SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 83,586

U.S. COURT OF APPEALS CASE NO. 93-4015

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

Appellant,

vs.

PREVOST CAR, INC., a
New Jersey corporation,

Appellee.
_____/



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**APPELLANT, AIRPORT RENT-A-CAR'S INITIAL BRIEF**
(On Certification from the United States Court of Appeals
for the Eleventh Circuit - Case No. 93-4015)

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## STATEMENT OF ISSUES

**WHETHER THE ECONOMIC LOSS RULE PRECLUDES RENT-A-CAR FROM STATING A CAUSE OF ACTION UNDER THE THEORIES OF NEGLIGENCE, STRICT LIABILITY AND/OR NEGLIGENT FAILURE TO WARN.**

This issue is analyzed and explained by the three separate certified questions presented by the United States Court of Appeals, Eleventh Circuit:

### QUESTION I:

**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.**

### QUESTION II:

**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.**

### QUESTION III:

**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.**

## STATEMENT OF THE CASE

For purposes of this Brief, the Appellant, AIRPORT RENT-A-CAR, INC., the Plaintiff below, shall be referred to as "RENT-A-CAR". The Appellee, PREVOST CAR, INC., the Defendant below, shall be referred to as "PREVOST". References to the Record Excerpts filed along with the briefs before the United States District Court, Eleventh Circuit shall be referred to as "R-_"; or "R-_ at pg _". An appendix is not being attached in that the Eleventh Circuit forwarded the briefs filed before it which contained the identical excerpts.

RENT-A-CAR filed a Complaint against PREVOST alleging three theories comprising six counts, to-wit: negligence, strict liability and breach of implied warranty, all arising out of two bus fires. Said buses were manufactured by PREVOST and owned by RENT-A-CAR.

PREVOST filed a Motion to Dismiss and prior to the Court ruling upon the same, RENT-A-CAR amended its Complaint. PREVOST moved to strike the Amended Complaint as being unauthorized. The District Court entered an Order denying PREVOST'S Motion to Strike Amended Complaint and granting PREVOST'S Motion to Dismiss.

RENT-A-CAR filed its Second Amended Complaint alleging three theories, comprising six counts, to-wit: negligence, strict liability and negligent failure to warn (R-2). PREVOST filed a Motion to Dismiss the Second Amended Complaint and Memorandum of Law (R-3). The Federal District Court entered an Order granting

Defendant's [PREVOST] Motion to Dismiss Second Amended Complaint with prejudice (R-4). Thereafter, RENT-A-CAR timely filed its Notice of Appeal to the United States Circuit Court of Appeals, Eleventh Circuit. The Eleventh Circuit thereafter certified three questions to this Court.

There is no evidence which was formally presented to the Federal District Court in that the disposition of this case was based upon the pleadings and motions filed with the Court. The facts stated below are those facts alleged and pleaded by RENT-A-CAR.

RENT-A-CAR was the owner of several buses manufactured by PREVOST (R-2 at pg 2). Two of the PREVOST buses caught fire and destroyed each of the buses (R-2 at pgs 2-3). Each of the buses caught fire while they were in transport. One of the buses caught fire while transporting school children (R-2 at pg 2).

RENT-A-CAR did not purchase these buses directly from PREVOST, nor did they purchase these buses from a distributor. RENT-A-CAR alleged that they purchased the buses from Associated Cab Company, Inc. Associated Cab Company, Inc. was not a supplier or distributor of these buses and not a merchant as described by the Uniform Commercial Code. It was further alleged that no cause of action exists against Associated Cab Company, Inc. under any express or implied warranty claim and that they are not a merchant as defined by the Uniform Commercial Code (R-2 at pg 3).

It was alleged that PREVOST was the manufacturer and seller of this bus and was engaged in the business of selling these products

(R-2 at pg 3). It was alleged that the buses when sold were defective and unreasonably dangerous for various reasons set forth in the Second Amended Complaint (R-2 at pg 4, 6). RENT-A-CAR had no alternate remedy against PREVOST in that they were not in privity with them. Based upon these allegations, RENT-A-CAR brought an action for negligent products liability for each of the buses and a strict products liability claim for each of the buses. RENT-A-CAR also brought a count for negligent failure to warn for each of the buses. It was alleged that:

> "Upon information and belief, the Defendant, PREVOST, knew or should have known after the manufacturing process of [the buses], that the [buses were] defective and unreasonably dangerous by virtue of the fact that other buses, similarly manufactured utilizing the same floorboard material, have caught fire destroying the buses similar to the buses herein." (Emphasis added) (R-2 at pg 10, 11)

It was alleged that PREVOST has a duty to adequately warn RENT-A-CAR of the buses' dangerous propensity to catch fire and/or rapidly spread throughout the vehicles (R-2 at pg 10, 11).

PREVOST moved to dismiss the Second Amended Complaint alleging that the "Economic Loss Rule" precludes recovery in tort for damages to the product itself, absent personal injury or damage to other property and that no exception to this Rule exists under the facts of this case (R-3).

It should be noted that RENT-A-CAR alleged damage to other property, separate and apart from damage to the buses (R-2 at pgs 5, 7).

The Federal District Court held that the Second Amended

Complaint failed to overcome the Economic Loss Rule and failed to state a claim for which relief can be granted. The District Court further found that RENT-A-CAR cannot further amend its Complaint to state a claim, and thereafter dismissed the Second Amended Complaint with prejudice (R-4).

*Standard of Review*: To state a claim, Fed.R.Civ.P., 8(a) requires, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." And, Fla. R. Civ. P. 1.110(b)(2) provides, inter alia, "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." The Court must "take the material allegations of the complaint and its incorporated exhibits as true, and liberally construe the complaint in favor of the Plaintiff." Burch v. Apalachee Community Mental Health Servs., Inc., 840 F.2d 797, 798 (11th Cir. 1988) (citation omitted), aff'd, 494 U.S. 113 (1990). See also, Abruzzo v. Haller, 603 So.2d 1338 (Fla. 1st DCA 1992). The law in the Eleventh Circuit and this State is well-settled that "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir.) cert. denied, 486 U.S. 1055 (1988) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). See: Maybarduk v. Bustamante, 294 So.2d 374 (Fla. 1974).

## SUMMARY OF ARGUMENT

There are several exceptions to the "Economic Loss Rule", two of which RENT-A-CAR falls within, to state a cause of action to overcome PREVOST'S Motion to Dismiss. The first exception, the "no alternate remedy" exception to the "economic loss rule", as recognized in Florida, allows recovery for purely economic losses in tort when a plaintiff has no alternate remedies against another party. The general situation where the "economic loss rule" comes into play is where a purchaser of a product sues a manufacturer with whom he is in privity. The Courts have held that the plaintiff's remedies are better suited in contract (i.e. warranty claims under the Uniform Commercial Code), than in tort. In that RENT-A-CAR has no alternate remedy against the manufacturer because they were not in privity with the manufacturer, and because the seller of the products to RENT-A-CAR were not merchants and subject to warranty claims pursuant to the Uniform Commercial Code, RENT-A-CAR has no alternate remedy.

The second exception under which RENT-A-CAR falls is the "sudden calamity" exception to the "economic loss rule". Although it is true that in Florida, it appears, at least in one case, that Florida has not accepted this exception, that case is distinguishable from the facts in the case sub judice. Because RENT-A-CAR pleaded that the vehicles were involved in a sudden calamitous event and, further, that the vehicles destroyed, were utilized for transporting passengers and in one instance, was in fact transporting passengers, the facts established create an

unreasonable risk of harm of endangering the safety of person and property. It is specifically these types of situations for which this exception was created.

RENT-A-CAR has two counts for "negligent failure to warn". It was alleged that this failure to warn occurred "after the manufacturing process". A negligent failure to warn a purchaser of a defect in a product after the manufacturing process, creates a "independent tort" separate and apart from any contractual actions for which the "economic loss rule" is inapplicable.

## ARGUMENT AND CITATIONS OF AUTHORITY

**WHETHER THE ECONOMIC LOSS RULE PRECLUDES RENT-A-CAR FROM STATING A CAUSE OF ACTION UNDER THE THEORIES OF NEGLIGENCE, STRICT LIABILITY AND/OR NEGLIGENT FAILURE TO WARN.**

Generally stated, the "Economic Loss Rule" precludes recovery in tort for damages to the product itself, absent personal injury or damage to other property. Florida Power and Light Company v. Westinghouse Electric, 510 So.2d 899, 901 (Fla. 1987). This Court has specifically addressed and adopted the majority rule by approving the "Economic Loss Rule". Florida Power and Light, supra. In Florida Power and Light, supra, this Court agreed with the majority rule that contract principles are more appropriate than tort principles to resolve purely economic claims.

However, the adoption of the "Economic Loss Rule" in Florida is not ironclad. There are exceptions which have been recognized which would allow recovery in tort for economic damages.

**QUESTION I: 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.**

Prior to the ruling in Florida Power and Light, supra, this Court, on at least two occasions, has allowed recovery in tort for "purely economic losses". In A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973), the Plaintiff sued the Defendant architect for allegedly negligently preparing plans and specifications resulting

in delays to the Plaintiff contractor. This Court characterized the case as a "products liability" case in which economic loss resulted. In that case, this Court held that the Plaintiff who sustained purely "economic loss" stated a cause of action against the architect in tort.

Also, in First American Title Insurance Company v. First Title Service Company of the Florida Keys, 457 So.2d 467 (Fla. 1984), recovery was allowed in a negligence action against an abstract company for purely economic losses.

The facts giving rise to the cause of action in Florida Power and Light Company, supra, are distinguishable from the case sub judice. In Florida Power and Light, supra, Florida Power and Light directly entered into relations with Westinghouse for the design, manufacture and furnishing of steam generators. When problems arose with the generators, Florida Power and Light brought suit alleging that Westinghouse was liable for breach of express warranties in contract as well as a tort claim for negligence seeking economic damages only. In the case sub judice, the manufacturer PREVOST was not in privity with RENT-A-CAR. RENT-A-CAR had no contractual dealing with PREVOST, did not negotiate a sale with PREVOST, nor did they purchase the buses from PREVOST. It was alleged that RENT-A-CAR purchased the buses from a third party who is not a distributor, supplier or merchant as defined by the Uniform Commercial Code. Thus, there was no warranty claim that could have been raised against the party from whom RENT-A-CAR purchased the vehicles or from PREVOST.

In Florida Power and Light, supra, it was Florida Power and Light's contention that the legal duty between Florida Power and Light and Westinghouse was created by their contract between them. Florida Power and Light, supra, relied upon East River Steam Ship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct., 2295, 90 L.Ed.2d 865 (1986). In East River, supra, the United States Supreme Court held 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. This decision was based, in part, upon the rationale that the parties can negotiate risks by contractual agreement.

> "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." East River, supra, at 2303 (footnotes and citations omitted).

In fact, in Florida Power and Light, supra, this Court stated:

> "The policy adopted by the majority of courts encourages parties to negotiate economic risks through warranty provisions and price." Florida Power and Light, supra at 901.

It is precisely this rationale that has lead courts to carve an exception to the "Economic Loss Rule"; namely, the "No Alternate Remedy" exception. This distinction was first pointed out by this Court in AFM Corporation v. Southern Bell Telephone and Telegraph Company, 515 So.2d 180 (Fla. 1987). In AFM, supra, this Court

distinguished its prior decision in A.R. Moyer, Inc. v. Graham, supra.

> "What distinguishes *Moyer* from the above cases, however, is that the Plaintiff was not the beneficiary, either directly or as a third party beneficiary of the underlying contract. In that case we held a general contractor had a cause of action for the alleged negligent supervisory performance by an architect. In so holding, we expressly determine that the contractor was not a party to the contract with the architect, nor was he a third party beneficiary of the contract. ... Since there was no contract under which the general contractor could recover his loss, we concluded he did have a cause of action in tort." AFM, supra at 181.

In Latite Roofing Company, Inc. v. Urbanek, 528 So.2d 1381 (Fla. 4th DCA 1988), the Florida District Court again expressed this exception stating:

> "... It seems clear that the 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 damages party for a particular kind of loss." Latite, supra at 1383.

When the Federal District Court in the case sub judice first dismissed RENT-A-CAR'S Amended Complaint, it stated that RENT-A-CAR had an alternative remedy by seeking recovery for the loss of the buses from the seller. Presumably, the District Court believed that the seller of the buses was a distributor of buses and subject to warranty claims under the Uniform Commercial Code. In its Second Amended Complaint, RENT-A-CAR alleged that this was not the case and, thus, had no alternate remedy against the seller. The District Court, without addressing this specific issue, impliedly

rejects the "no alternate remedy" exception under the facts of this case.

The facts in Latite, supra, are analogous to the facts in the case sub judice. In Latite, supra, the defendant, Latite, was a roofing contractor who constructed a portion of a roof area of a shopping center. The Plaintiffs purchased the shopping center after Latite had completed the work which it performed on the center. The purchasers filed suit against Latite seeking damages for negligent construction and installation of the roof. Latite argued that since no personal injury or property damage was sustained, a cause of action in negligence does not lie to recover only economic losses when no privity of contract exists between the parties. The District Court recognized several cases supporting this position, but found that the same were not apposite in the facts in Latite. The Court found that the purchasers' sole theory of recovery could only be against the roofer (since they were not in privity with the seller and no warranty claim existed) and, thus, the owner had no alternate remedies.

It could have been argued in Latite, supra, that the purchaser of the shopping center could have obtained insurance to protect itself or, brought an action against the seller, thus creating an alternate remedy. Yet, this argument could be made in every case rendering the "no alternate remedy" exception illusory. Like the case sub judice, because there were no warranty claims which could have been brought because the sellers do not fall within the purview of the Uniform Commercial Code, there is no warranty claim

which would give rise to a cause of action. It was precisely the existence of this warranty claim that this Court in Florida Power and Light, supra, adopted the "Economic Loss Rule". The absence of this warranty claim, gives rise to the "no alternate remedy" exception which would allow a cause of action for purely economic losses in tort. See: Latite, supra at 1383.

The Appellant is not unmindful of this Court's recent decision of Casa Clara Condominium Association, Inc. v. Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993). In applying the economic loss rule, this Court disapproved several District Court cases which allowed recovery for product liability without damage to other property or personal injury, to-wit: Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA 1981); review dismissed 411 So.2d 380 (Fla. 1981); Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515 (Fla. 4th DCA 1981) review denied, 417 So.2d 328 (Fla. 1982) and Latite Roofing Co. v. Urbanek, supra.

However, Casa Clara is distinguishable on its facts from the case sub judice. In Casa Clara, supra, the Petitioners (homeowners) had alternate remedies, not only available to them, but which were being actively litigated. This Court noted that the homeowners had separate actions against numerous defendants which included claims for breach of contract. Casa Clara, supra at P. 359, Fn. 3. In the case sub judice, there are no pending or available claims which were brought or which could have been brought other than the claims brought against Prevost.

Interestingly, in Casa Clara, this Court did not reverse Adobe, Drexel, and Latite, on the grounds that the "no alternate remedy" exception was not viable in Florida. Rather, they were disapproved because the District Courts "... refused to apply the economic loss rule to what should have been contract actions ..." Casa Clara, supra at P. 359. This Court declined to circumvent the economic loss rule by excepting homeowners due to the "large" investment involved.

Because RENT-A-CAR has no alternate remedy, against the seller or the manufacturer, PREVOST, RENT-A-CAR falls within the "no alternate remedy" exception to the "economic loss" rule and the negligence and strict products liability counts stated a cause of action.

**QUESTION II: 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.**

Each bus fire occurred suddenly and without warning. It was alleged that the buses were passenger buses utilized to transport passengers, including school children. Each of the fires was unable to be extinguished and completely engulfed and destroyed each of the buses. It was alleged that one of the buses was in the process of transporting school children when the sudden accident occurred. Fortunately, none of the school children were injured.

The District Court, in its Order dismissing the First Amended Complaint, held that Florida does not align itself with the majority of jurisdictions. RENT-A-CAR is aware of only two cases

applying Florida law discussing the sudden calamity exception to the economic loss rule; to-wit: Florida Power and Light Company v. McGraw Edison Company, 696 F.Supp. 617 (S.D. Fla. 1988), aff'd, 875 F.2d 873 (11th Cir. 1989); and General Dynamics Corporation v. Wright Airlines, Inc., 470 So.2d 788 (3d DCA 1985).

In General Dynamics Corporation, supra, although not discussed in detail, the defendant raised arguments in an attempt to circumvent the Economic Loss Rule. Apparently, one of the arguments raised by the defendant, was the "Sudden Calamity" exception to the Economic Loss Rule. The Third District distinguished the case of Cedars of Lebanon Hosp. Corp. v. European X-Ray Distrib. of America, Inc., 444 So.2d 1068 (Fla. 3d DCA 1984), stating that the *Cedars* case is distinguishable from the claim in General Dynamics, because the "property damage sustained in that [Cedars] case was not the product of a sudden calamitous event, as is true of the property damage sustained in the instant [General Dynamics] case." Thus, the Plaintiff in General Dynamics, supra, fell within the Sudden Calamitous event exception to the Economic Loss Rule which would sustain a judgment for damages in a products liability action. General Dynamics Corp., supra at 789, Fn. 1.

At first blush, McGraw, supra, appears to recede from the law set forth in General Dynamics, supra. In McGraw, an action arose from the explosion of a transformer which was brought by the Plaintiff, Florida Power and Light against the Defendant, McGraw-Edison. Florida Power and Light sought to recover pursuant to the theories of negligence, strict liability and breach of express and

implied warranty. It was asserted that a part within the transformer caused an explosion within the transformer and a subsequent fire. The District Court precluded the claims based upon the "Economic Loss Rule" in that there was no personal injury or damage to property other than the product itself. The District Court rejected the argument that damage to surrounding walls and curbing, as well as connecting pipes, were separate property to take this matter out of the "Economic Loss Rule".

The *McGraw* Court goes on to state that the fact that the malfunctioning part caused an explosion does not alter the Court's ruling, citing East River Steamship, Corp. v. Transamerica Delaval, Inc., supra, where the United States Supreme Court recognized,

> "... [e]ven 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". Id. at 870, 106 S.Ct. at 2302.
>
> "The paradigmatic products-liability action is one where a product 'reasonably certain to place life and limb in peril,' distributed without re-inspection, causes bodily injury. See: e.g., MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1051, 1053 (1916). The manufacturer is liable whether or not it is negligent 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'. Escola v. Coca Cola Bottling Company of Fresno, 24 Cal.2d, at 462, 150 P.2d at 441 (Opinion concurring in Judgment).

> For similar reasons of safety, the manufacturers' duty of care was broadened to include protection against property damage. (citations omitted)." East River, supra at 2300.

It is this unreasonable risk of danger which has lead the majority of jurisdictions to develop the "Sudden Calamity" exception to the Economic Loss Rule. McGraw, supra, however, is distinguishable from the case sub judice in that the facts in *McGraw*, supra, do not appear to create an unreasonable risk of harm of endangering the safety of persons. Unlike McGraw, supra, RENT-A-CAR alleged that not only were these vehicles used for transporting passengers, but one of the buses caught fire while transporting school children. See: BiPetro Refining Company v. Hartness Painting, Inc., 120 Ill.App. 3d 556, 76 Ill.Dec. 70, 458 N.E.2d 902 (4th DCA 1983), where the Court adopted the reasoning that when a defect causes an accident involving some violence or collision endangering safety to persons and property, the Court held that a cause of action exists despite the Economic Loss Rule. See also: Corfab, Inc. v. Modine Mtg. Company, 641 F.Supp. 448 (N.D. Ill. 1986) where the Court held that recovery of economic losses are allowed in tort when the damage occurs in a way that poses an unreasonable risk of harm to a plaintiff or its property.

**QUESTION III: 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.**

RENT-A-CAR, in its Second Amended Complaint, specifically paragraph 32 and 36, alleged

> "[u]pon information and belief, the Defendant, PREVOST, knew or should have known, after the manufacturing process of this bus, that the bus was defective and unreasonably dangerous."

If an "independent tort" is alleged separate and apart from any contractual action, the Economic Loss Rule is inapplicable. Interstate Securities Corporation v. Hayes Corporation, 920 F.2d 769 (11th Cir. 1991).

There is a clear distinction between failing to warn a purchaser of a defect in a product known at the time of the manufacturing process and failure to warn upon discovery of a defect after the manufacturing process. In the former instance, because the failure to warn arose during the manufacturing process and before delivery of the product, it is said to be part and parcel with the strict liability claim and, thus, the "Economic Loss Rule" would apply absent any exceptions to the Rule. In the latter instance, a discovery of the defect, after the manufacturing process, as alleged in the case sub judice, creates an independent tort. Nicor Supply Ships Associates v. General Motors, 876 F.2d 501 (5th Cir. 1989).

In Nicor, supra, the Circuit Court draws a distinction between a "failure to warn" claim predicated on knowledge gained by the manufacturer after the product was delivered (which creates an independent tort) and failing to warn a purchaser of a defect in the product known at the time it is manufactured (which does not create an independent tort), citing Miller Industries v.

Caterpillar Tractor Company, 733 F.2d 813 (11th Cir. 1984) and McConnell v. Caterpillar Tractor Company, 646 F.Supp. 1520 (N.J. 1986).

Because RENT-A-CAR alleged a "failure to warn" after the manufacturing process, an independent tort is created, and the economic loss rule is not applicable nor a bar to recovery.

## CONCLUSION

Based upon the foregoing argument, this Court should recognize the "no alternate remedy" exception and the "sudden calamity" exception to the economic loss rule. Further, this Court should recognize the independent tort of failure to warn after the manufacturing process and find that an independent tort may exist outside the bar of the economic loss rule and, conclude that RENT-A-CAR states a cause of action in its Second Amended Complaint, and the District Court's Order Dismissing the same with prejudice should be reversed.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief has been provided by U.S. Mail to SELLARS, SUPRAN, COLE, MARION & ESPY, P.A., Post Office Box 3767, West Palm Beach, Florida 33402 this 5th day of May, 1994.

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