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# The Economic Loss Rule: Is a Building a “Product?” — Another View

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*This Article addresses how the Florida Supreme Court in Tiara Condominium Association v. Marsh & McLennan Cos. receded from its definition of “other property” in Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc. In Casa Clara the Florida Supreme Court held that a building is to be treated as a “product” for purposes of applying the Economic Loss Rule’s bar to tort claims for defective building materials incorporated into the building. Although Casa Clara adopted the economic loss rule established by Seely v. White Motor Co. and East River Steamship Corp. v. Transamerica Delaval, Inc., it departed from those seminal cases by adopting the “object of the bargain” rationale and, in doing so, determining that real property is the “product itself.” In addition, Casa Clara departed from prior Florida precedent which held that real property is not*

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<sup>\*\*</sup> Ervin Gonzalez was a Partner at Colson Hicks Eidson. “Ervin Gonzalez, UM Law class of 1985, passed away earlier this year, having spent his career serving his community and fighting on behalf of people in need. His generosity and peerless legal advocacy impacted the lives of countless clients, students, and colleagues, and he inspired all who knew him. He will be greatly missed.” – Dean Colson, Partner at Colson Hicks Eidson

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*a product in the context of products liability actions. Moreover, in *Saratoga Fishing Co. v. J.M. Martinac & Co.* the United States Supreme Court rejected the “object of the bargain” analysis that served as the sole basis for the Florida Supreme Court’s characterization of real property as the “the product itself.” The Saratoga Court recognized that the focus should be on the product that was “placed in the stream of commerce” instead. Thus, when the Florida Supreme Court returned the economic loss rule to its original interpretation under *Seely and East River in Tiara*, it receded from *Casa Clara*’s holding that a building must be treated as a “product” for the purposes of applying the economic loss rule.*

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## INTRODUCTION

Correcting a series of decisions that had expanded the Economic Loss Rule (“ELR”) beyond its logical application, the Florida Supreme Court, in *Tiara Condominium Association v. Marsh & McLennan Cos.* (“*Tiara*”), recently returned the ELR to its roots by limiting it to product liability claims where there is no personal injury or damage to other property.<sup>1</sup> In doing so, the Supreme Court clarified the law governing the ELR in three significant ways. First, the court receded from its prior holding in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.* (“*Casa Clara*”), which stated that a building must be treated as a “product” for purposes of applying the ELR to bar tort claims for defective building

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<sup>1</sup> *Tiara Condo. Ass’n Inc., v. Marsh & McLennan Cos.*, 110 So. 3d 399, 400 (Fla. 2013).

materials.<sup>2</sup> Second, the court expressly limited the ELR's application to products liability cases,<sup>3</sup> a dramatic shift from earlier jurisprudence that had begun applying the ELR far afield from its original scope.<sup>4</sup> Lastly, the Supreme did away with the so called "contractual privity" ELR

This Article focuses upon the Supreme Court's criticism of these earlier cases, including *Casa Clara*, and maintains that *Tiara* requires that a building must not be viewed as a single product for purposes of applying the ELR. Accordingly, under *Tiara*, the ELR no longer bars claims against builders and general contractors based upon negligent use of building materials, nor claims against manufacturers of defective materials where those materials cause damage to other materials used in a building's construction, as *Casa Clara* previously held.

### I. THE ECONOMIC LOSS RULE EXPLAINED

Under Florida law, the ELR provides as follows:

The "economic loss" rule is a court-created doctrine which prohibits the extension of tort recovery for cases in which a product has damaged only itself and there is no personal injury or damage to "other property," and the losses or damage are economic in nature.<sup>5</sup>

In other words, the ELR prevents recovery in tort based solely on a party's economic losses.<sup>6</sup> Application of the rule prohibits tort recovery for disappointed expectations, such as lost profits, delay damages, loss of the benefit of the bargain, and the reduced value of

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<sup>2</sup> *Id.* at 407 ("We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability."); *see also Casa Clara Condo. Ass'n, Inc., v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993).

<sup>3</sup> *Tiara*, 110 So. 3d at 400.

<sup>4</sup> *See id.* at 403 n. 3 (specifying prior cases where the ELR was liberally applied); *see also id.* at 406-07 (discussing the unprincipled extension of the economic loss rule).

<sup>5</sup> *Moransais v. Heathman*, 744 So. 2d 973, 979 (Fla. 1999) (quoting *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 7 (Fla. Dist. Ct. App. 1994)).

<sup>6</sup> *See id.* at 980.

property.<sup>7</sup> Litigants seeking compensation for these types of losses may find recourse in contract law, but the ELR has generally precluded their recovery in products liability and non-intentional tort cases.<sup>8</sup>

Florida's ELR first arose exclusively in the products liability context.<sup>9</sup> The first expression of the ELR by the Florida Supreme Court precluding a tort recovery occurred in *Florida Power & Light Co. v. Westinghouse Electric Corporation*, "where steam generators were themselves defective but otherwise caused physical damage to no other property or equipment."<sup>10</sup> The court said that tort law "is particularly unsuited to cover instances where a product injures only itself."<sup>11</sup> Instead, where a product has caused damage only to itself and not to other property, the court concluded that recovery was unavailable in tort and restricted recovery to such remedies as remained available in contract.<sup>12</sup>

*Florida Power & Light* concerned a commercially produced and purchased product, a steam generator, which could be bought and sold in the normal stream of commerce.<sup>13</sup> In this context, the ELR did not deprive consumers of a remedy for defective products—it simply placed the onus upon the parties to negotiate that remedy in their purchase agreement.<sup>14</sup> The court's rationale for doing this was simple: in the context of a purely economic risk that the consumer

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<sup>7</sup> *Casa Clara*, 620 So. 2d at 1246.

<sup>8</sup> *See id.*

<sup>9</sup> Florida's ELR, first adopted in *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901–02 (Fla. 1987), drew on two non-Florida decisions: *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) and *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965). *See Fla. Power & Light*, 510 So. 2d at 900–01. The heart of the doctrine was articulated in *East River*: "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *E. River*, 476 U.S. at 871. *See also* H. Hugh McConnell, *The Other Property Problem—Applying the Economic Loss Rule to Construction Contracting Claims*, 74 FLA. B.J. 87, 87 (2000), <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/8222165FB95E3EA885256ADB005D630E>.

<sup>10</sup> McConnell, *supra* note 9, at 87; *see also Fla. Power & Light*, 510 So. 2d at 900.

<sup>11</sup> McConnell, *supra* note 9, at 87; *see also Fla. Power & Light*, 510 So. 2d at 901.

<sup>12</sup> *See Fla. Power & Light*, 510 So. 2d at 902.

<sup>13</sup> *Id.* at 900.

<sup>14</sup> *Id.* at 902.

alone would suffer by purchasing a defective product, a consumer may choose to shoulder the risk if doing so means he may secure a better purchase price; or he may choose to impose that risk upon the manufacturer by paying for a warranty.<sup>15</sup> Either way, the issue of where the risk of purely economic harm should lie is for the contracting parties to decide in their negotiations.<sup>16</sup> The law need not intervene.<sup>17</sup>

By comparison, where a defective product placed in the stream of commerce injures a person or other property, the public's safety is directly at risk.<sup>18</sup> In such circumstances, the law of strict products liability or tort imposes duties upon the manufacturer to mitigate those risks, as contract law is inadequate to protect the public's interest—a notion which the ELR under *Florida Power & Light* left undisturbed.<sup>19</sup>

## II. CASA CLARA'S UNMOORED EXPANSION OF THE ELR

*Casa Clara* represented a departure from *Florida Power & Light*. In *Casa Clara*, homeowners sought tort recovery against a concrete supplier whose defective concrete had damaged other components of their buildings and undermined the structural integrity of the buildings as a whole.<sup>20</sup> Unlike a steam generator, building products are typically “furnished by different manufacturers and suppliers and are often incorporated into real property by various contractors specializing in different trades.”<sup>21</sup> Nevertheless, the Florida Supreme Court did not recognize a distinction between a machine and its parts on one hand, and a building and its constituent materials on the other, concluding that the ELR applied to the homeowners' claims:

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<sup>15</sup> *Id.* at 901.

<sup>16</sup> *See id.* at 902.

<sup>17</sup> *See id.* (“We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.”).

<sup>18</sup> *See East River*, 476 U.S. at 866–67 (“The manufacturer is liable whether or not it is negligent because ‘public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.’ (quoting *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944))).

<sup>19</sup> *See generally id.*; *see also Fla. Power & Light*, 510 So. 2d at 901–02.

<sup>20</sup> *McConnell*, *supra* note 9, at 87.

<sup>21</sup> *Id.*

The homeowners also argue that Toppino's concrete damaged "other" property because the individual components and items of building material, not the homes themselves, are the products they purchased. We disagree. 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. *King v. Hilton-Davis*, 855 F. 2d 1047 (3d Cir. 1988). 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.<sup>22</sup>

*Casa Clara* adopted two questionable propositions. First, the Florida Supreme Court focused on what the consumer purchased—the "object" of the bargain—rather than on what the manufacturer or distributor released into the stream of commerce, to reach its determination that the home was the product itself rather than "other property."<sup>23</sup> Second, the Florida Supreme Court broke with prior precedent when it characterized real property as a "product," even though Florida courts have consistently held that real property is not a "product" in the context of products liability actions.<sup>24</sup>

With regard to the first error, *Casa Clara* cited *King v. Hilton-Davis*, a United States Third Circuit Court of Appeals case applying

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<sup>22</sup> *Casa Clara*, 620 So. 2d at 1247.

<sup>23</sup> *Id.* at 1246–47 (stating that "[t]he character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look at the product purchased by the plaintiff, not the product sold by the defendant." (emphasis added)).

<sup>24</sup> *Cf. Pamperin v. Interlake Cos., Inc.*, 634 So. 2d 1137, 1140 (Fla. Dist. Ct. App. 1994) (identifying a line of cases holding that structural improvements to real property are not generally considered products for purposes of products liability actions). *See also* McConnell, *supra* note 9, at 87.

Pennsylvania law,<sup>25</sup> as the grounds for its rationale that a product should be defined based upon analyzing “the product purchased by the plaintiff, not the product sold by the defendant.”<sup>26</sup> But, even as an out-of-state authority, *King* was feeble support for *Casa Clara*’s holding. As the United States Supreme Court demonstrated four years after *Casa Clara* in *Saratoga Fishing Co. v. J.M. Martinac & Co.*,<sup>27</sup> *King* incorrectly construed the precedent upon which it relied, *East River Steamship Corp. v. Transamerica Delaval, Inc.*,<sup>28</sup> by focusing upon the consumer’s “bargained-for expectations,” or the “object-of-the-bargain,”<sup>29</sup> to determine whether the damage at issue was to the “product itself” or damage to “other property.”<sup>30</sup> As the Supreme Court discussed, the “object-of-the-bargain” rule “pushes *East River*’s principle beyond the boundary set by the [ELR’s] rationale” and “creates a tort damage immunity beyond that set by any relevant tort precedent that [the Court has] found.”<sup>31</sup> The Court concluded instead that “[w]hen a manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the ‘product itself’ under *East River*.”<sup>32</sup>

Although *Casa Clara* was decided without the benefit of *Saratoga Fishing*, it is clear that *Casa Clara* adopted the same misinterpretation of *East River*—an “object-of-the-bargain” analysis—that

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<sup>25</sup> *King v. Hilton-Davis*, 855 F. 2d 1047, 1051 (3d Cir. 1988).

<sup>26</sup> See *Casa Clara*, 620 So. 2d at 1247; see also *King*, 855 F. 2d at 1051 (“[I]t is the character of the plaintiff’s loss that determines the nature of the available remedies.”).

<sup>27</sup> 520 U.S. 875, 880 (1997) (finding fault in the Ninth Circuit’s reasoning that *East River* required it to look at what the plaintiff had purchased to define the defective “product itself.”).

<sup>28</sup> 476 U.S. 858, 871 (1986).

<sup>29</sup> See *Saratoga Fishing*, 520 U.S. at 890 (Scalia, J., dissenting). Justice Scalia coined the “‘object-of-the-bargain’ rule” to also encompass the analysis applied by the Third Circuit Court of Appeals in *King* and the Florida Supreme Court in *Casa Clara*.

<sup>30</sup> *King*, 855 F.2d at 1051 (“As we read *East River*, it is the character of the plaintiff’s loss that determines the nature of the available remedies.”). The Third Circuit Court of Appeals focused on the consumers’ “bargained-for expectations” to determine whether the damage at issue was to the “product itself” or to “other property.” *Id.* at 1052 (“Focusing on the [plaintiffs’] bargained-for expectations, we hold that the relevant product in this case ‘injured only itself.’”).

<sup>31</sup> *Saratoga Fishing*, 520 U.S. at 880.

<sup>32</sup> *Id.* at 879.



the United States Supreme Court expressly repudiated.<sup>33</sup> Accordingly, even before *Tiara* was decided, *Casa Clara*'s continuing viability was doubtful.<sup>34</sup> Indeed, prior to *Tiara*, the Florida Supreme Court expressly recognized the disparity between its interpretation of *East River* in *Casa Clara* and the United States Supreme Court's clarification in *Saratoga Fishing*, and nonetheless cited *Saratoga Fishing* favorably.<sup>35</sup> In *Comptech International Inc. v. Milam Commerce Park, Ltd.*, the Florida Supreme Court ruled that the ELR did not bar a claim for damage to computers stored in a warehouse whose construction did not meet the Florida Building Code, a violation that is actionable under Florida statutory law.<sup>36</sup> *Comptech* stated that its holding was "supported by the United States Supreme Court's recent decision in *Saratoga Fishing*. . . ."<sup>37</sup> The Florida Supreme Court's rejection of the Third District Court of Appeal's application of the "object-of-the-bargain rule" and its endorsement of

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<sup>33</sup> *Casa Clara*, 620 So. 2d at 1247 ("[T]o determine the character of a loss, one must look to the product purchased by the plaintiff. . . ."). In fact, when the *Saratoga Fishing* Court provided examples of distinctions between the "product itself" purchased by the initial user, and "other property" incorporated with the product itself, it included the example of "[a] warehouse owner recover[ing] for damage to a building caused by a defective roof." *Saratoga Fishing*, 520 U.S. 880 (describing *United Air Lines, Inc. v. CEI Indus. of Ill., Inc.*, 499 N.E. 2d 558, 559 (Ill. App. Ct. 1986)). In *United Air Lines*, the Appellate Court of Illinois held that the collapse of a defective roof, which damaged the walls and furnishings of a warehouse, "resulted in damage to property other than the roof" for the purposes of the economic loss doctrine. *Id.* at 563.

<sup>34</sup> For example, *Casa Clara* specifically cites to *Seely*, a California Supreme Court case, as "set[ting] out the economic loss rule." 620 So. 2d at 1246. However, California courts interpreting *Seely* have consistently held that the economic loss rule does not apply to real property. *See, e.g.*, *Stearman v. Centex Homes*, 92 Cal. Rptr. 2d 761, 769 (Cal. Ct. App. 2000) (holding that where a defectively constructed foundation resulted in slab movement and cracks all over the residence there was damage to "other property" and the ELR did not apply). *See also Saratoga Fishing*, 520 U.S. at 889–90 (Scalia, J., dissenting) (Justice Scalia explicitly cites to *Casa Clara* as a case that has applied the "object-of-the-bargain rule," which conflicts with the Court's holding in *Saratoga Fishing*).

<sup>35</sup> *See Comptech Int'l, Inc., v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1226 (Fla. 1999).

<sup>36</sup> *See id.* at 1221.

<sup>37</sup> *Id.* at 1226.

*Saratoga Fishing* cast *Casa Clara*'s holding into doubt,<sup>38</sup> and implicitly acknowledged *Saratoga Fishing* as the appropriate standard for defining "other property" for purposes of the ELR.<sup>39</sup>

The second dubious proposition underlying *Casa Clara*, the characterization of a building as a "product," ran counter to the well-established rule of law in Florida that real property and structural improvements to real property are not "products" for purposes of products liability claims.<sup>40</sup> Thus, applying the ELR to claims such as those litigated in *Casa Clara* insulated real estate builders and general contractors against claims from the public to an even greater extent than product manufacturers, as builders and general contractors were not susceptible to claims for strict products liability.<sup>41</sup> There was no principled policy reason given in *Casa Clara* for giving builders and contractors legal immunity that surpassed those granted to actors in virtually all other comparable professions.

### III. THE ELR'S RETURN TO ITS PRINCIPLED ROOTS

At the greatest extent of its judicial expansion, the ELR was held by Florida courts to bar tort claims for economic damages arising from a wide variety of commercial relationships, including defective

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<sup>38</sup> The Court stated that "[e]ven under a *Casa Clara* analysis, the computers are 'other property' and not subject to the economic loss rule." *Id.* If the Florida Supreme Court had intended *Casa Clara* to be controlling precedent, the Court would not have used the words "[e]ven under a *Casa Clara* analysis." *See id.*; *see also In re Chinese Manufactured Drywall Products Liab. Litig.*, 680 F. Supp. 2d 780, 794 (E.D. La. 2010) (noting that the Florida Supreme Court's decisions in *Moransais* and *Comptech* "cast doubt on its decision in *Casa Clara*").

<sup>39</sup> *See Comptech*, 753 So. 2d at 1226.

<sup>40</sup> *See Pamperin v. Interlake Cos., Inc.*, 634 So. 2d 1137, 1140 (Fla. Dist. Ct. App. 1994), which listed cases holding that structural improvements to real property are not generally considered products for purposes of products liability actions. *Pamperin* references, among others, *Easterday v. Masiello*, 518 So. 2d 260, 261 (Fla. 1988) (where the Florida Supreme Court was "unwilling to hold that a jail facility is a product that invokes the principles of products liability cases"). *See also Simmons v. Rave Motion Pictures Pensacola, LLC*, 197 So. 3d 644, 648 (Fla. Dist. Ct. App. 2016) (holding that a "movie theater seating system [is] a structural improvement to real property and, thus, not a product.").

<sup>41</sup> *See, e.g., Plaza v. Fisher Dev., Inc.*, 971 So. 2d 918, 924 (Fla. Dist. Ct. App. 2007) (holding that a general contractor could not be held liable under a theory of strict products liability because "as a matter of law, the subject conveyer is a structural improvement to real property, not a product.").

products,<sup>42</sup> faulty business services,<sup>43</sup> negligent construction contracting,<sup>44</sup> and professional malpractice.<sup>45</sup>

That development of the ELR, and the confusion conveyed by its rapidly changing scope, led the Florida Supreme Court to express concern “with what it perceived as an over-expansion of the economic loss rule.”<sup>46</sup> Beginning with *Moransais v. Heathman*,<sup>47</sup> continuing with *Indemnity Insurance Co. of North America v. American Aviation, Inc.*,<sup>48</sup> and finally in *Tiara*,<sup>49</sup> the Florida Supreme Court has steadily reversed this course by limiting application of the ELR to its principled beginnings.

First, in *Moransais*, the Florida Supreme Court ruled that the ELR does not apply to professional negligence claims.<sup>50</sup> In doing so,

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<sup>42</sup> Fla. Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 900 (Fla. 1987) (power generating equipment).

<sup>43</sup> AFM Corp. v. S. Bell Tel. & Tel. Co., 515 So. 2d 180, 180–82 (Fla. 1987) (inaccurate telephone listing).

<sup>44</sup> Sandarac Ass’n v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1350–51 (Fla. Dist. Ct. App. 1992).

<sup>45</sup> *Id.* (architectural design). *But see* Southland Constr., Inc. v. Richeson Corp., 642 So. 2d 5, 8 (Fla. Dist. Ct. App. 1994) (declining to apply the ELR to professional malpractice).

<sup>46</sup> *Tiara Condo. Ass’n Inc., v. Marsh & McLennan Cos.*, 110 So. 3d 399, 406 (Fla. 2013).

<sup>47</sup> *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999). In *Moransais* the Florida Supreme Court states that its holdings after *Florida Power & Light* “have appeared to expand the application of the [ELR] beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent.” *Id.* at 980. The Florida Supreme Court proceeded to criticize *Casa Clara* as one such expansive holding:

We also stated *expansively* in *Casa Clara* that “[w]hen 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.’ In *Airport Rent-A-Car*, we followed the reasoning in *Casa Clara* in holding the economic loss rule barred a cause of action for negligence against the manufacturer of defective buses where the only damage alleged was to the buses themselves.

*Id.* at 981 (emphasis added) (citations omitted).

<sup>48</sup> *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 534 (Fla. 2004).

<sup>49</sup> *Tiara*, 110 So. 3d at 407 (“Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context.”).

<sup>50</sup> *Moransais*, 744 So. 2d at 983.

the court expressly rejected an argument that such claims were analogous to the claims brought in *Casa Clara*: “[*Casa Clara*] was not unanimous,” the court remarked, “especially as to our characterization of ‘other property.’”<sup>51</sup> Although the opinion failed to describe what differences of opinion the members of the court had, in his dissent Senior Justice Overton notably complained that the majority “effectively overruled our rather recent decision in *Casa Clara* without saying so.”<sup>52</sup>

Next, the Florida Supreme Court ruled in *American Aviation* that the ELR was limited to two circumstances: (1) cases involving contractual privity between the parties (the “contractual privity” ELR); and (2) cases where products damage themselves (the “product liability” ELR).<sup>53</sup> It stated plainly:

We conclude that the “economic loss doctrine” or “economic loss rule” bars a negligence action to recover solely economic damages only in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product, and no established exception to the application of the rule applies.<sup>54</sup>

With regard to claims in the latter category, the Supreme Court was specific in limiting the ELR to claims against only manufacturers and distributors of products (as opposed to “builders,” for example), and only where the product damages itself: “we hold that a manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself.”<sup>55</sup> As Justice Cantero explained in his concurrence, “the economic loss rule does not apply in the services context unless a contract exists.”<sup>56</sup>

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<sup>51</sup> *Id.* at 981.

<sup>52</sup> *Id.* at 985 (Overton, J., dissenting).

<sup>53</sup> *American Aviation*, 891 So. 2d at 534.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 542–43.

<sup>56</sup> *Id.* at 544 (Cantero, J., concurring).

The ELR was further simplified in *Tiara*, where the Florida Supreme Court discarded the “contractual privity” prong of the ELR<sup>57</sup> and limited the ELR’s application to products liability cases.<sup>58</sup> “[W]e expressly limited tort liability with respect to defective products to injury caused to persons or damage caused to property other than the defective product itself.”<sup>59</sup>

#### IV. TIARA’S IMPACT ON *CASA CLARA*

When read alongside one another, *American Aviation* and *Tiara* demonstrate that the product liability ELR, as now defined by the Florida Supreme Court, is strictly limited to circumstances where “the defendant is a manufacturer or distributor of a product”<sup>60</sup> and the defective product injures only itself.<sup>61</sup> The ELR therefore has only limited application in the context of building construction, where Florida recognizes a clear distinction between contractors, who furnish *services*,<sup>62</sup> and manufacturers and distributors, who furnish *products*, in connection with improving real property.<sup>63</sup>

First, because the ELR can apply only to products sold by manufacturers and distributors, logically it cannot apply to products that are *not* sold by manufacturers and distributors. Since manufacturers and distributors create and sell building materials, as opposed to improving real estate, the ELR can apply only to building materials, not real estate. Moreover, the ELR can apply only to claims brought

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<sup>57</sup> Compare *id.* at 536–37 (explaining the contractual privity economic loss rule), with *Tiara Condo. Ass’n v. Marsh & McLennan Co.*, 110 So. 3d 399, 407 (Fla. 2013) (limiting the economic loss rule to products liability cases).

<sup>58</sup> *Tiara*, 110 So. 3d at 407. A residue of the contractual privity ELR, formally eliminated in *Tiara*, remains in Justice Pariente’s concurring opinion, in which she recognized that “to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim.” *Id.* at 408 (Pariente, J., concurring).

<sup>59</sup> *Id.* at 405 (quoting *American Aviation*, 891 So. 2d at 541).

<sup>60</sup> *American Aviation*, 891 So. 2d at 534.

<sup>61</sup> *Tiara*, 110 So. 3d at 405.

<sup>62</sup> See *Jackson v. L.A.W. Contracting Corp.*, 481 So. 2d 1290, 1292 (Fla. Dist. Ct. App. 1986) (stating that contractor in that case was a provider of services and not goods).

<sup>63</sup> See *id.* (distinguishing case in which contractor applied road sealant from one in which contractor applied *and manufactured* road sealant).

with respect to a defective product that damages only “itself.”<sup>64</sup> This excludes other materials that compose a structural improvement. Thus, where defective building materials damage materials that come from different suppliers, the ELR does not apply—these manufacturers did not supply “a building” as their product, only constituent parts.<sup>65</sup> With respect to the “other property” analysis, this articulation of the ELR puts the focus back on manufacturers and distributors and the products they put into the stream of commerce—and the public benefit brought about by imposing strict liability upon them—rather than focusing on the finished product that a consumer buys.

Second, a contractor provides the service of directing the manner and means in which building materials are installed in order to accomplish the intended design of a structure. By contrast, material suppliers are in the business of manufacturing or distributing products and are deemed to be merchants who give warranties pursuant to the Uniform Commercial Code (UCC).<sup>66</sup> The use of building materials in the ordinary course of providing general contracting services does not transform a contractor into a distributor.<sup>67</sup> Accordingly, the ELR does not stand as a bar to tort claims against contractors, subcontractors, design professionals and other actors who provide services toward the construction of a building.

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<sup>64</sup> See *Tiara*, 110 So. 2d at 405.

<sup>65</sup> Cf. *Adobe Bldg. Ctrs., Inc., v. Reynolds*, 403 So. 2d 1033, 1033, 1035 (Fla. Dist. Ct. App. 1981), *review dismissed*, 411 So. 2d 380 (Fla. 1981) (holding that retailer or wholesaler is subject to tort liability when purchaser combines product with another product or substance and suffers economic damages from use of the final amalgam). *Adobe* was expressly disapproved by the Florida Supreme Court. See *Casa Clara Condo. Ass’n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1248 (Fla. 1993).

<sup>66</sup> *Construction Law Survival Manual: Ch 4 - Uniform Commercial Code Sale Of Goods*, FULLERTON & KNOWLES, <http://www.fullertonlaw.com/uniform-commercial-code#g> (“Most construction material buyers and sellers will be merchants for transactions in the ordinary course of their business.”) (last visited Apr. 2017).

<sup>67</sup> See, e.g., *Jackson*, 481 So. at 1292 (road contractor not liable in warranty as a distributor for defective sealant applied to road surface); *Arvida Corp. v. A.J. Indus., Inc.*, 370 So. 2d 809, 810, 812 (Fla. Dist. Ct. App. 1979) (per curiam) (contractor not liable under UCC for parts and materials used in repairing bathroom fixtures).

That leaves tort claims against manufacturers and distributors of products as the sole survivor of the ELR's decline, effectively resetting the clock back to 1987 and the Florida Supreme Court's first adoption of the ELR in *Florida Power & Light*.<sup>68</sup> At that time, strict liability in tort had been adopted in Florida,<sup>69</sup> and at least one district had expressly recognized an action for strict liability against the distributor of a defective building material for damage done to the building in which it was incorporated.<sup>70</sup>

If, as stated in *Tiara*, the applicability of ELR rule in Florida has returned to its original rationale and intent under *Seely* (1965), *East River* (1986), and *Florida Power & Light* (1987),<sup>71</sup> then the clock must also be reset with regards to real property's place within the context of the ELR.<sup>72</sup> Under the Supreme Court's holding in *Saratoga Fishing*, the Florida Supreme Court's application of the "object-of-the-bargain" analysis in *Casa Clara* does not align with the "original rationale and intent" of *East River* and, therefore, was receded from in *Tiara*.<sup>73</sup> That is to say: (1) for purposes of applying the ELR, courts must look at the product placed in the stream of commerce by the manufacturer or distributor, and (2) real property falls outside the purview of the ELR, which "applies only in the products liability context."<sup>74</sup>

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<sup>68</sup> Fla. Power & Light v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987).

<sup>69</sup> West v. Caterpillar Tractor Co., 336 So. 2d 80, 92 (Fla. 1976).

<sup>70</sup> *Adobe*, 403 So. 2d at 1033.

<sup>71</sup> See *Tiara Condo. Ass'n Inc., v. Marsh & McLennan Cos.*, 110 So. 3d 399, 406 (Fla. 2013) ("In *American Aviation*, in recognizing our history of unprincipled extension of the rule, [the Florida Supreme Court] concluded that the economic loss rule should be expressly limited to the original rationale and intent of *Seely*, *East River*, and *Florida Power* . . ."). Notably, *Casa Clara* was not among those cases to which the Florida Supreme Court expressly cited. See *id.*

<sup>72</sup> In *Tiara*, the Florida Supreme Court stated that the application of the ELR in Florida from its inception to its ruling in *Florida Power*, which would include the Fourth District Court of Appeal's decision in *Adobe*, reveals a strict adherence to the reasoning of *East River* and *Seely*. See *id.* at 405. The Florida Supreme Court also reiterates that its rulings after *Florida Power* "appeared to expand the application of the rule beyond its principled origins" and lists *Casa Clara* (and its determination that real property is a product) as an example of its expanded application of the rule. See *id.* at 405–06 & n.5.

<sup>73</sup> See *Tiara*, 110 So. 3d at 407.

<sup>74</sup> See *id.*; see also *Pamperin v. Interlake Cos., Inc.*, 634 So. 2d 1137, 1140 (Fla. Dist. Ct. App. 1994) and cases cited therein.

## CONCLUSION

With its opinion in *Tiara*, the Florida Supreme Court has properly rolled back the invasive nature of the ELR as defined by previous jurisprudence, including *Casa Clara*'s incorrect definition of real property as a product.<sup>75</sup> The Florida Supreme Court's focus on "object-of-the-bargain" analysis in *Casa Clara* served as the foundation for its characterization of a building as "the product itself" for purposes of applying the ELR to claims related to the defective concrete at issue in that case. But in light of *Saratoga Fishing*<sup>76</sup> and the Florida Supreme Court's rulings in *Comptech*,<sup>77</sup> *Moransais*,<sup>78</sup> *American Aviation*,<sup>79</sup> and *Tiara*,<sup>80</sup> the foundation supporting *Casa Clara* has crumbled. These latter cases confirm that the building-as-product doctrine must give way to viewing a building as its constituent parts for purposes of applying the ELR. Defective building materials that damage materials that come from different manufacturers and distributors should not be subject to the ELR, as these are different products causing harm to one another, and not a product damaging "itself." From the outset of the ELR's existence, its intended application was only in the products liability context—a context to which it has been appropriately returned under *Tiara*.

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<sup>75</sup> See *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993).

<sup>76</sup> *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997).

<sup>77</sup> *Comptech Int'l, Inc., v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999).

<sup>78</sup> *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

<sup>79</sup> *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004).

<sup>80</sup> *Tiara Condo. Ass'n Inc., v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013)