CASE NO. SC03-1601

In the
Supreme Court of Florida

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
Plaintiff-Appellant

v.

AMERICAN AVIATION, INCORPORATED.
Defendant-Appellee

Case No: 02-14828-AA

PROFILE AVIATION SERVICES, INC.
Plaintiff-Appellant

v.

AMERICAN AVIATION, INC.
Defendant-Appellee

Case No: 02-14830-CC

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

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CONSOLIDATED ANSWER BRIEF OF APPELLEE, AMERICAN AVIATION, INCORPORATED

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Statutes

Regulations

Rules of Court

Other Authorities

CERTIFIED QUESTIONS

These cases came before this Court by way of five questions certified by the Eleventh Circuit Court of Appeals. The five certified questions are:

> I. Whether the "economic loss" doctrine of Florida applies to alleged torts if the defendant has provided services to a product rather than has sold a product.
>
> II. Whether the "economic loss" doctrine of Florida applies if there is no contractual relationship between the plaintiffs and the defendant.
>
> III. Whether the "economic loss" doctrine of Florida applies to the facts of this case with regard to damage to the total aircraft as opposed to mere damage to the landing gear under the "other property" exception.
>
> IV. Whether the providing of certified mechanical services falls under the category of the "professional services" exception to the "economic loss" doctrine of Florida or under some related services exception.
>
> V. Whether the negligent representation claim in this case provides an exception to the "economic loss" doctrine of Florida.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

Profile Aviation Services, Inc. ("Profile") and Indemnity Insurance Company of North America ("Indemnity") filed suits against American Aviation, Inc. ("American") in the United States District Court for the Middle District of Florida

arising from damage an aircraft sustained when its landing gear allegedly malfunctioned during a landing. (R_P Doc. 1 pp. 1-9; R_I Doc. 1 pp. 1-10) Each complaint asserted the following: negligence, negligence *per se*, negligent misrepresentation, and breach of warranty. (R_P Doc. 1 pp. 1-9; R_I Doc. 1 pp. 1-10) American moved to dismiss the complaints, arguing that Florida's economic loss rule barred the tort-based claims, and that a lack of privity precluded the breach of warranty claims. (R_P Doc. 3 pp. 1-8; R_I Doc. 3 pp. 1-8) Applying Florida's economic loss rule, on July 1, 2002, the Middle District Court dismissed the tort-based claims in both complaints with prejudice. (R_P Doc. 7 p. 10; R_I Doc. 8 pp. 3-8) Citing lack of privity, the court dismissed Indemnity's breach of warranty claim, but granted leave to amend. (R_I Doc. 8 p. 9) Finding that Profile had alleged privity in its complaint, the court denied American's motion to dismiss Profile's warranty claim. (R_P Doc. 7 p. 9)

Profile and Indemnity ("Appellants") filed motions for reconsideration. (R_P Doc. 9 pp. 1-2; R_I Doc. 9 pp. 1-2) In its memorandum, Indemnity conceded that no contract existed between Profile and American, and asserted, for the first time, that Profile was an intended beneficiary to a contract between American and the damaged aircraft's un-named former owner. (R_P Doc. 9 p. 2; 6) Noting that nowhere in its complaint had Profile asserted intended beneficiary status, the court rejected Appellants' assertion, and dismissed Profile's warranty claim, providing leave to

amend. (R_P Doc. 9 pp. 4-5; R_I Doc. 16 pp. 4-6) Appellants elected not to amend their complaints; thus, the court dismissed their warranty claims with prejudice. (R_P Doc. 21 p. 1; R_I Doc. 16 pp. 5-6)

Appellants timely filed notices of appeal to the Eleventh Circuit Court of Appeals. (R_P Doc. 23 pp. 1-2; R_I Doc. 19 pp. 1-2) On December 5, 2002, the appellate court consolidated the appeals. On September 4, 2003, the Eleventh Circuit, pursuant to section 25.031, Florida Statutes (2002) and Florida Rule of Appellate Procedure 9.150(a) certified five questions of law to the Florida Supreme Court. This Court has received the certified questions, the record on appeal with the Eleventh Circuit and the parties' Eleventh Circuit appellate briefs.

B. Statement of the Facts.

On November 22, 1996, a mechanic employed by American removed both of the main gear retract actuators from a Beechcraft KingAir 100 aircraft, registration number N924RM (the "aircraft"). (R_I Doc. 1 Exhibit A) Following an inspection of the actuators by an entity not a party to this action[1], the American mechanic reinstalled

[1] American asked the Eleventh Circuit to take judicial notice of Indemnity's pending suit against the entity that performed the maintenance and inspection of the actuators, Stevens Aviation, Inc., in the United States District Court for the District of South Carolina, Case No.: 02-CV-1625. The complaint and docket sheet for this matter are attached as an addendum to American's Eleventh Circuit answer brief. Indemnity's

the actuators on the aircraft. (*Id.*) The mechanic certified that the removal and reinstallation of the actuators were in accord with applicable maintenance manuals and Federal Aviation Regulations and approved the aircraft for return to service. (*Id.*)

The record does not show that the mechanics employed by American were FAA-certified mechanics. A mechanic employed by an authorized FAA certified repair station need not be personally certified or have gone through all the schooling Appellants describe. As long as the repair station is certified, the repair station has the authority to approve an aircraft to be returned to service after it has gone through maintenance, preventive maintenance, rebuilding or alteration. 14 C.F.R. § 43.7(c). Nor do the complaints allege or the attached logbook entries show that the mechanics employed by American were FAA-certified. (R_p Doc. 1 pp. 1-9; R_I Doc. 1. pp. 1-10) Further, Appellants do not even state these individuals were FAA-certified in their Statement of Facts. If the mechanics were working on an aircraft in their individual capacities, they would have to be certified to authorize the return of the aircraft to service, but in this case, the mechanics were employed by the class 3 rated repair

filing of this action is indisputable, and the fact of its filing is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The Eleventh Circuit may take judicial notice of a filing in another court "for the limited purpose of recognizing the judicial action taken or the subject matter of the litigation." *See Young v. Augusta, Georgia*, 59 F.3d 1160, 1167 n.11 (11th Cir. 1995) (citing *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). The Florida Supreme Court may take judicial notice of a record from any court of record in the United States. § 90.202, Fla. Stat. (1978).

station that possessed the certification. On May 14, 1999, after Profile purchased the aircraft, Appellants alleged that the aircraft was damaged when the right main landing gear failed to extend during landing. (R_P Doc. 1 p. 3; R_I Doc. 1 p. 3; Appellants' Consolidated Brief at 6) Pursuant to 14 C.F.R. § 91.409(a)(1), the aircraft must have undergone at least two annual inspections between the time that American performed its reinstallation of the actuators and May 14, 1999, when the aircraft sustained damage while landing.[2] Profile and its insurer Indemnity filed separate actions in tort and contract against American, asserting that American was liable for damage to the aircraft. (R_P Doc. 1 pp. 1-9; R_I Doc. 1 pp. 1-10)

STANDARD OF REVIEW

The Florida Supreme Court reviews questions of law, certified questions, and appeals of dismissals of complaints *de novo*. *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit*, 840 So.2d 1008, 1013 (Fla. 2003); *Florida Dept. of Health and Rehabilitative Services v. S.A.P.*, 835 So.2d 1091, 1094 (Fla. 2002).

SUMMARY OF THE ARGUMENT

[2] Even if the aircraft was maintained on a progressive maintenance schedule, as indicated by 14 C.F.R. § 91.409(d)(4), the aircraft would have had to have been completely inspected twice after American's reinstallation of the actuator.

First Certified Question

The Eleventh Circuit confined its first question to whether the economic loss rule applies to services to a product rather than to services in general. The question should be answered in the "affirmative" for three reasons. First, in general, Florida law applies the economic loss rule to cases in which a service has been provided. *AFM Corp. v. Southern Bell Telephone and Telegraph Co.*, 515 So.2d 180 (Fla. 1987). Second, if the question is limited to servicing a "product," the question should even more definitively be answered "yes," as the *Moransais* Court has indicated that the economic loss rule is most properly applied in product liability-type cases. Finally, the facts of the case at bar involve more than a "service." Plaintiff below purchased a "product," which damaged itself but caused no personal injury or "other property" damage. Profile did not purchase a "service,' it purchased an aircraft. Also, American did not "service" the product, in the same sense that it merely checked its oil or fuel. American reinstalled a component of the aircraft – the actuator. American therefore stands in the shoes of the manufacturer as it is required to do under 14 C.F.R. § 43.13, which mandates an aircraft repair station perform work on an aircraft in the same manner as the manufacturer of the aircraft so that "the condition of the aircraft. . . will be at least equal to its original or properly altered condition…." 14 C.F.R. § 43.13(b).

Simply stated, what occurred below was economic damage to a "product," with no personal injury or damage to other property. Thus, under the Florida Court's original adoption of the economic loss rule and the Court's most recent decisions, the facts of the cases below fall squarely within the parameters of the economic loss rule and its application in the product liability context. *See Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899 (Fla. 1987); *Comptech v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 1999); *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999).

Second Certified Question

The second question asking whether the economic loss rule applies where there is no contractual relationship should be answered in the "affirmative." This Court has consistently applied the economic loss rule where no contract or privity exists *See Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So. 2d 628, 630-31 (Fla. 1995); *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc*. 620 So. 2d 1244 (Fla. 1993). This Court has not ruled that the economic loss rule applies only to cases involving privity or a contractual relationship. Rather, this Court has approved the application of the rule where no contract or privity existed. In *Casa Clara*, a homeowner sued the supplier of the defective concrete used in building the homeowner's house. In *Airport Rent-A-Car*, the owner of several buses that caught fire sued the manufacturer of the buses. In neither case was there a contract nor were the parties in privity. Appellants' intermediate appellate decisions stemming from *Southland Constr., Inc. v. Richeson Corp.*, 642 So.2d 5 (Fla. 5th DCA 1994) are not controlling and are distinguishable on their facts and legally under Florida law. In addition, because Appellants have sought a contractual remedy against another entity arising from the damage to the aircraft, the economic loss rule precludes Appellants' tort-based claims. *See Excess Risk Underwriters, Inc. v. Lafayette Life Ins. Co.*, 208 F. Supp. 2d 1310, 1314 (S. D. Fla. 2002).

Third Certified Question

The third question, asking whether the facts of this case fall under the economic loss rule with regard to damage to the entire aircraft rather than under the "other property' exception for damage to the landing gear, should also be answered in the "affirmative." Florida law is clear that damage to a component of a product such as a landing gear, does not mean that damage to the entire product, here the aircraft, is damage to "other property," so as to come under the exception. In the case at bar, no "other property" damage occurred. The aircraft's landing gear is an integral part of the product—the aircraft—that Profile purchased and Indemnity insured. *See Casa Clara*, 620 So. 2d at 1247. When the aircraft's landing gear failed, only the aircraft sustained damage and those damages were purely economic damages.

Fourth Certified Question

This Court has already basically answered the Eleventh Circuit's fourth certified question, whether the providing of certified mechanical services falls under the "professional negligence" exception to the economic loss rule, and the answer should remain in the "negative." In *Garden v. Frier*, 602 So.2d 1273, 1275 (Fla. 1992), this Court in an exhaustive well reasoned opinion, defined a "professional" for purposes of the two-year statute of limitations on professional malpractice as requiring at minimum a four-year college degree majoring in the subject of the profession, prior to licensing. This Court then extended the definition to determine whether an engineer is a "professional" for purposes of a professional negligence action. *See Moransais*, 744 So. 2d at 976. The record below does not show that the mechanics providing service to the aircraft possessed four-year college degrees in aviation repair or state licenses. Nor did Plaintiffs allege in the Complaints below that the individuals working on the subject aircraft were "professionals." In fact, neither the record nor the complaints below show or allege that the employee(s) who reinstalled the landing gear actuator were FAA-certified mechanics. *Garden* held that "equivalency" does not render an individual a professional. Simply because a mechanic must be well trained, does not render the mechanic a "professional" under Florida law.

Fifth Certified Question

The fifth certified question whether the negligent misrepresentation claim provides an exception to the economic loss rule should be answered in the "negative." American's logbook entry was not supplied for the guidance of others in their business transactions, but was supplied in compliance with and in furtherance of federal regulations. Moreover, it was not supplied specifically for Profile Aviation or any other future buyer of the aircraft, and thus the limited applicability of section 552 of the Restatement (Second) of Torts does not apply. *See First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So.2d 9, 15 (Fla. 1990); *Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So.2d 412, 417 (Fla. 3d DCA 1995). American owed no "duty" to Profile so as to be subject to a negligence claim.

ARGUMENT

CERTIFIED QUESTION I

THE "ECONOMIC LOSS" DOCTRINE OF FLORIDA APPLIES TO ALLEGED TORTS IF THE DEFENDANT HAS PROVIDED SERVICES TO A PRODUCT RATHER THAN HAS SOLD A PRODUCT

A. The Core Principles Underpinning the Economic Loss Rule Require Applying the Rule to Services and to Services to a Product Where There has been Only Economic Loss and No Personal Injury or Damage to Other Property.

Appellants argue in general against applying the economic loss rule to "services." but that is not the question certified by the Eleventh Circuit Court of Appeals. The Eleventh Circuit is well aware that under settled Florida law, the rule applies to services. Therefore, the federal appeals court confined its question to whether in Florida, the economic loss doctrine applies if a party has provided services to a product rather than sold a product. The answer to this first question should be "yes," for the following three reasons: (1) Florida law applies the rule to services; (2) servicing a "product" involves the same product liability-type considerations referenced in *Moransais* as being subject to the economic loss rule; and (3) the facts of this case involve more than a service because Appellant Profile purchased the aircraft, and American, by reinstalling the landing gear actuator stands in the shoes of the aircraft's manufacturer under the Federal Aviation Regulations.

1. Florida Law Applies the Economic Loss Rule to Services.

In *AFM Corp. v. Southern Bell Telephone and Telegraph Co.*, *supra*, this Court applied the economic loss rule to a claim for negligence for economic damages caused by negligently supplying the service of a "yellow page" advertisement. *Id.* at 180-181. The *AFM* ruling, in answering the certified question: "Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal

injury or property damage?" in the negative, expanded the application of the economic loss rule to services. *See also R.A.M. Sourcing Agency, Inc. v. Seaboard Marine, Ltd.*, 995 F. Supp. 1465, 1468 n. 4 (S.D. Fla. 1997).

Thirteen years later in *Moransais v. Heathman*, *supra* and *Comptech Intn'l Inc. v. Milam Commerce Park, Inc. supra*, this Court reaffirmed and approved the *AFM* decision, holding that the result reached in *AFM* was "sound." The majority in both *Moransais* and *Comptech* refused to recede from *AFM*, even though several justices argued recession in dissent.

Florida is not the only state that applies the economic loss rule to services. The majority of states agree with Florida law and refuse to apply the rule only to the sale of a product. *See e.g. Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 176 Ill. 160, 223 Ill. Dec. 424, 679 N.E.2d 1197, 1200-01 (Ill. 1997); *American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1190 (Utah 1996); *Boston Inv. Property # 1 v. E.W. Burman, Inc.*, 658 A.2d 515 (R.I. 1995); *Thomson v. Espy Huston & Assoc.*, 899 S.W.2d 415, 422 (Tex. App. 1995); *Berschauer/Phillips Const. Co. v. Seattle School District No. 1*, 124 Wash. 2d 816, 881 P.2d 986 (Wash. 1994); *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n*, 54 Ohio St. 3d 1, 560 N.E.2d 206, 212 (Ohio 1990); *Blake Const. Co., Inc. v. Alley*, 233 Va.

31, 353 S.E.2d 724, 726 (Va. 1987). The Illinois Supreme Court, in *Fireman's Fund* explained the similarity between a provider of services and seller of goods in respect to the economic loss rule:

> The policy interest supporting the ability to comprehensively define a relationship in a service contract parallels the policy interest supporting the ability to comprehensively define a relationship in a contract for the sale of goods. It is appropriate, therefore, that the economic loss rule should apply to the service industry.

Id at 1200.[3]

As in *Fireman's Fund*, the policy interests in the cases at bar "parallel" the policy interests in products cases. See discussion in Section I A, 2 and 3, *infra*.

The *Moransais* and *Comptech* majorities were correct in not receding from *AFM*. *AFM* followed and relied upon the seminal Florida economic loss rule decision – *Florida Power & Light Co. v. Westinghouse Electric Corp.*, *supra*, in which this Court held that contract principles are more appropriate that tort principles in resolving economic losses resulting from the purchase of a product where there are no personal injury or property damage claims. The *Florida Power & Light Co.* holding was consistent with the threshold case of *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

[3] Although *Fireman's Fund* references a contract for services, as do the other cases cited above, Florida law does not require a contract for the economic loss rule to apply. See Certified Question II, *infra*.

The basis for *East River*, *Florida Power & Light*, and their progeny remains critical to the separation of pure economic loss from injury to persons or damage to other property. In *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, *supra*, this Court held that the rule "prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself." In *Casa Clara*, the Florida Supreme Court noted that "economic losses are 'disappointed economic expectations,' which are protected by contract law, rather than tort law. This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party." *Casa Clara*, 620 So. 2d at 1246 (citation omitted).

The Court further noted:

> The purpose of a duty in tort is to protect society's interest in being free from harm, and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. When only economic harm is involved, the question becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies."

Casa Clara, 620 So. 2d at 1246-7 (citations omitted).

The *Casa Clara* appellants urged the court to create an exception to the economic loss rule for homeowners. The appellants owned homes that were constructed with concrete supplied by the appellee. They alleged that the defendant concrete supplied was defective causing the concrete to crack and break off." *Casa Clara*, 620 So. 2d at 1245. The homeowners, who had no contractual privity with the supplier sued the supplier in tort for purely economic damages. The Florida Supreme Court rejected the opportunity to create an exception to the economic loss rule for homeowners, reasoning:

> If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law. There are protections for homebuyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects. Coupled with homebuyers' power to bargain over price, these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses…. If we held otherwise, "contract law would drown in a sea of tort."

Casa Clara, 620 So. 2d at 1247 (footnotes omitted).

Contrary to Appellants' and other plaintiffs' wishes, *Casa Clara* has remained good law for ten years and is the case relied upon by the Middle District in the actions below. *Casa Clara* succinctly explains the reasons for the economic loss rule and its

application. Notwithstanding Appellants' contention to the contrary, the facts of this matter place it **squarely** within the holding and rationale of *Casa Clara*, in which a purchaser's product expectations were disappointed following the purchase of the product from a seller. In *Casa Clara*, the purchaser sustained no personal injury, and only the product itself was damaged.

Here, appellants asserted torts claims that allegedly arise from American's reinstallation of an aircraft's landing gear actuator for damage only to the product itself – an aircraft. Appellants have not alleged that any personal injury or that the aircraft damaged other property but allege only that upon the alleged failure of the aircraft's landing gear component, the aircraft itself was damaged.

As in *Casa Clara*, the public safety concerns that ground tort actions are not at issue here because only the aircraft sustained damage. Thus, there is no reason to spread the cost of the aircraft's damage to the consuming public as a whole. Clearly, this case is precisely the type of 'disappointed economic expectation' claim that Florida's strict interpretation of the economic loss rule forecloses, because Appellants' suit against American essentially alleges that their expectations of the aircraft's performance were disappointed.

Appellants could have protected their investment in the aircraft in a number of

ways. First, Appellants could have contracted for a detailed and independent pre-purchase inspection of the aircraft. Second, Appellants could have obtained additional insurance to cover losses arising from the damage to the aircraft, such as loss of use and diminution in value. Finally, Appellants could have secured a warranty from the seller or from American under an independent warranty scheme. Their failure to avail themselves of these protections does not justify imposing the cost of the aircraft's repairs on the consuming public. [4]

Excruciating costs would be imposed on Florida's significant and extensive aircraft maintenance industry, if this Court were to hold American liable in tort for its maintenance of the aircraft. American would be forced to pass the costs of any damages on to its customers by increasing prices for its maintenance. To prevent future losses, American would have to purchase unlimited liability insurance and pass the costs of premiums on to its customers. [5] Holding an aviation repair station liable in tort for economic losses from maintenance would make the station a guarantor to

[4] Appellants argue against contractual protections overriding tort actions, even though contractual negotiations and economic protection are a cornerstone of the economic loss rule. Appellants' contention that Indemnity's subrogation rights cancel out the importance of economic protections as set forth in *Casa Clara* and *East River* is irrelevant and meaningless to the legal principles involved in these cases.

[5] Appellants make light of American's explanation that if a negligence action is permitted, American would have to pass on the costs to society. Appellants overlook the fact that this is exactly the concern expressed in this Court's economic loss rule decisions.

unknown and remote third parties for routine maintenance and logbook entries completed in compliance with federal regulations. Clearly, the costs of imposing liability on American do not justify the benefits. Instead, this Court should oblige the party that chose not to protect itself to bear the costs of its failure to do so. [6]

Today, *Casa Clara* and *AFM* remain the law of Florida. The Florida Supreme Court has not overruled *Casa Clara* or disapproved of it in any way and has recently described the *AFM* decisions as "sound." Appellants would have this Court recede from *Florida Power & Light*, *Casa Clara* and *AFM* and totally abolish the economic loss rule. Appellants would limit the economic loss rule so as to allow most all causes of actions in tort for purely economic loss. The result would be contract law that "would drown in a sea of tort." *Casa* Clara, 620 So,2d at 1247. This is an erroneously broad misreading of the recent history of Florida's application of the rule. While it is true that this Court has limited the rule's application to certain specific causes of actions, s*ee Comptech*, 753 So.2d 1219 (statutory negligence); *Moransais*, 744 So.2d 973 (professional negligence); *PK Ventures, Inc. v. Raymond James & Assocs*., 690 So.2d 1296 (Fla. 1997) (negligent representation); *HTP, Ltd. v. Lineas Aeras*

[6] Appellants also criticize this argument but with no legal support to contest the reality that American owes no duty to unknown future purchasers of an aircraft it inspected for an owner years ago.

Costarricenses, S.A., 685 So.2d 1238 (Fla. 1996) (fraudulent inducement), Appellants are incorrect in contending that these recent decisions "control the instant cases." This Court has not limited or disturbed the rule's core application – to actions for purely economic loss in which the product has only damaged itself. *Casa Clara, AFM* and the history of the economic loss rule in Florida, as the District Court correctly decided, control the instant cases. *Casa Clara* and *AFM* should continue to be the law in Florida. Appellants' tort-based claims should be barred because contract principles are more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage.

2. The Economic Loss Rule Applies Because Appellants' Tort Claims are for Economic Loss to a "Product."

Florida law requires the application of the economic loss rule to Appellants' tort claims because the alleged damage is to a product and the loss claimed is purely economic. In *Casa Clara*, this Court observed:

> Economic loss has been defined as 'damages for inadequate value, 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.' Note. *Economic Loss in Product Liability Jurisprudence*, 66 Colum.L.Rev. 917, 918 (1966). It includes 'the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured or sold.' Comment, *Manufacturer's' Liability to Remote Purchasers for Economic Loss: Damages – tort or Contract*?, 114 U.Pa.L.Rev. 539, 541 (1966).

Casa Clara, 620 So.2d at 1246.

Appellants' Complaints alleged economic loss and only economic loss. Although American was not the manufacturer or seller (although it stood in the shoes of the manufacturer as set forth *infra*), the only damage was to a product and the only loss was economic loss. This Court recently observed in *Moransais*, that the economic loss rule "should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis." [7] *Moransais*, 744 So. 2d at 983. In its analysis, the *Moransais* court tracked the evolution of the economic loss rule in Florida common law, noting that the rule's roots lie within cases involving damages to defective products. *See Moransais*, 744 So. 2d at 980 The court observed that in the defective product context, the "parties were in the best position to have anticipated potential problems with the items provided and could have adequately protected their respective interests through measures such as the applicable warranty law, 'negotiation and contractual bargaining,' or insurance." *Moransais*, 744 So. 2d at 980.

[7] Appellants rely extensively on this Court's decision in *Moransais* to persuade the Court that the economic loss rule does not apply to the facts of this case. *Moransais*, however, does not support Appellants' position, because that decision denied application of the rule specifically and only to professional malpractice cases.

That is exactly the situation in the instant case, where Appellant, Profile was in the best position to anticipate problems and protect its economic interests when purchasing the aircraft – a "product." The action performed by American Aviation was reinstallation of a component part to a "product," specifically to an aircraft. Appellants argue that the economic loss rule should not apply to services to a product, but only to the sale or manufacture of a product. This position improperly narrows the *Moransais* opinion limiting the rule to policy considerations substantially identical to those underlying the product liability-type analysis.

In light of the *Moransais* court's analysis, the economic loss rule is especially applicable here because, notwithstanding Appellants' repeated assertions to the contrary, this is a products liability case, or at the very least, a "substantially identical" case. Appellants allege that American had a duty to service the aircraft's landing gear in manner such that it would be reasonably safe for use; that American breached that duty; that American's breach legally caused Appellants' injury; and that the Appellants suffered damages. Thus, this is a products case. As such, it is distinguishable from *Moransais*, a professional malpractice case, and it is analogous to *Florida Power & Light Co.* and *Casa Clara*, both of which arose from defects in products that the

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respective plaintiffs purchased.

In contrast to *Moransais*, the factual allegations here give rise to policy considerations that are substantially identical to those underlying a product- type analysis. [8] In *Moransais*, the court noted that when a consumer deals with a professional, the consumer typically does not have the bargaining power nor the means to protect himself as he would if he was a party to a commercial transaction. *See Moransais*, 744 So. 2d at 983. Here, however, in the products liability context, Appellants were in the best position to anticipate problems with the aircraft and they could have protected their interests in the aircraft with contract language, warranty, negotiation, and additional insurance. Should the Court permit Appellants to maintain an action in tort against American, the Court would unnecessarily spread the costs of Appellants' failure to protect themselves over the consuming public because American would be forced to raise its prices to satisfy both the losses from such a suit and the insurance premiums necessary to cover future exposure. This excessive future exposure would include unlimited warranty liability as long as the aircraft exists. As

[8] Appellants' reliance on *Value House, Inc. v. MCI Telecommunications, Corp.*, 917 F. Supp. 5 (D.D.C. 1996) in misplaced. *Value House* overlooked the controlling case of *AFM* in its analysis, as the issue before the court was negligent communications services, just as in *AFM*. Moreover, the *Value House* court acknowledged the application of the economic loss rule *in Palau Intn'l Traders*, *supra*, a case almost identical to the instant cases and involving, as the *Value House* opinion states "a broken airplane." The *Value House* court also acknowledged that *Palau* was a products liability case. *Id* at 7.

specifically announced in *Casa Clara*, society need not bear the costs of Appellants' failure. As argued above, this case does not give rise to the safety concerns that ground tort actions since no personal injury occurred, and no other property was damaged. Instead, Appellants have simply suffered an economic loss. Should this Court permit Appellants to maintain their tort claims against American, Appellants could receive a windfall. The resultant damages would exceed commercial expectations, and Appellants would receive more than their benefit of the bargain.

Perhaps in *Moransais,* the Florida Supreme Court sought to limit the reach of the economic loss rule; however, because this case is essentially products in nature, and the policy considerations underlying a products case are substantially identical to those at work here, even under *Moransais,* the economic loss rule should apply to the cases below.

3. The Economic Loss Rule Applies Because Appellants Purchased a "Product," not a Service.

Appellant, Profile did not purchase a "service" from American, such as checking oil or fuel. Nor did Appellants purchase an intangible service not involving a product. Profile purchased a "product" from the seller of the aircraft. This Court has defined the nature of a product as being available for purchase in the sense it is offered in the stream of commerce in a way that "for instance, soft drinks or

automobiles are." *Edward M. Chadbourne, Inc. v. Vaughn*, 491 So.2d 551, 553 (Fla. 1986). Thus, this case comes within the realm of the policy considerations that underlie products cases and should be analyzed from that perspective. Moreover, the work that American did on the aircraft was, as required by Federal Regulations, identical to the work performed in the original manufacture of the aircraft. 14 C.F.R. § 43.13 sets forth the performance rules governing the maintenance, preventing maintenance, rebuilding and alteration of an aircraft and states, in pertinent part:

> (b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition….

This is the action taken by American in compliance with the regulation – reinstallation of the landing gear actuator to render the aircraft equal to its original condition in which it was originally sold to the first buyer. American, "standing in the shoes of the manufacturer," then "returned" the aircraft to service.

Appellants attempt to differentiate between manufacturing a product and servicing it. However, the two functions are not that different, especially in regards to aircraft. An aviation repair station must work on the aircraft to render it equal to its original condition and the manufacturer must perform services to the product to

complete its assembly, such as inspection and tests. The work done by American on the aircraft was not a "service" to be considered light years away from the manufacture or the sale of the aircraft. Manufacture, sale and service of a product are inextricably related and, thus, the economic loss rule should apply in all three relationships to a product where; (1) there has been no personal injury and no damage to property other than the product itself, and (2) the policy considerations are substantially identical to those underling the product liability-type analysis.

The Middle District Court, in dismissing the complaints, relied in part on the Third District case of *Palau Intn'l Traders, Inc.*, *Inc.*, *supra,* which Appellants dismiss as no longer good law after *Moransais.* However, *Moransais* did not overrule *Palau* and the decision remains good law in Florida.

The *Palau* court observed that like the homeowners in *Casa Clara,* the buyer of an aircraft could have taken steps to protect himself such as hiring his own mechanic to perform maintenance and inspection on the aircraft rather than rely on the seller's airplane mechanic. *Id* at 416. The Court explained that under those circumstances, the buyer would have had his own contractual remedy directly from its own mechanic. The Court also observed that the buyer could have, in such a large transaction, protected his interests by negotiation and contractual bargaining or insurance with the seller or foregone warranty protection in order to obtain a lower

price. *Id*. The Court explained that those alternatives illustrated that although the buyer's expectations were not met, any damages would have been remedied.

The *Palau* Court announced the ramifications of allowing the buyer a tort claim against an aviation repair station:

> To expand negligence law under the facts of this case would result in providing the buyer with a remedy against Narcam without consideration, that is of longer duration and greater financial impact than the remedy the buyer contracted for with the seller in the first place. Such a result would be contrary to the well established policy of limiting recovery in contract actions to damages which were with the contemplation of the parties.

Id. (citation omitted).

These are the ramifications at play in the case before this Court. Profile contract with the seller to purchase the aircraft. Profile then failed to receive the benefit of its bargain with the seller. Failure to receive the benefit of a bargain is a core concern of contract, no**t tort** law.

B. The Florida Supreme Court's Holding in *Moransais* Explicitly Applies Solely to Professional Negligence Cases.

Appellants base almost all of their argument on the *Moransais* decision, wherein an engineering firm inspected and advised the potential buyer regarding the condition of a home that the buyer had agreed to purchase. When the buyer later discovered

defects in the home that, he alleged should have been, but were not reported in the engineering inspection, the buyer filed a professional negligence action against the engineers who performed the inspection. The Complaint alleged no personal injury or other property damage, and claimed only damages sustained from the allegedly undisclosed and undetected defects in the home. The trial court granted the plaintiff engineers' motion to dismiss, reasoning that Florida's economic loss rule barred petitioner's professional negligence claim. Florida's Second District Court of Appeal affirmed with opinion, certifying questions of great public importance to the Florida Supreme Court.

Specifically, in *Moransais,* the Florida Supreme Court addressed whether "the economic loss rule bar[s] a claim for professional malpractice against the individual engineer who performed the inspection of the residence where no personal injury or property damage resulted." *Moransais,* 744 So. 2d at 974 (emphasis omitted). This Court held that: "the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature and the aggrieved party has entered into a contract with the professional's employer." *Moransais,* 744 So. 2d at 983-4.

Moransais is totally distinguishable. In the case at bar a "mechanic" is involved. In Moransais, it was a professional "engineer' Mechanics should not be held to the

higher standard of one who is hired to inspect and render an opin ion about a product. Holding an aviation mechanic to such a high standard would significantly erode the aviation repair business in the state of Florida. The *Moransais* court explicitly limited its holding to cases involving professional negligence. In *Monroe v. Sarasota County School Board*, 746 So.2d 530, 534 (Fla. 2d DCA 1999), the Second District declined to extend the *Moransais* reasoning to a negligence claim for failure to place a teacher's name on a list of prospective employees. The *Monroe* court stated:

> We do not believe. . . that *Moransais* should be read to allow recovery for purely intangible economic losses through negligence in a wider array of cases that do not present that conflicting issues found in construction law. Rather courts still need to make careful assessments before expanding negligence law to cover purely economic injuries.

Id.

The rule clearly should apply here even more so than in *Monroe*, because the instants cases involve damage to a product, not to intangible economic losses. [9]

In stark contrast to *Moransais*, Appellants have not asserted any professional negligence claim against American. *See* R_P Doc. 1 pp. 1-9; R_I Doc. 1 pp. 1-10. Nor

[9] In *First Equity Corp. of Florida, Inc. v. Watkins*, 1999 WL 542639, *1 (Fla. 3d DCA July 28, 1999) (not reported in Southern Second), the Third District took a broader view of *Moransais* than did the Second District in *Monroe*, and refused to apply the economic loss rule to a breach of fiduciary duty.

are airplane mechanics "professionals." [10] Also, in contrast to *Moransais*, Appellants do not allege, and have conceded that they cannot allege, that they hired American or that American knew Appellants were intending to rely on American's inspection and maintenance of the aircraft. The absence of a professional malpractice claim, American's non-professional status, and the fact that Appellants could not allege that they were intended beneficiaries of American's inspection and maintenance renders, contrary to Appellants' assertions, *Moransais* inapplicable to the case at bar.

In summation, The Eleventh Circuit's first certified question should be answered in the affirmative. Service to a product causing only economic loss resulting from damage only to the product itself, comes under the parameters of the product context policy considerations upheld by the courts of Florida.

CERTIFIED QUESTION II

THE "ECONOMIC LOSS" DOCTRINE APPLIES EVEN THOUGH THERE WAS NO CONTRACTUAL RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANT

A. Florida Law is Clear that the Economic Loss Rule may Apply in the Absence of a Contract or Privity between Plaintiff and Defendant

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[10] See discussion regarding Fourth Certified Question, *infra*.

The second certified question asks whether the economic loss rule applies if there is no contractual relationship between plaintiff and defendant. The answer should be "yes." This Court has never held that the economic loss rule application requires a contract or privity. To the contrary, this Court has applied the rule in non-contractual settings. *See Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 at 630-31 (holding that the economic loss rule barred negligence claims even though parties had no contractual relationship); *Casa Clara*, 620 So. 2d at 1248 (the economic loss rule applied even though the parties lacked a contractual relationship); *Florida Building Inspection Svcs., Inc. v. Arnold Corp.*, 660 So. 2d 730, 731 (Fla. 3d DCA 1995) (Florida's long standing general rule of law is that economic damages are not recoverable in a tort action where there is an absence of privity between a plaintiff and defendant); *see also R.A.M. Sourcing Agency, Inc., v. Seaboard Marine, Ltd.*, 995 F. Supp. at 1468 (in general, the economic loss rule applies when there is an absence of privity between a plaintiff and defendant); *Krehling v. Baron*, 900 F. Supp. 1578, 1583 (M.D. Fla. 1995) (Florida's long standing general rule of law is that economic damages are not recoverable in a tort action where there is no privity between plaintiff and defendant); *Excess Risk*, 208 F. Supp. 2d at 1314 (privity is not required in order for a party to raise the economic loss rule as a defense).

Other jurisdictions also apply the rule to non-contractual or non-privity situations. *See e.g. Carstens v. City of Phoenix*, 2003 WL 22076612 (Ariz. App. 2003); *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998). As the *Carstens* court explained:

> Contrary to the Carstens characterization, Arizona courts have never held that application of the economic loss rule depends on the plaintiff also having a viable contract claim against the defendant. Instead, irrespective of a plaintiff's contractual claims against a defendant, the rule bars recovery of economic damages in tort because such damages are not cognizable in tort absent actual injury. In this case, because the Carstens allege purely economic losses, their damages sound in contract, and, presumably, may be asserted against those defendants with whom the Carstens are in privity. Thus, the rule does not prevent the Carstens from recovering their economic losses, but merely restricts them to suits against those defendants actually liable in contract.

This is the same principle found in Florida law. Appellants have another entity to sue. In fact they have sued Stevens Aviation, Inc. for breach of warranty.

Appellants cite no Florida Supreme Court opinion to support their arguments that a contract or privity is required to activate the economic loss rule. The intermediate appellate decisions Appellants cite for their assertion that a contractual relationship is required for the application of the economic loss rule ultimately rely on *Southland Constr. Inc. v. Richeson Corp.*, *supra*. There, the court permitted a contractor to maintain an action in tort against an individual engineer for the negligent design of a retaining wall, because the contractor had no contractual remedy against

the engineer. Underlying the court's analysis is the notion that the engineer intended that the contractor primarily and directly benefit from the engineer's design. [11] Here no such intent is present or alleged. American performed its maintenance on the aircraft nearly three years before the May 14, 1999 incident in which the aircraft was damaged, and before Appellants had any interest in the aircraft. "It is unseemingly unfair for every person who provides some service to worry about judicial scrutiny down the road." *Arnold*, 660 So. 2d at 733.

B. Appellants should not be Permitted to Benefit from their Failure to Amend their Complaints.

In their Complaints, Appellants alleged breach of warranty claims, and in their Motions for Reconsideration, they argued that they were entitled to intended beneficiary status. R_p Doc. 1 pp. 8-9, Doc. 9 p. 2; 6; R_i Doc. 1 pp. 8-9, Doc. 9 pp. 1-2. Thus, until now, Appellants have sought to create a contractual relationship

[11] Appellants' other authorities are also distinguishable. *Pearson v. Ford Motor Co.*, 694 So.2d 61, 69 (Fla. 1st DCA 1997) does not hold what Appellants claims it holds. *Pearson* rejected application of the rule because the tort claims were outside the contract and not based on breach of contract, and Appellants cite to mere dicta. In *Transpetrol, Ltd. v. Radulovic,* 764 So.2d 878, 880 (Fla. 4th DCA 2000) and *McLeod v. Barber,* 764 So.2d 790, 792-93 (Fla. 5th DCA 2000) there were no contractual claims asserted. These cases and *Williams v. Bear Stearns & Co.*, 725 So.2d 397, 400 (5th DCA 1998) all rely erroneously on *Southland* and/or *Pearson*. Not one of these cases acknowledges *Casa Clara* or *Airport Rent-A-Car*.

between themselves and American in an effort to make their breach of warranty claims stick. Now, however, when it is beneficial and convenient for them to shed their contractual relationship allegations, Appellants contend that no contractual relationship exists. This Court should not permit Appellants to change their position on this issue as a chameleon changes the color of its skin. Instead, the Court should hold the Appellants to the claims pleaded in their Complaints.

C. Florida Courts Have Held that, in the Absence of Privity, When a Party has a Contractual Remedy Against Another Entity, the Economic Loss Rule may Preclude Tort-based Claims.

In *Excess Risk Underwriters, Inc. v. Lafayette Life Ins. Co.*, 208 F. Supp. 2d at 1314, the court noted that, assuming a party has a contractual remedy against another entity, the "'defendant need not be in privity of contract with a plaintiff in order for the tort claims against that defendant to be dismissed under the economic loss rule.'" *Id.* quoting *Tai Pan, Inc. v. Keith Marine, Inc.*, 1997 WL 714898 *7 n.12 (M.D. Fla. May 13, 1997); *see also American Universal Ins. Group v. General Motors Corp.*, 578 So. 2d 451, 454-555 (Fla. 1st DCA 1991. In addition, Florida courts have held that the economic loss rule may not be circumvented by the "no alternative remedy" exception except in limited circumstances, none of which exist in the cases brought by Appellants. *See Airport Rent-A-Car*, 660 So.2d at 630-31; *R.A.M. Sourcing Agency*, 995 F.Supp. at 1468.

Here, Indemnity has filed suit in the United States District Court for the District of South Carolina against Stevens Aviation, Inc., the entity that inspected the aircraft landing gear actuators, alleging, *inter alia* a breach of warranty claim. Thus, Indemnity, as subrogee to Profile's interest in the aircraft, has a contractual remedy against another entity. Therefore, this Court should apply the economic loss rule here, and preclude Appellants from recovering in tort against American.

In light of *Casa Clara*, and its progeny, this Court should answer the second certified question in the affirmative and hold that the economic loss rule applies in the absence of contract and/or privity.

CERTIFIED QUESTION III

THE DAMAGE TO THE AIRCRAFT DOES NOT CONSTITUTE "OTHER PROPERTY" SO AS TO COME UNDER THE "OTHER PROPERTY" EXCEPTION TO THE ECONOMIC LOSS RULE

Appellants assert that the economic loss rule does not apply because the aircraft constituted "other property," separate and distinct from the aircraft's landing gear. Underlying this assertion would be the notion that Appellants purchased not an aircraft, but an assortment of aircraft parts and components. Appellants' assertion is senseless and lacks legal support.

It is indisputable that Appellants have alleged that when the aircraft's landing gear failed, only the aircraft itself sustained damages. The aircraft, of which the landing gear was an integral "component," does not constitute "other property," so as to provide an exception to the economic loss rule. In *Casa Clara*, the homeowners similarly argued that the supplier's concrete damaged "'other' property because the individual components and items of building material, not the homes themselves, are the products they purchased. *Casa Clara*, 620 So. 2d at 1247. This Court rejected the homeowners' argument, stating:

> The 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. Generally house buyers have little or no interest in how or where the individual components of a house are obtained. They are content to let the builder produce the finished product, i.e., a house. These homeowners bought finished products-- dwellings-- not the individual components of those dwellings. They bargained for the finished products, not their various components. The concrete became an **integral** part of the finished product and, thus, did not injure "other" property.

Casa Clara, 620 So. 2d at 1247 (emphasis added; citation omitted).

The "integral" part test for whether a product is "other property" preceded *Casa Clara* in Florida jurisprudence. In *Aetna Life & Casualty Co. v. Therm-O-Disc, Inc.*, 511 So.2d 992 (Fla. 1987), plaintiff sued defendant for damages caused by

defective switches which, subsequent to Therm-O-Disc's sale, had been incorporated by another company into heat transfer units. The damage was to the switches themselves and also to other parts of the heating units. Given the integration of the switches into the units, the Florida Supreme Court concluded that the units were not "other property" in relation to the switches. *Id* at 993.

The integral approach has remained Florida law **since** *Casa Clara*. Fast Forward to the recent Florida Supreme Court of *Comptech,* which Appellants wrongly rely upon, and it is clear from *Comptech*'s approval of *Casa Clara's* "integral" approach, that Florida law continues to support the fact that the aircraft containing the landing gear actuator component part is not "other property."

In addition, the integral test has been applied consistently by Florida courts. *See Premix-Marbletite Manufacturing Corp. v. SKW Chemicals, Inc.*, 145 F. Supp. 2d 1348, 1360 (S.D. Fla. 2001) (damage to finished product caused by component "does not come within the economic loss rule's other property exception"); *All American Semi Conductor, Inc. v. Mil-Pro Svcs., Inc.*, 686 So. 2d 760, 761 (Fla. 5th DCA 1997) (damaged microchips were not other property, but were "an integral part of the programming services purchased by [the appellant]"); *Fishman v. Boldt*, 666 So. 2d 273, 274 (Fla. 4th DCA 1996) (failure of seawall damaged pool, patio and home: "pool,

patio, and home were not 'other property' which would exclude application of the economic loss rule"); *American Universal Ins. Group v. General Motors Corp.*, 578 So. 2d at 453 (oil pump was an "integral or component part" of engine such that "damage to the engine caused by this component part was not damage to separate property").[12]

The Sixth Circuit Court of Appeal recently addressed the "other property" exception with facts similar to the instant case and found that landing gear was not separate property. In *HDM Flugservice GMBH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2003), the Court found that landing gear was not other property distinct from a helicopter. Citing to *East River*, wherein the United States Supreme Court noted that almost every mechanical device has components, the *HDM* court stated:

> [I]ndeed, a mechanical device, such as a helicopter, is merely many components assembled into a finished product. When the product malfunctions, the cause will almost always be a component. If the Ohio courts were to hold that a component is "other" property from the integrated product, it would allow purchasers to circumvent the economic loss rule in almost every case.

Id at 1031. [13]

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[12] In *American Universal*, the court noted that "'other property' [is] such damage as would occur if defective brakes on [a] truck caused it to run into and damage a home." *Id* at 454 (citing *American Home Assurance Co. v. Major Tool & Machine, Inc.*, 767 F.2d 446 (8th Cir. 1985).

[13] Other jurisdictions also follow the "integrated" approach to determine whether an item is "other property." *See e.g. Kice Industries, Inc. v. AWC Coatings, Inc.*, 255 F. Supp. 1255, 1259 (D. Kan. 2003) (economic loss rule precludes tort claim where defective product is part of an integrated system composed of component materials);

Just as the *Casa Clara* court held that the concrete was an integral part of the dwellings that the homeowners purchased, this Court should find that the aircraft's landing gear was an integral part of the aircraft that Profile purchased. This is not a case where, when the landing gear failed the aircraft crashed into a hanger or other physical structure and caused damage to that structure. In such a situation, the defective landing gear would have damaged other property. Instead, here, only the aircraft itself was damaged. Examining the transaction from the point of view of the purchaser, Profile bargained for and bought an aircraft, not an amalgamation of aircraft parts and components. The aircraft's landing gear would be useless were it not integrated into the various systems and components on the aircraft. Thus, the aircraft as a whole is a systematically integrated product. It is that product which Profile purchased and Indemnity insured.[14]

Appellants' reliance in part on *Comptech* for their invocation of the economic loss rule's other property exception is misplaced. In *Comptech*, the issue was

Cincinnati Ins. Co. v. AM Intn'l, Inc., 591 N.W. 2d 869, 871-72 (Wis. App. 1999) (rule in Wisconsin is that where two or more pieces of equipment are component parts to a single system, damage by one to the other or to the system is not damages to other property for the purposes of the economic loss rule).

[14] American was retained to provide service to the entire aircraft, not just the landing gear. The landing gear servicing was performed by Stevens Aviation, Inc. Thus even if there was written contract between Appellants and American it would have been for inspection of the entire aircraft, not just the landing gear.

computers damaged in a warehouse. This Court held that the damaged computers were "other property" because "[t]he computers placed in the warehouse were not an integral part of the product and were therefore 'other property' under the *Casa Clara* rationale." *Comptech*, 753 So. 2d at 1226.

Comptech is plainly distinguishable from this case. The aircraft's landing gear is integrally related to the aircraft unlike computers stored within a warehouse. No property was stored inside the aircraft as were the computers in the warehouse. *Comptech* is inapposite. This Court should answer certified question three in the affirmative as the economic loss rule applies, under Florida law, to the facts of this case with regard to damage to the entire aircraft which is not "other property."

CERTIFIED QUESTION IV

THE "PROFESSIONAL" EXCEPTION TO THE ECONOMIC LOSS RULE DOES NOT APPLY BECAUSE UNDER WELL SETTLED FLORIDA LAW, AIRCRAFT MECHANICS ARE NOT PROFESSIONALS

In *Garden* v. *Frier*, *supra*, this Court addressed the question of whether land surveyors are "professionals" for purposes of availing themselves of the protection of the two-year statute of limitations. The *Garden* opinion noted the last time the question had been before the Court was in *Pierce v. AALL Ins., Inc.*, 531 So.2d 84 (Fla. 1988), wherein the Court noted that the legislature had neglected to define the

term "professional" for purposes of the professional malpractice statute. *Id.* at *86.* The *Garden* Court reiterated its holding in *Pierce* that:

> [I]f, under the laws and administrative rules of this state a person can only be licensed to practice an occupation upon completion of a four-year college degree in that field, then that occupation is a profession.

Garden, 602 So.2d at 1275, quoting *Pierce*, 531 So.2d at 87.

The *Garden* Court also receded from language in the *Pierce* decision suggesting that the equivalent of a four-year degree would suffice and stated that: **"**There can be no equivalency exception." *Garden*, 602 So.2d at 1275.

Appellants argue that the equivalency of a federally certified mechanic meets the criteria of a professional. This argument is directly contradicted by the *Garden* Court's rejection of equivalency. An aviation mechanic is not required to have a four-year undergraduate or graduate degree. An aviation mechanic is not required to be licensed by the state of Florida. As the *Pierce* court stated: "education is the common factor among all vocations which are considered professions." *Pierce*, 531 So.2d at 87.

Appellants rely on *Moransais*, in which the Florida Supreme Court created an exception to the economic loss rule specifically for professional negligence actions. *See Moransais*, 744 So. 2d at 983-4. Appellants urge this Court to apply that

exception to this case. [15] However, *Moransais* should not apply because aircraft mechanics are not professionals, and *Moransais* reiterated the *Garden* standard by which to define a professional as "'any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida.'" *Moransais*, 744 So. 2d at 976 [16]

In Appellants' Consolidated Brief at page 32, the Appellants state that an aircraft mechanic undergoes extensive training to practice his vocation, citing requirements such as graduation from a "certified aviation maintenance technician school" or "substantial practical experience," from "18 to 30 months," an "equivalency" argument, explicitly rejected in *Garden.* Appellants can cite no requirement, and in fact no such rule exists, that mandates an aircraft mechanic have a minimum four-year college degree prior to licensing in Florida and must be licensed in Florida. Thus, under Florida law, aircraft mechanics are not professionals.

[15] Appellants have not pleaded a professional malpractice cause of action. Appellants never even mention the word professional in their Complaints. *See* R_P Doc. 1 pp. 1-9; R_I Doc. 1 pp. 1-10. Appellants' failure to allege the professional status of American's mechanic warrants a dismissal of their negligence claims from their Complaints. *See In re Flagship Healthcare, Inc.*, 269 B.R. 721, 730 (S.D. Fla. 2001) (because "there are no allegations of [defendants'] professional status, the cause of action for negligence cannot be maintained as a matter of law"); *see also Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982) ("a judgment may not be based on issues not presented in the pleadings and not tried with the express or implied consent of the parties").

[16] In *Moransais*, in addition to having the four-year college degree, the engineers were licensed under chapter 471, Florida Statutes (1993).

Further, notwithstanding Appellants' multi-page general explanation of the certification which aviation mechanics may undergo, the record in this case does not show that the mechanics employed by American *were* FAA-certified mechanics nor have Appellants alleged they were FAA-certified mechanics.. A mechanic employed by an authorized FAA certified repair station need not be personally certified or go through all the schooling Appellants describe. As long as the repair station is certified, the repair station has the authority to approve an aircraft to be returned to service after it has gone through maintenance, preventive maintenance, rebuilding or alteration. 14 C.F.R. § 43.7(c). Nowhere in the Complaints do Appellants allege these mechanics are certified under the FAA regulations that Appellants claim render them professionals.

Appellants argue that in defining "professional," the *Garden* court limited the application of the definition to the statute of limitations for professional negligence actions. Appellants ignore that in *Moransais,* the Florida Supreme Court applied the statute of limitation's definition of professional in determining whether the plaintiff could maintain a professional negligence action against an engineer. A "professional" for the purpose of the professional negligence statute of limitations should be a

professional for all purposes, including whether a plaintiff can maintain a professional negligence action.

Simply stated, the professional negligence exception to the economic loss rule is inapplicable to the providing of mechanical services or to the providing of *certified* mechanical services. Appellants' contentions to the contrary are without merit. This Court should answer the fourth certified question in the negative.

CERTIFIED QUESTION V

THE "NEGLIGENT MISREPRESENTATION" CLAIM PROVIDES NO EXCEPTION TO THE ECONOMIC LOSS RULE

The Eleventh Circuit asks the Court to decide whether the negligent representation claim in this case comes under an exception to the economic loss rule. The answer to this question is "no." Appellants assert that American is liable for negligent representation under Section 552 Restatement (Second) of Torts, which reads in pertinent part:

> **§ 552. Information Negligently Supplied for the Guidance of Others**
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on the information, if he fails to exercise reasonable care for competence in obtaining or communicating the information.

Appellants argue that when American's mechanic certified the aircraft's actuators as having been inspected and installed in accordance with the applicable maintenance manuals and federal regulations, the mechanic made a representation upon which they were entitled to rely, and upon which they did rely to their detriment. This negligent misrepresentation exception is inapplicable here because neither American nor American's mechanic was in the business of supplying information to others. Rather, the aviation repair station was engaged in the business of maintaining and inspecting aircraft. Appellants have alleged no other purpose for the logbook entry other than that it was made to satisfy Federal Aviation Administration ("FAA") airworthiness requirements. In addition, Appellants have conceded that they could not amend their complaint to assert intended beneficiary status. Thus, it is disingenuous for them to now assert that the mechanic's logbook entry induced any reliance.

The Florida Supreme Court adopted the negligent misrepresentation exception to the economic loss rule in *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So.2d at 15, wherein over the course of communications to a bank, an accountant misrepresented the assets, liabilities, and net income of a client. The accountant

personally knew that the bank would use the information he furnished to determine whether to extend a loan to the accountant's client. When the bank learned of the accountant's misrepresentations, it filed suit against the accountant, asserting, *inter alia*, negligent misrepresentation. The court considered whether an absence of privity between the bank and the accountant precluded the bank's negligence claims. In adopting section 552, the *First Florida Bank* Court qualified its adoption, stating:

> [W]e are persuaded by the wisdom of the rule which limits liability to those persons or classes of persons whom an accountant "knows" will rely on his opinion rather than those he "should have known" would do so because it takes into account the fact that an accountant controls neither his client's accounting records nor the distribution of his reports.

First Florida, 558 So. 2d at 12.

The Court held that the accountant was liable under section 552, <u>because the accountant knew</u> that the bank would rely on the information he provided. Since *First Florida*, Florida courts have employed section 552 in "very limited circumstances." *Palau v. Int'l Traders, Inc.*, 653 So. 2d at 417. The limitation is based upon the crucial question whether the defendant *knew* the information would be used by the plaintiff. In *Cooper v. Brakora & Assocs., Inc.*, 838 So.2d 679 (Fla. 2d DCA 2003), the Second District in affirming dismissal of a negligent representation claim, engaged

in a detailed analysis of section 552. [17] There, Plaintiff, Cooper, obtained a bank loan from Barnett Bank to pay for his purchase of residential property. The Bank hired Brakora, an appraisal company to help it evaluate Cooper's mortgage loan application by appraising the property. The appraisal stated that the overall condition of the property was "good." Cooper purchased the property and nine months later found the house was overrun with termites. Cooper sued Brakora for negligent representation under section 552, Restatement (Second) of Torts on the theory that "good" was false information negligently supplied that caused him to sustain a $50,000 economic loss.

Cooper argued that Brakora's duty was extended to him under section 552 because Brakora knew that Cooper was the buyer of the property appraised and that he was a party to the loan transaction the appraisal was intended to influence. Brakora argued that the appraisal was prepared for the benefit of the bank, not Cooper, and that there were no allegations in Cooper's complaint that Brakora knew Barnett Bank intended for Cooper to rely upon the appraisal or that Brakora knew Barnett Bank intended for Cooper to rely on the information contained in the report.[18] *Id. a*t 681.

[17][17] The *Cooper* trial court dismissed on the basis of lack of privity but the Second District affirmed by applying the economic loss rule.

[18] In the instant case, there is no allegation as required by *First Florida* that American's mechanic *knew* that Profile would rely on his logbook entry.

In holding that section 552 did not apply, the *Cooper* court noted that "[t]he tort theory announced in section 552 could easily overwhelm the law of contracts if it is not a limited theory." *Id*. The Court stated that the "business transaction" involved was a secured loan and not the purchase of the house. Even assuming that Brakora negligently supplied false information indirectly to Cooper, the information was supplied for the loan transaction, not for the transaction between the buyer and seller of real estate. The facts in the case at bar are different but the analysis should be the same. American inspected the aircraft and reinstalled the landing gear for purposes of FAA regulations, not to provide Profile with information supplied for the purchase of the aircraft.

The facts in *Palau* parallel the facts in the case at bar although in this case, the alleged negligence involved reinstallation of a landing gear actuator into a product rather than a pre-buy inspection. The Third District found that section 552 did not apply to the facts in *Palau*, just as section 552 does not apply herein. In *Palau*, the Third District considered whether an aircraft repair station was liable to an aircraft purchaser under section 552 for representations that the repair station's mechanic reported in the subject aircraft's logbook. The repair station was hired to perform the maintenance and inspections necessary to obtain an airworthiness certificate from the FAA. At the time the repair station's mechanic made the logbook entries, the repair

station was aware that the seller had contracted with a buyer for the purchase of the aircraft. After the buyer took delivery of the aircraft, the FAA certified the buyer's application for an airworthiness certificate and later issued a standard airworthiness certificate for the aircraft. Six months later, the buyer discovered that the aircraft's landing gear was "cracked due to extensive corrosion." *Palau*, 653 So. 2d at 414. The buyer filed suit against the repair station, alleging that the repair station had misrepresented the condition of the aircraft.

The court held that the repair station was not liable under section 552, reasoning that the repair station "was in the business of servicing airplanes. It was not in the business of supplying information for the guidance of others as contemplated by section 552 of the Restatement of Torts." *Palau*, 653 So. 2d at 418. The court also stated: "[W]e are convinced that there were various ways for the buyer to ensure that it would have an adequate remedy, we decline to extend section 552 to a party who failed to protect itself." *Palau*, 653 So. 2d at 418.

The factual similarities between *Palau* and the instant case are significant and obvious. In both cases: aircraft purchasers sought to impose liability under section 552 for repair stations' representations in their logbooks; the repair stations made the logbook entries in an effort to comply with federal regulations, not to supply

information for the guidance of others; and the purchasers could have protected their interests in the aircraft through warranties, insurance, additional inspections, or price bargaining. [19] In *Palau*, the repair station was aware that the aircraft it inspected was under a contract for sale. In the case at bar, Appellants have not alleged that American knew the aircraft would be sold to Profile or to any buyer three years after it performed FAA required maintenance and made an FAA required logbook entry. Additionally, federal regulations required that the aircraft's owner annually conduct a complete inspection of the aircraft. *See* 14 C.F.R. §§ 91.409(a)(1), (d)(4). Thus, following American's reinstallation of the actuators in 1996 and prior to the incident on May 14, 1999 when the landing gear failed, the complete aircraft would have been inspected at least twice.

The rationale of *Palau* is sound. Under the *First Florida* interpretation of section 552, one purpose in supplying information is material. Duty arises from the purpose the individual employs when he supplies the information. Here, no such duty arises. As in *Palau,* the only purpose Appellants alleged for the American mechanic's logbook entry was the mechanic's required compliance with federal regulations that require an aircraft mechanic to record and certify completed maintenance and

[19] Even if this Court would recede from *Garden* and deem a mechanic a professional, section 552 would still not apply to this case, because American owed no duty to Appellants. *See Palau,* Cope, J. concurring.

inspections in logbook entries. *See* 14 C.F.R. 43.11(a); 14 C.F.R. 91.409; 417. A mechanic's record and certification of logbook entries are but a step along the path to obtaining and maintaining an airworthiness certificate from the FAA. *See Palau*, 653 So. 2d at 414. The purpose of the entries is not to supply information for others' guidance in their business transactions. [20] When the American mechanic made his logbook entry, he was not in the business of supplying information for the guidance of others, but was complying with federal aviation regulations. American was and is **in the business of repairing airplanes**. American is not a provider of services such as an engineer, a surveyor or an accountant. The fact that the federal government requires written documentation regarding aircraft does not place an aviation repair station in the business of providing information.

[20] In an analogous case, the Tenth Circuit has held that a helicopter manufacturer's supply of information for an FAA required type certificate did not give rise to a duty under section 552. *See Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc.*, 24 F.3d 125, 132-33 (10th Cir. 1994). In *Rocky Mountain*, the plaintiff invoked section 552 to support its claim that a helicopter manufacturer had negligently misrepresented the capability of its rotor blades in a type certificate application to the FAA. The court held that because the purpose of the manufacturer's representation was to obtain an FAA type certificate, not to supply information for the guidance of others, section 552 was inapplicable. *See Rocky Mountain*, 24 F.3d at 133.

Notwithstanding Appellants' assertion to the contrary, *Palau* remains good law. [21] It has not been receded from or overruled by *Moransais* or *Comptech.* Nothing in those opinions indicates that the Florida Supreme Court would now decide *Palau* differently.

Moreover, Appellants have conceded that they have no contractual privity with American, and that they could not, in good faith, amend their complaint to allege that they were intended beneficiaries of any contract involving American. Implicit in these concessions is Profile's inability to establish that they relied on any representation by American. Although the texts of their Complaints include allegations of reliance, the allegations are insufficient to invoke section 552. This Court should recognize Appellants' pleading deficiencies and hold that the negligent misrepresentation exception to the economic loss rule is inapplicable.

CONCLUSION

Based upon the foregoing legal authorities and argument, American Aviation, Inc. asserts that the Court should answer certified questions 1 through 3 in the affirmative and answer certified questions 4 and 5 in the negative, in accordance with Florida law.

[21] As stated before, it was even cited in 2002 by Appellants' own authority, *Value House* and characterized therein as a products liability case.

AMENDED CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this_____ day of December, 2003 to: **Tracy Raffles Gunn, Esq.**, Fowler, White, Boggs, and Banker, P.A., Post Office Box 1438, Tampa, Florida 33601, attorneys for The Florida Defense Lawyers' Association; and **Thomas J. Stueber, Esq.**, Lord, Bissell & Brook, The Proscenium, Suite 1900, 1170 Peachtree Street, NE, Atlanta, Georgia, 30309-7675 and **Hugh C. Griffin, Esq.**, Lord, Bissell & Brook, 115 South LaSalle Street, Chicago, Illinois 60603, attorneys for Plaintiffs/Appellants.

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CERTIFICATE OF COMPLIANCE

This brief is submitted in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and the undersigned certifies the brief complies with the font and other requirements of the Rule. This brief also has been filed in diskette format as required by the Court.

_____

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