IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,586

AIRPORT RENT-A-CAR,
a Florida corporation,

Appellant,

v.

PREVOST CAR, INC.,
a New Jersey corporation,

Appellee.
_____/

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

ON CERTIFIED QUESTIONS FROM
THE ELEVENTH CIRCUIT COURT OF APPEALS

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INTRODUCTION AND STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. (PLAC) is an organization established to express the views of its members, as friends of the Court, in cases involving significant products liability issues.

PLAC participated as amicus curiae before this Court in the case of Casa Clara Condominium Association Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993). Its purpose at that time was to suggest the profound social and economic impact which adoption of plaintiffs' position would have on the members of PLAC. PLAC was concerned because plaintiff was asking the court to realign the traditional role of contract law and tort law in resolving disputes--a change which would critically impact on manufacturers and sellers of goods in Florida.

This Court flatly rejected plaintiffs' position and confirmed that the economic loss rule was firmly imbedded in Florida law. Incredibly, it is only one year later, and a new Plaintiff is trying to open the very door which was sealed by the Court last year. Principles of stare decisis as well as sound economic and public policy considerations require that this Court once again refuse Plaintiff's attempt to disrupt an area of law which has been firmly settled.

STATEMENT OF THE CASE AND FACTS

PLAC adopts the Statement of the Case and Facts as set forth in the decision of the Eleventh Circuit Court of Appeals. Airport

Rent-A-Car, Inc. v. Prevost Car, Inc., 18 F.3d 1555 (11th Cir. 1994).

SUMMARY OF THE ARGUMENT

One year ago, this Court decided Casa Clara Condominium Association Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993) which, consistent with the landmark decision in Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987), reinforced this Court's commitment to the economic loss rule as an integral part of Florida products liability law.

Plaintiff appears before this Court arguing for "exceptions" to the economic loss rule which have already been rejected by this Court. Casa Clara; Florida Power. Moreover, since the economic loss rule is simply a restatement of the common law principle that negligence protects interests in the safety of one's person and property, any proposed "exception" to the economic loss rule would be an expansion of traditional tort law. Plaintiff has failed to demonstrate any justification for the creation of a new cause of action.

As to Plaintiff's first proposed "exception," in Casa Clara, this Court determined that the absence of a remedy in contract does not impact upon the decision that a tort claim does not exist for recovery of economic losses. The policies and theories behind the economic loss rule cannot change simply because a particular plaintiff is without a remedy.

As to Plaintiff's second proposed "exception," this Court has already rejected the "sudden, calamitous event" rule as being too indeterminate and inconsistent with the policies underlying the economic loss rule. Casa Clara; Florida Power. The policies which allow recovery in tort in a products liability action are only implicated where the use of the product results in personal injuries or damage to property other than the product itself. Thus, whether a product injures itself gradually or through a sudden, calamitous event--that distinction itself being often based on individual subjective opinion--is immaterial where no personal injury or property damage results.

As to Plaintiff's third proposed "exception," this Court has already rejected Plaintiff's argument that a "post-sale" or "continuing" duty to warn is not related to the original manufacturing process. Wallis v. Grumman Corp., 515 So. 2d 1276 (Fla. 1987). This Court has also already held that a failure to warn claim sounding in tort cannot be maintained where there is no personal injury or property damage. Florida Power. Thus, even assuming arguendo Florida law would recognize a post-sale duty to warn in any products liability context, such a duty cannot support an action in tort where there is no personal injury or damage to property other than the product itself. The same policies which preclude maintenance of an action premised on a failure to warn at the point of sale also apply where the action is premised on a failure to warn post-sale.

ARGUMENT

INTRODUCTION

Plaintiff in this case is a purchaser of two passenger buses which were destroyed by fire. Plaintiff brought this products liability suit against the manufacturer of the buses alleging that the vehicle was defective and unreasonably dangerous. The damages sought are purely economic losses--loss of the value of the buses, damages caused by the loss of use of the buses and costs of litigation. Plaintiff sought recovery under theories of strict liability and negligence (including negligent manufacture, design, and failure to warn). The court granted Defendant's motion to dismiss finding that Plaintiff has no cognizable tort claims under Florida law by virtue of the economic loss rule.

Plaintiff does not argue that it suffered personal injury or property damage. Rather, Plaintiff seeks to overcome this ruling by arguing for "exceptions" to the economic loss rule where: (a) it is alleged that there is no alternative remedy; (b) there is a sudden calamitous event; and (c) there is an allegation of a post-sale failure to warn.

A full understanding of the scope of the economic loss doctrine requires an exploration of the roots from which the doctrine developed. Accordingly, unlike Plaintiff's analysis this brief first describes the history leading to the adoption of economic loss rule. That discussion will demonstrate that: (1) the policies and philosophy underlying the economic loss rule

will not allow for the "exceptions" being asserted, and (2) this Court has already resolved the issues raised by this Plaintiff in Casa Clara Condominium Association Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993) and Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987). This appeal is nothing more than a motion for rehearing of those decisions.

I.

THE ECONOMIC LOSS RULE IS INCORPORATED INTO THE LAW OF CONTRACTS AND AS SUCH, TORT REMEDIES FOR ECONOMIC LOSS ARE UNAVAILABLE.

A. The Difference Between Contract Law and Tort Law.

The law of contract and the law of torts exist for different reasons, are designed to protect different interests, and provide for different remedies. In its simplest form, the difference between contract law and tort law is the difference between expectancy and duty.

Contract law is designed to enforce the expectancy interests created by agreement between private parties. Its purpose arises from society's interest in the performance of promises. Spring Motors Distributors v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660, 672 (N.J. 1985). The law imposes no standards to judge each party's performance, the only standards are those agreed upon by the parties. As such, contract law seeks to enforce standards of quality as defined by the contract. Barrett, Recovery of

Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C. L. Rev. 891 (1989).

The Uniform Commercial Code provides a comprehensive system for determining the rights and duties of buyers and sellers of goods. The framework provided includes the parol evidence rule, express and implied warranties, rules on disclaimers, notice requirements, limitations on the extent of a manufacturer's liability, and a statute of limitations. Each of these rules serves the purpose of determining the quality of the product promised, the quality of the goods to be received and the rights and obligations if these standards are not met. In short, the law of sales protects and governs the parties' expectations as set forth in the agreement between the parties.

Tort law, on the other hand, is designed to secure the protection of all citizens from the danger of physical harm to their persons or their property and is only implicated where actual physical injury to persons or other property has occurred. The basic function of tort law is to shift the burden of loss from the injured party to one who is better able to bear it. In contrast to contracts, where the standards are defined by the parties' agreement, tort standards are imposed by law without any reference to private agreement. See Spring Motors. These standards obligate each citizen to exercise reasonable care to avoid foreseeable physical harm to others. The penalties for failure to do so include a broader range of damages, including

punitive damages, as well as less restrictions on imposing liability, for example, no requirement of notice. For these reasons, of course, tort law is always attractive to a plaintiff in search of a remedy.

B. Economic Loss Falls Within the Boundaries of Contract Law.

Economic loss is generally defined as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent lost profits--without any claim of personal injury or damage to other property." Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966). Stated another way, it encompasses "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Comment, Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages--Tort or Contract? 114 U. Pa. L. Rev. 539, 541 (1966). These definitions of economic loss are consistent with the policy of warranty/contract law to protect expectations of suitability and quality. Thus, a buyer's desire to enjoy the benefit of the bargain is not an interest that tort law traditionally protects. Anderson Electric Inc. v. Ledbetter Erection Corp., 115 Ill. 2d 146, 503 N.E. 2d 246, (1986) (quoting Redaravicz v. Ohlendorf, 92 Ill.2d 171, 177, 441 N.E.2d 324 (1982)). Instead, as will be described below, the majority of courts have concluded that "contract law . . . provides the more appropriate system for adjudicating

disputes arising from frustrated economic expectations." Spring Motors, 489 A.2d at 672-73.

In recognition of the distinction between contract law and tort law, the California Supreme Court in Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) refused to apply tort law to a truck purchaser's claim for damages related to his allegedly defective vehicle; i.e., economic loss. Plaintiff in Seely purchased a truck for use in his business and found that it bounced violently. The dealer was unable to correct this problem. Subsequently, as the result of an alleged defect in the brakes, the vehicle overturned, causing damage to the truck, but not to its occupants. Plaintiff sought recovery under theories of warranty and strict liability in tort.

In affirming recovery under the contract theory, but not the tort theory, the court articulated the distinction between the two theories of recovery:

> The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries.

403 P.2d at 149.

The court further observed that the basic interest sought to be protected by warranty law--the quality of the product--is better served by contract remedies and principles. As explained

by the court, the plaintiff properly sought warranty damages related to the failure of the vehicle to perform as expected by this consumer; i.e., the normal uses for which this Plaintiff intended the vehicle to function. Had the manufacturer also been liable under a tort theory, then, the manufacturer would be accountable to other purchasers even though he had not agreed that the product would meet those consumers' demands. Such a broad scope of liability would be inappropriate.

> [The manufacturer] can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demand.

Id. at 151.

Viewed from the other perspective, the consumer:

> should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Id. In sum, the court concluded:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an

> accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.

Id. at 151.

C. The United States Supreme Court has Adopted the Distinction Between Tort and Contract as it Relates to the Economic Loss Rule.

Over the years, Seely emerged as the prevailing view which was ultimately adopted by the United States Supreme Court in East River Steamship Corp. v. Transamerican Delaval Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). Like Seely, the Supreme Court's decision in East River was grounded in the distinction between tort and contract. On the one hand, tort law concerns itself with protection of individual's safety. When a person is injured, the costs and the loss of time or health "may be an overwhelming misfortune and one which the person is not prepared to meet." East River, 476 U.S. at 871 (quoting Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944)). On the other hand,

> Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." The maintenance of product value and quality is precisely the purpose of express and implied warranties.

Id. at 2303 (footnotes and citations omitted).

Those damages are ones for which the parties may maintain insurance and for which the parties can reach their own agreements regarding limitations of liabilities, disclaimers of liability, and, of course, price. There is then, no reason to presume that the parties require additional protection:

> When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

Id. at 2302. Thus, the increased costs to the public that would be associated with providing protection through tort liability is not justified. Id. Ultimately, the Court concluded that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." 106 S. Ct. at 2302.

The rationale of Seely and East River has become the majority view in the United States. See cases cited in the appendix to Jones, Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort, 44 U. Miami L. Rev. 731 (1990). The majority view reflects not only the critical distinction between tort and contract, but also the public policy that the benefit of protecting individuals by shifting the burden of economic loss to manufacturers is outweighed by the impact that the rising costs of this shift would cause to the marketplace. See Casa Clara, 620 So. 2d at 1247. See also Barrett at 902.

D. **Florida's Adoption of the Economic Loss Rule.**

Florida courts have uniformly adhered to this distinction between tort and contract law. The landmark decision in Florida on the rule is Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So. 2d 899 (Fla. 1987).

In Florida Power, the plaintiff purchased two nuclear steam generators which it later determined to be defective. Plaintiff initiated suit under theories of breach of warranty and negligence seeking recovery of the costs of repair, revision, and inspection of the steam generators. Defendant moved for summary judgment on the negligence claim arguing that tort theories were inappropriate in the context of this claim for economic losses.

Following Seely and East River, this Court agreed that tort law which is concerned with safety and standards of care is unsuited to cover instances where a product injures only itself:

> We hold contract principles more appropriate than tort principles for resolving economic loss without accompanying physical injury or property damage.

Id. at 902.

Florida Power was in accord with earlier district court of appeal decisions on this issue. See Monsanto Agricultural Products Co. v. Edenfield, 426 So. 2d 574, 576 (Fla. 1st DCA 1982) (tort law imposes upon manufacturers a duty to exercise reasonable care so that the products they place in the marketplace will not harm persons or property; however, tort law does not impose any duty to manufacture only such products as

will meet the economic expectation of purchasers); GAF Corp. v. Zack Co., 445 So. 2d 350, 351 (Fla. 3d DCA 1984), rev. denied, 453 So. 2d 45 (Fla. 1984) (the law of torts affords no cause of action for the plaintiff to recover for its purely economic losses); Cedars of Lebanon Hosp. Corp. v. European X-Ray Distributors of America Inc., 444 So. 2d 1068 (Fla. 3d DCA 1984)(holding that strict liability should be reserved for those cases where there are personal injuries or damage to other property only); Affiliates for Evaluation and Therapy Inc. v. Viasyn Corp., 500 So. 2d 688 (Fla. 3d DCA 1987) (rejecting negligence claim for economic damages).

The challenge to the economic loss rule continued in this Court with Casa Clara. In Casa Clara, a homeowner brought a negligence claim against a concrete supplier alleging that a defect in the concrete caused damage to plaintiffs' residences. Focusing precisely on the distinction between tort and contract law, and adopting once again the analysis of Seely, East River, and Florida Power, the Court explained that the economic loss rule represents "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." Id. at 1246 (citing Barrett, 40 S.C. L. Rev. at 894). As the court explained, economic losses are disappointed economic expectations which are protected, if at all, by contract. Tort

liability, on the other hand, exists because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Id. at 1246 (citing Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 441 (1944) (Traynor, J. concurring)). When only economic harm is involved, the Court concluded, the consuming public as a whole should not bear the cost of economic losses sustained by those who failed to bargain for adequate contractual remedies.

E. The Implications of These Decisions.

From the foregoing discussion, it is apparent that the economic loss rule is not an arbitrary doctrine designed to limit certain plaintiffs' ability to recover. Rather, it is the "boundary" between two very different bodies of law: contract law, which protects expectancies; and tort law which imposes duties to protect against personal injury and property damage. Quite clearly, contract law and tort law exist for different reasons and serve different purposes. Contrary to plaintiff's view, economic losses do not sit on the fence ready to fall either way depending upon the prevailing winds. Instead, economic losses are part of the very foundation--the building block--of contract law. As such, an economic loss cannot become the basis of a tort claim.

One need only look to the harm done to determine whether the case falls within the realm of tort law or contract law. When

persons sue for personal injury or property damage, they may proceed in tort. A contract claim is also available if privity exists. However, when the damages sought are for economic losses only, tort law concerns for safety of persons and property are no longer implicated and the law regarding economic expectations will govern. See Sylla v. Massey-Ferguson Inc., 660 F. Supp. 1044 (E.D. Mich. 1984).

Once this distinction is understood, it becomes apparent that the economic loss rule is simply a restatement of the common law principle that negligence protects interests in the safety of one's person and property. Viewed from this perspective, any proposed "exception" to the economic loss rule, would be an expansion of traditional tort law. Such was the analysis of the Second District Court of Appeal in Sandarac Association v. W.R. Frizzell Architects, 609 So. 2d 1349 (Fla. 2d DCA 1992), rev. denied, 626 So. 2d 207 (Fla. 1993). The court in Sandarac concluded by noting:

> Because the law of negligence does not recognize a protected interest in purely economic loss, no cause of action exists under such circumstances. The analysis of an exception to the economic loss rule must justify the creation of a new cause of action--not a bar to an existing cause of action. It seems more difficult to justify a new claim than to lift a bar against an existing claim.

Id. at 133.

Plaintiff has failed to demonstrate any justification for the creation of a new cause of action. As such, each of its arguments must fail.

II.

THE ABSENCE OF A REMEDY IN CONTRACT DOES NOT IMPACT UPON THE DECISION THAT A TORT CLAIM DOES NOT EXIST FOR RECOVERY.

In its first issue on appeal, Plaintiff argues for an "exception" to the economic loss rule based on the alleged nonexistence of a remedy in contract for this particular Plaintiff.[1] Plaintiff's argument must fail because the issue has been resolved against Plaintiff's position by this Court in Casa Clara. Casa Clara is consistent with decisions outside of Florida that have addressed the issue. Finally, the Casa Clara result is supported by the foundational principles underlying the economic loss rule as well as sound policy reasons.

A. Casa Clara Foreclosed the Argument That an Alternative Remedy is Necessary before the Economic Loss Rule Can be Applied.

The homeowners in Casa Clara sought recovery against the supplier of concrete under products liability theories of negligence, strict products liability, and breach of warranty, as well as for violation of the building code. The trial court rejected all theories finding that: (1) the economic loss rule

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[1]At this stage of the proceedings, it is merely Plaintiff's assertion that it has no alternative remedy. The certified question to this Court reflects the uncertainty on this issue when it states that "Plaintiff claims to have no alternative theory of recovery."

applied to bar the tort claims; (2) the implied warranty claim was barred by lack of privity; and (3) the supplier of concrete had no duty to comply with the building code. The Third District Court of Appeal affirmed.

The case appeared before this Court based on conflict with several decisions including Latite Roofing Co. v. Urbanek, 528 So. 2d 1381 (Fla. 4th DCA 1988) in which the Fourth District Court of Appeal had held:

> It seems clear that invocation of the rule precluding tort claims for only economic losses applies only when there are alternative theories of recovery better suited to compensate the damaged party for a peculiar kind of loss.

Id. at 1383.

The elimination of plaintiff's implied warranty claim based on lack of privity was not challenged in Casa Clara. Moreover, this Court determined the concrete supplier had no duty under the building code. Thus, like the plaintiff in Latite, plaintiff's only potential remedy would be in tort. All parties and amici briefed the issue of alternative remedies.

On these facts, this Court found there could be no recovery in tort. In doing so, this Court expressly disapproved the decision in Latite. The Court also limited A.R. Moyer Inc. v. Graham, 285 So. 2d 397 (Fla. 1973), another case frequently relied upon for the "no alternative remedy exception," strictly to its facts. Casa Clara, 620 So. 2d at 1245, 1248 n.9. By overruling Latite and limiting Moyer, it is clear that this Court

intended to and did put an end to any arguments based on a "no alternative remedy exception."[2]

This Court's commitment to the concept that the presence of an alternative remedy is immaterial to the application of the economic loss rule is demonstrated by its approval of other decisions in which the absence of an alternative remedy did not preclude the application of the rule. For example, the Third District's decision in GAF was cited with approval by this Court in Florida Power as well as Casa Clara. In GAF, a roofing contractor sued the manufacturer of roofing material and was denied recovery in negligence based on the economic loss rule, while at the same time, his claim for breach of implied warranty was rejected based on the lack of privity. After finding that no tort or contract cause of action existed against the manufacturer, the court noted that plaintiff's "sole remedy, **if any**, for these economic losses" would be an action for breach of implied warranty or breach of contract against the seller of the material. Id. at 352 (emphasis added).

Recently, in Sandarac, the court focused on whether the economic loss rule only precluded a negligence claim when the parties had elected an alternative remedy under contract. In analyzing the issue, the court discussed Moyer, a case which had

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[2]That the absence of an alternative remedy was at the heart of the Court's reasoning is further demonstrated by the dissenting opinions which specifically took issue with the notion of barring a tort claim when no other remedy exists.

been interpreted to suggest that the absence of a contract remedy meant that the tort claim would be permitted. The Sandarac court rejected the position that Moyer and cases interpreting Moyer could be used to argue the need for an alternative remedy. Instead, the court concluded that Moyer was distinguishable because of the nature of the parties' duties. In Casa Clara, citing Sandarac, stated that Moyer should be strictly limited to its facts. 620 So. 2d at 1248. Thus, this Court was again reinforcing the notion that a "no alternative remedy" "exception" does not exist. See also American Universal Group v. General Motors Corp., 578 So. 2d 451 (Fla. 1st DCA 1991) (the fact that a warranty action against manufacturer was precluded did not justify extension of doctrine of strict liability); Affiliates for Evaluation and Therapy Inc. v. Viasyn, 500 So. 2d 688 (Fla. 3d DCA 1987) (consumer's action in negligence barred by economic loss rule; claim in breach of warranty barred because of lack of privity).

East River is the third case which has been adopted by this Court in which the absence of an alternative remedy did not preclude application of the economic loss rule. In East River, the plaintiff ship charterer was not in contractual privity with the remote manufacturer of the allegedly defective product. The court specifically acknowledged that the charterer could not have asserted warranty claims, yet, the court rejected the tort claims.

In light of the foregoing, this Court's position is clear and unequivocal--the existence of an alternative remedy is not necessary or relevant to a determination as to whether a tort claim is cognizable based on the economic loss rule.

B. Cases Outside of Florida Support this Court's Decision in Casa Clara.

Florida is not alone in its conclusion that the existence of an alternative remedy is immaterial. For example, in Palco Linings Inc. v. Pavex, Inc., 755 F. Supp. 1278 (M.D. Pa. 1990), one of the issues before the court with regard to the economic loss rule was whether the absence of other bases of recovery should preclude application of the economic loss rule. In that case, a subcontractor brought a negligence action against the architect/engineer on a construction project. Plaintiff argued the absence of a contractual remedy should justify its reliance on tort. The court disagreed:

> [Plaintiff] thus resorts to a tort claim only because it has no other basis for recovery. The economic loss doctrine was designed to prevent just such strategy. Palco's inability to recover in contract or warranty due to the lack of privity, although unfortunate, does not change the fact that Plaintiff's remedies in this matter are limited by law.

Id. at 1280. The court further explained:

> While Pennsylvania courts have addressed, as favorable, the fact that the use of warranties and other terms allow parties to allocate the risk of economic loss prior to engaging in transactions, those opportunities are not prerequisites to the application of the economic loss doctrine.

> Whether the parties take advantage of such opportunities is not relevant. . . . **[t]he question is not what recovery a plaintiff may receive as the alternative to tort, but whether recovery is permitted.**

Id. at 1281 (emphasis added).

Applying Wisconsin law, the court in Miller v. U.S. Steel Corp., 902 F.2d 573, 575 (7th Cir. 1990), held "privity of contract is not an element of the economic loss doctrine." Similarly, the Illinois Supreme Court has stated, "a plaintiff seeking to recover purely economic losses due to defeated expectations of a commercial bargain cannot recover in tort, **regardless of the plaintiff's inability to recover under an action in contract."** Anderson Electric, Inc. v. Ledbetter Erection Corp., 115 Ill. 2d 146, 503 N.E.2d 246 (1986).

Delaware addressed the question in Danforth v. Acorn Structures, Inc., 608 A. 1194, 1200 (Del. Super. 1992) finding:

> We are more persuaded, however, by the view that contract notions of privity are irrelevant to the question whether a commercial seller owes a duty to foreseeable users of its products, under tort law, to protect against the risk that its product, if defective might damage only itself.

Michigan has also resolved this issue by looking at the traditional roles of tort and contract law:

> The reliance on privity notions to ascertain whether tort or commercial law applies serves only to blur the distinction between, and applicability of, commercial law and tort law to economic losses. Instead, a more logical and conceptually manageable approach is to determine the type of loss a plaintiff is alleging. Allegations of only

> economic loss do not implicate tort law concerns with product safety, but do implicate commercial law concerns with economic expectations.

Sullivan Industries Inc. v. Double Seal Glass Co., Inc., 192 Mich. App. 333, 480 N.W.2d 623 (Mich. App. 1992). The analysis in Idaho is similar to Michigan. See Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978).

All the foregoing authorities simply confirm what this Court has already ruled--a plaintiff cannot seek tort remedies for purely economic losses, irrespective of whether there is an alternative remedy available.

C. The Casa Clara Decision is Consistent with Sound Policy and the Principles Underlying the Economic Loss Rule.

Incredibly, Plaintiff's brief reads as if Casa Clara never even mentioned Latite or Moyer. They suggest that Latite should control and that Casa Clara is different because the homeowners had remedies against other parties, while this Plaintiff has no other remedy. Plaintiff fails to explain, however, why the fact that in Casa Clara there is no contract remedy against a particular defendant, but there is a contract remedy against some other defendant should create a different result from the situation where there is no contract remedy at all. In fact, the very concepts and policies which support the economic loss rule demonstrate why Plaintiff's "no alternative remedy exception" must be rejected.

First and foremost (and without repeating the entire discussion above), the underlying premise of the case law which developed the economic loss rule including Seely, East River, Florida Power, and Casa Clara is not at all affected by the presence or absence of an alternative remedy. Since an economic loss falls within the orbit of contract law and outside the realm of tort law, tort concepts are inapplicable and cannot be recognized. To do otherwise, would in effect be to create a new cause of action. See Sandarac.

Secondly, each of the policies which support the economic loss rule are furthered by determining that the existence of other remedies is immaterial. Specifically, courts have determined that the consuming public as a whole should not pay the price for those who fail to bargain for adequate contract remedies. Casa Clara, 620 So. 2d at 1247; Barrett, supra at 933. It is undesirable to impose liability exposure on a manufacturer based on the "vagaries of individual purchaser's product expectation," Florida Power, 510 So. 2d at 901, which will have the effect of raising prices on every sale.

Plaintiff's assertion that it has no alternative remedy ignores the fact that, at all times, it was free to negotiate with its seller for warranty coverage or to purchase insurance to cover its risks. See Florida Power, 510 So. 2d at 901; Bocre Leasing Corp. v. General Motors Corp., 840 F. Supp. 231 (E.D.N.Y. 1994); American Universal. Presumably, the absence of a warranty

resulted in a lower purchase price which at least temporarily inured to Plaintiff's benefit. Now that an alleged problem has arisen, it would be unjust and unfair to expect the manufacturer and ultimately the public at large to bear the burden of Plaintiff's decision.

Additionally, adoption of this exception would actually encourage parties to forego negotiating warranty coverage and contract remedies in favor of the more lucrative tort recovery. It is well recognized that tort liability, which imposes less restrictions on liability and provides a broader range of damages, is favored by injured parties. See Casa Clara 620 So. 2d at 1245. If there were an automatic exemption from the implications of economic loss rule for one who has no contract remedy, the smart purchaser would intentionally avoid contractual relationships and purchase everything "as is" at a lower price thereby opening his avenues of relief in the event of a failure of the goods, placing the ultimate cost on society through higher prices.

Finally, a rule which would allow a remedy based on the facts of an individual purchaser's circumstances without regard to the underlying principles behind the economic loss rule, would not only be unfair to the manufacturer and public at large, but it would also be entirely unworkable. Numerous collateral issues would arise as the court attempts to identify those plaintiffs entitled to relief based on the "no alternative remedy"

exception. For example, how far does plaintiff have to go in order to demonstrate that he has no alternative remedy? Here, it is merely an allegation. Should that be deemed sufficient or must plaintiff seek and be denied relief against other entities? What if the entity against whom plaintiff has a cause of action is judgment proof or not a deep enough pocket to pay? Should the test be whether plaintiff is otherwise compensated in full? These questions and others demonstrate the foolhardiness of attempting to create a remedy based on a particular individual's needs and circumstances rather than on sound policy and reasoning.

The first certified question should be answered in the affirmative.

III.

UNDER THE ECONOMIC LOSS RULE, NO CAUSE OF ACTION EXISTS IN TORT FOR RECOVERY OF DAMAGE TO THE PRODUCT ITSELF EVEN IF THE DAMAGE IS CAUSED BY A SUDDEN, CALAMITOUS EVENT.

Plaintiff argues that a products liability action in tort should be created to allow recovery of purely economic loss in the nature of damage to the prcduct itself where that damage is caused by a "sudden, calamitous event." To the extent there was any arguable fire to this argument under previous Florida law,[3]

[3]In obiter dictum, the court in General Dynamics Corp. v. Wright Airlines, Inc., 470 So. 2d 788, 789 n.1 (Fla. 3d DCA 1985), made a passing reference to the "sudden, calamitous event" rule. The court's holding, however, was premised on the appellant's failure to properly preserve its issues for appellate review. Even in its observations on the merits, the court noted

it was completely doused by this Court in Florida Power. To the extent there was any spark left to the argument after Florida Power, it was extinguished by this Court in Casa Clara. Plaintiff presents absolutely no argument, policy or otherwise, that could provide fuel for reigniting any such argument here.

A. This Court has Already Rejected the "Sudden, Calamitous Event" Rule.

In Florida Power, this Court drew extensively on, and ultimately adopted, the rationale of the Supreme Court in East River in clarifying the principles of the economic loss doctrine under Florida law. This issue was squarely presented to the Supreme Court in East River because the Third Circuit in that case had adopted the "sudden, calamitous event" rule based upon its previous development and articulation of that rule in Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981).[4] After careful consideration of the

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that the tort claim there involved "cognizable property damage." Id. at 789 n 1, 790. Thus, the principles underlying the economic loss rule would allow maintenance of a tort action. In any event, the single reference to the "sudden, calamitous event" rule in Florida case law hardly suggests acceptance of the rule under Florida law. Certainly, it falls by the wayside in the face of the express reasoned rejection of the concept by both this Court and the United States Supreme Court in the later decisions of Florida Power, Casa Clara, and East River.

[4]Pennsylvania Glass involved a products liability action under Pennsylvania law. Following the Supreme Court's decision in East River, the Third Circuit reanalyzed this issue under Pennsylvania law and overruled Pennsylvania Glass, finding the East River decision was well reasoned and provided the better rule from a policy standpoint. Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110 (3d Cir. 1987), cert. denied, 486 U.S. 853 (1988).

varying positions across the country, the Supreme Court flatly rejected this rule that seeks to artificially differentiate between "the disappointed users . . . and the endangered ones":

> The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. **We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. But either way, since by definition no person or other property is damaged, the resulting loss is purely economic.** Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain--traditionally the core concern of contract law.

476 U.S. at 869-70 (citations omitted) (emphasis added).

In Florida Power, this Court reiterated the Supreme Court's holding that a manufacturer "has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." 510 So. 2d at 901. "[T]ort law . . . is particularly unsuited to cover instances where a product injures only itself." Id. Of course, speaking of a product "injuring itself" bespeaks of a sudden, calamitous, accident-like event, not a gradual deterioration of a product. Thus, in keeping with the very rationale underlying the economic loss rule and the policy distinctions between contract and tort law, this Court necessarily rejected the "sudden, calamitous

event" rule in Florida Power. See Florida Power & Light Co. v. McGraw Edison Co., 696 F. Supp. 617, 619-20 (S.D. Fla. 1988), aff'd, 875 F.2d 873 (11th Cir. 1989).

Any possible question in this regard was put to rest in Casa Clara. The plaintiffs in Casa Clara sought to invoke the "sudden, calamitous event" rule to save their tort claims for recovery of economic loss. Specifically, they argued that their tort claims should be permitted because the "exploding concrete," the product involved, could cause personal injuries, although it had not actually caused any such injuries to date. This Court expressly rejected plaintiffs' argument, finding such a rule based upon the "degree of risk," rather than actual damage sustained, was too indeterminate. 620 So. 2d at 1247. Again, following the rationale of the Supreme Court in East River, the Court held:

> This argument goes completely against the principle that **injury must occur before a negligence action exists.**

Id. (emphasis added).

B. The Policies Underlying the Economic Loss Rule Fully Support This Court's Rejection of the "Sudden, Calamitous Event" Rule.

This Court's previous rejection of the "sudden, calamitous event" rule is solidly based in the policies and principles that underlie and distinguish the law of contracts and the law of torts. As set forth above, these policies and principles were discussed and analyzed at length by the Supreme Court in East River, and that Court's reasoning was expressly approved and

adopted by this Court in both Florida Power and Casa Clara. It is significant in this regard, as observed by the Third Circuit, that the Supreme Court's East River opinion "was not a paste and scissor job that set forth the diverse holdings in myriad cases and then arbitrarily opted for one view over the others." Rather, the Supreme Court "identified, examined, and evaluated controlling dogma, doctrine, and fundamental principles of tort and contract remedies." Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 118 (3d Cir. 1987), cert. denied, 486 U.S. 853 (1988). By rejecting the indefinite case-by-case "sudden, calamitous event" rule and opting for the bright line drawn between the type of harm contract and tort law were designed to protect against, "a murky trudge through sophisticated nuances gives way to an unencumbered flight to basics." Id. at 119.

Plaintiff presents absolutely no rational policy argument for this Court to abandon its adherence to the traditional distinctions and "foundational boundary" between contract and tort law. See Casa Clara, 620 So. 2d at 1246. Indeed, the "sudden, calamitous event" rule introduces such a "murky line," see East River, 476 U.S. at 869-70, 875, between claims cognizable in contract versus tort, that it creates no certainty whatsoever upon which manufacturers can structure their business behavior. Id. at 870. Essentially, any "sudden, calamitous, accident-like event" involving a product can be traced to some "slower acting" phenomena. The end result would be that

manufacturers would be subject to potential tort liability (and lose any bargained-for contractual limitations to responsibility for product quality and value) based solely on the individual predilections of the trial judge before whom the claim happened to fall rather than on any predicable rule of law. See National Union Fire Ins. Co. v. Pratt & Whitney Canada, Inc., 107 Nev. 535, 815 P.2d 601, 605 (Nev. 1991); Continental Ins. v. Page Engineering Co., 783 P.2d 641, 648-49 (Wyo. 1989). See generally W. Keeton, Prosser and Keeton on The Law of Torts § 101 (5th ed. 1984).

In practical effect then, the "intermediate position" under the "sudden, calamitous event" rule is similar to the highly-criticized minority rule originally expressed in Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). The only difference is that the minority rule would hold manufacturers responsible for expansive tort liability for solely economic loss due to disappointed expectations as to product value and quality, whereas the "sudden, calamitous event" rule would expose manufacturers to the same liability with ultimate responsibility being determined on a case-by-case basis. Under either rule, the manufacturer is forced to increase the price of products and service to the public to cover its increased liability exposure.

In expressly rejecting the minority view, this Court held:

> [T]he minority view exposes a manufacturer to liability for negligence based on economic loss alone, replacing the freedom of bargaining and negotiation with a duty of

> care. A duty of care . . . is particularly unsuited to the vagaries of individual purchasers' product expectations. As important, under the minority view, a manufacturer faced with this kind of liability exposure must raise prices on every contract to cover the enhanced risk.

Florida Power, 510 So. 2d at 901. This Court determined that public policy dictated society should not bear the increased costs for products and services that would result if purchasers, who decide to obtain products at lower prices and fail to bargain for or purchase contractual protection through warranties, insurance or otherwise, are nevertheless permitted to recover in tort for disappointed expectations in the quality and performance of the products. Id. at 901-02.

The same considerations necessarily apply here. Only by adherence to the policy expressed in East River, as previously adopted by this Court, will society avoid the imposition of increased costs for products and services that would otherwise be necessary to cover the enhanced risk of liability exposure to manufacturers. This Court should adhere to the policy that encourages parties to negotiate economic risks through warranty provisions and price. See Florida Power, 510 So. 2d at 901. The second certified question should be answered in the negative.

IV.

UNDER THE ECONOMIC LOSS RULE, NO CAUSE OF ACTION IN TORT EXISTS FOR BREACH OF ANY POST-SALE DUTY TO WARN ABSENT PERSONAL INJURY OR DAMAGE TO PROPERTY OTHER THAN THE PRODUCT ITSELF.

A. No Cause of Action Exists For Breach of Any Post-Sale Duty to Warn Where the Damages Allegedly Caused By The Breach Consist Solely of "Economic Loss."

Plaintiff concedes, as it must, that any alleged failure to warn at the time of manufacture and sale of a product of known dangers inherent in the use of that product, which failure allegedly causes only economic loss, can not support a cause of action sounding in tort. (Initial Brief at 18) See Florida Power, 510 So. 2d at 900-02. Nevertheless, Plaintiff suggests that a cause of action in tort should be maintainable when that same product causes the same economic loss, but it is alleged that the manufacturer's failure to warn is predicated on the manufacturer's learning of the "defect" or dangerous characteristic of the product only after the manufacture and sale of the product. Thus, Plaintiff seeks to have this Court create a cause of action in tort against a manufacturer to protect purchasers of products from economic loss caused by the manufacturer's failure to warn of dangers or "defects" unknown and unknowable at the time of manufacture and sale, but learned about at some point post-sale.

Plaintiff presents no policy grounds to support recognition of such a new tort theory in this state. Instead, Plaintiff

relies solely upon three cases, the first of which does not support its position, the second of which has been overruled on the very point in question, and the third of which has been severely criticized by other courts to consider the issue. Examination of the case law as well as the policies underlying tort law and the economic loss doctrine leads to the inescapable conclusion that Plaintiff's arguments must be rejected.

1. **The Policies Underlying Tort Principles and the Economic Loss Doctrine as Defined in Florida Products Liability Law Preclude Plaintiff's Post-Sale Failure to Warn Theory.**

Recognition of a cause of action in tort which would allow recovery against a product manufacturer for purely economic loss where the claim is based upon an alleged breach of some purported post-sale duty to warn would be directly contrary to this Court's holding in the landmark case of Florida Power. In Florida Power, this Court held, based upon the policies underlying the economic loss doctrine, that the plaintiff could not maintain a cause of action in tort based upon an alleged failure to warn where the claim consisted of damage to the product itself and other associated economic loss, but no personal injury or damage to other property. 510 So. 2d at 900-02. The timing of the alleged "breach of duty," pre-sale or post-sale, is immaterial to the policy underlying the economic loss rule.

As discussed in detail above, the economic loss rule is premised on the well-established principle that personal injury

or property damage must occur before a negligence action can exist. Casa Clara, 620 So. 2d at 1247. Absent the occurrence of the type of damages which tort law was developed to protect against (personal injury and property damage), no products liability cause of action exists in tort--regardless of a purported "breach of duty" or when such a "breach" purportedly occurred.[5] Thus, Plaintiff's argument is necessarily defeated by the foundational principles underlying tort law and the economic loss doctrine as defined under Florida law.

Furthermore, Plaintiff's suggestion that the mere timing of the alleged breach of duty somehow disassociates the post-sale "breach of duty" from the act of manufacturing the product with a "defect" or unreasonably dangerous condition in the first instance is untenable. As this Court has expressly held, an "allegation of the failure of a continuing duty to warn is clearly founded on the design and manufacture of the [product] because the duty to warn of a defect arises because of [the defendant's] status as a manufacturer or seller of the [product]." Wallis v. Grumman Corp., 515 So. 2d 1276, 1277 (Fla.

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[5]See Casa Clara, 620 So. 2d at 1246-47; Florida Power, 510 So. 2d at 900-02; Affiliates, 500 So. 2d at 690-92; GAF, 445 So. 2d at 350, 351-52; Cedars, 444 So. 2d at 1070-71; Monsanto, 426 So. 2d at 576. See generally East River, 476 U.S. at 866-76; Sandarac, 609 So. 2d at 1352-53, 1355. See also Robertson v. Deak Perera (Miami), Inc., 396 So. 2d 749 (Fla. 3d DCA 1981) ("Negligence in the air, so to speak, will not do.") (citing Pollock, Law of Torts 468 (13th ed. 1920)).

1987). Thus, the distinction Plaintiff seeks to make between pre-sale and post-sale failures to warn is also legally invalid.

2. Decisions From Other Jurisdictions Have Overwhelmingly Rejected Attempts to Avoid the Principles Underlying the Economic Loss Rule Through Pleading a Post-Sale Failure to Warn.

Plaintiff provides no legitimate policy basis for distinguishing between pre-sale and post-sale failure to warn theories for purposes of application of the economic loss rule. Indeed, the policy implications are the same regardless of the theory of recovery on which Plaintiff's claim is based. Neither is cognizable where the damages claimed consist solely of economic loss since tort law is not designed to protect against such loss in the first place.

The argument presented by Plaintiff here was directly addressed and rejected by the Supreme Court of Wyoming in Continental Ins. v. Page Engineering Co., 783 P.2d 641 (Wyo. 1989). In Continental Ins., the plaintiffs' claim arose from the failure of a product which destroyed itself but caused no personal injury or other property damage. The plaintiffs sued the manufacturer under various theories, including negligent failure to warn. The trial court dismissed all plaintiffs' tort claims pursuant to the economic loss rule.

On appeal, the plaintiffs argued, as does Plaintiff here, that their post-sale failure to warn claim should have been permitted to proceed under the holdings in Miller Industries v.

Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984) and McConnell v. Caterpillar Tractor Co., 646 F. Supp. 1520 (D.N.J. 1986). The supreme court disagreed and expressly rejected the analysis in Miller and McConnell as being inconsistent with the policies underlying the economic loss rule and the legal distinctions between tort and contract law:

> [W]e rest our rejection of [plaintiffs'] argument squarely upon the proposition that recovery for pure economic loss should not be permitted when the tort alleged is failure to warn. Recognizing the conclusion to the contrary in [Miller and McConnell], we perceive that both styles of tort concern the conduct of the manufacturer, albeit that conduct may occur at different times in connection with the manufacturer's business. Certainly, it may be argued that the manufacturer who intentionally, or negligently, fails to warn of a known defect in a product that has been placed on the market is more culpable for his actions. The rejection of recovery for pure economic loss under theories of negligence and strict liability, however, has not been because of the absence of culpability, but because of the policy that economic loss is better adjusted by contract rules than by tort principles. What is true with respect to strict liability and negligence, i.e. the risk associated with a product which does not meet the expectations of a buyer is a risk better suited to resolution by agreement between sophisticated bargaining parties rather than shifting the economic burden through tort principles, also is true with respect to the tort of failure to warn. See W. Keeton, Prosser and Keeton on the Law of Torts, § 101 at 709.

783 P.2d at 649-50.

The Continental Ins. court also rejected the contention of the courts in Miller and McConnell that failure to recognize such

an action might encourage "a manufacturer who is aware it has a defective product on the market to hide behind its warranty while the buyer unknowingly uses it." See Miller, 733 F.2d at 818; McConnell, 646 F. Supp. at 1526 (quoting Miller). The court reasoned that imposing liability in tort for personal injuries and property damage is ample incentive to encourage manufacturers to warn of dangerous defects of which they are aware. 783 P.2d at 650. Of course, the manufacturer has no duty to produce a product that will meet the economic expectations of individual purchasers unless it contractually agrees to do so.

The court further found no inherent wisdom in recognition of a cause of action for economic losses based upon a post-sale duty to warn which "could impose a duty on the manufacturer to advise each customer of every change in the design of its product that, in some way, might lengthen the useful life of that product." Id. On the other hand, the court noted that to permit recovery where the product damages only itself simply because the plaintiff has alleged failure to warn of the defect will only encourage plaintiffs to present claims "clothed in 'failure to warn' language" that otherwise would be precluded by the economic loss rule. Id. As the court held, adoption of a tort theory of recovery for economic loss based upon allegations of a breach of a post-sale duty to warn would simply permit the plaintiff "to reach through a rear door that sanctuary from which he is foreclosed by a bar on the main entrance." Id.

The same result was reach by the court in Mays Towing Co. v. Universal Machinery Co., 755 F. Supp. 830 (S.D. Ill. 1990). There, the plaintiff argued that it could recover economic loss in the nature of damage to the product itself if the alleged failure to warn occurred after the sale of the product. Id. at 833. The court disagreed and held it would not permit plaintiff to circumvent East River by alleging the claim under a post-sale failure to warn theory:

> Plaintiff is precluded from recovery for damages to the product itself under any products liability tort theory. This conclusion is logically derived from East River.

Id. at 834. The court specifically found the Miller court's contrary holding unpersuasive because it predated East River and because the holding in East River addressed the type of damages recoverable under a tort versus contract theory, and the Supreme Court did not limit its holding to particular tort theories. Id.

Similarly, in Utah International, Inc. v. Caterpillar Tractor Co., 108 N.M. 539, 775 P.2d 741 (Ct. App. 1989), the court affirmed dismissal of a claim for economic loss based on an alleged breach of a post-sale duty to warn under the economic loss doctrine. The plaintiff in Utah Int'l, like Plaintiff here, sought to uphold its claim under the McConnell decision. Citing this Court's decision in Florida Power as an example, the Utah Int'l court found McConnell to stand alone against the multitude of post-East River cases that apply broadly the rule prohibiting

any cause of action in tort for recovery of economic loss. 775 P.2d at 745. The court held that "the same policy considerations which apply to defects in manufacturing also apply to failure to warn of defects." Id.

This Court, like the courts in Continental Ins., Mays Towing, and Utah Int'l, should reject Plaintiff's suggestion to create a cause of action in tort which would allow recovery against a product manufacturer of purely economic loss caused by a breach of an alleged post-sale duty to warn. The fundamental policies that underlie the distinction between the laws of contract and tort, embodied in the economic loss rule as adhered to by this Court in Florida Power and Casa Clara, preclude the recognition of such a cause of action.

3. The Decisions Relied Upon by Plaintiff Provide No Basis for Recognizing Plaintiff's Proposed Cause of Action in Tort.

The isolated court decisions relied upon by Plaintiff provide no compelling basis to break away from a 150 year-old doctrine firmly entrenched in Florida law.[6] For example, Plaintiff's reliance on Nicor Supply Ships Associates v. General Motors Corp., 876 F.2d 501 (5th Cir. 1989), is wholly misplaced. Nicor stands for the proposition--directly at odds with

[6]See Florida Power & Light, 510 So. 2d at 903 (recognizing what has come to be known as the economic loss rule "has a long, historic basis originating with the privity doctrine"); Winterbottom v. Wright, 152 Eng. Rep. 402 (1842)(decision generally credited with creation of the privity doctrine which precludes recovery of damages outside a contractual setting).

Plaintiff's argument here--that a cause of action in tort does not exist for a manufacturer's breach of a duty to warn which breach allegedly causes only economic loss:

> While failing to warn a purchaser of a defect in a product known at the time of manufacture is, of course, different from manufacturing a defective product, both negligent acts occur during the manufacturing process and before delivery of the product to the buyer. We are unable to assign to either act a relatively higher level of consciousness of wrongdoing, and thus do not discern a meaningful legal difference between them. Nicor's second cause of action is but a variant of its first claim, attempting to saddle a manufacturer with liability for damages that the Supreme Court has refused to impose.

Id. at 504. As explained by the court, recognizing such a cause of action in tort "would invite all purchasers of self-damaging products that were negligently manufactured but beyond the coverage of the warranty to style their complaints in terms of the manufacturer's negligent failure to warn of a known defect." Id. Permitting recovery on such grounds would frustrate the foundational principle underlying the economic loss doctrine and the distinction between tort and contract law--that a manufacturer should be liable for the damage a product causes to itself as a result of negligent manufacture or design only to the extent that the parties have contractually agreed to apportion liability in such a manner. Id. In any event, no cause of action in tort exists. Id. Accord Florida Power, 510 So. 2d at 900-02. See Continental Ins., 783 P.2d at 649-50 (recognizing

the same concerns and policies apply where a post-sale failure to warn claim is alleged).

In dicta, the Nicor court discussed the "possible exception" to East River carved out by Miller and McConnell. That "possible exception" related to those courts' holdings that a viable cause of action in tort could be maintained to recover economic loss caused by a failure to warn of a defect learned about by the manufacturer after the product had been delivered. 876 F.2d at 504. Since the case before it did not involve such facts or allegations, the Nicor court did not consider the merits of the "possible exception" further. The court certainly did not hold--as Plaintiff suggests--that a viable legal distinction exists between pre-sale and post-sale failure to warn claims, or that the latter can be maintained as an "independent tort" to recover economic loss while the former cannot. To the contrary, the court expressly stated that it intimated no opinion concerning whether a plaintiff could state a cause of action in tort to recover economic loss by alleging the manufacturer discovered a defect in its product after sale and manufacture and failed to warn of same. Id. at 505. Thus, Nicor lends no support to Plaintiff's argument.

Plaintiff's reliance on Miller is also misplaced. Miller no longer represents good law even in admiralty cases in the Eleventh Circuit. The Miller court's holding was premised on the circuit's historic rejection of any rigid separation of the law

of contracts or sales and the law of torts in admiralty cases. 733 F.2d at 817 (discussing Jig the Third Co. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (5th Cir. 1975) (former Fifth Circuit), cert denied, 424 U.S. 954 (1976)). In East River, the supreme court granted certiorari "to resolve a conflict" between the Third Circuit's decision in East River and the decisions of the courts in Miller and Jig the Third, among others. 476 U.S. at 863 and n. 1. By adopting in large part the rationale of the Third Circuit, but creating an even brighter line and a more rigid separation between the harm protected against by tort versus contract law and policy, the supreme court necessarily overruled and disapproved Miller and its precursors which were in conflict. 476 U.S. at 862, 870-76. See Shipco 2295, Inc. v. Avondale Shipyards, Inc., 825 F.2d 925, 927 (5th Cir. 1987), cert. denied, 485 U.S. 1007 (1987).

In McConnell, the last case relied upon by Plaintiff, the court wholesale adopted the analysis in the Miller opinion. Without addressing the inconsistencies created with the policies underlying the East River decision, the McConnell court held that a negligent failure to warn claim for economic loss did not involve negligence "as part of the manufacturing process" and thus was not precluded by East River. 646 F.Supp. at 1526. The court provided no analysis as to why the economic loss doctrine as espoused in East River did not apply to failure to warn claims, but rather merely quoted the Miller court's opinion which

was disapproved in East River. Certainly, the court's attempt to distinguish the duty to warn from the manufacturing process is invalid under Florida law. See Wallis, 515 So. 2d at 1277.

As discussed above, the Miller and McConnell decisions have been criticized and rejected by those courts that have addressed the issue. See Continental Ins.; Mays Towing; Utah Int'l. Thus, Miller and McConnell provide no sound support for Plaintiff's argument.

4. The Policies Underlying the Economic Loss Doctrine as Recognized in Florida Dictate Rejection of Plaintiff's Post-Sale Failure to Warn Argument.

Based upon the policies underlying the economic loss rule and the authorities discussed above, this Court should reject Plaintiff's request that this Court create a products liability cause of action in tort which would permit a plaintiff to recover purely economic loss based upon an alleged breach of a purported post-sale duty to warn of "defects" in a product discovered by the manufacturer after the manufacture and sale of the product. Recognition of such an action would, in practical effect, overrule a 150-year-old doctrine, eviscerate the distinction between, as well as the principles and polices underlying, contract and tort law, eliminate any of the certainty and safeguards contained in the law of contracts and the Uniform Commercial Code, and truly lead to "contract law drown[ing] in a sea of tort." See East River, 476 U.S. at 866; Casa Clara, 620 So. 2d at 1247; Florida Power, 510 So. 2d at 901, 902. This is

so because disappointed purchasers could overcome any warranty or contractual limitations by merely alleging the manufacturer failed to warn post-sale of a "defect" that adversely affected the purchaser's economic expectations with regard to the product. See Continental Ins., 783 P.2d at 650. This Court should not allow such subterfuge which would collapse the foundation of certainty and predictability of contract law that allows businesses to operate on an understood and accepted economic plane, and which would directly defeat the strong legal and social policies that encourage parties to negotiate economic risks through warranty provisions and price. See Florida Power, 510 So. 2d at 901, 902. The third certified question should be answered in the negative.

B. **This Court Should Expressly Refrain from Deciding Whether and Under What Circumstances, if any, a Cause of Action Exists for an Alleged Breach of Any Post-Sale Duty to Warn Where Personal Injuries or Property Damage is Involved.**

The third issue certified by the Eleventh Circuit begs the question of whether, under Florida law, a products liability cause of action can be maintained even for traditional tort damages (personal injury and property damage) where the plaintiff alleges a duty to warn which arose from facts which came to the knowledge of the manufacturer after the manufacture and sale of the product. Neither this Court nor any Florida appellate court has yet squarely addressed the underlying complex policy question of whether, and under what circumstances, if any, Florida law

should recognize any products liability action predicated on a purported post-sale duty to warn.[7] The effect of recognition of such an action would be quite widespread, impacting many policies underlying many established rules of law.[8] However, due to the inadequacy of the current record, this Court should expressly refrain from addressing this issue and the underlying policy considerations in this case.

As might be expected where numerous policy considerations are implicated, the courts around the country are split as to whether a post-sale duty to warn should be imposed on a manufacturer under any circumstances. Many courts have held a "post-sale" or "continuing" duty to warn exists only with regard

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[7]The concept itself has only arisen in a few Florida appellate decisions where, as here, such a duty was assumed arguendo to dispose of the case on another ground. See, e.g., Wallis, 515 So. 2d at 1277 (reference is made to plaintiff's "allegation" of a claimed breach of a "continuing duty to warn" in affirming dismissal of plaintiff's action as being barred by the statute of repose); Williams v. American Laundry Machinery Indus., 509 So. 2d 1363, 1365 (Fla. 2d DCA 1987) (same), rev. denied, 525 So. 2d 881 (Fla. 1988). There are no cases from this Court or the Florida appellate courts, however, where the question of whether an action premised on a "post-sale" or "continuing" duty to warn is viable under Florida law was actually briefed by the parties or directly addressed by the court.

[8]For instance, recognition of a post-sale duty to warn would impact and could displace the polices underlying rules of law relating to subsequent remedial measures and state-of-the-art concepts, as well as many well-established rules of law regarding the scope of a manufacturer's duties under Florida products liability law. See, e.g. Lynch v. McStomme & Lincoln Plaza Associates, 378 Pa. Super. 430, 548 A.2d 1276 (1988); Collins v. Hyster Co., 174 Ill. App. 3d 972, 529 N.E. 2d 303, 306 (1988), cert. denied, 124 Ill. 2d 554, 535 N.E.2d 913 (1989).

to an unreasonably dangerous condition of a product the manufacturer knew about, or in the existence of reasonable care should have known about, at the time of manufacture and sale; no duty, however, is owed to warn about a condition that becomes apparent only after sale, or about post-sale changes in the state of the art concerning safe operation or improved safeguards. See, e.g., Estate of Kimmel v. Clark Equipment Co., 773 F. Supp. 828, 831 (W.D. Va. 1991); Jackson v. New Jersey Manufacturers Ins. Co., 166 N.J. Super. 448, 400 A.2d 81, 90 and n.3, cert. denied, 81 N.J. 330, 407 A.2d 1204 (1979); Bottignoli v. Ariens Co., 234 N.J. Super. 353, 56 A.2d 1261 (1989). Other courts have recognized a "post-sale" or "continuing" duty to warn under various circumstances, but have taken great care in defining the scope of the duty, often limiting their holdings to the facts before them. See, e.g., Kozlowski v. John E. Smith's Sons Co., 275 N.W. 2d 917 (Wis. 1979); Gracyalny v. Westinghouse Elec. Corp., 723 F. Supp. 1311 (7th Cir. 1983); Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (1993); Walton v. Avco Corp., 383 Pa. Super. 518, 557 A.2d 372 (1989), aff'd in part, rev'd in part, 530 Pa. 568, 610 A.2d 454 (1992). See generally Schwartz, The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine, 58 N.Y.U. L. Rev. 892 (Oct. 1983).

This case does not present the appropriate vehicle for this Court to delve into the intricate policy issues involved in

determining whether or not to recognize a post-sale duty to warn in a products liability case. The record here is inadequate because neither the parties nor the federal courts have addressed this issue in the case. The record is also lacking in any factual development, precluding the Court from evaluating the implicated policy issues in any concrete factual situation. Accordingly, the determination of whether a products liability action premised on a post-sale duty to warn should be recognized under Florida law should await an appropriate case, where the issues are properly raised by the parties and the record is properly developed to allow appropriate consideration of the competing policy issues.

Nevertheless, it would be appropriate for this Court to expressly note in its opinion that its determination of the economic loss rule issue presented is not indicative of a recognition of a post-sale duty to warn under Florida law in any products liability case. That is, this Court has assumed arguendo the existence of such a duty only for purposes of resolving the limited issue presented. Absent such an express limitation, the sheer "weight" of the dicta created in cases such as the present case, where the viability of an action premised on a so-called post-sale or continuing duty to warn is assumed arguendo for purposes of disposing of the case on another ground, will have a serious, significant and unjustified impact on the day-to-day handling of products liability cases by the lower courts of this

state. See Dobson v. Crews, 164 So. 2d 252, 255 (Fla. 1st DCA 1964) (pronouncements of obiter dicta more often serve to confound rather than clarify law and, therefore, courts should confine and limit their pronouncements to those statements of legal principle necessary for deciding the issues presented), aff'd, 177 So. 2d 202 (1965); cf. Continental Assurance Co. v. Carroll, 485 So. 2d 406, 408 (Fla. 1986); Coastal Petroleum Co. v. American Cynamid Co., 492 So. 2d 339, 344 (Fla. 1986), cert. denied, 479 U.S. 1065 (1987).

CONCLUSION

Based on the foregoing, PLAC submits that the first certified question should be answered in the affirmative and the second and third questions should be answered in the negative.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 16th day of June, 1994 to GARY S. MAISEL, ESQ., Patterson & Maloney, 600 South Andrews Avenue, Suite 600, Ft. Lauderdale, Florida 33301; DANIEL M. M. BACHI, ESQ. and BARD D. ROCKENBACH, ESQ. SELLARS, SUPRAN, COLE & MARION, P.A., P.O. Box 3767, 1250 Northpoint Parkway, West Palm Beach, Florida 33402; and RICHARD SOLOMON, ESQ., Cabaniss, Burke & Wagner, P.A., P.O. Box 2513, Orlando, FL 32803.

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