SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellants,

vs.

AMERICAN AVIATION, INC.,

Defendant-Appellee.

Case No.: SC03-1601

PROFILE AVIATION SERVICES, INC.,

Plaintiff-Appellants,

vs.

AMERICAN AVIATION, INC.,

Defendant-Appellee.

On Certified Questions of Law from the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE FLORIDA CONCRETE & PRODUCTS ASSOCIATION, INC. (submitted with leave of court in support of Appellee)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Other Authorities

STATEMENT OF INTEREST

The Florida Concrete & Products Association, Inc. is a trade association representing one hundred and seventy-five(175) members comprising approximately eighty (80) percent of all ready-mix concrete, concrete pipe, cement, aggregate, masonry, and chemical admixture manufacturers and suppliers in Florida.

It participated as *amicus curiae* in this Court's landmark decision in *Casa Clara Condominium Ass'n. v. Charley Toppino & Sons, Inc*.,620 So.2d 1244(Fla.1993),and *Airport Rent-A-Car, Inc. v. Prevost,*660 So.2d 628(Fla.1995); *Polygard, Inc v. Jarmco, Inc.,* 684 So.2d 732(Fla.1996); and *Comptech Int'l, Inc. v. Milan Commerce Park, Ltd,* 753 So.2d 1219(Fla.1999) because its members have relied on the Economic Loss Rule and related contract principles for decades in conducting their affairs, negotiating their contracts, and assessing their insurance needs.

It joins this appeal because any further retreat from the core policies announced in *Casa Clara* will unexpectedly and unfairly expose its members to hundreds of millions, if not billions, of dollars of unanticipated and unwarranted tort liability, depriving them of the benefits of their contracts and significantly increasing the cost of construction in Florida, thereby preventing many members of the consuming public from owning their own home due to the price increases that inevitably will follow from adoption of Appellants' positions.

SUMMARY OF THE ARGUMENT

Prior to *Moransais v. Heathman*, 744 So.2d 973(Fla.1999) and

Comptech v. Milam Commerce Park, Ltd.,753 So.2d 1219 (Fla.1999), it was clear in Florida that this Court strongly embraced the Economic Loss Rule(“Rule”) and recognized that it was the "**fundamental boundary**" between contract law and the law of torts, thereby encouraging parties to protect their own economic interests through contract and insurance. *See Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244(Fla.1993); *see also Airport Rent-A-Car v. Prevost Car, Inc.*,660 So.2d 628(Fla.1995); *AFM Corp. v. Southern Bell Tel. & Tel. Co.*,515 So.2d 180(Fla.1987); and *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899(Fla.1987).It also was clear that the judiciary should refrain from injecting itself into private economic decisions and that the Rule’s exceptions must be narrowly construed to prevent them from swallowing the Rule, eviscerating the law of contracts in the process. *Id.*

After *Moransais* and *Comptech,* however, which dramatically reduced the Rule’s status from the “fundamental boundary” to having mere “genuine, but limited, value in our damages law” and ignored *stare decisis* by holding the Rule was not intended to apply to architects and engineers even though the majority in *Casa Clara* and a unanimous Court in *Airport Rent-A Car* recognized precisely the opposite, only one thing is clear: the continuing scope and viability of the Rule is in great doubt.

This, in turn, has caused significant confusion (and widely divergent opinions)among Florida’s lower courts and left the bar with conflicting guidance. Indeed, this confusion is evidenced by this appeal, in which the Eleventh Circuit has advised it

cannot answer five questions about the Rule even though most, if not all of them, already have been answered by this Court.

Nor is this confusion limited to the services. To the contrary, because *Moransais* and *Comptech* showed open disdain for the Rule and repeatedly criticized *Casa Clara,* a products case, the Rule's continuing scope and viability is in doubt in the products context as well, including proper application of the "other property" and "negligent misrepresentation" exceptions, which threaten to defeat the Rule in every case.

The inevitable result of *Moransais* and *Comptech,* as warned in *Florida Power & Light,* has been significant increases in the prices of virtually all goods and services in Florida, directly and very negatively impacting all consumers. In the construction industry, the result has been significantly higher prices for building materials and construction in general, not to mention dramatic increases in the cost of malpractice insurance, preventing many citizens, and particularly those on the lower income scale, from fulfilling their dream of owning a home.

In the final analysis, the controlling issue here is the same as in *Casa Clara*: whether society as a whole should bear the economic burden of those who fail to protect themselves through contract or insurance. For the reasons adopted in *Casa Clara*, the answer must be "No", for to hold otherwise will surely deal a final deathblow to the law of contracts.

This appeal presents this Court with an opportunity to clarify that the Rule is the "fundamental boundary" between contract law and the law of torts and that its exceptions must

be narrowly construed and rarely applied to preserve the law of contracts. Consistent with this, the First Certified Question should be answered "YES" by clarifying the Rule generally bars tort claims against all non-professional service providers.

Similarly, since the Second Certified Question was answered "YES" in *Casa Clara* and *Airport Rent-A-Car,* the Court should reaffirm that the Rule applies even if a plaintiff lacks privity with the defendant(unless the defendant is a professional).

The Third Certified Question also should be answered "YES" and the Court should clarify that under *Casa Clara's* "object of the bargain" test, Appellants' did not suffer damage to "other" property when the landing gear of their aircraft damaged same.

The Fourth Certified Question should be answered "NO" and the Court should clarify that only learned professionals fall under the "professional service" exception adopted in *Moransais*.

Finally, the Fifth Certified Question should be answered "NO" and the "negligent misrepresentation" exception should be rejected. Alternatively, it should be limited to professionals or those falling squarely within the Restatement (Second) of Torts § 552. The Court also should clarify that this exception does not apply in products liability cases, thereby preventing the exception from defeating the Rule in every products case.

ARGUMENT

I. THE RULE'S CORE POLICY UNDERPINNINGS WEIGH HEAVILY AGAINST ALLOWING APPELLANTS' TORT CLAIMS

No meaningful analysis of the certified questions can be made without first re-examining the policy considerations that led this Court to adopt the Rule in the products setting in *Florida Power & Light* and in the services context in *AFM*. This is necessary because application of the Rule and its exceptions must be made against the backdrop of its core policy foundation: preservation of the law of contracts, including the UCC.

Justice Traynor explained this foundation as follows:

> 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...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...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.

Seely v. White Motor Co.,63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965)(citations omitted, emphasis added).

The U.S. Supreme Court agreed, holding that when merely economic losses are involved, "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...is not

justified." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d. 865 (1986).

Ultimately, this Court agreed, holding:

> We...find no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public. We hold contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage. The lack of tort remedy does not mean the purchaser is unable to protect himself from loss. We note the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which...would have limited application if we adopted the minority view. Further, the purchaser...can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.

Florida Power & Light, 510 So.2d at 902 (emphasis added).

Shortly after *Florida Power & Light*, this Court recognized that the same policy considerations supported application of the Rule in the services context. *AFM*, 515 So.2d at 180. This followed because the "policy interest supporting the ability to comprehensively define a relationship in a services contract parallels the policy interest supporting the ability to comprehensively define a relationship in a contract for the sale of goods." *See Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 679 N.E.2d 1197,1200(Ill.1997). Stated differently, since there is no principled reason to find that service providers may not rely on contract law to govern their relationships, the Rule must apply with equal force to them to preserve the law of contracts.

It is clear from *Seely*, *East River*, *Florida Power & Light,* and *AFM,* therefore, that the Rule was founded on a recognition

that contract and tort law are designed to protect very different interests. Contract law, on the one hand, is designed to protect the expectancy interests of parties to private, bargained-for agreements. It seeks to hold them to the terms of their agreements by imposing a general duty to perform as agreed, thereby ensuring that each party receives the benefit of its bargain. This duty is not imposed by law, however, but arises exclusively from the willingness of one party to voluntarily contract with the other.

Tort law, on the other hand, is rooted in the concept that society as a whole must be protected from physical harm 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." ***East River***, 476 U.S. at 866. Tort duties differ significantly from those assumed by contract, therefore, because they <u>are imposed by law</u> to protect society from harm whether or not a contract exists.[1]

The common thread running through these cases, however, is a recognition that tort law generally <u>is not implicated in the absence of physical injury to persons or "other" property.</u> *Airport Rent-A-Car*, 660 So.2d at 632. This is necessary because the cost of tort protection <u>ultimately is borne by society as a whole in the form of higher prices for all goods and services</u> because manufacturers and service providers faced with tort liability must "raise prices on every contract to cover the enhanced risk." *Florida Power & Light*, 510 So.2d at 901.

While this cost burden is justified when a product or service causes actual physical injury to persons or "other" property, when only economic losses are at issue, the question becomes "whether the consuming public should bear the cost of economic losses sustained by those who failed to bargain for adequate

contract remedies" or failed to purchase 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). Until *Moransais* and *Comptech,* this Court always answered this question in the negative. After, *Moransais* and *Comptech,* the answer is not so clear, particularly since the plaintiffs in both cases were allowed to recover economic losses in tort even though they agreed that they could not recover the same losses in their contracts. *See, e.g., Comptech* Record at R.56 and 60.[1]

Simply put, *Moransais* and *Comptech* ignored prior precedent and greatly expanded the reaches of tort law, driving up the cost of construction and malpractice insurance in the process. *Moransais,* 744 So.2d at 984(Overton, J. dissenting). For example, since the plaintiffs in both cases allocated the risk of the tort losses this Court allowed in their contracts with the defendants, the result-driven conclusion reached in *Moransais* and *Comptech* ignored *Florida Power & Light's* teachings that the judiciary should refrain from injecting itself into this type of economic decision-making.[2]

More importantly, the *Moransais* court's core holding – that this Court never intended the Rule to bar tort claims against professional architects and engineers – directly conflicts with *Airport Rent-A-Car*, *Casa Clara* and even *AFM,* all of which reached precisely the opposite conclusion. Not only is this evident from the fact that *Airport Rent-A-Car*, *Casa Clara* and *AFM* strictly limited *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973), to its unique facts, which concerned application of the Rule to architects and engineers, but also from the fact that the *Casa Clara* court repeatedly relied on cases applying the Rule to professional architects and engineers in reaching its decision, including *Sandarac Assoc'n, Inc. v. W.R. Frizell Architects, Inc.*, 609 So.2d 1349 (Fla. 2d DCA 1992) and the Virginia Supreme Court's decision in *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E. 2d 55 (1988). *See Casa Clara,* 620 So.2d at 1246-1247,n.8 and 9.

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[1] Mr. Moransais, for eamples, paid $600.00 for an inspection of a home worth nearly a million dollars. He agreed in his contract with the inspectors' employer that his recovery for a faulty inspection was limited to $50,000.00. Yet, because he was allowed to sue the inspectors for the full value of his home, this Court's decision exposed them to hundreds of thousands of dollars of liability Mr. Moransais agreed he could not recover.

[2] *Comptech's* core holding that the Rule does not bar statutory claims is sound under a separation of powers analysis. However, its reaffirmation of *Moransais* and repeated attacks on *Casa Clara* have caused it to be cited by the Plaintiff's bar as supporting the same positions advanced by Appellants.

It is also evident from the fact that *Casa Clara* **expressly disapproved** *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So. 2d 976 (Fla. 4th DCA 1979) and *Navajo Circle, Inc. v. Development Concepts, Corp.*, 373 So.2d 689 (Fla. 2d DCA 1979), **which held (like *Moransais*) that the Rule did not apply to architects and engineers.** *Casa Clara*, 620 So.2d at 1248,n. 9. It follows *a fortiori* that this Court did intend for the Rule to bar claims against professional architects and engineers when it decided *Airport Rent-A-Car*, *Casa Clara* and *AFM* **unless** they performed the somewhat rare supervisory functions at issue in *Moyer*. Or, as Justice Shaw noted in *Airport Rent-A-Car*:

> Pivotal to our decision [in *Moyer*] was the supervisory nature of the relationship between the architect and the general contractor...'[W]e based our decision on the fact that the supervisory responsibilities vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract.' The facts in this instance are void of supervisory responsibility; accordingly, *Moyer* is inapplicable. Based on the above, we find that Economic Loss Rule cannot be circumvented...absent the required supervisory responsibilities as annunciated in *Moyer*.

Airport Rent-A-Car, 620 So.2d at 628.

In the end, *Moransais* and *Comptech* ignored the doctrine of *stare decisis* even though no societal change warranted that result. *See North Florida Women's Health & Counseling Services, Inc. v. Florida*, 2003 WL 21546546(Fla.2003)(where Justice Shaw held "we cannot forsake the doctrine of *stare decisis* and recede from our own controlling precedent when the only change...has been the membership of this Court"). It is this irreconcilable clash between *Moransais* and *Comptech*, on the one hand, and *Florida Power & Light*, *Casa Clara* and *Airport Rent-A-Car*, that has caused the confusion that has cumulated in this appeal.

In the end, the Rule was adopted to serve 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. By performing this critical function, the Rule seeks to preserve the fundamental principles on which commerce has been based in this country for over 200 years - Freedom of Contract – including one's ability to control its liability exposure through contract limitations and disclaimers.

This does not mean parties like Appellants are left without remedies. Rather, the lessons of *East*

River, Seely, Casa Clara, Florida Power & Light, Airport Rent-A-Car and *AFM* are clear: parties who purchase products or services should negotiate for warranty protection or purchase insurance to protect their interests. They may forego such protection in exchange for a lower price. But the choice is theirs and the judiciary should "refrain from injecting [itself] into this type of economic decision-making," a lesson ignored in *Moransais* and *Comptech*.[3]

Indeed, if Appellants' views are adopted, the **antithesis** of the Rule's bedrock policy foundation will be achieved: parties will be encouraged to **never bargain** for warranty or insurance protection, relying instead on tort law and the judiciary for their **free** "warranty" protection. This will make it impossible for manufacturers and service providers to allocate their liability through contract, exposing 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 law of contracts and UCC will crumble into a heap of meaningless words.

The citizens of Florida do not deserve the higher prices for goods and services that inevitably will follow. Instead, they deserve for this Court to uphold *stare decisis* by following *Airport Rent-A-Car*, *Casa Clara* and *Florida Power & Light* and reaffirming that "contract principles [are] more appropriate than tort principles" for resolving economic loss claims.

II. THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED BY HOLDING THE RULE APPLIES TO ALL NON-PROFESSIONAL SERVICE PROVIDERS

As *AFM* confirmed, the ability to control one's liability through contract should apply equally to service providers. Indeed, every purchaser of products from the Association's members performs a service, such as placing concrete, erecting walls, and building homes. Why should these hard working service providers, many of whom are small, one-person operations, be exempted from the protection of contract law and the Rule simply because they perform a service rather than sell products? Surely they deserve the same protection as product manufacturers.

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[3] Appellants find "a tort remedy attractive because it often permits the recovery of greater damages than an action on a contract," allowing them to avoid their contracts. *Casa Clara*, 620 So.2d at 1245,*quoting* William L. Prosser, *The Borderland of Tort and Contract in Selected Topics on the Law of Torts*, 380, 425 (Thomas M. Cooley Lectures, 4th Series,1953).But this is certainly no justification for adopting Appellants' views.

The confusion leading to the First Certified Question arose from *Moransais'* statement that the Rule was "primarily intended to limit actions in the product liability context, and its application generally should be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis." *Moransais*, 744 So.2d at 980. But, as *AFM* recognized, the same policy considerations supporting application of the Rule to products applies with equal force to service providers.

Stated differently, there is no principled reason to hold that ordinary service providers may not define their relationships through contract, including limitation of liability clauses. Since the Rule's core policy foundation – preservation of contracts – applies with equal force to service providers, the Court should clarify that all non-professional service providers fall under the Rule's protection.[2]

III. THE SECOND CERTIFIED QUESTION SHOULD BE ANSWERED BY REAFFIRMING THAT THE RULE APPLIES EVEN IF THERE IS NO PRIVITY BETWEEN THE PLAINTIFF AND DEFENDANT

Rule 9.370 prevents a full analysis of the certified questions. However, *Casa Clara* and a unanimous *Airport Rent-A-Car* held that the Rule applies even if the plaintiff is not in privity with the defendant and plaintiff is left with no alternative remedy(because, for example, it foregoes warranty protection for a lower price). *Airport Rent-A-Car*,660 So.2d at 630;*Casa Clara*,620 So.2d at 1246.

Simply put, there is no legitimate reason to reject *Casa Clara* or the unanimous decision in *Airport Rent-A-Car* on this issue. Thus, the Court should reaffirm that, with the possible exception of professionals, the Rule applies even if the plaintiff is not in privity with the defendant.

IV. THE THIRD CERTIFIED QUESTION SHOULD BE ANSWERED BY FINDING APPELLANTS HAVE NOT SUFFERED DAMAGE TO "OTHER" PROPERTY

The confusion surrounding the "other" property exception stems from repeated negative references to *Casa Clara* throughout *Moransais* and *Comptech*, including *Casa Clara's* "other" property analysis. However, *Casa Clara* is supported by legions of cases, including the U.S. Supreme Court's decision in *East River*.

Under *Casa Clara*, "[t]he character of a loss determines the appropriate remedies and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant." *Id.* at 1247. The object of Appellants' bargain was an aircraft, not landing gear(and

definitely not Appellee's services). Like *Casa Clara*, when the landing gear damaged the aircraft, Appellants suffered purely economic losses, not damage to "other" property.[4]

As a result, the Court should answer the Third Certified Question by reaffirming that *Casa Clara's* test for assessing whether "other" property has been damaged remains good law in Florida and compels the conclusion that Appellants have not suffered damage to "other" property under the Rule.

V. THE FOURTH CERTIFIED QUESTION SHOULD BE ANSWERED BY HOLDING ONLY LEARNED PROFESSIONALS FALL WITHIN THE PROFESSIONAL SERVICES EXCEPTION TO THE RULE

A finding that a non-professional, certified mechanic falls within the professional services exception would force this Court to hold the Rule does not apply to any service provider. But such a holding runs afoul of *Moransais* itself, since the core rationale there was that learned professionals are held to a higher standard than ordinary service providers. Id. at 978.

Such a holding also runs afoul of *Garden v. Frier*,602 So.2d 1273,1275(Fla.1992), which held that a "professional" is someone who must complete a four-year college degree as a prerequisite to engage in an occupation. *Id*. It also runs afoul of *Garden's* recognition that there "can be no equivalency exception." *Id.*

In short, since *Moransais'* holding that the Rule was never intended to apply to architects and engineers was itself an unwarranted expansion of tort law and conflicts with *Casa Clara, Airport Rent-A-Car* and *AFM,* the Court should clarify that the exception is limited strictly to learned professionals, such as architects, engineers, lawyers, doctors and accountants.

[4] Even under a *Comptech* analysis, the "object" of Appellant's bargain was a finished aircraft, not its landing gear.

VI. THE FIFTH CERTIFIED QUESTION SHOULD BE ANSWERED BY REJECTING THE "NEGLIGENT MISREPRESENTATION" EXCEPTION OR, ALTERNATIVELY, LIMITING IT TO PROFESSIONALS OR THOSE FALLING UNDER THE RESTATEMENT (SECOND) OF TORTS §552.

No prior holding of this Court threatens to undermine the Rule (whether in a products or services context) more than *PK Ventures, Inc. v. Raymond James & Assoc.*, 690 So.2d 1296 (Fla.1997),in which the Court held that mere "negligent misrepresentation" survives the Rule. This is true because many lower courts and the plaintiff's bar have interpreted this "black letter" statement to literally mean that **all** "negligent misrepresentation" claims survive the Rule, even in the products liability context.

The problem with this conclusion is that nearly every contract claim, including in products cases, can be framed as a "negligent misrepresentation" claim, arming crafty lawyers with an easy tool to defeat the Rule and their client's contract in every case. *See Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So.2d 74, 77 (Fla. 3d DCA 1997); and *Puff 'N Stuff, Inc. v. Bell*, 683 So.2d 1176, 1179-80(Fla.5th DCA 1996)(Harris, J. concurring). Under such a literal, "black letter" interpretation of this exception, for example, a plaintiff may overcome a product manufacturers contractual limitations by simply alleging that the manufacturer "negligently misrepresented" that its product would work for its intended purpose, an obvious concern of warranty law and not properly a concern of tort law.

At a more fundamental level, the Association submits *PK Ventures* stands on very unstable footing, at least as currently applied. This is true because *PK Ventures* never analyzed the issue or the ramifications of its holding and, instead, merely adopted *Woodson v. Martin*, 685 So.2d 1240(Fla.1996), which, in turn, merely adopted the holding in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238 (Fla.1996),that "fraud in the inducement" survives the Rule.

The rationale cited in *HTP* for finding that fraud in the inducement survives the Rule, however, does not carry over with equal weight to mere negligent misrepresentation. This is true because fraud in the inducement is more akin to intentional misconduct, under which a party's ability to freely contact is undermined by pre-contract deceit. *Id.* at 1239-1240. Thus, *PK Ventures* was not controlled by *HTP* or *Woodsen* as it stated. Rather, it greatly expanded both cases and the reach of tort law, strongly undermining contract law in the process.

Moreover, the Court in *HTP* also recognized that "fraud in the performance" is barred by the Rule

even though fraud under any color surely is a more serious wrong than any form of negligence. Viewed in this light, the Court should revisit *PK Ventures* and find that mere "negligent misrepresentation" unattended by fraud does not survive the Rule, particularly since parties have the ability to protect against the possibility of negligent misrepresentations through contract negotiation and insurance.

Alternatively, the Court should limit the "negligent misrepresentation" exception to learned professionals or those who fall squarely within the confines of the Restatement(Second) of Torts § 552. Since the Appellee's employees clearly do not fall under either category, Appellants' tort claims under this theory also should fail. *See Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So.2d 412 (Fla. 3d DCA 1995).

Finally, the Court should also clarify that the "negligent misrepresentation" exception, as opposed to "fraud in the inducement", has no place in products liability jurisprudence. A contrary conclusion will invite all plaintiffs and their counsel to defeat their contracts in every case by simply alleging that the subject manufacturer "negligently misrepresented" that the product would perform as intended, which should be of no concern to the law of torts and must be governed by warranty law.

CONCLUSION

Appellants cannot escape the fact they seek purely economic losses in tort because they failed to protect their own economic interests through contract or adequate insurance. In effect, they ask this Court to "rewrite their contracts" so they can avoid the ramifications of their own bad bargain.

This Court made it clear in *Florida Power & Light,* however, that the judiciary should refrain from injecting itself into this type of economic decision-making. While the Court moved far away from this lesson in *Moransais* and *Comptech,* it can return to the strong foundation of *Florida Power & Light, Casa Clara,* and *AFM* by reaffirming that the Rule is the "fundamental boundary" between the law of contracts and torts and must be strongly and broadly applied to preserve freedom of contract.

In the end, the citizens of Florida do not deserve to bear the economic burden of those who fail to protect themselves. A contrary conclusion will surely cause contract law to "drown in a sea of tort," taking the UCC with it to a watery grave. *Casa Clara,* 620 So.2d at 1247,*quoting East River*, 476 U.S. at 866.

Respectfully submitted,

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I HEREBY CERTIFY that this brief complies with the font and other requirements of Rule 9.210, Florida Rules of Appellate Procedure and has been filed in diskette format as required by the Court.

Attorney

[1] Simply put, the basic function of tort law is to shift the burden of loss from the injured party to the one causing the injury, the latter of whom is presumed to be better suited to prevent the injury in the first place and to bear the financial burden of same. *Casa Clara*, 620 So.2d at 1246.

[2] This conclusion is supported by *Moransais*, which recognized that *AFM* is "sound". However, the *Moransais* court's attempt to limit *AFM's* reliance on the Rule by suggesting its decision "may have been unnecessarily over-expansive [in its] reliance on the economic loss rule as opposed to fundamental contractual principles" overlooked the fact that the Rule was adopted to protect those same "fundamental contractual principles".