IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC03-1601

On Certified Questions of Law and Consolidated Cases from the United States Court of Appeals for the Eleventh Circuit, Case Numbers 02-14828-AA and 02-14830-CC

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Appellant,

v.

AMERICAN AVIATION, INC.,
Defendant-Appellee.

PROFILE AVIATION SERVICES, INC.,
Plaintiff-Appellant,

v.

AMERICAN AVIATION, INC.,
Defendant-Appellee.

AMICUS CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS' ASSOCIATION (Supporting Defendant-Appellee)

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STATEMENT OF INTEREST

Amicus Curiae, Florida Defense Lawyers Association (FDLA), submits this brief supporting Defendant-Appellee, American Aviation, Inc. (American). Specifically, FDLA respectfully submits this brief in its capacity as a Florida-wide organization of defense attorneys consisting of over 1,000 members. FDLA is very often involved in cases of great importance that impact Florida law.

The consolidated cases before this Honorable Court are an opportunity for this Court to clarify a rule that, by this Court's own language, has "not always been clear, and accordingly, have been the subject of legitimate criticism and commentary." *Moransais v. Hathman*, 744 So.2d 973 at 980 (Fla. 1999). The rule has undergone significant transformation since the first decision substantially discussing it in its modern form in *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899 (Fla. 1987). Subsequent decisions have moved the Rule from matters of pure products liability to cases that arguably do not involve products at all.

FDLA therefore respectfully requests this Honorable Court to clarify the Economic Loss Rule by holding that the Economic Loss Rule is applicable as a bar to Plaintiff-Appellants' tort-based claims. By upholding the Rule's applicability to this case, this Court will uphold the rule's applicability to claims in which a product's manufacture or reassembly is directly at issue. Doing so will endorse the original intent behind the Rule.

SUMMARY OF THE ARGUMENT

The primary point for this Court to consider is whether the complained-of activity, the reassembly of an aircraft landing gear, is activity that falls under the Economic Loss Rule. Both the underlying policy behind the Rule and case law clarifying and defining the Rule show that it was meant to apply, above all other types of actions, to a products liability action like the one before this Court. This is especially true where the allegations being made stem solely from the construction, assembly or reassembly of a finished product that is later found to have been defective, with the only alleged loss involving the product itself. That is precisely the situation before this Court.

The Rule is subject to various exceptions as well, the first of which is the "other property" exception. Case law defining the exception, however, makes it clear that the exception does not apply where a defective part damages the entire product of which the part is an "integral" component. Such is the case here, where an allegedly defective landing gear damaged an aircraft.

Another exception is the "professional services" exception. Here this Court has an opportunity to define the area of the Economic Loss Rule that has been subject to extensive criticism, as it has the opportunity to clarify that services performed that contribute to the construction, assembly or reassembly of a finished product do not fall under the exception. Doing so will be consistent with existing case law and allow a far clearer standard for the exception to apply.

Finally, the "negligent misrepresentation" exception to the rule does not apply since it only exists where an entity provides information to a very limited group of individuals to whom the allegedly negligent provider of information intended to supply information. This can certainly not be the case at bar since the Plaintiff-Appellants did not purchase the airplane at issue until years after the allegedly negligent misrepresentation took place.

ARGUMENT

I. THE ECONOMIC LOSS RULE SHOULD APPLY TO ALLEGED TORTS IF THE DEFENDANT HAS PROVIDED SERVICES RELATED TO THE CONSTRUCTION, ASSEMBLY OR REASSEMBLY OF A PRODUCT.

To date, Florida law has struggled to define the specific activity to which the Economic Loss Rule applies. An analysis of the underlying policies behind the Rule, along with the cases interpreting the Rule provide precedent requiring the Rule to be applied when the complained-of activity substantially contributed to or caused the construction, assembly or reassembly of a product. Such a requirement will contain the Rule as suggested by this Court and provide a clearer framework within which the Rule can operate. Completely adopting the Plaintiff-Appellants' construction of the Rule will further blur the applicability of the Rule and frustrate the distinction between contract and tort law.

A. The Economic Loss Rule's Underlying Policy Requires Parties Purchasing Products to Guard Against Product Defects Through Contract Provisions, Price Adjustments, Insurance or Contract Remedies Rather than Tort.

This Court, in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987), set forth the many policy concerns that gives rise to the Economic Loss Rule. First, the Rule arises from the notion that a manufacturer of a product "has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." *Id.* at 901 (quoting *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 at 865 (1986)). A product, through a defect of some form, that injures itself and no other property or person, merely fails to satisfy the economic expectation that the product's buyer had at the time of purchase. *See id.* From this, this Court concluded that a product that solely damaged itself would be better governed through contract law than tort. *See id.*

Second, this Court noted that the Rule encouraged bargaining and negotiation rather than an after-the-fact tort remedy through a negligence claim. *See id.* Subjecting a product manufacturer to tort liability would also unfairly subject it to unclear "vagaries of individual purchasers' product expectations." *Id.* Doing so would cause product manufacturers to raise prices to cover the costs associated with the unclear and higher damages typically claimed in tort actions. *See id.* Allowing warranty/contract actions, however, would fix damages at more certain expectation damages, thereby allowing aggrieved parties to be compensated for "forgone business opportunities" while preventing an unnecessary cost burden on the public. *See id.* at 901-902.

The *Florida Power and Light Co.* decision involved the sale of two nuclear steam supply systems that included six steam generators that later developed leaks. *See id.* at 900. Both Florida Power and Light and Westinghouse were in privity of contract with each other. *See id.* As a result, this early case in the evolution of the Rule involved a pure contract for the sale of goods between two parties and offers a good starting point for any analysis of the Rule.

This Court cited further policy reasons behind the Rule in *Casa Clara Condominium Association, Inc. v. Charley Topping and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993). In *Casa Clara*, this Court considered whether the Rule barred a negligence claim arising from a construction contractor's use of concrete with a high salt content. *See id.* at 1245. The concrete allegedly caused reinforcing steel beams in a condominium complex to rust and significantly damage the structure. *See id.* Homeowners sued the contractors directly along with other defendants in separate contract actions. *See id.* at fn. 3. While the issue of contractual privity was not substantially discussed, this Court noted that homeowners are afforded protections including warranties, the ability to bargain over price and the ability to inspect prospective properties for defects. *See id.* at 1247. This Court defined economic loss as "costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Id.* at 1246. This Court then held that "these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses." *Id.* Holding otherwise, according to this Court, would cause contract law to "drown in a sea of tort." *Id.*

The policy reasons behind the Rule were reiterated in *Pulte Home Corp. v. Osmose*

Wood Preserving, Inc., 60 F.3d 734 at 739-40 (11th Cir. 1995), where the Eleventh Circuit noted that "[t]he rationale underlying the economic loss rule is that parties should protect against the risk of economic loss during contract negotiations through warranty provisions and price adjustments rather than attempt to recover under tort law after the loss occurs." *Pulte Home Corp.* featured an allegation that Osmose (a wood preservative manufacturer) failed to adequately manufacture a chemical used to treat lumber that Pulte used in the construction of townhouses in several states. *See id.* at 736-737. Osmose stamped sheets of plywood treated with the chemical with stamps to indicate the treatments to the sheets. *See id.* at 737. The stamped sheets apparently degraded under high temperature consistent with an attic environment, giving rise to the lawsuit. *See id.* at 738. The *Pulte Home Corp.* court held that the Rule prevented the plaintiff from recovering on a negligence theory. *See id.* at 744. In so doing, the Eleventh Circuit upheld the policy that "parties should protect against the risk of economic loss during contract negotiations through warranty provisions and price adjustments rather than an attempt to recover under tort law after the loss occurs." *Id.* at 739-40.

The aforementioned cases make it definitive that the Rule is designed to preclude plaintiffs from recovering purely economic losses for defective products through contract law rather than tort. The case at bar features just such a situation. That is, a claim of purely economic losses stemming from landing gear that the Plaintiff-Appellants allege was installed improperly.

B. Further Cases Interpreting the Economic Loss Rule Show that the Rule Should Apply to Situations Where a Product has Allegedly Been Improperly Constructed, Assembled or Reassembled.

Arguably, the greatest difficulty in determining the applicability of the Economic Loss Rule involves determining the point at which a "service" becomes a "professional service," which constitutes an exception to the Rule, and permissible services that cannot be remedied by tort under the Rule. *See Moransais*, 744 So.2d at 979 (Fla. 1999) (holding that a cause of action in tort exists against individual engineers and their corporate employer when the engineers failed to detect defects during a detailed home inspection). While this section does not attempt to specify a standard for determining the specific services that fall on either side of the Rule, it does seek to establish that services resulting in a finished product (construction, assembly or reassembly) are those for which the Rule precludes tort recovery.

The most enlightening case for this point is *Palau Intl. Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So.2d 412 (Fla. 3d DCA 1995) (en banc). In *Palau Intl. Traders, Inc.*, a purchaser of a used airplane attempted to recover against the airplane's certified mechanic under a negligence cause of action. *See id*. at 413. The allegations made were very similar to those of the instant action. First, the plaintiff alleged that it was a third party that could foreseeably sustain an economic loss caused by the certified mechanic's negligent repair of the airplane. *See id*. at 414. Second, the plaintiff alleged that the mechanic and Narcam negligently supplied information that led the plaintiff to buy the airplane. *See id*. Third, the plaintiff argued that § 552 of the Restatement (Second) of Torts (1976) allowed them to recover in tort for negligent supply of information for the guidance of others. *See id*. at 417. Finally, the damage eventually discovered to the plane was damaged landing gear. *See id.*

The Third District, deciding en banc, found *Casa Clara* controlling, and held that it precluded tort recovery under any of the aforementioned theories. *See id.* at 416-417. The court held that the purchaser's "failure to receive the benefit of his bargain is a core concern of contract, not tort law." *Id.* The purchaser, according to the court, was free to protect itself with independent inspections prior to buying, negotiation of contract price, other contractual bargaining or purchasing insurance. *See id*. In denying the plaintiff's negligent misrepresentation claim under § 552 of the Restatement (Second) of Torts, the court held that the sale under consideration fell under the Uniform Commercial Code unlike the cases adopting the rationale of § 552. The court went on to quote William Prosser, *Law of Torts* § 101 at 665 (4th ed. 1971) as follows:

There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes, as well as damage to any property in the vicinity. But where there is no physical damage, and the only loss is a pecuniary one, through loss of value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule, . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery.

Id. at 418.

Palau therefore indicates that the process of performing certified repairs or inspections to an aircraft fall under the Economic Loss Rule. Since the certified repairs or inspections go toward the completed product, an airplane, the repairs or inspections are services that fall under the protection of the Rule.

Additional case law supports the conclusion held in *Palau*. In *American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 451 (Fla. 1st DCA 1991), the First District held that the Rule precluded recovery of a claim involving an allegedly improperly installed oil pump in an engine used on a commercial fishing boat. The plaintiff attempted to argue that the destruction of the engine after the replacement oil pump's malfunction constituted damage to "other property," which was a an exception to the Economic Loss Rule. *See id.* at 453. This argument was rejected, however, since the malfunctioning oil pump was an "integral or component part" of the engine. *See id*. In this case, the Economic Loss Rule protected the reassembly of an engine with a replacement oil pump from tort liability.

Another case supporting the idea that the Rule applies to the construction, assembly or reassembly of products is *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995). In *Airport Rent-A-Car, Inc.*, the plaintiff sued the manufacturer of buses that it had purchased through another party, alleging that the buses were negligently constructed. *See id.* at 629. The buses had burst into flame, and one of them had done so while transporting children. *See id.* The case appealed to the Eleventh Circuit, which certified the issue of whether the Economic Loss Rule applies to the plaintiff's negligence claims. *See id.* at 630. The only damages claimed were the buses themselves. *See id.*

This Court held that the Rule barred a negligence theory of recovery against the manufacturer. *See id.* at 631. It relied primarily on the *Casa Clara* case, and affirmed its disapproval and limitation of *Latite Roofing Co., Inc. v. Ubanek*, 528 So.2d 1381 (Fla. 4th DCA 1988) and *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973), which collectively allowed another exception to the Economic Loss Rule when no alternative theory of recovery existed. *See id.* at 630-631. It found that the Rule's prohibition of tort recovery applied equally to cases where a plaintiff sought tort recovery against a manufacturer of products, regardless of privity. *See id.*

The foregoing cases show that the Economic Loss Rule prohibits causes of action arising in tort for the construction, assembly and reassembly of products that later are alleged to be defective, thereby resulting in purely economic loss. As a result, while the Rule has been subject to some criticism for being vague regarding the type of services that fall under the Rule's prohibitions, it is definitely well settled that services contributing to a complete finished product, such as the assembly of a landing gear in a finished airplane, are included. There can therefore be no doubt that the Rule includes the case set forth in the certified questions.

II. NONE OF THE EXCEPTIONS FOR THE ECONOMIC LOSS RULE APPLY TO THE CASE AT BAR.

The certified questions before this Court include an inquiry regarding three possible

exceptions to the Economic Loss Rule. They include the "other property" exception, "professional services" exception, and "negligent misrepresentation" exception. None of them apply to the case at issue, and the Economic Loss Rule is not affected by operation of them.

A. The "Other Property" Exception to the Economic Rule does not Apply Since the Landing Gear at Issue is an "Integral Part" of the Completed Airplane.

The "other property" exclusion under Florida law begins with an analysis of *King v. Hilson-Davis*, 855 F.2d 1047 (3d Cir. 1988). *See Comptech Intl., Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219, 26 (Fla. 1999); *Casa Clara Condominium Assn., Inc.*, 620 So.2d at 1247 (Fla. 1993); *American Universal Insurance Group*, 578 So.2d at 454 (Fla. 1st DCA 1991). Florida courts have used this case's analysis of the character of a plaintiff's loss to determine whether the exception applies. *See id.* "[T]o determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant." *Id.* Courts have examined whether a plaintiff purchases a group of individual components or a finished product such as a house or engine. *See Casa Clara Condominium Assn., Inc.*, 620 So.2d at 1247; *American Universal Insurance Group*, 578 So.2d at 454. The exception was found to apply where a plaintiff sued for damage done to equipment subsequently installed on a defective boat that the plaintiff purchased. *See Shipco 2295, Inc. v. Avaondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987). The exception was also found to apply in *Comptech International, Inc.*, where an allegedly improperly repaired roof damaged computers contain within the building itself. *See Comptech International, Inc.*, 753 So.2d at 1221.

The District of South Carolina described the exception succinctly in *Myrtle Beach Pipeline Corp. v. Emerson Electric Co.*, 843 F.Supp. 1027, 1058-60 (D.S.C. 1993). There, the Court said that the exception only applied to damaged property that would not be damaged through the reasonably foreseeable function of the "product or service within the contract's contemplation." *Id.*

The case before this Court falls squarely within the class of cases that found the exception inapplicable. Here, Plaintiff-Appellants are attempting to sue based on allegedly improperly installed landing gear following a certification inspection. The landing gear is a component necessary for the finished airplane. When Plaintiff-Appellants initially purchased the airplane at issue, Plaintiff-Appellants certainly did not bargain for the purchase of a group of individual airplane parts. Instead, Plaintiff-Appellant bargained for a completed airplane that could not properly function without its landing gear. Moreover, the damage complained of is the kind of damage that could reasonably be foreseen through operation of the aircraft. As such, the landing gear is an "integral part" of the airplane and the exception does not apply.

B. The "Professional Services" Exception does not Apply Since the Mechanics Who Allegedly Performed the Improper Work are not Professionals.

FDLA respectfully joins in the argument raised by Defendant-Appellee that states that the aircraft mechanics at issue are not "professionals" under the standard set forth in *Garden v. Frier*, 602 So.2d 1273 (Fla. 1992). It would like to further point out, however, that the services discussed in the *Moransais* decision, which actually cemented the exception into Florida law to begin with, hardly dealt with the construction, assembly or reassembly of a product as discussed in Section I(B) above. *See Moransais*, 744 So.2d at 974. Quite the opposite, that case dealt solely with an inspection of an existing house for defects. *See id*. The professionals held liable in tort through this exception did nothing to contribute the construction, assembly or reassembly of the finished product purchased by the plaintiff. *See id*. As discussed *supra*, the Economic Loss Rule has drawn criticism for having limited definitions and parameters regarding the types of services to which the Rule does and does not apply. *See id*. at 979. *Moransais* represents a limitation that applies to professional services rendered that do nothing to affect the construction, assembly or reassembly of a finished product. As such, its applicability to the facts of this case should be very limited. Failing to do so will forever muddy the water of the Rule's professional services exception, since plaintiffs will constantly attempt to argue that any point in the process of creating a product constitutes a "professional service," as Plaintiff-Appellants are attempting to do here. By the tenuous standard suggested by Plaintiff-Appellants, a person on a vehicle assembly line would be providing such service, when they are in fact simply creating a product to which the Rule would typically apply. FDLA therefore respectfully requests that this Court limit the professional services exception to services rendered that do not construct, assemble or reassemble a finished product. Doing so will avoid a legal end-around the provisions of the Rule that apply it to its clearly defined purpose in product liability litigation.

C. <u>The "Negligent Misrepresentation" Exception does not Apply Since the Plaintiff does not Fall Within the Class of Entities Affected by the Exception.</u>

Again, FDLA agrees with and adopts the argument of Defendant-Appellee on this issue. It would like to make it clear, however, that § 552 of the Restatement (Second) of Torts (1976), upon which this Court relied in *First Florida Bank, N.A. v. Mitchell & Co.*, 558 So.2d 9, 12 (Fla. 1990) states:

. . . . the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he [American Aviation] intends to supply the information or knows that the recipient intends to supply it.

Accordingly, the Plaintiff-Appellees, in order for the exception to apply, must be a person or entity that American, at the time of its work on the plane, intended to supply the information plaintiff complains was improperly provided. Such a situation simply cannot be the case where the aircraft was purchased years after the inspection and

reassembly took place.

CONCLUSION

For the foregoing reasons, Amicus Curiae FDLA respectfully requests that this Honorable Court Answer the Certified Questions Consistent with the arguments and legal authority provided above and in Defendant-Appellee's brief.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF REQUIREMENTS

I HEREBY CERTIFY that the foregoing Amicus Brief complies with the Brief Requirements of Fla. R. App. P. 9.210(a)(2) this _____ day of November, 2003.

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