CASE NO. SC03-1601

IN THE
SUPREME COURT OF FLORIDA

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellant,

v.

AMERICAN AVIATION, INC.,

Defendant-Appellee.

On Certified Questions of Law from the United States Court
of Appeals for the Eleventh Circuit
Case Number: 02-14828-AA

PROFILE AVIATION SERVICES, INC.,

Plaintiff-Appellant,

v.

AMERICAN AVIATION, INC.,

Defendant-Appellee.

On Certified Questions of Law from the United States Court
of Appeals for the Eleventh Circuit
Case Number: 02-14830-CC

AMENDED CONSOLIDATED MOVANTS' REPLY BRIEF ON QUESTIONS OF LAW CERTIFIED BY THE ELEVENTH CIRCUIT

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I. FLORIDA'S ECONOMIC LOSS RULE, AS LIMITED BY THIS COURT'S RECENT DECISIONS, DOES NOT APPLY TO THESE TORT ACTIONS BETWEEN NON-CONTRACTING PARTIES THAT ALLEGE THE NEGLIGENT RENDITION OF AIRCRAFT MAINTENANCE SERVICES. (Certified Questions I and II.)

A. Introduction

By considering the first two certified questions together, plaintiffs seek to make clear that they do *not* seek to "abolish" the economic loss rule (American Br. 18); they do *not* seek a ruling that an action for negligent rendition of services can never be barred by the economic loss rule (American Br. 10); and they do *not* even seek a holding that the economic loss rule can never apply unless the parties have a contractual relationship (American Br. 28)—although we believe such a holding would be consistent with the historical underpinnings of the rule.[1]

Plaintiffs do not seek such holdings because, as this Court indicated in *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999), application of the economic loss rule should be decided on a case-by-case basis, and not "on situations not actually before us." *Moransais,* 744 So.2d at 983.

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[1] *See* discussion, *infra*; Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 Fla. B.J. 34, 42 ("[A]s to parties that lack contractual privity, the economic loss rule is simply inapplicable"); *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 627 So.2d 1244 (Fla. 1993) (the economic loss rule "works well when the loss is suffered by one who is privy to the contract and involves loss that was the subject matter of the contract. It works mischief, however, where . . . the injured party is not privy to the contract . . .") (Shaw, J., dissenting).

The "situation" before the Court in the instant case involves an action by the owner of an Aircraft (Profile) and its subrogated insurer (Indemnity) for damages to Profile's airplane caused by the negligent rendition of maintenance services to the Aircraft's landing gear by an FAA-certified repair facility (American) (Certified Issue No. 1) with whom Profile had no contractual relationship (Certified Issue No. 2), inasmuch as Profile did not own the Aircraft at the time.

B. Profile Was In The "Zone of Risk" Created By American's Negligence.

If this negligent rendition of maintenance services had resulted in bodily injury to an airplane passenger or a collision with another airplane, a cause of action for American's negligence would clearly lie. *See Dettloff v. Abraham Chevrolet, Inc.*, 534 So. 2d 745 (Fla 2d DCA 1988) (cause of action for the negligent repair of automobile that resulted in death of driver); *Bill Kelley Chevrolet, Inc. v. Keer*, 258 So.2d 280 (Fla. 3d D.C. 1972) (judgment against repairer for oil leak that caused oncoming truck to lose control and strike driver of negligently repaired truck who was outside his vehicle at the time of the accident); *Aime v. State Farm Mut. Co.*, 739 So.2d 110 (Fla. 4th D.C.A. 1999) (injured automobile passenger's negligent repair claim against insurance company that actively controlled the repair stated a cause of action because injured plaintiff was in the foreseeable "zone of risk" created by defendant's negligent conduct). *See generally, McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992), and *Whitt*

v. Silverman, 788 So.2d 210 (Fla. 2001), recognizing and reaffirming the foreseeable "zone of risk" test to determine the existence of a legal duty giving rise to an action in negligence.

Here, Profile, as a subsequent purchaser of the Aircraft who relied on American's log book certification that its maintenance work on the Aircraft's landing gear had been properly performed (14 C.F.R. § 91.407(b)(2)) and rendered the plane air-worthy (14 C.F.R. § 91.407(a)(2)) was clearly in the foreseeable "zone of risk" created by American's negligence in connection with the bearing on the right main landing gear actuator having been installed backwards.[2] Thus, as more fully discussed below, this Court's statement in *Moransais* that "we never intended to bar well-established common law causes of action", 744 So.2d at 983, should be determinative in this case. The economic loss rule was never meant to abolish the duty of care that American owed subsequent owners of the Aircraft (such as Profile) under Florida's traditional common law of torts.

C. American Essentially Ignores This Court's Analysis Of The Economic Loss Rule In *Moransais*.

[2] American's claim that it will show that Profile should have found and corrected American's negligent reinstallation of the landing gear (American Br. 5) is, at best, an issue for the jury to resolve in determining the ultimate issues of negligence and proximate cause. *See Whitt*, 788 So.2d at 221, noting that the existence of a duty "merely opens the 'courthouse doors'" and that "an injured party must still prove the remaining elements of a negligence claim, including the much more specific proximate cause requirement."

In their Opening Brief, plaintiffs demonstrated that this Court's most recent pronouncements in *Moransais*, 744 So. 2d at 983, and *Comptech Int'l v. Milam Commerce Park, Ltd*., 753 So.2d 1219, 1225 (Fla. 1999), make clear that the economic loss rule retains only "limited" value and that many prior Florida cases have applied the rule well beyond this Court's original intent. As a prime example of such an erroneous expanded application of the rule, the *Moransais* court specifically referred to its holding in *AFM Corp. v. Southern Bell Telephone Co.*, 515 So.2d 180 (1987), involving an action for the negligent rendition of non-professional services. The *Moransais* court noted that the result in *AFM* was still "sound" based on fundamental contract principles (plaintiff and defendant in *AFM* were parties to a contract in which they expressly agreed to limited liability, and there was no allegation that any tort had been committed independent from the contract breach itself). But this Court strongly indicated that its reliance on the economic loss rule in *AFM* had been misplaced:

> Unfortunately, however, our subsequent holdings have appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts *to situations well beyond our original intent. For example, in AFM Corp*., we extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional services context. * * * In order words, we held that a purchaser of services could not recover purely economic loss due to negligence arising from a breach of contract where the purchaser has not shown the commission of a tort independent of the breach itself. *Id*. While we continue to believe the outcome of that case is sound,

> *we may have been unnecessarily over-expansive in our reliance on the economic loss rule* as opposed to fundamental contractual principles.

744 So.2d at 980 (emphasis added). Thus, the very first argument in American's brief—that *Moransais* and *Comptech* "reaffirm," "approve," and "refused to recede from" application of the economic loss rule to the rendition of non-professional services in *AFM* (American Br. 11-12)—is disingenuous and shows the time warp in which American's brief is written.[3] As noted in *Moransais*, 744 So. 2d at 980, and in many of the earlier cases involving actions between *two contracting parties*, *e.g.*, *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So. 2d 899, 902 (Fla. 1987), *AFM*, 515 So. 2d at 181, the reason for applying the economic loss rule in such a case is that the contracting parties are in the best position to set forth their expectations concerning the subject matter of the contract and to protect their respective interests through express warranties, price adjustments, indemnity provisions, and other contractual allocation of risk provisions.

But none of these reasons apply here where there was no contract or contractual relationship between Profile and American, and thus no opportunity for

[3] The *amicus* brief of the Concrete Products Association ("CPA") is more forthright: it acknowledges that *Moransais* and *Comptech* have "dramatically reduced" the status of the economic loss rule. (CPA *Amicus* Br. 2.) The CPA then apparently seeks to have this Court overrule these recent, well-reasoned decisions as "unwarranted expansion[s] of tort law" (CPA *Amicus* Br. 16), and "irreconcilable" with prior decisions (CPA *Amicus* Br. 11).

Profile to negotiate with American on any issue.[4] In short, this case will not cause a "death blow" to the law of contracts. (CPA *Amicus* Br. 4.) Cases involving claims between contracting parties will still be governed by *AFM* and *Florida Power & Light*.

D. American's Reliance On *Casa Clara* Is Misplaced—This Is Not A Products Liability Case.

American relies heavily on *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993) (American Br. 13-17)[5] as did the federal district court. (Rp-1-7-pp. 3-8, 10; Ri-1-8-pp. 3-8, 11.)[6] In that case, the economic loss rule was applied to a product liability action against the manufacturer/supplier of defective concrete with whom plaintiffs (owners of the condominiums damaged by the concrete) had no contractual relationship. Is *Casa Clara* still good law? There is strong indication in *Moransais* and *Comptech* that it may not be. *Moransais*, 744 So. 2d at 981; *Comptech*, 753 So. 2d at 1225-26. But again, this is *not* an issue that this Court need resolve in the instant case

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[4] Nor does this case involve the "vagaries of individual purchasers' product expectations." (FDLA *Amicus* Br. 6.) No purchaser of an airplane expects its landing gear to collapse during a landing.

[5] American's citation to cases from other states such as Illinois (American Br. 12-13) is inappropriate. *See Moransais*, 744 So.2d at 983 n.13, where this Court specifically refused to follow Illinois decisions.

[6] "Ri" signifies Indemnity's Record on Appeal, while "Rp" signifies Profile's Record on Appeal. Thus, "Rp-1-1-pp. 1-10" refers to Profile's Record on Appeal, Volume 1, Document 1, pages 1-10.

because, notwithstanding American's and its *amici's* repeated contentions to the contrary (American Br. 6, 21-22, 24; FDLA Br. 3), this is not a product liability case.

American is not the designer/manufacturer/supplier/seller of a product. No Florida case has ever held that an entity that renders inspection, maintenance, or repair services to a product is thereby subject to a product liability action as if it were the manufacturer/designer/seller of the product. *See, E. Pritchard v. E.I. DuPont de Nemours & Co.*, 1994 WL 150834 at 3 (M.D. Fla. April 12, 1994), cited at page 15, n.1 of plaintiffs' Opening Brief, setting forth the elements of a product liability/negligence action under Florida law, including the requirement that "the *manufacturer* must have a legal duty to design and *manufacture* a product reasonably safe for use." (Emphasis added.) In the federal district court, American was more candid, correctly describing this case as "aris[ing] out of mechanical *services*" and involving "the 'performance' of the mechanical *services*." (R. p-1-3; pp. 1-7; R. i-1-3; pp. 1-7 (emphasis added).) *See also* the CPA's reference to "service providers". (CPA *Amicus* Br. 14.) Even in its current brief, American concedes that "American was not the manufacturer or seller of the Aircraft." (American Br. 19.)

Nor is there anything to support American's unfounded argument based on the FAA regulations' requirement that an airplane should be repaired or maintained

in a condition equal to its original condition. 14 C.F.R. § 43.13. (American Br. 4, 23.) That is the normal goal or standard for most maintenance or repair work in any field. Indeed, American's insinuation that this case would be different if it had failed to properly check the Aircraft's fuel or oil levels (American Br. 6, 22), shows the illogic of its argument. A rule that holds a maintenance facility liable in tort if it fails to oil or lubricate a part, but not when it puts the part in backwards, defies common and legal sense.

Moreover, *Moransais* itself is contrary authority to American's attempt to turn this negligent rendition of mechanical services case into a product liability case. A residential home may be considered a "product" for purposes of the economic loss rule analysis. *Fishman v. Boldt*, 666 So.2d 273, 274 (Fla. 4th DCA 1996) (American Br. 35). Yet the *Moransais* court held that the plaintiff's action against the individual engineers for negligent inspection services rendered to a home he later purchased was not barred by the economic loss doctrine.
This is *not* "free warranty" protection. (CPA *Amicus* Br. 12.) Plaintiffs will not recover by simply proving that the landing gear failed; they must also prove that the failure and the resulting damage was proximately caused by American's negligence.

E. American's Remaining Contentions Lack Merit.

Almost all of American's remaining arguments about why the economic loss rule applies to this case and bars plaintiffs' negligence action against American have already been answered in the Opening Brief (pp. 30-33). Thus, plaintiffs will only supplement their Opening Brief with regard to the following assertions in American's brief:

Other entities can be sued. (American Br. 31-32.) This contention is squarely contradicted by *Moransais*, where despite the existence of "contractual remedies against other entities," this Court held that the economic loss rule did not bar plaintiff's claims against the individual engineers. *Moransais*, 744 So. 2d at 938-84.

Plaintiffs failed to amend their complaints to allege a contractual relationship. (American Br. 31.) No such amendment was tendered because American and Profile had no contractual relationship, and Profile could not in good faith assert the facts necessary under Florida law to establish a third-party beneficiary relationship. *See* Opening Br. 10.

Plaintiffs seek to make American a "guarantor" and hold it liable for its "compliance" with federal regulations. (American Br. 17.) This is a preposterous assertion. In order for plaintiffs to recover in these tort actions, plaintiffs must prove that American's work was *not* in "compliance with federal regulations," and that this negligence was a proximate cause of the damages sustained by plaintiffs.

Plaintiffs had other options to protect against loss. (American Br. 16.) As set forth above, American's and its *amici's* discussion about a party's right to protect itself from risk of loss by contract provisions is persuasive when the litigating parties have a contractual relationship, *e.g.*, *AFM* and *Florida Power*, but here American and Profile had no contract or contractual relationship. Under many Florida appellate court cases, this absence of any contract relationship is a sufficient ground alone to hold the economic loss rule inapplicable. (*See* cases cited in Opening Brief, pp. 32-33; *see also* Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*; *Casa Clara* dissent, fn 1 *supra*.)

Nor does the fact that Profile may have had a contract with the entity that sold it the Aircraft, bar its claim against American. Again, in *Moransais*, plaintiff homeowner had two contracts with other entities, but that did not preclude an action against the engineers with whom he had no contract. Profile did purchase insurance, and that is why Indemnity is a co-plaintiff in this action. We assume that American also has insurance or certainly could have purchased insurance. But the fact that Indemnity is now subrogated to Profile's rights to the extent of its payment does not mean that American is thereby excused from the consequences of its negligent acts. *See* subrogation cases cited at pp. 31-32 of the Opening Brief. The existence of insurance does not affect the duty owed to the insured plaintiff,

and in most cases is not even admissible in evidence. *Sheffield v. Superior Ins. Co.*, 800 So.2d 197 (Fla. 2001) (reaffirming collateral source rule).

Imposing liability on American would result in an intolerable "cost to society." (American Br. 17.) As stated in the Opening Brief (p. 30), American's threat to pass on the costs of its liability to its customers makes no legal point. Any losing party in a tort action can theoretically attempt to pass on its loss to its customers, but this does not mean that the party whose negligence has caused the injury or damage to another in the foreseeable "zone of risk" is thereby allowed to escape responsibility for its conduct. *See Whitt, supra*, 788 So.2d 219-20 (rejecting similar argument).[7]

II. EVEN IF FLORIDA'S ECONOMIC LOSS RULE COULD APPLY TO THIS NON-PRODUCT LIABILITY TORT ACTION INVOLVING PARTIES WITH NO CONTRACTUAL

[7] The hysterical assertions of the CPA that there will be "hundreds of millions, if not billions" of dollars of additional liability (CPA *Amicus* Br. 1) and that *Moransais* and *Comptech* have already caused significant price increases in "virtually all goods and services in Florida" and will prevent Florida citizens from building a home (CPA *Amicus* Br. 3) are ludicrous. The CPA affords no support or other empirical data to support its outlandish claims. *Moransais* and *Comptech* (like this case) involve only the application of the economic loss rule to the specific facts before the Court which do not involve the concrete industry or any aspect of home building. Nor will a decision in favor of plaintiffs in this case subject anyone to "unwarranted" tort liability. (CPA *Amicus* Br. 16.) On the contrary, American will be liable in this case only if plaintiffs can prove that the damages and losses they suffered were proximately caused by American's negligence. In such event, liability will not be "unwarranted"; rather it will be consistent with the fundamental purpose of tort law, recognized by the CPA itself, to "shift the burden of loss from the injured party to the one causing the injury." (CPA *Amicus* Br. 8, fn. 1.)

RELATIONSHIP, THIS CASE FALLS WITHIN THREE WELL-SETTLED EXCEPTIONS TO THE DOCTRINE.

Because Florida's economic loss rule does not apply to this case involving parties with no contractual relationship and alleging the negligent rendition of aircraft maintenance services, this Court need not reach the exceptions issue. *Comptech*, 753 So.2d at 1226. Nevertheless, there are at least three separate exceptions that apply.

A. The "Other Property" Exception Applies Here Because American's Negligent Reinstallation Of The Aircraft's Landing Gear Damaged Parts Of The Aircraft That Are Separate And Distinct From The Landing Gear Itself. (Certified Question No. III.)

Although American's negligent reinstallation of the Aircraft's landing gear caused damage to "other property"—parts of the Aircraft other than the landing gear—American relies principally on *Casa Clara* for the proposition that the "other property" exception is inapplicable here. The vitality of *Casa Clara* is questionable, particularly on this issue. *See Moransais*, 744 So.2d at 981, stating:

> Our opinion [in *Casa Clara*] was not unanimous, especially as to our characterization of "other property."

But even if *Casa Clara* is still good law, American's reliance on it is misplaced for at least two reasons:

First, the landing gear on the Aircraft, unlike the cement in *Casa Clara*, did not become an indistinguishable part of the building materials for a condominium;

rather, it remained a functionally unique piece of equipment that maintained its own identity separate and distinct from the other parts of the Aircraft. Indeed, the landing gear was separately manufactured, separately serviced, and independently certifiable as to airworthiness under the FAA regulatory scheme. It can easily be removed from one airplane and installed in another. *See* detailed discussion in Opening Br. at 33-36. Plaintiffs seek to recover for damages to the other parts of the Aircraft that were damaged when the landing gear collapsed. American did not service other parts of the Aircraft, but these other parts of the Aircraft were certainly in the foreseeable "zone of risk" by reason of American's negligent reinstallation of the landing gear. *Whitt*, 788 So.2d at 216-17; *McCain*, 593 So.2d at 502.

Second, the "integral component part" rule should be rejected—particularly under the facts at bar where the landing gear maintained its own separate and distinct identity apart from the rest of the Aircraft. Indeed, when faced with a similar issue in *Jimenez v. Superior Court of San Diego County*, 58 P.3d 450, 29 Cal. 4th 473 (2002), the California Supreme Court recently refused to apply the economic loss rule to an action against the manufacturer of defective windows which caused damage to the other parts of plaintiff's house, noting that over time the concept of what was other property had properly been expanded to "include damage of one part of a product caused by another defective part." 58 P.3d at 483-

84.[8] This Court should reach the same result here consistent, not only with California law, but also with the view of Prosser quoted in the brief of American's own *amicus* (FDLA Br. 11) and in *Palau v. Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So. 2d 412, 418 (Fla. 3d DCA 1995)[9]:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including. . .property damage to the defective chattel itself, *as where an automobile is wrecked by reason of its own bad brakes*.

Prosser, *Law of Torts*, p. 665 (4th ed. 1971) (footnotes omitted) (emphasis added.)

B. The "Professional Services" Exception Applies Here Because American's Provision of FAA-Certified Mechanical Services Required a High Degree of Federally-Mandated Expertise and Training. (Certified Question No. IV.)

American relies on the definition of the term "professional" in the statute of limitations for professional malpractice. But as explained in plaintiffs' Opening Brief (pp. 37-38), this Court has already held that this definition does not control in other contexts. *Garden v. Frier*, 602 So.2d 1273, 1277 n.9 (Fla. 1992).

Next, American claims that its mechanics are not professional enough because "[a] mechanic employed by an authorized FAA certified repair station need not be personally certified or go through all the schooling [plaintiffs]

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[8] The *Jimenez* court noted it was not dealing with the *Casa Clara* situation of defective raw materials that were incorporated into a product and would leave that issue for another day. 58 P.3d at 484.

[9] See further discussion of *Palau infra* (Point II, C.)

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." (American Br. 40.) In support, American cites 14 C.F.R. § 43.7(c). A careful reading of that regulation, and the surrounding regulatory scheme in which it is integrated, shows that while American's non-supervisory mechanics may not have to be personally FAA-certified, FAA regulations require that an FAA-certificated mechanic supervisor, with all the schooling described in the Opening Brief (pp. 38-39), direct, overlook and approve all of the work American performed on the landing gear of the Aircraft (14 C.F.R. § 145.153).

Furthermore, under the applicable federal aviation regulations, repair stations that do not possess the appropriate FAA certification are explicitly prohibited from performing the services at issue here (inspection, maintenance, and reinstallation of the Aircraft's landing gear). 14 C.F.R. §§ 43.3, 43.7. These regulations effectively carve out an exclusive franchise for those repair stations that, like American, have satisfied the rigorous professional standards described in the Opening Brief (pp. 38-39). Thus, the controlling federal regulatory scheme places certified repair stations and their supervisor mechanics in a position akin to doctors, engineers and lawyers, who are likewise granted the exclusive right to practice in their field based on a showing of advanced learning and professional

skill, thereby invoking the "professional services" exception recognized in *Moransais.* 744 So. 2d at 983.

C. The "Negligent Misrepresentation" Exception Applies Here Because American, as an FAA-Certified Class 3 Repair Station, Is In the Business of Supplying Information Within the Meaning of Section 552 of the Restatement (Second) of Torts. (Certified Question No. V.)

Plaintiffs have alleged that they detrimentally relied on logbook entries prepared by American which falsely represented that the Aircraft's landing gear had been inspected by American in accordance with FAA regulations and that American had completed the FAA-required 30-month maintenance on the main landing gear actuators of the Aircraft. (R_p-1-1-pp. 3, 7, Ex. A; R_i-1-1-pp. 3, 7, Ex. A.) *See* 14 C.F.R. § 43.5. American was an FAA-certified repair station. Its business operations were controlled by a regulatory scheme that unquestionably establishes that plaintiffs' reliance on the logbook entries was both foreseeable and justified. Under *P.K. Ventures, Inc. v. Raymond James & Assoc. Inc.*, 690 So. 2d 1296 (Fla. 1997) this alone should be sufficient to satisfy the "negligent misrepresentation" exception.

Moreover, plaintiffs have properly stated a claim for negligent misrepresentation that "fall[s] squarely within the confines of" (CPA *Amicus* Br. 14) Section 552 of the Restatement (Second) of Torts, providing in relevant part:

> (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 upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> * * *
>
> (3) The liability of one who is under a public duty to give the information extends to the loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Federal aviation regulations expressly require that an aircraft's inspection and maintenance records "be retained and transferred with the aircraft at the time the aircraft is sold." 14 C.F.R. § 91.407(b)(2). This requirement's obvious purpose is to accurately advise new owners of the maintenance and inspections that have been performed on the aircraft, so that the new owner can ascertain whether or not the aircraft meets federal airworthiness requirements. Thus, Profile is clearly one "of the class of persons for whose benefit the duty [to make the logbook entries] is created". Furthermore, American's certification (as the FAA's delagatee under 14 C.F.R. 43.7[10]) that the Aircraft's landing gear was properly maintenanced and inspected in accordance with federal aviation regulations is a "public duty". See Restatement (2d) of Torts, § 552, Illustration 18 (a government

[10] Under 14 C.F.R. § 43.7, the FAA Administrator retains the exclusive right to approve an aircraft for return to service after it has undergone maintenance, but that authority is delegated to *certificated* mechanics and repair stations, who accordingly stand in place of the FAA Administrator when rendering maintenance and inspection services.

food inspector that negligently stamps beef as "Grade A" is liable to a purchaser who buys the beef in reliance on the stamps and sustains economic loss).

1. *Palau* is inapposite.

American's reliance on *Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So. 2d 412 (Fla. 3d DCA 1995), an appellate court decision that was issued prior to *Moransais*, *Comptech*, and *P.K. Ventures* is misplaced. The *Palau* decision was based on cases that no longer reflect current Florida law after *Moransais*, 744 So. 2d at 983. Notably, one author has referred to *Palau* as a "troubling" application of the economic loss rule. Schwiep, at p. 36. In addition, there are at least four other reasons why *Palau* should not be persuasive in the case at bar.

a) No Damage To "Other Property" In *Palau*.

In *Palau* there was no damage to "other property"--the plaintiff alleged that the defendant negligently inspected the landing gear and sought economic damages that were based solely on the cost to repair the cracked and corroded condition of the landing gear. There was no damage to any other part of the plaintiff's airplane. In the present case, "other property" (other parts of the Aircraft) was extensively damaged. Moreover, to the extent that *Palau* did address the issue of damage to other parts of the Aircraft, the court favorably quoted a passage from

Prosser's *Law of Torts* to the effect that a party responsible for a car's bad brakes would be liable for resulting damage to the car itself. *Palau*, 653 So. 2d at 418.

b) No Reliance In *Palau*.

Secondly, the element of reliance was absent in *Palau*. The defendant repair station was hired by the seller to repair and inspect the airplane in order to obtain an airworthiness certificate, but because the sales transaction was consummated prior to the issuance of an airworthiness certificate, plaintiff could not justifiably contend that it had actually relied on the defendant's repair and inspection of the plane in closing the deal. *Palau*, 653 So. 2d at 414.

By contrast, Profile's complaint explicitly alleges reliance on American's negligently prepared logbook entries. (R_p-1-1-pp. 3, 7, Ex. A; R_i-1-1-pp. 3, 7, Ex. A.) Had American failed to file these maintenance records, the applicable federal aviation regulations would have rendered the Aircraft inoperable and Profile's purchase of the Aircraft would not have occurred. 14 C.F.R. § 91.407(a)(2).

c) *Palau* Did Not Consider the Applicability of Section 552(3).

Third, the *Palau* opinion limited its consideration of Section 552 to subsections (1) and (2). The repair station's liability under subsection (3) for negligent misrepresentation pursuant to a "public duty" to provide information to "any of the class of persons for whose benefit the duty is created" was not addressed or even considered. See discussion *supra*.

d) *Palau* Did Not Properly Analyze the Intent and Purpose of the Relevant FAA Regulations.

Lastly, plaintiffs submit that *Palau*'s holding that a FAA-certified aircraft repair station was not "in the business of supplying information for the guidance of others", 653 So. 2d at 418, is contradicted by the relevant FAA regulatory scheme, whereby certificated aircraft repair stations, like American, regularly supply information in an aircraft's logbook regarding the condition of the aircraft's vital equipment (including landing gear) that is then reasonably relied upon by an aircraft's subsequent owners, such as Profile.

CONCLUSION

Based on the foregoing legal authorities and argument, plaintiffs respectfully submit that this Court should hold that under the particular facts of this case, certified questions 1 through 3 should be answered in the negative and certified questions 4 and 5 should be answered in the affirmative.

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