liability in tort. In **West v. Caterpillar Tractor Co.**, 336 So.2d 80 (Fla. 1976), this Court adopted the theory of strict liability as set forth in section 402A of the Restatement as the law of this

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[10]The Amici's reliance on certain language from the opinion in **Tampa Drug** to the effect that a manufacturer can be liable for injuries resulting from a foreseeable "misuse" of its product is misplaced, and such language has no application here -- as Petitioners tacitly acknowledge. A "misuse" of a transformer might include using an inadequate size transformer for the amount of voltage passing through it, but the actual dismantling and destruction of a junk transformer for salvage of its components goes far beyond a simple "misuse" of the original product. In any event, the Amici ignore the corollary principle that a "knowing misuse" of a product does not create liability on the part of the manufacturer. **Talquin Electric Cooperative v. Amchem Products, Inc.**, 427 So.2d 1032 (Fla. 1st DCA 1983); **Georgia-Pacific Corp. v. Reid**, 501 So.2d 653 (Fla. 5th DCA 1986), **review denied**, 509 So.2d 1118 (Fla. 1987); **Clark v. Boeing Co.**, 395 So.2d 1226, 1229 (Fla. 3d DCA 1981); **see West**, 336 So.2d at 92. No reasonable contention has been or can be made that HIGH, PEPPER'S and FPL did not know that WESTINGHOUSE's transformers were not manufactured for the purpose of being torn apart for recovery of their components or for the purpose of having the dielectric fluid contained therein dumped or spilled on persons or the ground -- in violation of penal laws.

state. A manufacturer's duty under section 402A clearly extends only to "users" or "consumers" of the manufacturer's product. Restatement (Second) of Torts §402A(1) (1965). Use or consumption is defined to include all ultimate uses **for which the product is intended**. Restatement (Second) of Torts § 402A comment 1. Thus, under Florida law, the test for determining a manufacturer's liability under strict liability (or any products liability theory for that matter) is "whether or not the product was reasonably safe for its **intended use, as manufactured and designed,** when it left the plant of the manufacturer." **West**, 336 So.2d at 86 (emphasis added); **Clark v. Boeing Co.**, 395 So.2d 1226, 1229 (Fla. 3d DCA 1981).

In **West**, this Court expanded the class of potential plaintiffs who could maintain a strict products liability claim beyond those originally provided for in section 402A to include "innocent bystanders." 336 So.2d at 89. In doing so, however, the Court took great care to avoid the imposition of an overly broad duty on manufacturers. This Court held:

> Of course, the duty of a manufacturer for breach of which liability will attach runs **only** to those who suffer personal injury or property damage as the result of **using or being within the vicinity of the use** of the dangerous instrumentality furnished by a manufacturer which fails to give notice of the danger. [emphasis added]

Id. Thus, even though an "innocent bystander" may recover under strict liability, the scope of the manufacturer's potential liability is still defined by a **use** of its product; that is, the innocent bystander must have been injured as a result of being

within the vicinity of the **use** of the manufacturer's product in order to assert a claim under strict liability against the manufacturer. **Id. See also Ford Motor Co. v. Hill**, 404 So.2d 1049, 1050 (Fla. 1981) (noting that in **West** the Court held a manufacturer could be held liable under strict products liability "to a **user** of a product or a bystander to its **use**") (emphasis added). This Court in **West**, as it had done in **Tampa Drug** in the negligence area, emphasized that the adoption of strict liability did not make the manufacturer an insurer for all physical injuries caused by its products. **Id.** at 90. **See Royal v. Black & Decker Manufacturing Co.**, 205 So.2d 307, 309 (Fla. 3d DCA 1967), **cert. denied**, 211 So.2d 214 (Fla. 1968).

As these well-established principles of Florida products liability law indicate, a manufacturer owes a legal duty under a strict liability theory only to those persons who are injured while **using** or while being in the vicinity of the **use** of the manufacturer's product. It necessarily follows that where, as here, the plaintiff is allegedly injured not during a **use** of the product, but rather during the process of destroying and dismantling what was once the defendant's product, the plaintiff is in no sense injured "as a result of using or being within the vicinity of the use" of the original product and no duty is owed by the defendant manufacturer under strict liability to the plaintiff. **See West.**

3. No court has permitted a products liability claim against a manufacturer where the injury did not occur during a foreseeable and intended use of the manufacturer's product.

Petitioners have failed to cite a single case from Florida (or

elsewhere) in which a court has permitted a plaintiff to recover against a manufacturer where, as here, the plaintiff's injury did not occur during a foreseeable and intended **use** of the manufacturer's product. In all of the products cases relied upon or cited by Petitioners or Amici, the plaintiffs were injured by a product while the product was being used in an ordinary and intended manner. **See Johnston v. United States,** 568 F. Supp. 351 (D. Kan. 1983) (plaintiffs injured during repair and overhaul of instruments, undertaken so instruments could continue in use) and **Hethcoat v. Chevron Oil Co.**, 383 So.2d 931 (Fla. 1st DCA 1980), **on remand from**, 380 So.2d 1035 (Fla. 1980), **quashing in part**, 364 So.2d 1243 (Fla. 1st DCA 1978) (plaintiff injured during normal repair and maintenance on product to permit continued use of product);[11] **Whitehead v. St. Joe Lead Co.,** 729 F.2d 238 (3d Cir. 1984) (defendant supplied lead ingot for the express purpose of being used by plaintiff's employer in the manufacture of solder wire; plaintiff injured by exposure to lead particles released from the lead ingot during the manufacturing process); **Harrison v. McDonough Power Equipment, Inc.**, 381 F.Supp. 926 (S.D. Fla. 1974) (plaintiff injured by lawnmower while lawnmower being used by another); **Tampa Drug**, 103 So.2d at 605, 608 (decedent injured by exposure to fumes in cleaning chemical while using product to clean

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[11]The comments to section 402A of the Restatement indicate that ordinary repair and maintenance on a product so that the consumer or user can continue to use the product for its intended purpose are intended uses of the product. **See** Restatement (Second) of Torts § 402A comment 1 ("user" includes those who are utilizing product for purpose of doing work upon it, as in the case of an employee making repairs on a car).

floor -- a "purpose. . . within the stated purposes for which the label advertised that it was 'useful'"); **Advance Chemical Co. v. Harter,** 478 So.2d 444 (Fla. 1st DCA 1985) (plaintiff injured by exposure to ammonia in cleaning product while using the product according to the directions on the label to clean a floor), **review denied,** 488 So.2d 829 (Fla. 1986); **Brownlee v. Louisville Varnish Co.,** 641 F.2d 397 (5th Cir. 1981) (plaintiff-consumer injured when "disposable" aerosol can exploded in his trash can, and manufacturer admitted that disposal in family trash can was an intended use of the product); **Adobe Building Centers, Inc. v. Reynolds,** 403 So.2d 1033 (Fla. 4th DCA) (plaintiffs' property damaged as a direct result of using defendants' product for its ordinary and intended purpose; both majority and concuring opinions emphasizing that "use" or "consumption," which sets the parameters of the product manufacturer's potential liability, is defined in terms "uses for which the product is intended"), **review dismissed,** 411 So.2d 380 (Fla. 1981); **Johns-Manville Sales Corp. v. Janssens,** 463 So.2d 242 (Fla. 1st DCA 1984) (plaintiff injured by exposure to asbestos from thermal insulation products while the insulation was being used on Navy ships), **review denied,** 467 So.2d 999 (Fla. 1985); **Cohen v. General Motors Corp.,** 427 So.2d 389 (Fla. 4th DCA 1983) (duty to warn exists where product supplier has reason to know of danger inherent in "normal use" of product; finding no duty existed under facts). The plaintiffs in all these cases were injured as a result of "using or being within the vicinity of the use" of the manufacturer's product.

FPL asserts that the court in **Moffat v. U.S. Foundry &**

Manufacturing Corp., 551 So.2d 592 (Fla. 2d DCA 1989), recently extended a manufacturer's duty under products liability beyond protecting users, consumers or "innocent bystanders." The fallacy of FPL's argument is patent from a simple examination of the **Moffat** decision, including those portions of the opinion omitted by ellipses in FPL's brief. The defendant-manufacturer in **Moffat** had sold a drainage grate intended to be and actually being used as a component of a bridge. The grate was located across one portion of a pathway over the bridge which was designed for use by pedestrians and bicyclists. The plaintiff was injured when he was struck by an automobile while crossing the bridge on a bicycle. The accident allegedly occurred due to the plaintiff's attempt to cross the bridge without crossing over the grate which was alleged to contain slots large enough to trap bicycle tires and to create a hazard for bicyclists. The trial court dismissed the action at the pleading stage. **Id.** at 592.

As a secondary argument for affirmance,[12] the manufacturer argued that it owed no duty to the plaintiff in either negligence or strict products liability. Whether or not the plaintiff was a consumer or user of the manufacturer's product, however, was not at issue and was not relevant to the arguments presented or the issue decided -- contrary to the suggestion in FPL's brief. The issue

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[12]The trial court dismissed the action upon a determination that proximate cause was lacking as a matter of law. **Id.** at 592. The appellate court reversed because "causation . . . requires a careful consideration of factual details which need not be alleged" in the complaint. **Id.** at 592, 593. The court was quick to point out, however, that **summary judgment** based upon lack of causation might be entirely appropriate if the facts demonstrated that the grate "simply provided the occasion" for the accident. **Id.** at 593.

presented and decided by the court is evident from the court's opinion, quoted without deletion:

> [The manufacturer] argues that a person who is injured in the vicinity of a product is only owed a duty if the injury is caused by some explosion or other active defect in the product. We do not interpret the duty under strict liability to "innocent bystanders," established in **West v. Caterpillar Tractor Co.**, 336 So. 2d 80, 89 (Fla. 1976), so narrowly. Although not relying upon **Palsgraf v. Long Island R.R. Co.**, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928), [the manufacturer] clearly argues that this child was not a foreseeable plaintiff to whom a duty was owed **because its alleged negligence was "passive."** The fact that the grate did not actively cause the child's injuries may ultimately prove significant in determining the issue of causation. Nevertheless, **we see no reason to limit the duty owed in negligence or strict liability by an active/passive distinction which has not proven to be a manageable distinction in the past. See Houdaille Indus. Inc. v. Edwards**, 374 So.2d 490 (Fla. 1979). [emphasis added]

Id. at 593. Thus, the court in **Moffat** did no more than reject the argument that a manufacturer's duty under products liability law is limited by an active/passive distinction. Contrary to FPL's assertions, the plaintiff's status as an "innocent bystander" who was allegedly injured **while the product was being used in its ordinary and intended manner** -- as a drainage grate in a bridge -- was not even questioned by the parties or the court. Accordingly, FPL's argument that the court in **Moffat** expanded a manufacturer's duty under Florida products liability law, to extend beyond users of, consumers of, or "innocent bystanders" to the use of, the manufacturer's product, must be rejected.

Petitioners have failed to cite a single case from any jurisdiction in which a plaintiff has been permitted to pursue a

products liability claim against a product manufacturer where, as here, the plaintiff's injuries did not occur during a foreseeable and intended use of the product as manufactured and designed. There simply is no decision in Florida or in the United States which has imposed liability against a manufacturer under facts analogous to those in the instant case. Petitioners have failed to present any compelling reason why this Court should disregard decades of Florida and national jurisprudence which holds that a manufacturer is potentially liable to and thus owes a legal duty to only those persons who are injured as the result of **using** or being in the vicinity of the **use** of the manufacturer's product.[13] **See West**, 336 So.2d at 89; **Tampa Drug**, 103 So.2d at 608; **Matthews**, 88 So.2d at 300. **Cf. Sakon v. Pepsico, Inc.**, 553 So.2d 163, 166-67 (Fla. 1989) (holding manufacturer owed no legal duty to plaintiff, no duty was breached, and plaintiff's injuries were not foreseeable where plaintiff's injuries were not related to a **use** (emphasis by Court) of the manufacturer's product; noting that no decision in the United States had imposed liability on a manufacturer under similar facts).[14] Accordingly, the decision of the Third District

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[13]HIGH'S ability to recover for any injuries he may have suffered are completely protected since his claims against the proper party defendants, FPL, the party who sold the scrap metal and oil and benefited from its sale, and PEPPER'S, the party who dismantled the scrap transformers and dumped the oil on the ground and benefited from its activity, are currently pending in the trial court below. **See supra** note 10; **Georgia-Pacific**, 501 So.2d at 652.

[14]The Amici erroneously assert that "if a person knows, or with the exercise of reasonable diligence should know, that his conduct will likely result in harm to another," a duty necessarily arises under negligence law requiring the person to take action to prevent the injury. (Amicus Brief at 10) Amici's assertion was necessarily rejected by this Court in its recent decision in **Sakon**.

Court of Appeal in this case should be approved.

C. Florida Public Policy Considerations Support The Rule That A Manufacturer Cannot Be Held Liable To A Person Injured During The Process Of Destroying Or Dismantling For Salvage What Was Once The Manufacturer's Product

As the Court recognized in **West**, distinctions between different theories of liability in products cases have been of more theoretical than practical significance. 336 So.2d at 86. Thus, regardless of the theory asserted -- negligence, breach of warranty or strict liability -- there has been only one test recognized under Florida law for measuring a manufacturer's responsibility for injuries caused by its product:

> In a products liability suit against a manufacturer. . ., the sole test has been whether or not the product was reasonably safe for its **intended use, as manufactured and designed**, when it left the plant of the manufacturer. [emphasis added]

Id. at 86. **See also Clark**, 395 So.2d at 1229. In recognizing, developing and adopting products liability principles as Florida law, this Court has always carefully avoided the imposition of an

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In **Sakon**, this Court accepted as a fact that the defendant manufacturer "knew or should have known" that the manner in which it marketed its product would result in persons, such as the plaintiff, engaging in certain dangerous activity which could result in injury. 553 So.2d at 164. Nevertheless, this Court held as a matter of law that the defendant owed no legal duty to the plaintiff and was entitled to judgment as a matter of law despite the fact that the plaintiff was injured while engaging in the very activity actually foreseen by the defendant as a result of its conduct. **Id.** at 166, 167. Significantly, this Court emphasized that the plaintiff was not injured during a **use** of the defendant's product and, therefore, held as a matter of law and policy that the plaintiff's injury was unforeseeable from the standpoint of the manufacturer defendant -- the same result reached below in the present case. **See also Robertson v. Deak Perera (Miami), Inc.**, 396 So.2d 749, 750-51 (Fla. 3d DCA), **review denied**, 407 So.2d 1105 (Fla. 1981).

overly broad duty on manufacturers by limiting their potential responsibility for injuries to those occurring as a result of a reasonably foreseeable and intended **use** of their products. **See West**, 336 So.2d at 89; **Tampa Drug**, 103 So.2d at 608; **Matthews**, 88 So.2d at 300.[15]

Petitioners' theory in this case is in direct conflict with the carefully drafted opinions of this Court which expressly limit the persons to whom a manufacturer owes a duty to those injured during the use of the manufacturer's product (whether the injured person is the actual "user" or, rather, is simply in the vicinity of the product's use). **See West**, 336 So.2d at 89; **Tampa Drug**, 103 So.2d at 608; **Matthews**, 88 So.2d at 300. Petitioners would have this Court expand products liability law beyond its current boundaries to impose a duty unlimited in scope on manufacturers. The theory advanced by Petitioners goes far beyond the current protection afforded persons injured during the use of a manufacturer's product to include persons injured by components of what was once a manufacturer's product during the destruction and dismantling of the product for salvage. Petitioners' arguments cannot be supported in any way by the policies underlying products liability

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[15]Indeed, this Court has repeatedly emphasized that its adoption of various products liability principles has never been intended to make a manufacturer an insurer against all injuries that might be caused by its products or to impose a duty on a manufacturer to design only accident-proof or foolproof products. **West**, 336 So.2d at 90; **Ford Motor Co. v. Evancho**, 327 So.2d 201, 204 (Fla. 1976); **Tampa Drug**, 103 So.2d at 608-09. This policy against equating manufacturers with insurers applies with greater force in the present case than in the normal case since HIGH was not even injured by or during a use of WESTINGHOUSE's products, but rather by scrap material that once may have made up WESTINGHOUSE's products.

law in Florida.

The motivating force behind the development of today's products liability law was the recognition that the traditional requirement of privity as a prerequisite to suit was out of step with the modern realities of the marketplace and consumer marketing. Thus, products liability law developed to protect ultimate users and consumers injured during the normal use of a product. This was principally accomplished through the elimination of the requirement of privity as a prerequisite to suit between the ultimate consumer and the manufacturer. **See West**, 336 So.2d at 84-87; **see also Tampa Drug**, 103 So.2d at 607; **Matthews**, 88 So.2d at 300; **cf. Toombs v. Fort Pierce Gas Co.**, 208 So.2d 615 (Fla. 1968); **McBurnett v. Playground Equipment Corp.**, 137 So.2d 563 (Fla. 1962). Regardless of the legal theory asserted, the doctrine of products liability in Florida is premised on the public policy that manufacturers should be responsible for injuries proximately resulting from the normal and intended use of their products. As this underlying public policy was summed up by this Court in **West:**

> The manufacturer, by placing on the market a potentially dangerous product for use and consumption and by inducement and promotion encouraging the use of these products, thereby undertakes a certain and special responsibility toward the consuming public who may be injured by it.
>
> * * * *
>
> The consumer or user is entitled to believe that the product will [safely] do the job for which it was built.

336 So.2d at 86, 92. These policies clearly have no application to the present case where the alleged injuries did not occur during

the use of the products in a manner for which they were built, but rather after the useful lives of the products had expired, they had become scrap, and they had entered the process of destruction or dismantling for recovery of the scrap components.

As the district court recognized, the electrical transformers manufactured and sold by WESTINGHOUSE were not potentially dangerous for use in their ordinary intended manner -- to raise and lower voltages through power lines. Certainly, the alleged inclusion of PCBs in the dielectric fluid did not render functioning electrical transformers dangerous for their ordinary intended use. **High**, 559 So.2d at 228 (while the transformers were sealed and intact, there was no harm or potential danger). **See also Florida Power & Light v. Allis Chalmers Corp.**, Case No. 86-1571-CIV-ATKINS (S. D. Fla. order dated April 9, 1990) (even assuming the transformers contained PCBs, they posed no hazard of any sort until **after** they were stripped at the PEPPER'S site). (W.A. 15) Contrary to HIGH's assertion that transformers are "defective and dangerous because they contain PCBs" (HIGH Brief at 15, 24),[16] transformers containing PCBs are neither defective nor dangerous. To the contrary, transformers designed to contain dielectric fluid containing PCB or askarel were often purchased for use where fire safety was important because of the high fire resistant characteristics of PCBs. PCBs have been used in dielectric fluids in transformers since the 1930s because of this safety factor. (R. 1012; A.4; R.1082, 1180-81) Furthermore, in recognition of the

[16]WESTINGHOUSE has never "admitted" such an assertion, contrary to the suggestion in HIGH's brief.

continued value and utility of PCBs, Congress and the Environmental Protection Agency continue to permit the use of PCBs in "totally enclosed" items, expressly including "intact, nonleaking electrical equipment such as transformers." **See** 40 C.F.R. § 761.20 (1988); 15 U.S.C. § 2605(e)(2) (1988). Subject to certain conditions, "PCBs at any concentration may be used in transformers . . . and may be used for purposes of servicing including rebuilding these transformers for the remainder of their useful lives." 40 C.F.R. § 761.30(a). It necessarily follows, as the lower courts recognized, that inclusion of PCBs in mineral oil transformers does not render them dangerous for their ordinary and intended use. **See Florida Power & Light Co. v. Allis Chalmers Corp.**, Case No. 86-1571 (S.D. Fla. order dated April 9, 1990). (W.A. 15)

In addition, there is no evidence in this record or elsewhere that WESTINGHOUSE promoted the sale of its transformers for the purpose of reselling the components of the transformers as scrap. Certainly, WESTINGHOUSE never induced or promoted the dismantling and unsealing of its transformers and the dumping, spilling or splashing of the dielectric fluid therein on persons or the ground. Further, there is no evidence in this record or elsewhere that WESTINGHOUSE derived any financial benefit whatsoever from FPL's sales of the scrap metal and oil which once made up the transformers. Rather, the evidence is that FPL alone generated and benefitted from the sales of this scrap to PEPPER'S. (R.198-99,

206)[17]

As the foregoing demonstrates, none of the factors or policies which underlie the creation of Florida's products liability law support the imposition of liability on WESTINGHOUSE for the injuries allegedly sustained by HIGH in this case. It follows that no support can be found in Florida's public policy for Petitioners' request that this Court expand the existing boundaries of Florida products liability law through the imposition of a duty on WESTINGHOUSE which would support the instant claim.

Furthermore, permitting HIGH to proceed with a cause of action against WESTINGHOUSE in this case would undercut the very foundation of modern products liability law which seeks to distribute liability in accordance with responsibility for the injury-producing condition of the product. Even under strict products liability, the most expansive doctrine for imposing liability on a manufacturer, the manufacturer is potentially liable only if its product reaches the plaintiff **"without substantial change in the condition in which it is sold."** Restatement (Second) of Torts § 402A(1)(b) (emphasis added). Thus, the comments to the Restatement provide:

> The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by

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[17]It should be emphasized in this regard that this case does not involve a disposal by an ordinary consumer of a disposable household or consumer product. Rather, this case involves a disposal method selected by a sophisticated product user, FPL, whose decision as to disposal was profit-motivated. FPL was not simply disposing of junk transformers, it was selling scrap and collecting money and profits as a result of these sales. (R.198-99, 206)

> the time it is consumed.
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> * * * *
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> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, . . . the seller is not liable.

Id. comments g and h. Based upon these principles, where a product has been substantially altered after it leaves the possession of the manufacturer and such alteration results in the product being in a dangerous condition which results in injury, the manufacturer is not responsible for the dangerous condition of the product and, thus, is not liable. **See Ford v. International Harvester Co.**, 430 So.2d 912 (Fla. 3d DCA), **review denied**, 441 So.2d 631 (Fla. 1983). **Cf. Martinez v. Clark Equipment Co.**, 382 So.2d 878 (Fla. 3d DCA 1980) (finding changes in product did not relieve manufacturer of liability because they did not result in the product's dangerous condition which caused the injury).

When manufactured, WESTINGHOUSE's transformers were completely closed systems intended to be used as electrical transformers which raise and lower voltages passing through power lines. While the transformers were sealed and intact and being used as intended, there was no potential for harm through exposure to the PCBs alleged to be present in the dielectric fluid. Such a potentially dangerous condition only arose as a result of the substantial alteration of the transformers during the destruction and dismantling process carried on by PEPPER'S and FPL, during which the transformers were ripped open and the dielectric fluid therein was dumped, spilled or splashed on the ground and on HIGH. **See High**,

559 So.2d at 228; **Florida Power & Light**, Case No. 86-1571 (S.D. Fla.). (W.A. 15) These facts have not and cannot be questioned by Petitioners. Based on WESTINGHOUSE's indisputable lack of responsibility for the dangerous condition of the junk transformers which allegedly resulted in HIGH's injuries, the lower court properly held:

> [T]he determination of no liability is based upon a substantial change in the product from the time it left the manufacturer's control to the time of the subject incident; this change negates the manufacturer's liability for any alleged defect under 402A.
>
> Where it is undisputed that a product defect has been created by subsequent alteration (i.e., destruction) and not by the actions of the manufacturer, the manufacturer is properly exonerated of liability as a matter of law. [citations omitted]

High, 559 So.2d at 228. As the lower court held, at the time of HIGH's alleged exposure to PCBs, "WESTINGHOUSE's product as it had originally been sold to FP&L, for practical purposes, had ceased to exist." **Id.** Indeed, WESTINGHOUSE's products lost their independent identity when they were sold as scrap and were no longer being used, stored or handled as functional electrical transformers.

As the court in **Cassel v. Price** held:

> [S]o long as our system of laws recognizes a dividing line between conduct which may properly require a party to be subjected to the burden of trial and the risk of an adverse jury verdict for damages, and conduct which will not, the trial and appellate courts often have a duty, difficult as the task may be, of drawing that line.

396 So.2d at 261. The only logical place to "draw the line" on a manufacturer's duty to prevent injury from its product is at the

point where that product is sold and purchased by another party as a different product, i.e., as scrap. At that point, the manufacturer's product loses its independent identity and, for practical purposes, ceases to exist. **See High**, 559 So.2d at 228.

For instance, in the present case, FPL never sold PEPPER'S a functional WESTINGHOUSE transformer. Rather, it sold PEPPER'S "junk" transformers at a price determined by the type of copper, the number of pounds of copper contained therein, and the size of the junk transformer (or weight of the metal). (R.198-99, 206) Thus, FPL sold and PEPPER'S purchased hunks of scrap, not WESTINGHOUSE transformers. It was FPL who produced and sold scrap, not WESTINGHOUSE. WESTINGHOUSE certainly received no benefit from FPL's sales of scrap to PEPPER'S, and WESTINGHOUSE is not in the business of producing or "manufacturing" scrap. Public policy considerations, therefore, dictate that a manufacturer's tort duty with regard to its product ends when that product ceases being used, stored or handled as the original product and becomes scrap which has been sold for purposes of recycling or destruction and salvaging of components in the original product. This is precisely the basis of the lower courts' decisions in the instant case.

D. The Uniform Rule Throughout The Country Is That The Process Of Recycling Or Destroying A Product For Salvage Is Not A Reasonably Foreseeable Use Of The Original Product As A Matter Of Law.

As the foregoing discussion demonstrates, existing and well-established policies and principles underlying products liability law in Florida fully support the trial court's entry of final summary judgment in favor of WESTINGHOUSE in this case. The Third

District's affirmance of that judgment is likewise supported by these policies and principles. Furthermore, although the **factual** situation presented here is one of first impression in Florida, decisions of courts in other jurisdictions applying similar principles to similar facts provide additional support for the lower courts' decisions in this case.

To date, every court to consider the specific issue has determined, as a matter of law and policy, that the process of recycling or destroying a product is not a "use" of the product reasonably foreseeable to the manufacturer and, therefore, the manufacturer owes no duty to an individual injured during such a process under either negligence or strict liability theories. **See Kalik v. Allis-Chalmers Corp.,** 658 F. Supp. 631 (W.D. Pa. 1987); **Johnson v. Murph Metals, Inc.,** 562 F. Supp 246 (N.D. Texas 1983); **Wingett v. Teledyne Industries,** 479 N.E. 2d 51 (Ind. 1985). The rationale of these cases is completely consistent with the theories of negligence and strict liability recognized under Florida products liability law and fully supports the summary judgment entered by the trial court in this case. **High**, 559 So.2d at 227-28.

In **Wingett,** the plaintiff was injured while engaged in the removal of certain ductwork from a building. While engaged in the standard procedure in the industry for removal of the ductwork, an allegedly defective connection gave way and the plaintiff fell 25 to 30 feet and was injured. The plaintiff sued the owner and the manufacturer of the ductwork under theories of negligence and strict liability. 479 N.E. 2d at 53-54. The plaintiff asserted that the defendant "manufactured and installed a product with a

dangerously hidden defect and failed to warn him of the danger presented by his reasonably foreseeable use of the product." **Id.** at 55. The trial court granted summary judgment for the defendants upon a determination that the injury did not occur during a reasonably foreseeable use of the product. **Id.** at 54. The Indiana Supreme Court agreed.

Initially, the supreme court recognized that the question of whether a duty exists is a question of law for the court:

> The court must determine whether the law recognizes any obligation on the part of a defendant to conform his conduct to a certain standard for the benefit of the plaintiff.

Id. at 54. After reviewing the elements of strict liability,[18] the court rejected the plaintiff's contention that a person who dismantles or demolishes a product is a "user" or "consumer" protected by strict liability law. **Id.** at 55. The court also rejected the plaintiff's assertion that dismantling or demolishing a product is an intended use of the product within the scope of any products liability theory of recovery. **Id.** at 55-56. The court concluded as follows:

> We hold that a manufacturer's potential liability for products placed in the stream of commerce does not extend to the demolition of the product.
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> * * * *
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> It is uncontroverted that the ductwork was manufactured and installed solely for the purpose of collecting sand and dust from machinery used in the foundry. There is nothing to indicate any risk inherent in the

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[18]The substantial equivalent of section 402A of the Restatement was adopted by statute in Indiana. **Id.** at 55.

intended use of the ductwork.

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> [W]e hold that appellant's "use" of the ductwork was not reasonably foreseeable as a matter of law, notwithstanding appellant's allegation that he was employing the standard trade procedure for duct removal. Because the dismantling and demolition of the ductwork was not a reasonably foreseeable use of the product, [the manufacturer] owed no duty to appellant to warn of any risks related to his work as part of the demolition crew.

Id. at 56. Accordingly, the supreme court ordered the reinstatement of the trial court's summary judgment in favor of the manufacturer. **Id.**

In **Johnson v. Murph Metals,** the defendants were manufacturers of automotive batteries. After their useful lives, batteries are commonly resold as scrap for purposes of salvaging the valuable quantities of lead contained in them. The batteries are destroyed and the lead extracted and introduced into a lead smelting process. The plaintiffs were employees of various lead smelting plants who were allegedly injured by exposure to fumes and dust emitted during the lead smelting process. The plaintiffs sought recovery against the battery manufacturers under theories of strict liability and negligent failure to warn. The manufacturers moved for summary judgment on both theories. 562 F. Supp. at 248.

Initially, the court recognized that, under either theory, potential liability extends only to "users" of the product in question. To determine whether a plaintiff is a "user" of a product, the court held that the defendant's product must first be defined. The court found as a matter of law that the actual

products supplied by the defendants were the automotive batteries, not the hazardous lead contained in the batteries. The court then determined that the plaintiffs had not even come into contact with the defendants' products, since the defendants' products "had ceased to exist" prior to the alleged injuries. While recognizing that "users" is sometimes broadly construed to afford protection to injured parties under negligence and strict liability theories in products cases, the court held that "there are necessarily some limits on the concept of product use." **Id.** at 249. Ultimately, the court held:

> To hold that Plaintiffs are "users" of Defendants' product would expand the concept of products liability far beyond its existing boundaries.... [I]t would be untenable to find that the creation of dangerous gases due to the smelting of scrap metal is a "use" of Defendants' automotive batteries. The Court finds that there are no material fact questions as to the "use" issue, and that, as a matter of law, Plaintiffs are not "users" of the Defendants' products within the meaning of Sections 402A and 388 of The Restatement (Second) of Torts.

Id. at 249-50. Accordingly, the court entered summary judgment for the manufacturers on the plaintiffs' claims under strict liability and negligent failure to warn theories. **Id.**[19]

In **Kalik v. Allis-Chalmers,** the court was presented with a factual situation virtually identical to that involved in the present case. **Kalik** involved an action brought by the owners of a PCB-contaminated site on which the owners had operated a scrap

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[19]Contrary to the assertion in HIGH'S brief, the court in **Johnson** did **not** "indicate that its ruling [would] have been different if the Plaintiffs had been injured while the batteries were being destroyed." (High Brief at 14, 19)

metal business. The action was brought against manufacturers and suppliers of electrical components containing PCBs that had been scrapped at the site, and the plaintiffs sought to recover clean up costs and damages under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and under common law tort theories. It was alleged in the complaint that, during the course of storage, handling and dismantling of junk electrical equipment, PCB contaminated oil spilled or leaked onto the site. General Electric ("GE") was named as one of the defendants who had manufactured products containing PCBs and was sued under theories of strict liability (§ 402A) and negligent failure to warn. GE moved to dismiss these claims for failure to state a claim upon which relief could be granted.[20] 658 Supp. at 633-34.

The court determined that the controlling issue was whether, under the allegations of the complaint, the damages were incurred during a reasonably foreseeable use of GE's product. The court held that "[l]iability exists under § 402A or for a negligent failure to warn only if there was a use of the product reasonably foreseeable to the manufacturer." **Id.** at 634. The court then presented a discussion of the decisions in **Johnson** and **Wingett**. The court found that these cases stood for the legal principle that

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[20]HIGH's argument that **Kalik** should not be followed because "it is not possible to know what facts or evidence were available to the court at the time it rendered its decision" is without merit. (HIGH Brief at 13, 18) As the court was considering a motion under Rule 12(b)(6), Fed.R.Civ.P., it obviously did not consider any evidence, but rather relied solely on the allegations contained in the complaint. The court set forth the material allegations of the complaint in its opinion. 658 F. Supp. at 633-34.

the recycling or destruction of a product is not a use of the product reasonably foreseeable to the manufacturer as a matter of law. **Id.** at 635. Noting that there were no cases in which a court had asserted a principle of law contrary to that in **Johnson** and **Wingett,**[21] the court held:

> [T]hese decisions do provide a persuasive basis for concluding, as a matter of law, that the dismantling and processing of junk electrical components was not a reasonably foreseeable use of GE's product and the Court so finds.

Id. Accordingly, the court dismissed all claims against GE and the other manufacturers of electrical components arising from the dismantling and processing of the junk electrical equipment. **Id.** at 635-36, 638.

The same result is mandated in the present case. HIGH never came into contact with functioning electrical transformers, the products manufactured by WESTINGHOUSE. These products, even if they did contain PCBs, did not create any risk of harm to HIGH inherent in their **intended use**, to wit: to raise and lower voltages through electric power lines. **See Wingett**, 479 N.E. 2d at 56. Rather, HIGH alleges he was injured by exposure to PCBs in mineral oil dumped or spilled from junk transformers that had been

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[21]HIGH's assertion that the **Kalik** court admitted it could not find any cases in any jurisdiction addressing a similar factual situation is not accurate. (HIGH Brief at 13, 18) In fact, the court found the factual situations in **Johnson** and **Wingett** sufficiently similar to premise its decision on those cases. What the **Kalik** court actually stated was that the parties had not cited, and its research had not disclosed, any cases reaching results **contrary** to that reached in **Johnson** and **Wingett** on similar facts. **Id.** at 635.

sold by FPL to PEPPER'S. These junk transformers amounted to no more than "hunks" of scrap metal and oil. (R. 198-99, 206) Once the transformers were sold as scrap to PEPPER'S, WESTINGHOUSE's products "for practical purposes, . . . ceased to exist." **See High**, 559 So.2d at 228; **Johnson**, 562 F.Supp. at 249. The metals and oils that once made up WESTINGHOUSE's products entered the process of destruction, dismantling and recycling at that point. (R. 55) Since such a process is not a reasonably foreseeable use as a matter of law from the perspective of a manufacturer of functioning electrical transformers, WESTINGHOUSE is not liable to HIGH, who was allegedly injured "while the transformers were being dismantled." (R.1098, 2000) **See Kalik; Johnson; Wingett.** To hold that HIGH was injured during a **use** of WESTINGHOUSE's transformers "would expand the concept of products liability far beyond its existing boundaries." **See Johnson**, 562 F. Supp. at 249. Accordingly, since HIGH was not injured during the use of or while being in the vicinity of the use of WESTINGHOUSE's products, HIGH can not seek recovery against WESTINGHOUSE for his alleged injuries under a negligence or strict liability in tort theory. **See Kalik; Johnson; Wingett. See also West**, 336 So.2d at 89; **Tampa Drug**, 103 So.2d at 608; **Matthews**, 88 So.2d at 300.

HIGH and FPL seek to distinguish **Wingett**, **Johnson** and **Kalik**, on spurious, irrelevant and inaccurate grounds, yet they are unable to cite any authority in support of their position. In fact, in FPL's motion for rehearing filed in the trial court, it conceded that these three cases supported the trial court's ruling:

Those cases hold that the destruction of a

> product, or the recycling of component parts of a product after it has been destroyed, are not uses of the product reasonably foreseeable to the manufacturer, as a matter of law, and that a manufacturer is therefore not liable in negligence or strict liability in tort for injury to third persons resulting from destruction or recycling of its product.

(R.1171-72) Thus, the Petitioners' belated attempts to distinguish these cases fall far short and should be rejected.

FPL attempts to distinguish **Kalik** because the court there did not dismiss the claims against GE which arose from allegations of "storage and handling" of the electrical equipment as opposed to the dismantling and processing of the equipment. FPL then argues that since HIGH testified that he came in contact with mineral oil during "handling," as well as during dismantling and processing, junk transformers, the trial court erred in entering summary judgment in favor of WESTINGHOUSE. FPL's argument is without merit.[22]

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[22]This argument was not presented to the trial court by any party prior to entry of the final summary judgment under review. In fact, HIGH never presented or joined in this argument in the trial court at all. To the contrary, HIGH affirmatively asserted in the trial court that the alleged injury occurred "while the transformers were being dismantled." (R.1098, 2000) As discussed hereafter, this "handling" argument was first raised by FPL in its motion for rehearing. HIGH's half-hearted attempts to raise this frivolous argument for the first time on appeal must be rejected. **See Dober v. Worrell**, 401 So.2d 1322 (Fla. 1981); **Jaffe v. Endure-A-Life Time Awning Sales, Inc.**, 98 So.2d 77 (Fla. 1957); **Sparta State Bank v. Pape**, 477 So.2d 3 (Fla. 5th DCA 1985); **Hunter v. Employers Mutual Liability Ins. Co.**, 427 So.2d 199 (Fla. 2d DCA), **review denied**, 434 So.2d 887 (Fla. 1983). Just as HIGH's attempt to raise this "handling" argument for the first time on appeal is improper, so too FPL's attempt to raise this argument for the first time after entry of summary judgment, and after having expressly declined to oppose WESTINGHOUSE's motion at the summary judgment hearing, **see supra** note 5, is untimely and improper. **See Bonded Transportation, Inc. v. Lee**, 336 So. 2d 1132 (Fla. 1976) (raising issue for first time in motion for new trial is untimely and does

First, the entire premise of HIGH's claim is for injuries allegedly incurred during the dismantling of the junk transformers.[23] In fact, HIGH's counsel conceded as much at the hearing on WESTINGHOUSE's motion for summary judgment when he stated that "[t]he injury allegedly took place while the transformers were being dismantled." (R. 1098, 2000) HIGH's position before the trial court was simply that **Kalik** is "bad law" and should not be followed in Florida. The "handling" argument was first raised **by FPL,** who had previously refused to oppose WESTINGHOUSE's motion, in its motion for rehearing **after** final summary judgment had been entered below. Accordingly, this "paper issue" belatedly raised by FPL should have no bearing on the propriety of the summary judgment in favor of WESTINGHOUSE. **See Colon v. Lara,** 389 So.2d 1070, 1072

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not preserve issue for review on appeal); **Telephone Utility Terminal Co. v. EMC Industries**, 404 So.2d 183 (Fla. 5th DCA 1981) (raising issue for first time in motion for rehearing after entry of summary judgment is untimely and does not preserve issue for review on appeal). Accordingly, this Court need not and should not even consider this "handling" argument belatedly raised by Petitioners in an expedient attempt to manufacture an "issue" and create error where none exists.

[23]HIGH's testimony concerning his exposure to mineral oil in junk transformers during "handling" was that the mineral oil might "splatter" or "spill" when the transformers were "dropp[ed] the wrong way" or slipped off the hook while unloading "because sometimes the top wouldn't be on them good." (R.313, 315-16) As WESTINGHOUSE's transformers were designed as completely closed electrical systems, it is apparent that the transformers had been partially dismantled, i.e., tops dislodged, prior to any spillage. Needless to say, FPL's assertion that transformer oil was "splashed or spilled" on HIGH from "**intact**" transformers is factually illogical and nonsensical and certainly is contrary to the undisputed evidence of record. In any event, it is obvious from HIGH's testimony that his only possible contact with transformer mineral oil occurred **after** the transformers were sold as scrap and during the **process** leading to the ultimate destruction of what were **formerly** WESTINGHOUSE's transformers.

(Fla. 3d DCA 1980) (party cannot forestall the granting of summary judgment by raising paper issues).

Second, FPL's position stems from a misreading of the **Kalik** decision. The court in **Kalik** did **not** hold that storage and handling of junk electrical equipment was a reasonably foreseeable use of GE's products. Rather, the court simply recognized that the courts in **Johnson** and **Wingett** did not have the occasion to hold that such storage and handling was an unforeseeable use as a matter of law. Accordingly, the court simply declined to dismiss the storage and handling claims based on these decisions at the pleading stage of the case.

The underlying rationale of the decisions in **Johnson** and **Wingett**, however, clearly establishes that there is no reasonable or logical basis for a distinction between "storage and handling" and "dismantling and processing" of junk transformers **after they have been sold and purchased as scrap.** The legal policy behind the decisions in **Johnson** and **Wingett**, followed in **Kalik** and by the lower courts in this case, is that a manufacturer owes no duty to a person who is injured, not during a "use" of the manufacturer's product, but only after the product's useful life has expired, it has been sold as a different product, i.e., scrap, and the product has entered the process of being destroyed or recycled. At this point, the manufacturer's original product, for practical purposes, no longer exists. Accordingly, the summary judgment entered in the present case is fully supported by the rationale and reasoning contained in **Johnson** and **Wingett,** and adhered to by the court in **Kalik.**

E. WESTINGHOUSE's Letter Has No Bearing On The Legal Issue Of Whether WESTINGHOUSE Owes a Legal Duty To HIGH Under Negligence Or Strict Liability Principles.

Both HIGH and FPL argue that WESTINGHOUSE's letter dated November 22, 1976, raises a "factual" question on the foreseeable use issue. In that letter WESTINGHOUSE suggested to FPL and other utility customers that, in light of varying state legislation requiring special reporting, labeling and/or disposition of PCBs, they check their oil-filled transformers for the presence of PCBs "when performing repair, routine maintenance or disposal." (R.1012; A.4) HIGH and FPL argue that this quoted portion of the letter, which contains the word "disposal," creates a factual issue as to whether WESTINGHOUSE actually "foresaw" the ultimate disposal of its transformers.[24] Of course, the **legal** issue involved here

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[24]Petitioners strain the outer reaches of credibility by arguing that this letter shows not only that WESTINGHOUSE was aware that transformers will not last through eternity and, thus, will have to be disposed of someday, but also that WESTINGHOUSE was aware (presumably when it sold the subject transformers up to 60 years ago) that its transformers would be "recycled." (HIGH Brief at 7,26,28; FPL Brief at 21) Of course, Amici's statement -- without citation to the record -- that HIGH adduced testimony indicating WESTINGHOUSE actually knew its transformers would be recycled (Amicus Brief at 14) when it sold them decades ago is simply false. Even if such an unreasonable inference were permissible from WESTINGHOUSE's 1976 letter, the inference certainly would not include the foreseeability of the grossly negligent and criminal manner in which the salvage process was conducted in the present case. **See infra** note 25. Under Petitioners' argument, WESTINGHOUSE's use of the word "disposal" in its letter means it should have been aware and foresaw any possible means of disposal, presumably including illegally dumping junk transformers in the ocean causing damage to coral reefs. The absurdity of Petitioners' position is patent. Similarly, Petitioners' apparent reliance on the facts that concerns about PCBs have arisen since the early 1970s, that PCBs have been labeled as "toxic" or "hazardous" by Congress in 1976 and 1980 respectively, 15 U.S.C. § 2605(e); 42 U.S.C. 9601(14), and that recent Florida

is whether destruction and dismantling of a product is a foreseeable **use** subjecting the manufacturer to potential liability for injuries occurring during such a process, not whether the occurrence or event of disposal is foreseeable as a factual matter. **Cf. Sakon.** Accordingly, Petitioners' argument would deserve little comment but for the fact that they rely nearly exclusively on it for reversal.

The foreseeability issue involved here concerns the question of whether a legal duty is owed to HIGH by WESTINGHOUSE in light of the relationship between the parties and the lack of any injury occurring during a **use** of WESTINGHOUSE's product.[25] This issue

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legislation creates incentives to recycle products, § 403.702, Fla. Stat. (1989), **et seq.**, is misplaced and irrelevant, especially in light of the fact that the sales of most, if not all, the transformers from WESTINGHOUSE to FPL allegedly involved in this case took place decades earlier.

[25]It is clear that the argument presented by HIGH and FPL goes to that aspect of foreseeability relating to proximate cause. **See supra** Part II.A. While not the primary focus of WESTINGHOUSE's position, the trial court can be affirmed based on the proximate cause aspect of foreseeability as well. The criminal acts of PEPPER'S and its employees in dumping and spilling used mineral oil on the ground, thus exposing HIGH and others to the oil and any contaminants contained therein, constituted an independent, efficient, intervening cause of HIGH's injuries. (HIGH Brief at 4, 8-10 and references cited) The manner of disposal involved in the present case was clearly unforeseeable. The dumping of scrap oil, whether or not it contains PCBs, on the open ground violates penal statutes in nearly every state as well as federal law. Accordingly, even if PCBs were present in mineral oil in some transformers, such only provided the occasion for the negligent or criminal acts of one other than WESTINGHOUSE. The actions of PEPPER'S and its employees were so far beyond the realm of reasonable foreseeability that, as a matter of law and policy, WESTINGHOUSE cannot be held liable for HIGH's injuries. **See Department of Transportation v. Anglin,** 502 So.2d 896, 898-99 (Fla. 1987); **Roberts v. Shop & Go, Inc.**, 502 So.2d 915, 917 (Fla. 2d DCA 1986), **review denied**, 513 So.2d 1063 (Fla. 1987); **Hoffman v. Bennett**, 477 So.2d 43, 44 (Fla. 3d DCA 1985); **Jenkins v. City of Miami Beach,** 389 So.2d 1195 (Fla. 3d DCA 1980), **rev'd on other**

presents a matter of public policy and a pure question of law for the court. The fact that WESTINGHOUSE acknowledged in a letter that its products would be disposed of one day does not change the legal nature of the issue involved. **See High**, 559 So.2d at 229.

To state the obvious, every manufacturer of any product knows that its product will be disposed of someday. **See Perez v. National Presto Industries,** 431 So.2d 667, 668 (Fla. 3d DCA) (manufacturer cannot be expected to design products which will never wear out), **review denied,** 440 So.2d 352 (Fla. 1983). This fact, however, does not mean that a manufacturer is subject to liability *ad infinitum* for any injuries the dismantled component parts of its product, such as the mineral oil in the present case, may cause to individuals after the product's useful life has expired and the product has been sold as scrap material. It follows that WESTINGHOUSE's mere recognition in its 1976 letter that its transformers will be disposed of some day in some manner cannot be used to impose liability on WESTINGHOUSE *ad infinitum* for

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grounds sub nom., Avallone v. Board of County Commissioners, 493 So.2d 1002 (Fla. 1986); **Courtney v. American Oil Co.,** 220 So.2d 675 (Fla. 4th DCA 1968), **cert. denied**, 225 So.2d 919 (Fla. 1969); **Biltmore Terrace Associates v. Kegan,** 130 So.2d 631 (Fla. 3d DCA 1961), **cert. discharged,** 154 So.2d 825 (Fla. 1963). Accordingly, the final summary judgment can be affirmed for lack of proximate cause as well. **Anglin,** 502 So.2d at 898-99 (question of proximate cause is one for the court where there is an active and efficient intervening cause); **Hoffman**, 477 So.2d at 44 (third-party minor's negligent action of shaking defendant's harmful chemicals into plaintiff's eyes and face amounted to independent, efficient intervening cause which superseded defendant's negligence of leaving harmful chemicals unguarded and available to minor). **See General Telephone Co. v. Choate,** 409 So.2d 1101 (Fla. 2d DCA) (defendant not liable where he has created only a passive static condition which made the damage possible), **review denied,** 418 So.2d 1278 (Fla. 1982); Posser & Keeton, *Law of Torts* §43.

any injuries the dismantled components of its transformers cause to persons after the transformers' useful lives have expired, they have been sold as a different product, i.e., scrap, and they are no longer being handled, stored, worked upon or utilized as electrical transformers for the purpose of raising and lowering voltages. Accordingly, the district court correctly held that WESTINGHOUSE's 1976 letter to FPL does not have any bearing on the legal issue presented:

> Through the letter, Westinghouse did not assume liability for a transformer once its useful life was over and it had become a scrap item. Rather Westinghouse was acting in a responsible corporate fashion to inform its ultimate consumer, FP&L, of potentially important product information.

559 So.2d at 229.[26] Indeed, Petitioners' theory, which would have required WESTINGHOUSE to stand mute on the PCB issue to avoid liability, flies in the face of common sense and good public policy.

F. Maintenance And Repair Arguments Raised By FPL Are Irrelevant To This Case Which Does Not Involve Or Concern Injuries Occurring During Maintenance Or Repair.

Recognizing that the law and public policy is contrary to its position, FPL not only ignores the undisputed facts in this case, but tries to create new facts in its attempt to convert this case into a "maintenance or repair" case. FPL **alleges** that unsealing, stripping, and dumping the contents of ... transformers" are "tasks

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[26]Whether WESTINGHOUSE owed any duty **to FPL** and, if so, whether its letter discharged that duty are issues which are **not** involved in this case and are irrelevant to this Court's consideration of this appeal.

... required for routine maintenance or repair" and then seeks to analogize this case to one where a person is injured during maintenance or repair of a product. FPL's argument must be rejected for a number of reasons.[27]

First, this case has nothing to do with a person injured by a product during routine maintenance or repair performed on the product. Even the plaintiff allegedly injured here, HIGH, does not assert he was injured during maintenance or repair and does not attempt to make such an outlandish argument. This Court should refrain from deciding a case which is not before it.

Second, policy considerations different from those involved in the present case are clearly implicated where an injury occurs during routine maintenance or repair performed on a product in order **to permit its continued use in its intended manner.** Indeed, ordinary maintenance or repair performed on a product is considered to be an intended **use** of the product under the Restatement. **See** Restatement (Second) of Torts §402A comment 1. In contradistinction, the process leading to destruction or dismantling of a product for salvage of its component parts is universally held not to be a **use** of the original product, as the district court below recognized. **See High**, 559 So.2d at 227-29 (discussing the decisions in **Kalik**, **Johnson**, and **Wingett**). Thus, there is a logical, significant and critical distinction between an injury occurring

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[27]This argument was first raised by FPL in its motion for rehearing, rehearing *en banc*, and certification directed to the appellate court's opinion issued December 12, 1989. Accordingly, it should not even be considered by this Court. **See supra** note 22 and cases cited.

during routine maintenance or repair performed on a product and an injury occurring during the process of destroying and dismantling a product for salvage after its useful life has expired and it has been sold as scrap by the ultimate consumer of the original product.

Third, FPL's "maintenance or repair" argument is factually unsupportable. There is absolutely no evidence in this record to support FPL's **allegation** that the "unsealing, stripping and dumping the contents of ... transformers," or the dumping, spilling or splashing of the dielectric fluid in transformers onto persons or the ground as occurred here, are "tasks ... required for routine maintenance or repair of the transformers." **See Landers v. Milton**, 370 So.2d 368 (Fla. 1979) (party opposing properly supported motion for summary judgment must come forward with evidence sufficient to reveal genuine issue of fact and cannot rely on mere assertions of fact without any supporting evidence); **Harvey Building, Inc. v. Haley**, 175 So.2d 780 (Fla. 1965) (same); **Connolly v. Sebeco**, 89 So.2d 482 (Fla. 1956) (same). Accordingly, FPL's argument must be rejected as being factually unsupportable in addition to being legally unsound.

CONCLUSION

Based on the foregoing discussion and authorities, the decision of the Third District Court of Appeal should be affirmed.