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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.

APPELLANT, AIRPORT RENT-A-CAR'S REPLY BRIEF

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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.

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.

The Appellant, without rearguing Question I raised in its Reply Brief in the Eleventh Circuit Court of Appeals (the *no alternate remedy* exception), will reincorporate its argument therein. The Appellant will address the policy issues raised by the Appellee in its Answer Brief.

Appellant does not take issue with the *economic loss rule* recognized by a majority of the States throughout this country including this State. The *economic loss rule* clearly serves a critical function separating tort law from contract law, and shifts the risk accordingly depending upon the circumstances giving rise to a cause of action.

The *economic loss rule,* however, should not be set in stone, absolute, and blind to circumstances which justify exceptions to this rule. The policy reasons for the *economic loss rule,* are inapposite to certain factual situations when compared with countervailing policy reasons and should justify certain exceptions to this rule. Allowing exceptions to the *economic loss rule* will not as explained below, "open pandora's box" to unfettered litigation nor increase costs to the manufacturer or consumer. Rather, it will allow certain parties "access to the courts" which they otherwise would not have; and aid in propelling manufacturers to produce safe products.

The underlying rationale for the *economic loss rule* is two-fold: (1) to distinguish and brighten the line between torts (which is based upon protecting the consumer), and contract (which is based upon the benefit of the bargain theory, and (2) where there is personal injury or damage to

property other than the product itself, there is a social need to spread the resulting loss. When the resulting loss is to the product itself, the social need to spread this loss to the consumers is lessened.

In order to illustrate the "unfairness" of the Appellee's argument, Appellant proposes two examples:

EXAMPLE 1: A manufacturer sells a car to consumer "A" with express warranties. Consumer "A" sells or gives the car to consumer "B". Thereafter, the car catches fire, is engulfed in flames, and is completely destroyed. However, there is no personal injury or damage to any other property except the car.

If the car burned while consumer "A" owned it, clearly, the *economic loss rule* would prohibit consumer "A" from prevailing in tort (assuming there is a *no alternate remedy* exception or any other exception), but could bring his or her claim in contract or warranty. However, because the car was sold or given to consumer "B", consumer "B" would be left without a remedy. Consumer "B", without the availability of the *no alternate remedy* exception, could not sue in tort, nor could consumer "B" bring a contract or warranty claim against the manufacturer because consumer "B" did not have a contract with the manufacturer and was not in "privity" with it. The inequity of this factual scenario is evident: Why should the manufacturer be placed in a better position based on the fortuitous event that consumer "A" sold or gave the car to consumer "B"?

The countervailing question Appellee has alluded to in its Answer Brief is illustrated as follows:

EXAMPLE 2: A manufacturer sells a car to consumer "A" "as is." Thereafter, "A" sells or gives the car to consumer "B". The car catches fire, is engulfed in flames, and is destroyed, but does not cause any personal injury or damage to any other property aside from the car itself. In such a factual scenario, consumer "A" would have been precluded from bringing a tort claim against

the manufacturer based upon the *economic loss rule* and is precluded from bringing a contract or warranty claim in that consumer "A" bargained away his rights. Appellee is arguing in its Answer Brief under such a scenario, consumer "B", if this Court accepts Appellant's *"no alternate remedy"* exception, would be able to bring a tort claim against the manufacturer under this exception where consumer "A" would not be able to. Appellee alludes to the fact that consumer "B" would have greater rights than consumer "A" had because "A" bargained away his rights, and perhaps acquired the product at a lower price.

Under this factual scenario, the argument that Prevost makes is a viable one. Why should the manufacturer be exposed to greater liability based upon the fortuitous event that consumer "A" sells or gives the product to consumer "B"?

The paramount concern of Appellee, and those supporting its position, revolves around the increased costs associated with providing an unfettered exception to the *economic loss rule*. To create an absolute rule without exception, puts the subsequent consumer at a disadvantage and the manufacturer receives a windfall. Likewise, Prevost's argument that a "*no alternate remedy* exception" may under the circumstances in Example 2 described above, puts a subsequent consumer in a greater position than the original consumer, and subjects the manufacturer to greater exposure.

It is respectfully suggested that if the concerns of Prevost are shared by this Court, then a modified position be adopted by this Court, which would address the policy considerations upon which the *economic loss rule* is founded. It is suggested that a consumer, who acquires a product alleged to be defective, and has *no alternate remedy* against the manufacturer based upon lack of privity, then subsequent consumers should fall within the "*no alternate remedy* exception" to the *economic loss rule* but stands in the shoes of the original consumer. In other words, if the original consumer purchased the product from the manufacturer "as is" then the subsequent consumer should

acquire no greater rights than the original consumer. However, if the original consumer has various warranties or contractual rights, then the fortuitous event of transferring the product to a subsequent purchaser, should not result in a windfall to the manufacturer. Rather, the subsequent consumer, barring any other remedies available, should fall within this narrow exception to the *economic loss rule.*

The above proposed exception, alleviates the concerns of the Appellee and those supporting their position. The manufacturer, in such a situation would be subject to no greater exposure than that which they had originally calculated and negotiated. The policy considerations underlying the *economic loss rule* are maintained and appropriately balanced.

Although the courts have shifted the burden of loss from the injured party to the party who causes the injury where personal injury is involved, the courts have been reluctant to do so when the claim involves purely economic losses. *Florida Power & Light v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987). The reasoning was that cost was too high a price to pay and should be borne exclusively by the parties to the contract. Should this Court adopt this limited *no alternate remedy* exception whereby the subsequent consumer would acquire no greater rights than the original consumer, the concern of shifting costs is dubious at best. The manufacturer will have factored in any associated costs into the price of the product based upon the warranties or lack thereof provided to the original consumer. It will not alter this cost factor because the transfer of the product will provide no greater remedy to the subsequent consumer than the original consumer.

Likewise, the contrary policy considerations to allow this exception to the *economic loss rule* are satisfied. The underlying rationale for the *economic loss rule* is that it encourages parties to negotiate economic risks through warranty provisions and price. *Florida Power & Light* at page 901. The maintenance of product value and quality is precisely the purpose of express and implied

warranties. *Florida Power & Light* at page 901, citing *East River Steamship Corp. v. TransAmerica Delavel, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L.Ed.2d 865 (1986).

When a party is not in a position to bargain through warranties with the manufacturer, the above-referenced rationale is merely imaginary. There are many circumstances, as in the case *sub judice,* where it is unrealistic to purchase a warranty from the original consumer. Most often the original consumer is unable to provide such assurances because the representations warranted are beyond the knowledge and/or control of anyone but the manufacturer. Likewise to argue that the subsequent consumer can purchase insurance to protect itself is chimerical. This argument could be made in all cases, because in every case where there is property damage (regardless of whether there is personal injury) failure to procure insurance would bar any relief. In fact, carried to its logical conclusion, insurance could even be obtained to protect a consumer from personal injury from a product, the failure of which could foreclose a cause of action. It is not the ability to procure insurance that is the fulcrum for the *economic loss rule.* The rationale behind the *economic loss rule* and the reason it does not bar relief where there is personal injury or damage to other property is because the duty owed is separate from any contractual dealings. Yet, the argument regarding the ability to procure insurance could be made where the *economic loss rule* would not be a bar. It is the ability of a party to bargain and negotiate, the lack of which should not prevent a party from access to the courts.

The law will always give a remedy. To argue that a consumer's own insurance is his remedy is meaningless.

This Court should answer the first certified question negatively and allow for an exception to the *economic loss rule* where the Plaintiff has no alternative theory of recovery. Alternatively, this Court should adopt the modified *no alternative remedy* exception, allowing a plaintiff to maintain a

claim where he has no alternative theory of recovery; however, with no greater rights than the original consumer.

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.

As with Point I above, the Appellant will not repeat the argument raised in its briefs presented to the 11th Circuit Court of Appeals in that the briefs have been forwarded to this Court for review. Rather, the Appellant will address the policy considerations raised by the Appellee.

The Appellee argues that the *economic loss rule* should stand unpenetrated and without exception. They argue that to allow for an exception for a "sudden calamitous event", would defeat the underlying purpose of the *economic loss rule*. They argue that "this Court recognized the same principle in *Casa Clara* when it stated that the mere possibility of personal injury or property damage from deteriorating or exploding concrete is not enough and that injury must actually occur for a tort cause of action to exist." Prevost couches the *economic loss rule* as a "rule of damages" and without tort-type damages, you cannot have a cause of action in tort. This argument is short-sighted. True, if the *economic loss rule* is interpreted to have no exceptions by this Court, then the result would be that without "tort damages" you cannot maintain an action in tort. However, the *economic loss rule* does not turn on the type of damages one obtains.

The determination of "economic loss" in relation to the product does not turn on the mechanical application of the definition -- rather, it lies in the policy differences between the law of torts and contracts. *American Xyrofin, Inc. v. Allis-Chalmers Corp.*, 172 Ill. Dec. 289, 595 N.E. 2d 650 (Ill. 2d DCA 1992).

The *economic loss rule* is founded on the type of protection tort law affords and the type of protection contract law affords. Tort law is concerned with the safety of products and the corresponding quantum of care required of a manufacturer, while contract law is traditionally concerned with the fulfillment of economic expectations. *Northern Power & Engineering v. Caterpillar Tractor*, 623 P.2d 324, 328 (Alaska 1981). Contract law looks to whether a party has received his or her benefit of the bargain where tort law is concerned with consumer safety.

There are certain circumstances, as in the case *sub judice*, where the destruction of a product is such that the risk of harm is so great that it is best suited in tort and not contract. This is not a case where the products merely failed to perform up to the expectations of Airport Rent-A-Car. This is not a case, where through the advent of time, the buses' engines failed to live up to the expectations of the Appellant. Rather the circumstances, as pleaded, alleged that on two separate and independent occasions, two passenger buses suddenly and without warning, caught fire, spread throughout the buses, engulfing them in flames, and completely destroying the buses. The benchmark for determining liability should not be the fortuitous event of whether personal injury occurred.

The essence of a product liability tort case is not whether a plaintiff has failed to receive the quality of a product he or she expected, but rather whether the plaintiff was exposed, through a defective and unreasonably dangerous product, to an unreasonable risk of injury to his person or property.

Prevost argues that to allow a "sudden calamity" exception, would be impractical due to the uncertainty as to whether a product actually failed due to a sudden calamitous event or whether the sudden calamitous event was the ultimate last straw of a product which was deteriorating over time. This argument should not govern whether this exception is maintained by this Court. The determination as to whether a product destroyed as a result of a sudden calamity or was as a result

of a slow deterioration can be addressed based upon the circumstances underlying each factual situation on a case-by-case basis. Sure, the line is made definitively bright if there is no exception allowed. But, the courts should not merely look to what would be most convenient if to do so would be unjust.

The Court should answer the second certified question affirmatively, and allow a cause of action to 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.

Rent-A-Car cited in its initial brief three cases allowing recovery for an individual tort where such tort is the failure to warn after the manufacturing process. In each of these cases, *Nicor Supply Ships Associates v. General Motors,* 876 F.2d 501 (5th Cir. 1989), *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), the courts have held that the failure to warn after the manufacturing process is separate and apart from any contractual action, rendering the *economic loss rule* inapplicable.

Prevost argues that *Miller, supra.*, was "impliedly" overruled by *East River, supra. East River, supra,*. does not impliedly or otherwise overrule *Miller, supra. East River* did not address whether or not a party may state a cause of action by alleging an independent tort separate and apart from the trappings of the *economic loss rule. East River* also does not impliedly or otherwise determine that a failure to warn after the manufacturing process does not create an independent tort. In fact, the Supreme Court, in *East River,* specifically states that it "... do[es] not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic. (citations omitted)" *East River* at page 871, fn. 6.

Prevost is silent to the fact that both *Nicor, supra.*, and *McConnell, supra.*, were decided after *East River.* In both *Nicor* and *McConnell, supra.*, the courts clearly held that such an independent tort exists.

Prevost asserts that the cases relied upon by Rent-A-Car in support of its "failure to warn" claim is distinguishable based upon the favored status that maritime courts grant to fishermen. Prevost cites *Miller Industries v. Caterpillar Tractor Company,* 733 F.2d 813 (11th Cir. 1984) and *McConnell v. Caterpillar Tractor Company,* 642 F.Supp. 1520 (D.N.J. 1986). Prevost's argument is misapplied. Although it is true that *Miller, supra.*, and *McConnell, supra.*, apply admiralty law, the mere fact that admiralty law is applied does not in and of itself mean that the rule annunciated therein, relies upon any special treatment to fishermen exempting them from harsh rules. To hold as such would mean that *East River, supra.*, which applied the *economic loss rule,* in admiralty, should not be relied upon.

In *McConnell, supra.*, albeit an admiralty case involving fishermen, the court does not base its ruling upon the "special protection" afforded to fishermen. Actually, the District Court held that the harsh rules annunciated in the Supreme Court's decision of *East River, supra.*, limiting liability under the *economic loss rule,* would apply to fishermen, and deny them recovery for purely economic losses in product liability suits, even if the plaintiffs are fishermen. *McConnell, supra.*, at 1525. Stating that *East River* applies to fishermen, the District Court goes on to state that *East River* does not bar the plaintiff's negligence claim. The court distinguished *East River* not because the plaintiffs in *McConnell* are fishermen, but because the plaintiffs in *East River* allege that the negligence occurred "as part of the manufacturing process." In *McConnell,* it was alleged that the negligence was not that defendants negligently manufactured the crankshaft, but that they negligently failed to warn the plaintiffs of a known defect in the crankshaft. The *McConnell* court cites *Miller, supra.*,

which addresses the distinction between the negligent manufacture of a product and the negligent failure to warn of a defect in the product.

> "The *Miller* court explained that in *Jig the Third* [*Jig the Third Corp. v. Puritan Mar. Ins. Under. Corp.*, 519 F.2d 171 (5th Cir. 1975)],
>
> 'the plaintiffs' claim was premised on the negligent design and manufacturing of the product and thus was closely related to the quality of the product and the plaintiffs' expectations of how the product would perform. Here, the gravamen of the plaintiffs' complaint is the defendant failed to properly warn of the defects that it discovered after the engine was already on the market. Whatever the merits of adopting a rule that views defects in a product as part of the parties' bargain and thus within the law of sales, it is much less tenable to presume that the buyer has bargained away the manufacturer's obligation to warn of defects that later came to the manufacturer's attention. *A duty to warn of a products defect of which the seller becomes aware goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy.* To hold otherwise would impermissibly allow a manufacturer who is aware that it has a defective product on the market to hide behind its warranty while the buyer unknowingly uses it. *Id.* at 818.
>
> We find the reasoning in *Miller* persuasive. Thus, we hold that *East River*, where the alleged negligence occurred as part of the manufacturing process, does not bar plaintiffs' claim in this case, where there was an allegedly negligent failure to warn." *McConnell, supra.*, at 1526 (emphasis added).

It is exactly this type of conduct that tort law is designed to govern. When a manufacturer manufactures a product which is known to possess an unreasonable risk of harm and this knowledge is acquired after the manufacturing process, and the manufacturer blindly ignores this danger, the manufacturer should be held accountable. This conduct is separate and apart from the manufacturing process of the product which would be governed by the *economic loss rule*. It is precisely this type of conduct which amounts to an independent tort.

Florida, albeit not in a failure to warn setting, has consistently separated contract from tort by allowing recovery in tort despite the existence of a contract where there is "... additional conduct which amounts to an independent tort that such breach can constitute negligence." *Electronic Security Systems Corp. v. Southern Bell,* 482 So.2d 518 (Fla. 3d DCA 1986). *See also Southern Bell Telephone & Telegraph Co. v. Hanft,* 436 So.2d 40 (Fla. 1983); *Lewis v. Guthartz,* 428 So.2d 222 (Fla. 1982); *Floyd v. Video Barn, Inc.*, 538 So.2d 1322 (Fla. 1st DCA 1989), citing *Griffith v. Shamrock Village, Inc.*, 94 So.2d 854 (Fla. 1957); *Electronics, supra.*, and *Jones v. Continental Ins. Co.*, 670 F.Supp. 937, 946 (S.D. Fla. 1987).

Because Florida has long recognized the right to bring a tort action separate and apart from contract under the "independent tort" theory, and because a failure to warn after the manufacturing process creates an independent tort, this Court should answer the third question in the affirmative.

CONCLUSION

Based upon the foregoing, this Court should answer Certified Question I in the negative and Certified Questions II and III in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 15, 1994 a copy of the foregoing was served by mail upon:

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