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SUPREME COURT OF FLORIDA

AIRPORT RENT-A-CAR, INC.,
a Florida corporation,

Appellant,

v. CASE NO. 83, 586

PREVOST CAR, INC., a
New Jersey corporation,

Appellee.

AMICUS CURIAE BRIEF OF THE FLORIDA CONCRETE & PRODUCTS ASSOCIATION, INC.

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INTRODUCTION

Less than one year has passed since this Court carefully reexamined the Economic Loss Rule in *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993). The Florida Concrete & Products Association (hereinafter "Association"), which represents approximately eighty percent of the ready-mix concrete manufacturers and concrete industry suppliers in Florida, submitted an *amicus curiae* brief in *Casa Clara* because its members, in the course of negotiating with their customers and in assessing their insurance needs, have relied on the long-standing principle of law in Florida that purely economic losses are not compensable in tort.

The Association's *amicus curiae* brief in *Casa Clara* sought to focus the Court on the negative and socially undesirable economic consequences that any departure from the Economic Loss Rule would have on the Association's members, manufacturers and suppliers in general, and the consuming public as a whole. This Court expressly acknowledged those consequences in *Casa Clara* when it upheld the Rule and reconfirmed that it is an integral part of Florida law.

In disregard for the Court's decision in *Casa Clara*, the Appellant has mounted an all out attack on the Rule and the underlying policies on which it is founded. In effect, it asks this Court to abandon the Rule, even though the many negative consequences any departure from the Rule will have on the citizens of Florida, the Association's members, and product

manufacturers, are no less apparent today than they were when this Court decided *Casa Clara*.

The Association feels compelled, therefore, to join in this appeal to assure that its members' voices are heard again. Like its *amicus curiae* brief in *Casa Clara*, this brief is submitted with the intent of assisting the Court in understanding why the Appellant's arguments in opposition to the Economic Loss Rule are not supported by sound public policy, logic, or the established law of Florida, and how any departure from the Economic Loss Rule will harm the Association's members, product manufacturers, and, more importantly, the citizens of Florida.

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Case and of the Facts set forth in the Eleventh Circuit Court of Appeals' opinion in this case are adopted by the Association as its own.

STATEMENT OF THE CERTIFIED QUESTIONS

The following questions have been certified by the Eleventh Circuit Court of Appeals for resolution by the Court:

> (1) WHETHER, UNDER FLORIDA LAW, THE ECONOMIC LOSS RULE APPLIES TO NEGLIGENCE CLAIMS FOR THE MANUFACTURE OF A DEFECTIVE PRODUCT WHERE THE ONLY DAMAGES CLAIMED ARE TO THE PRODUCT ITSELF AND WHERE THE PLAINTIFF CLAIMS TO HAVE NO ALTERNATIVE THEORY OF RECOVERY.
>
> (2) WHETHER, UNDER FLORIDA LAW, A CAUSE OF ACTION OTHERWISE PRECLUDED BY THE ECONOMIC LOSS RULE MAY BE MAINTAINED IF THE DAMAGE TO THE PRODUCT IS CAUSED BY A SUDDEN CALAMITOUS EVENT.
>
> (3) WHETHER, UNDER FLORIDA LAW, A CAUSE OF ACTION MAY EXIST OUTSIDE THE BAR OF THE ECONOMIC LOSS RULE WHERE THE PLAINTIFFS ALLEGE A DUTY TO WARN WHICH AROSE FROM FACTS WHICH CAME TO THE KNOWLEDGE OF THE COMPANY AFTER THE MANUFACTURING PROCESS AND AFTER THE CONTRACT.

SUMMARY OF THE ARGUMENT

In *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993) and *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987), this Court firmly established that the Economic Loss Rule is an immutable principle of Florida jurisprudence. The Rule, which was erected to serve as the "fundamental boundary" between contract law and the law of torts, bars the recovery of purely economic losses in tort. In doing so, it encourages parties to negotiate economic risks through warranty provisions and price and to purchase insurance to protect their economic interests.

The Appellant, in disregard for the teachings of *Casa Clara* and *Florida Power & Light*, requests this Court to permit it to recover its purely economic losses in tort. It has failed, however, to explain why this Court should revisit issues that were resolved in *Casa Clara*. Nor has it pointed to any new public policy considerations, logic, or legal precedent to support the proposed exceptions to the Economic Loss Rule it requests this Court to adopt.

The so-called "no alternative remedy" exception to the Economic Loss Rule was thoroughly reviewed and expressly rejected by the Court in *Casa Clara*. This is evident from the Court's application of the Rule to bar the homeowners' tort claims against Toppino despite the fact they had no alternative theory under which to recover their purely economic losses from Toppino.

The Appellant's attempt to escape the clear application of *Casa Clara* to its case by alleging that, in addition to having no alternative remedy against the Appellee, it has no alternative remedy against the entity who sold it the buses in question, ignores the fact that it was free at all times to negotiate with its seller for warranty protection or to purchase insurance to protect its economic interests. Its apparent failure to protect itself contractually or through insurance does not justify imposition of tort liability on the Appellee. Such a result ultimately would force the consuming public as a whole to bear the purely economic losses sustained by the Appellant in contravention of *Casa Clara* and the Economic Loss Rule's underlying policies.

The purported "sudden calamity" exception to the Economic Loss Rule also was rejected by the Court in *Casa Clara* when it joined the majority of courts, including the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), in holding that a mere "risk" of injury, as opposed to actual injury, is insufficient to defeat application of the Rule. The so-called "sudden calamity" exception, which falls under the minority line of cases permitting the recovery of purely economic losses in tort if a product creates a "risk" of injury, defies the long-standing principle of Florida law that actual injury must occur before a tort action will lie. Adoption of such a speculation-fueled exception would undercut the very foundation of the Rule

and render it impossible for manufacturers to maintain realistic limitations on their liability exposure.

While the issue presented by the third certified question, concerning whether a post-sale "negligent failure to warn" theory of tort liability falls outside the bar of the Economic Loss Rule, may appear at first blush not to have been addressed in *Casa Clara* or *Florida Power & Light*, it was implicitly addressed by the Court and rejected in both cases. It also has been expressly rejected by the majority of courts who have considered the issue since *East River*. The Appellant's contention that such a claim falls outside the scope of the Rule ignores the one uncontested fact in this appeal that was controlling in all of this Court's Economic Loss Rule decisions; the Appellant has not sustained personal injury or damage to other property. Rather, it is attempting to recover purely economic losses in tort. Thus, none of the policies which justify imposition of tort liability have been triggered in this case.

Moreover, it becomes apparent under scrutiny that the proposed "negligent failure to warn" exception is merely another variation of the previously rejected "risk of injury" exception to the Rule. Like the "risk of injury" exception, the proposed "negligent failure to warn" exception could easily swallow the Rule in most instances because it too is fueled by speculation. Since the purported "risk" of injury which drives the alleged duty to warn may never materialize into actual injury, such an

exception is too indeterminate to enable manufacturers to easily structure their business behavior or to assess their liability exposure.

The Association's members and product manufacturers in general have relied on the principles of law reaffirmed in *Casa Clara* in allocating their liability exposure through contract, in pricing their products, and in assessing their insurance needs. Any departure from these principles now will expose them to many millions, if not billions, of dollars of unanticipated tort liability and will deny them the benefits of the bargains they have struck with their customers. Indeed, the very existence of many material manufacturers could be jeopardized by the imposition of such enormous and unanticipated tort liability.

Such a departure from the established law also will directly and very negatively impact all consumers of products in Florida because manufacturers faced with this unanticipated tort liability necessarily will be forced to increase the price of their products to offset this new and enhanced tort risk. In the construction industry, the inevitable result will be significantly higher prices for concrete, concrete construction, and construction generally, potentially preventing many Florida citizens, and especially those at the lower end of the income scale, from purchasing homes or other products. Such socially undesirable and negative economic consequences should not be imposed on the citizens of Florida or on product manufacturers because a few consumers, like the Appellant, fail to negotiate

for warranty protection or to purchase insurance to protect their economic interests. Only the Appellant will benefit from such a result. The rest of society will pay dearly.

ARGUMENT

I. THE ECONOMIC LOSS RULE BARS THE APPELLANT'S TORT CLAIMS

A. The Policy Underpinnings Of The Economic Loss Rule

No meaningful analysis of the three certified questions can be undertaken without first reexamining the policy underpinnings of the Economic Loss Rule. In both *Casa Clara* and *Florida Power & Light*, the Court recognized that application of the Economic Loss Rule does not turn on blind, definition-driven analysis. Rather, the Rule's application is driven by the underlying policies on which it is based and turns on an understanding of the different duties that arise under the law of contracts and those that are imposed by the law of torts.

In explaining the Rule and its policy foundation, this Court repeatedly has looked to the California Supreme Court's seminal Economic Loss Rule decision in *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), and the greatly influential unanimous decision of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) for guidance. The passage from *Seely* most often quoted by this Court in explaining the underlying rationale of the Rule provides:

> 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. He 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 demands. A 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.

63 Cal.2d at 18, 45 Cal.Rptr. at 23, 403 P.2d at 151 (citations omitted).

The United States Supreme Court followed the same reasoning in *East River*, noting that "[w]hen 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. . . . The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified." 476 U.S. at 871-872.

It is clear from these passages of *Seely* and *East River* that the Economic Loss Rule is founded on a recognition that the law of contracts and the law of torts are designed to protect

different types of interests. Contract law is designed to protect the expectancy interests of parties to private, bargained-for agreements. It seeks to hold contracting parties to their promises, and is rooted in the concept of ensuring that each party receives the benefit of their bargain. The duties implicated by the law of contracts, therefore, arise exclusively from the terms and conditions of contractual agreements between parties.

The law of torts, on the other hand, is rooted in the concept of protecting society as a whole from physical harm. A duty of care in tort differs significantly from the duties voluntarily assumed by parties to a contract because the tort duty of care is imposed by law to protect society as a whole from physical injury and does not depend on, and generally cannot be limited by, the private agreements of parties.

Tort law imposes liability for injury-causing products on the manufacturers or sellers of those products 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" and cause actual harm. *East River*, 476 U.S. at 866 (quoting *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944) (Traynor, J., concurring)). The basic function of tort law is to shift the burden of loss from the injured party to the party who caused the injury, the latter of which is presumed to be better suited to

prevent the injury in the first place and to bear the cost of remedying it. *Casa Clara*, 620 So.2d at 1246.

The common thread running through *Casa Clara*, *Florida Power & Light*, *Seely* and *East River* is a recognition that the duties imposed by tort law are not implicated in the absence of actual physical injury to persons or to other property. This bright-line recognition that actual injury must occur before tort law is triggered is grounded on an understanding that the cost of tort protection ultimately is borne by society as a whole in the form of higher prices for all goods and services. This is true because a manufacturer faced with tort liability for purely economic losses "must raise prices on every contract to cover the enhanced risk." *Florida Power & Light*, 510 So.2d at 901.

While the reasons for imposing this cost burden on the consuming public are justified in the context of products or services that cause actual physical injury to persons or other property, when only economic losses are involved, the question becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies" or failed to protect their economic interests through insurance. *Casa Clara*, 620 So.2d at 1247 (quoting Barrett, *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L. Rev. 891, 933 (1989)). The answer to that question, as confirmed in *Florida Power & Light* and *Casa Clara*, unequivocally is No!

The Economic Loss Rule, therefore, is designed to preserve the law of contracts by limiting the application of tort law to cases involving actual physical injury. The Rule serves this critical function by acting as "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." *Casa Clara*, 620 So.2d at 1246 (quoting *Barrett, supra*, at 933). By serving as this "fundamental boundary," the Rule preserves the fundamental principle on which commerce in this country has been based for over 200 years -- freedom of contract.

The lessons of *Casa Clara*, *Florida Power & Light*, *Seely* and *East River* are clear: parties who purchase products are encouraged to negotiate for warranty protection or to purchase insurance to protect their economic interests. This is less expensive to society than forcing the consuming public to bear the cost of purely economic losses sustained by those individual consumers who fail to protect their own economic interests.

Under these guiding principles, the Appellant was encouraged when it purchased the buses in question to negotiate with its seller for warranty protection and/or to procure insurance to protect itself in the event it sustained precisely the economic losses of which it now complains. *Florida Power & Light*, 510 So.2d at 901-902; *Casa Clara*, 620 So.2d at 1246-1247.

It was free, of course, to forego such protection in exchange for a lower price.

If the Appellant voluntarily elected not to bargain for warranty protection from its privy or to purchase insurance to protect its economic interests, it alone must bear the economic consequences of that decision. There simply is no justification for permitting it to avoid the bargain it struck with its seller, benefit from the lower price it apparently paid in exchange for no warranty or insurance protection, and then seek to recover its economic losses in tort from non-privies like the Appellee. The citizens of Florida would pay dearly in the form of higher prices for all goods and services if that were the law of Florida.

Indeed, under Appellant's theory of the law, parties would be encouraged to <u>never</u> bargain for warranty protection or to purchase insurance since they could save the cost of both and rely on tort law for their <u>free</u> "warranty" protection. Such a result, however, would render it impossible for manufacturers to control their own liability exposure. It would expose them to tort liability "in an indeterminate amount, for an indeterminate time to an indeterminate class." *See Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y.170, 179-780, 174 N.E. 441, 444 (1931). The very antithesis of the policies this Court sought to uphold in *Florida Power & Light* and *Casa Clara* would be achieved. The law of contracts and the Uniform Commercial Code would crumble into a heap of meaningless words.

When the Appellant's arguments are viewed in this light, it becomes apparent that all three of the proposed "exceptions" to the Economic Loss Rule it proffers must be rejected. Adoption of its arguments would allow the Appellant to escape the ramifications of its own failure to protect its economic interests through contractual negotiation or insurance and recover its purely economic losses in tort.

The citizens of Florida do not need more exceptions to the Rule. Rather, the citizens of this State need the Court to stand by its prior Economic Loss Rule decisions to assure that the Rule is applied consistently and uniformly throughout Florida.

B. The "No Alterative Remedy" Exception To The Economic Loss Rule Was Expressly Rejected In *Casa Clara*

It is difficult to understand how the purported "no alternative remedy" exception to the Economic Loss Rule can remain an issue after *Casa Clara*. That exception, which found its life-blood in *Latite Roofing Co. v. Urbanek*, 528 So.2d 1381 (Fla. 4th DCA 1988), was extensively briefed and argued in *Casa Clara* and expressly rejected by the Court when it overruled *Latite*.

In *Casa Clara*, the Court applied the Economic Loss Rule to bar the petitioners' causes of action in tort even though they did not have any "alternative" remedies to recover their purely economic losses from Toppino. In reaching this conclusion, the

Court joined the majority of courts, including the United States Supreme Court in *East River*, in recognizing that the existence of an alternative remedy in contract or otherwise against a specific defendant is irrelevant to application of the Economic Loss Rule. *See e.g., East River*, 476 U.S. at 875 (where the Court applied the Rule to bar the plaintiffs' tort claims despite the fact they lacked privity with the defendant and had no alternative remedy against it); *Miller v. United States Steel Corp.*, 902 F.2d 573, 575 (7th Cir. 1990) (existence of a contract remedy irrelevant to application of the Economic Loss Rule); *Bocre Leasing Corp. v. General Motors Corp.*, 840 F.Supp. 231, 234 (E.D.N.Y. 1994) (same). *See also GAF Corp. v. Zack Co.*, 445 So.2d 350 (Fla. 3d DCA), *rev. den.*, 453 So.2d 45 (Fla. 1984) (which was cited by the Court with approval in *Casa Clara*, *Florida Power & Light* and *Aetna Life & Casualty Co. v. Therm-O-Disc*, 511 So.2d 992 (Fla. 1987) and where the court applied the Rule despite the fact the plaintiff had no alternative remedy against the named defendant).

The Appellant's attempt to escape the binding application of *Casa Clara* by arguing that, in addition to having no alterative remedy against the Appellee, it has no alternative remedy against the entity who sold it the buses in question, ignores the fact that it was free at all times to negotiate with that seller for warranty protection or to purchase insurance to

protect its economic interests.[1] Its apparent failure to do so it no justification for imposing tort liability on remote manufacturers like the Appellee.[2]

Moreover, the "no alternative remedy" exception proposed by the Appellant would clearly lead to great "mischief" and contractual manipulation. *Casa Clara*, 620 So.2d at 1247. It would arm commercial consumers like the Appellant, for example, with the ability to voluntarily forego warranty protection by purchasing a product "as is" in exchange for the lowest possible price, and then sue remote manufacturers with whom they lacked privity in tort under the theory that they have, albeit voluntarily, "no alternative remedy" against their privy.

Such a conclusion defies logic, is inconsistent with the bedrock foundation of the Economic Loss Rule and must be rejected. Otherwise, the lessons of *Florida Power & Light* and *Casa Clara* -- that parties should negotiate with their privies for warranty protection or secure insurance -- would be lost in a cloud of subterfuge.

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[1]The Appellant's contention, which is questionable, that its contract with its seller is not governed by the Uniform Commercial Code does not change this conclusion. An identical argument also was made by the petitioners in *Casa Clara* and rejected. Such an argument also ignores the fact that the Appellant was free to sue its seller under common law contract principles in the event of a breach.

[2]This conclusion is further supported by the fact that one of the petitioners in *Casa Clara* also argued that, in addition to having no alternative remedy against Toppino, it had no alternative remedy against its privy, who allegedly was dissolved before that petitioner could file suit. Despite this argument, the Court applied the Economic Loss Rule with equal force to all of the petitioners.

Accordingly, the Court should reconfirm that the Economic Loss Rule applies even if a litigant has no alternative remedy against a specific defendant and should answer the first certified question "Yes."

C. The "Sudden Calamity" Exception To The Economic Loss Rule Also Was Rejected In *Casa Clara*

In *Casa Clara*, the homeowners requested the Court to carve out a "risk of injury" exception to the Economic Loss Rule, claiming such an exception was justified because the concrete supplied by Toppino allegedly was "exploding" into sizeable pieces, thereby exposing them to a very serious risk of being injured by falling pieces of concrete. This Court rejected their argument, however, that a mere risk of injury, albeit serious, defeats application of the Economic Loss Rule, stating "this argument goes completely against the principle that injury must occur before a negligence action exists." *Casa Clara*, 620 So.2d at 1247.

In rejecting the notion that a mere "risk of injury" defeats the Rule, this Court was again guided by and adopted the rationale of the United States Supreme Court's decision in *East River*. In that case, the plaintiffs' alleged that the crew of the ships in question were exposed to a risk of serious injury (or worse) when the ships broke down on the high seas during a severe storm. *East River*, 476 U.S. at 862. After surveying the three recognized lines of authority concerning the Economic Loss Rule, the United States Supreme Court rejected the so-called "intermediate," and minority, position that economic losses are

recoverable in tort if a product exposes its user to a serious risk of injury or is destroyed in a sudden, calamitous event:

> We find the intermediate . . . positions unsatisfactory. 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.

East River, 476 U.S. at 870.

By its own decision in *Casa Clara* and its express adoption of *East River* in *Casa Clara* and *Florida Power & Light*, it is clear this Court has rejected the "risk of injury/sudden calamity" exception to the Rule. This Court is not alone in this regard. A majority of courts also have rejected that exception, including other Florida and federal courts interpreting Florida law. *See, e.g., American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 451, 452-53 (Fla. 1st DCA 1991) (where the court noted this Court's adoption of *East River* and its rejection of the "risk of injury/sudden calamity" exception in holding that a litigant was barred from recovering purely economic losses in tort even though a defective oil pump

destroyed a fishing vessel's engine while it was operating off the coast of Florida); *Florida Power & Light Co. v. McGraw Edison Co.*, 696 F.Supp. 617, 619-620 (S.D. Fla. 1988), *aff'd* 875 F.2d 873 (11th Cir. 1989) (where the court followed *East River* and rejected the "sudden calamity" exception). *See also Bocre Leasing Corp.*, 840 F.Supp at 233.[3]

Having previously rejected the notion that purely economic losses are recoverable in tort if a product creates a risk of injury but does not cause actual injury, the Court should reaffirm its prior holding in *Casa Clara* and answer the second certified question "No."

D. This Court Should Join The Majority Of Courts In Holding That Negligent Failure To Warn Claims Do Not Defeat Application Of The Economic Loss Rule

(1) Appellant's Negligent Failure To Warn Claim Is Nothing More Than A Recharacterized Effort To Recoup Purely Economic Losses In Tort

Four critical facts must be kept in mind when the Court analyzes the third certified question and Appellant's contention that its "negligent failure to warn" claim falls outside the bar of the Economic Loss Rule:

1. No one in this case suffered personal injuries;

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[3]The fleeting reference to the "sudden calamity" exception in footnote one of *General Dynamics Corp. v. Wright Airlines, Inc.*, 470 So.2d 788 (Fla. 3d DCA 1985) does not support the proposition that Florida recognizes the "sudden calamity" exception. *General Dynamics* predated the United States Supreme Court's decision in *East River* and this Court's own decisions in *Florida Power & Light* and *Casa Clara*. Therefore, it does not reflect the law of Florida.

2. No "other property" of the Appellant's was damaged;

3. The Appellant seeks to recover purely economic losses; and

4. Its claim is cast in negligence.

Since the buses purchased by the Appellant damaged only themselves, none of the policies justifying the imposition of tort liability have been triggered in this case. This conclusion follows from the fact that "a manufacturer in a commercial relationship has no duty under either a negligence or strict liability theory to prevent a product from injuring itself." *Florida Power & Light*, 510 So.2d at 901.

Simply stated, the principles justifying application of the Economic Loss Rule in *Casa Clara*, *Florida Power & Light* and *East River* apply with full force to Appellant's "negligent failure to warn" claim. At its heart, that claim is nothing more than a recharacterized effort to recoup, in tort, expenditures for repair, replacement and loss of product value -- damages which are "traditionally the core concern of contract law." *East River*, 476 U.S. at 870.

Indeed, the "negligent failure to warn" exception proposed by the Appellant is merely another variation of the already rejected "risk of injury" exception to the Rule. Stated differently, the proposed exception would impose tort liability for purely economic losses on a manufacturer if it negligently failed to warn a consumer that there is a "risk" its product may cause physical injury even though no such injury actually occurs. Such a proposed tort duty, therefore, suffers from the same fatal

flaws that caused this Court to reject the "risk of injury" exception in *Casa Clara*; "its extent and the identity of injured persons is completely speculative." *Casa Clara*, 620 So.2d at 1247. Moreover, "the degree of risk is indeterminate, with no guarantee that damages will be reasonably related to the risk of injury, and with no possibility for the producer of a product to structure its business behavior to cover that risk." *Casa Clara*, 620 So.2d at 1247. Such an exception "goes completely against the principle that injury must occur before a negligence action exists." *Id.*

There are compelling reasons, therefore, why the Court should not create a tort duty which compels a product manufacturer to insure against mere risks of physical injury. Not the least of these reasons is that such a speculation-based tort duty was expressly rejected by the United States Supreme Court in *East River* and this Court in *Casa Clara*.

Additionally, such a theory of recovery in tort would likely become the exception that swallows the Rule. The goal of such an exception would be to encourage the repair of defects to eliminate the risk of physical injury. The net effect of such an exception, however, would be to allow the Appellant to recover, <u>in tort</u>, the costs associated with the repair or replacement of the allegedly defective buses -- damages which constitute purely economic losses. Thus, the intent of the Economic Loss Rule -- not to import pure tort duties into the traditional concerns of contract law -- would become subsumed by an exception that

carries with it an unmanageable, case-by-case judge or jury-made determination of whether a sufficient potential for physical injury is present in any given situation to require a manufacturer to issue warnings to its customers or, in cases like the instant case, to second, third or even fourth hand purchasers of its products of whom it may be unaware.

This method of reaching the result desired by the Appellant is disruptive and unpredictable enough to commend against it. It becomes unthinkable when one considers Florida's embedded condemnation of damage awards based on pure speculation. *Casa Clara*, 620 So.2d at 1247; *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918).

The enormous cost burden this would impose on manufacturers and, ultimately, their customers, is obvious. Assuming the task could even be undertaken, the cost burden would become virtually inconceivable if manufacturers also were forced to warn subsequent purchasers like the Appellant, with whom they never dealt, that their products might create a risk of injury. When the complained of damages are purely economic, as in this case, such a cost burden clearly is unjustified.

(2) A Majority Of Courts Have Rejected The Proposed "Negligent Failure To Warn" Exception

For the foregoing reasons, a majority of courts which have considered the issue after *East River* have agreed that such claims are barred by the Economic Loss Rule. The leading post-*East River* case on this issue appears to be the Wyoming Supreme

Court's decision in *Continental Insurance v. Page Engineering Co.*, 783 P.2d 641 (Wyo. 1989).

In *Page*, a reeving block (a large steel pulley) on a dragline failed, causing the dragline's 100 yard long boom to separate from the rest of the dragline structure and crash to the ground, destroying the boom. *Id.* at 642. After concluding that the plaintiff's strict liability and negligence claims were barred by the Economic Loss Rule despite the sudden, calamitous nature of the boom's destruction, the court addressed the plaintiff's alternative argument that tort recovery of purely economic losses should be permitted when the defendant fails to warn the plaintiff of a known, or foreseeable, unreasonably dangerous condition discovered after the product in question is sold. *Id.* at 649-650. In rejecting the contention that such conduct triggers the imposition of tort liability for purely economic losses, the court reasoned:

> 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.

. . .

> Recognition of a cause of action based upon duty to warn, in these circumstances, well 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. There does not appear to be any inherent wisdom in imposing such a duty. We also have considered, and rejected, the adoption of any distinction based upon whether the defect could create an unreasonably dangerous condition. Imposing liability for damages caused to the user or consumer or to other property is ample incentive to encourage manufacturers to warn of a dangerous defect of which they are, or should be, aware. To permit recovery in the instance in which the product damages only itself simply because the plaintiff has alleged failure to warn of the defect will only encourage plaintiffs to present "a products liability argument" clothed in 'failure to warn language,' if for nothing more than its settlement potential. . . . Stated another way, adoption of the tort theory of failure to warn would simply permit the damaged party to reach through a rear door that sanctuary from which he is foreclosed by a bar on the main entrance.

Id. at 650 (citations omitted).

The same conclusion was reached in *Utah Int'l, Inc. v. Caterpillar Tractor Co.*, 775 P.2d 741 (N.M. Ct. App. 1989). In that case, a coal hauler manufactured by the defendant was damaged when one of the hydraulic hoses on the coal hauler ruptured and sprayed hydraulic fluid onto the engine, causing the hauler to be engulfed in flames, necessarily exposing its operator to a serious risk of injury. *Id.* at 743. After rejecting the sudden calamity exception to the Economic Loss Rule, the court, citing *Florida Power & Light* and *East River*,

held that the same policy considerations which bar recovery of economic losses under traditional tort theories of negligence and strict liability bar negligent failure to warn claims if no actual tort damages are sustained. *Id.* at 745. *See also Frey Dairy v. A. O. Smith Harvestore Products, Inc.*, 680 F.Supp. 253 (E.D. Mich. 1988).

The common theme running through these cases is a recognition that without actual injury, the underlying policies justifying the imposition of tort liability are not triggered. This same theme led this Court and the Untied States Supreme Court in *East River* to reject that line of cases which permit recovery of purely economic losses in tort when the focal product creates a risk of injury. Imposition of such an exception would render it impossible for manufacturers "to maintain a realistic limitation on damages." *Casa Clara*, 620 So.2d at 1247 (quoting *East River*, 476 U.S. at 871).

The Appellant's reliance on *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984) is misplaced. *Miller Industries* predates *East River* and, by allowing the recovery of purely economic losses in tort, directly conflicts with *East River*. Indeed, the United States Supreme Court's conflict jurisdiction in *East River* was triggered, in part, by a conflict between *Miller Industries* and the Third Circuit's decision in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. 1985). *See East River*, 476 U.S. at 863, n.1. The United States Supreme Court resolved this

conflict by rejecting *Miller Industries* in favor of the Third Circuit's decision in *East River*. Since *Miller Industries* conflicts with *East River*, the other case cited by Appellant, *McConnell v. Caterpillar Tractor Co.*, 646 F.Supp. 1520 (N.J. 1986), which based its ruling on *Miller Industries*, also conflicts with *East River*.

Additionally, *Nicor Supply Ships Associates v. General Motors Corp.*, 876 F.2d 501 (5th Cir. 1989), does not support the Appellant's position despite its contention to the contrary. After acknowledging the existence of *Miller Industries* and *McConnell*, the Fifth Circuit expressly held in *Nicor* that "we intimate no opinion concerning whether Nicor would have stated a cause of action [for post-sale negligent failure to warn] had it alleged that General Motors had discovered a defect in the Series 149 engine after its manufacture." *Id.* at 505.

In short, without actual physical injury, no cause of action in tort can lie. Since the Appellant has suffered purely economic losses, the third certified question should be answered "No."

CONCLUSION

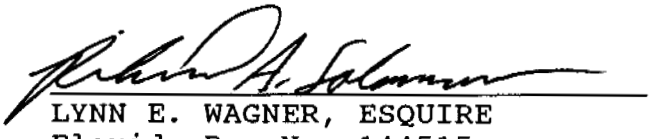
Stripped of the hyperbole and theatrical trappings, the Appellant seeks to recover purely economic losses in tort. It does so because it apparently failed to protect its economic interests through contractual negotiation or insurance. In effect, it requests this Court to assist it in avoiding the

ramifications of its own bargain because it no longer likes that bargain.

This Court should refrain from injecting itself into an area of the law already governed by contract principles and the Uniform Commercial Code, however. Neither the citizens of Florida nor product manufacturers should be forced to bear the cost of the economic losses the Appellant sustained because it failed to take steps to protect its own economic interests. A contrary conclusion would surely cause the law of contracts to "drown in a sea of tort," taking the Uniform Commercial Code with it to a watery grave. *Casa Clara*, 620 So.2d at 1247 (quoting *East River*, 476 U.S. at 866).

For these reasons, the Florida Concrete & Products Association respectfully submits that the first certified question should be answered "Yes," and the second and third certified questions should be answered "No."

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 26th day of May, 1994 to Gary S. Maisel, Esquire, PATTERSON & MALONEY, 600 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301; and Bard D. Rockenbach, Esquire, SELLARS, SUPRAN, COLE, MARION & ESPY, P.A., Post Office Box 3767, West Palm Beach, Florida 33402-3767.