Supreme Court of Florida

Case No. SC2024-0334
L.T. Case No. 22-14104 (U.S. 11th Circuit)

Liebherr-America, Inc., d/b/a Liebherr USA Co., and Liebherr Cranes, Inc.,

Appellants,

v.

NBIS Construction & Transport Insurance Services,

Appellee.
_____/

INITIAL BRIEF OF APPELLANTS LIEBHERR-AMERICA, INC., d/b/a LIEBHERR USA CO., And LIEBHERR CRANES, INC.

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Statement of the Case and Facts

The United States Court of Appeal for the Eleventh Circuit has certified to this Court the following question:

> Whether, under Florida law, the economic loss rule applies to negligence claims against a distributor of a product, stipulated to be non-defective, for the failure to alert a product owner of a known danger, when the only damages claimed are to the product itself?

NBIS Constr. & Transport Ins. Servs., Inc. v. Liebherr-America, Inc., 93 F.4th 1304, 1314–15 (11th Cir. 2024) (A 24).

In this brief, Appellants Liebherr-America, Inc., d/b/a Liebherr USA, Co., and Liebherr Cranes, Inc. (now a single company, see Doc. 148 at 3 (A 165), and collectively, "Liebherr-America") will demonstrate that the Court should answer this question in the affirmative. The tort claims at issue in this case are product liability claims involving only damage to the product itself and thus are barred by the economic loss rule, leaving the damage at issue to be addressed by other means, such as through contract, warranty, or insurance.

In fact, the product's purchaser in this case obtained insurance on the product and the insurer paid the purchaser's claim for diminished value. It is now the insurer's third-party administrator

who, claiming subrogation rights from the insured, has filed suit and seeks to use tort law to recover the insurance payment. The economic loss rule prohibits the insurer from doing so, as a subrogated insurer has no greater rights against an alleged tortfeasor than its insured, and the insured in this case lacks the right to bring the claims at issue.

The Crane

Nonparty Liebherr Werk Ehingen GMbH ("Liebherr-Germany") is a German crane and heavy equipment manufacturing company. Doc. 148 at 2 (A 164).[1] It manufactured a crane, model LTM 1500, and sold it to Liebherr-America, which distributes and services Liebherr-Germany cranes. Doc. 148 at 2–3 (A 164–65). The crane had previously been used. Doc. 148 at 3 (A 165). Liebherr-America sold the crane to Schuch Heavylift Corporation, which sold it to Atlantic Coast Cranes & Machinery, Inc., which sold it to Sims Crane & Equipment Company ("Sims") in August 2016. Doc. 148 at 3–4 (A 165–66). With its purchase, Sims received the operator manual

[1] Record references are to the federal district court filings that comprise the record on appeal in the Eleventh Circuit proceeding. Copies the district court filings referenced herein are contained in the appendix accompanying this brief.

Liebherr-Germany created for its LTM 1500 cranes. Docs. 148 at 4 (A 166); 167-5 at 21 (A 1397); Doc. 161 at 54 (A 1241).

Liebherr-America's standard practice was to offer 80 hours of training to new owners unless the customer already had the same or similar equipment. Doc. 155 at 227 (A 428). Sims had not previously owned a Liebherr LTM 1500 crane. Doc. 155 at 241 (A 442).

From January 30 to February 4, 2017, Liebherr-America provided Sims's employees, including crane operator Andrew Farris, with approximately 40 hours of training. Doc. 150-1 at 3 (A 191); Doc. 155 at 242–43 (A 443-44); Doc. 157 at 20, 23–24 (A 688, 691–92); Doc. 149-63 at 3–12 (A 179–88). A training record that tracked which topics Liebherr-America covered in the training sessions shows that numerous topics were covered and that some topics were either not covered or deemed not applicable. Doc. 149-63 at 3–12 (A 179–88).

The same training record, which Sims executed, described the contents of the Liebherr-America training. It stated:

> Objective: The training for crane operators is designed to equip operators with a comprehensive knowledge of the controls, arrangements, operational systems, procedures, characteristics, and safety concerns and considerations relating to the specific crane. ***The content of the***

Liebherr Cranes operating instructions is the basis for the training.

Doc. 149-63 at 2 (A 178, 191) (emphasis added). Liebherr-America, Sims, and Sims's employees were therefore all aware that Liebherr-America would conduct the training based on the contents of the crane's operator manual. Liebherr-America did not commit to providing training beyond the contents of the operator manual.

Among the many topics covered in the training was how to manipulate a particular pin on the crane, the T3 pin, when conducting a boom exchange. Doc. 157 at 29, 126 (A 697, 794). The T3 pin was the only pin that needed to be manipulated to perform a boom exchange. Doc. 157 at 126 (A 794). According to Farris, the training taught him to use a wrench to screw and unscrew the T3 pin, and "when you lock and unlock the pin, you go to where it stops, but don't over-torque it because you'll ruin the mechanism inside the pin." Doc. 157 at 29–30 (A 697–98). The operator manual also referenced that the specific measurement when the T3 pin was tightened should be 11 millimeters above the locking bore, though the training did not mention that point. Doc. 157 at 30, 139 (A 698, 807); Doc. 158 at 155 (A 1089).

The crane had another pin, the T4 pin. It was set and locked in position at the factory and should not be manipulated during a boom exchange. Doc. 157 at 126 (A 794); Doc. 158 at 57 (A 991). There is no dispute that, if the operator manual's instructions for a boom exchange are followed from the start, then inadvertent manipulation of the T4 pin is not possible. Doc. 157 at 137 (A 805). The T4 pin would be blocked and therefore inaccessible. *Id.*

The operator manual did not discuss the T4 pin, including what to do if someone manipulated it. Doc. 157 at 81–82 (A 749–50). Likewise, the training sessions—which used the operator manual as the basis for the training (Doc. 149-63 at 2) (A 178)—also did not discuss the T4 pin. Doc. 157 at 29–30, 38, 81, 84 (A 697–98, 706, 749, 752). As a result, like the operator manual, the training Sims's personnel received did not explain how to correct the T4 pin if it was improperly manipulated. Doc. 158 at 59 (A 993).

The Crane's Collapse

On February 16, 2018, Sims's employees began performing a boom exchange on the crane. Doc. 157 at 42–44 (A 710–12). Farris directed the operation and was assisted by an apprentice, Shane Burrows. Doc. 157 at 179–81 (A 747–49). Burrows had not been

trained to perform a boom exchange and had not read the operator manual regarding boom exchanges. *Id.* The procedure included manipulation of the T3 pin, but Burrows did not follow the operator manual's instructions and ended up mistakenly moving the T4 pin instead. Doc. 157 at 185–86 (A 853–54).

Burrows had trouble locking the T4 pin after he manipulated it, so he asked Farris for assistance. Doc. 157 at 46 (A 714). Farris realized that Burrows had manipulated the wrong pin. *Id.* Farris intended to return the T4 pin to where it had previously been, and he assumed it should have been set the way he had been trained to return the T3 pin when it was manipulated during a boom exchange. Doc. 157 at 138–39 (A 806–07). Farris assumed he reset the T4 pin correctly, but he did not. Doc. 157 at 140 (A 808). The boom later collapsed on itself. Doc. 157 at 54, 62–63, 140 (A 722, 730–31, 808). The collapse resulted in significant damage to the crane. Doc. 174 at 40 (A 1659).

Liebherr-Germany's Product Safety Bulletin

On November 8, 2017, just over three months before the collapse, Liebherr-Germany issued a product safety bulletin regarding the LTM 1500 model crane. Doc. 149-15 (A 175–76). The

bulletin emphasized the need to follow the operator manual's directions regarding the mounting and dismounting of the crane's telescopic sections. *Id.* The bulletin warned that if, when changing from the 50-meter telescopic boom to the 84-meter telescopic boom, the wrong release screw is locked or unlocked incorrectly, then the result could be uncontrolled retraction of the boom and serious injury or death. *Id.* The bulletin was directed to persons operating an LTM 1500 crane and stated that, "[i]n the near future, you will be receiving a product retrofit of the cover plate for locking [pins T3 and T4]." *Id.*

Liebherr-Germany issued the bulletin after learning of an accident in Japan in which a crane operator manipulated the T4 pin, resulting in an uncontrolled retraction of the boom. *See* Doc. 158 at 171 (A 1105); Doc. 161 at 30 (A 1217). That incident occurred in May 2017, months after Liebherr-America conducted its training sessions with Sims. Doc. 150-1 at 3 (A 191); Doc. 156 at 49 (A 506); Doc. 161 at 30 (A 1217). Liebherr-America was unaware of it. Doc. 155 at 122 (A 323). It was the only incident of its kind prior to the one in this case. Doc. 155 at 52 (A 253); Doc. 158 at 171 (A 1105).

Liebherr-America received the product safety bulletin from Leibherr-Germany on November 10, 2017. Liebherr-America was still sending bulletins, including "retrofit kits," to LTM 1500 crane owners in January and February 2018. *See* Doc. 155 at 153–55 (A 354–56); Doc. 158 at 22, 26 (A 956, 960). The kits consisted of a plate to cover the T4 pin and warning stickers to be placed in various locations, including a sticker with a red "X" to be placed on the T4 pin cover plate. *See* Doc. 148 at 9–10 (A 171–72); Doc. 174 at 38 (A 1657).

Some LTM 1500 crane owners received the bulletin after the February 19, 2018 incident in this case. Doc. 158 at 86 (A 1020). Sims was one of them. While Liebherr-America was aware that Sims owned an LTM 1500 crane, Liebherr-America's database of owners showed the crane's prior owner, not Sims, for the particular crane that Sims owned. Doc. 156 at 24 (A 481); Doc. 174 at 17 (A 1636). Liebherr-America did not correct its database and send the bulletin to Sims until February 26, 2018—one week after the accident in this case. Doc. 155 at 157 (A 358). Notably, Liebherr-America never sent a bulletin to the crane's prior owner, who had been listed in the database. *Id.*

NBIS's Claims

Prior to the collapse, Sims purchased insurance for the crane, which paid Sims based on the crane's fair market value prior to the incident. Doc. 174 at 40 (A 1659). NBIS Construction & Transport Insurance Services, Inc. ("NBIS"), as the insurer's third-party administrator and managing general agent, and as subrogee of Sims, then filed suit against Liebherr-America to recover the insurance payment. Docs. 24, 174 at 2 (A 27, 1621). NBIS essentially stood in Sims's shoes for purposes of the suit.

NBIS asserted three claims. In count one, NBIS alleged that Liebherr-America negligently failed to warn Sims when Liebherr-America trained Sims's employees and when it provided crane owners with the product safety bulletin. Doc. 24 at 4–5 (A 30–31). In count two, NBIS alleged that Liebherr-America negligently trained its own employees. *Id.* at 6 (A 32). Finally, in count three, NBIS alleged that Liebherr-America violated the Florida Deceptive and Unfair Trade Practices Act by failing to inform Sims of known dangers with the crane in a timely fashion. *Id.* at 7 (A 33).

It bears mention that a worker on the site was injured when the crane collapsed. Doc. 155 at 77-78 (A 278–79). He spent nearly two

months in the hospital before passing away from his injuries. Doc. 155 at 78 (A 279). NBIS's complaint, however, brought claims only on Sims's behalf, for damage that the crane did to itself when the boom collapsed. This litigation involves no claim for personal injury or damage to any property other than the crane itself.

Liebherr-America moved for summary judgment. Doc. 50 (A 39). In response to Liebherr-America's arguments that Florida's economic loss rule barred the negligent failure to warn claim and no tort duty existed, NBIS argued that the economic loss rule applies only to tort claims against a product manufacturer and that NBIS "does not contend that the [c]rane was defective in any manner." Doc. 51 at 2 & n.1 (A 64). A magistrate judge agreed with NBIS that "this is not a products liability action" and therefore NBIS's failure to warn claim was "not barred by the economic loss rule." Doc. 57 at 11 (A 93). The magistrate judge further recommended that Liebherr-America had a duty to protect Sims's economic interests in the crane because, in discovery, Liebherr-America "acknowledged" its policies to provide training and product safety bulletins. *Id.* at 12 (A 94). The magistrate judge recommended granting the motion on the FDUTPA

claim but denying the motion on the two remaining claims. Doc. 57 at 17–18 (A 99–100).

The district court adopted the magistrate judge's recommendations, granted Liebherr-America summary judgment on NBIS's FDUTPA claim, and denied Liebherr-America summary judgment on the two remaining claims. Doc. 74 at 3 (A 103). The district court thereafter assigned the case to the magistrate judge for disposition, and the case proceeded to a bench trial. Docs. 75 (A 104), 155 (A 202). Because the magistrate judge ultimately found in Liebherr-America's favor on count two—the claim that Liebherr-America negligently trained its own employees—the following discussion focuses on count one, NBIS's negligent failure to warn claim.

The Pretrial Stipulation

In proceeding to trial, the parties entered a stipulation covering 68 points. Doc. 148 (A 163). Among them was a provision stating that "[t]he Crane was not defective at any time prior to or at the time of the incident that occurred on February 19, 2018." *Id.* at 2 (A 164) (¶ 12).

The Trial

At trial, an engineer testified that the crane collapsed due to improper manipulation of the T4 pin. Doc. 158 at 19, 43, 60–61 (A 953, 977, 994–95). To support its failure to warn claim, NBIS relied on two theories. First, NBIS contended that Liebherr-America was negligent in training Sims's employees during the 2017 training sessions. A human factors expert opined that Liebherr-Germany's operator manual was "deficient" because "the relevant sections" were "silent on the T4 pin." Doc. 158 at 119, 139 (A 1053, 1073). He saw the same problems in Liebherr-America's training. Doc. 158 at 130 (A 1064). He testified that the training "never covered that either" (*id.* at 125) (A 1059) and that the training was the "same as the manual"—"[i]t was silent on the consequences of manipulating the T4 pin." *Id.* at 130 (A 1064). The expert thus opined that the "training was deficient in warning of the hazards associated with inadvertently adjusting the . . . T4 pin." *Id.* at 139 (A 1073).

Second, NBIS contended that Liebherr-America was negligent when it did not provide Sims with Liebherr-Germany's product safety bulletin until late February 2018, after the crane's collapse. A Liebherr-America representative agreed that when Liebherr-Germany

issues a product safety bulletin, it was Liebherr-America's "internal standard operating procedure" to send a product safety bulletin to any owner, so long as Liebherr-America is on notice of who owns a specific crane. Doc. 155 at 120 (A 321). NBIS's human factors expert opined that Liebherr-Germany created the product safety bulletin at issue after recognizing a deficiency in the crane's operator manual, Doc. 158 at 129 (A 1063), and had the bulletin's warnings been available to Sims, along with the cover plate and stickers from the retrofit kit, then Burrows would not have manipulated the wrong pin. Doc. 158 at 122 (A 1056).

Despite the magistrate judge having ruled at the summary judgment stage that NBIS's failure to warn claims were not products liability claims, Liebherr-America continued to assert that the economic loss rule barred NBIS's failure to warn claims, and no duty to Sims otherwise existed under Florida law to protect Sims's economic interests in the crane not damaging itself. Doc. 146 at 3–18 (A 107–22). Liebherr-America further asserted, among other things, that NBIS failed to show that Liebherr-America breached the applicable standards of care for training or for providing product updates. Doc. 173 at 77–86 (A 1480–89).

Following trial, the magistrate judge again ruled that Florida's economic loss rule did not apply to NBIS's failure to warn claim because it was supposedly a negligent services claim, not a products liability claim. Doc. 174 at 25 (A 1644). In support, the magistrate judge cited the parties' stipulation that the crane was not defective. *Id.*

Regarding NBIS's theory that Liebherr-America negligently trained Sims's employees on the crane's operation, the magistrate judge ruled that, at the time of the training, Liebherr-America knew the risks associated with touching the T4 pin and yet did not train Sims regarding those risks. Doc. 174 at 31 (A 1650). The magistrate judge determined that the failure to do so created a risk of harm that a catastrophic accident would occur, giving rise to a duty to warn that Liebherr-America breached by not instructing Sims on the dangers of manipulating the T4 pin. *Id.* at 31-37 (A 1650–56).

Regarding NBIS's theory that Liebherr-America negligently failed to provide Sims with the product safety bulletin concerning the T4 pin, the magistrate judge ruled that, "[a]s a company responsible for communicating product safety information, [Liebherr-America] had a duty to timely send the product safety warnings." *Id.* at 33

(A 1652). Apparently viewing this situation as no different than one involving personal injury or damage to other property, the magistrate judge stated, "[a]n improperly operated 600-ton crane has a high probability of injuring people and causing property damage," and that Liebherr-America "should have known if it did not properly maintain customer information, crane purchasers would not receive the pertinent warnings timely." *Id.* The magistrate judge further stated that when Liebherr-America received the safety bulletin, "it should have known, because the Manual lacks any warnings as to the T4 pin, failing to promptly communicate the warnings in the Safety Bulletin increased the risk of harm to Sims." *Id.* The magistrate judge ruled that Liebherr-America breached the duty to warn by not updating its ownership records and timely providing Sims with the product safety bulletin. *Id.* at 34, 38–39 (A 1653, 1657–58).

The magistrate judge accordingly found in NBIS's favor on count one, the negligent failure to warn claim, and awarded NBIS damages of $1,744,752.74 plus prejudgment interest. Doc. 174 at 39–40 (A 1658–59). The magistrate judge found in Liebherr-America's favor on NBIS's claim that Liebherr-America negligently trained its own

employees. *Id.* at 40–42 (A 1659–60). The clerk thereafter entered judgment in accordance with the magistrate judge's order. Docs. 175–76 (A 1662–64). The magistrate judge later reduced the prejudgment interest award, and the clerk entered an amended judgment. Docs. 180–81 (A 1666–76).

Liebherr-America's Appeal

Liebherr-America appealed to the Eleventh Circuit, raising a number of legal challenges to the judgment. Among those challenges were that Florida's economic loss rule barred NBIS's negligent failure to warn claim and that no duty to warn otherwise existed under Florida law. The Eleventh Circuit viewed the economic loss rule's application as a threshold issue, the resolution of which is unclear under Florida law. The Eleventh Circuit accordingly certified the following question to this Court:

> Whether, under Florida law, the economic loss rule applies to negligence claims against a distributor of a product, stipulated to be non-defective, for the failure to alert a product owner of a known danger, when the only damages claimed are to the product itself?

(A 24). This proceeding follows.

Summary of Argument

Point I. Florida products liability law imposes numerous tort duties on product manufacturers and sellers, including middleman distributors. For example, manufacturers and sellers must use reasonable care in the design and manufacture of their products to eliminate unreasonable risk of foreseeable injury. They must also provide adequate warnings of a product's dangerous propensities. A related but different set of duties exist under strict products liability, which holds manufacturers and sellers liable for damages caused by defects associated with a product.

Florida's economic loss rule categorically eliminates these duties in negligence and strict products liability for manufacturers, distributors, and other sellers with respect to damage that occurs to the product itself. Under the economic loss rule, 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. The economic loss rule recognizes that, with respect to purely economic losses caused by a product, such losses are better addressed through contract, warranty, and insurance principles, rather than tort law.

In this case, the only damage at issue is the crane's diminution in value after it collapsed. Sims purchased insurance for the crane, and the insurer paid Sims for crane's diminished value. Through its third-party administrator, NBIS, and having been subrogated to any rights Sims has against Liebherr-America, the insurer has now sued Liebherr-America in tort to recover the amount of the insurance payment. Under the economic loss rule, however, Liebherr-America owed no duty to Sims to protect its economic expectations in the crane's value.

Point II.A. The economic loss rule precludes both of NBIS's failure to warn theories of liability. As to NBIS's theory that Liebherr-America negligently trained Sims's employees regarding the T4 pin, the only damages sought are economic losses for damage to the crane itself, and Liebherr-America—the crane's distributor—simply agreed to provide instruction from the manufacturer's operator manual. NBIS's claim is thus a products liability claim. Likewise, NBIS's claim that Liebherr-America negligently distributed the manufacturer's product safety bulletin is also a products liability claim. Liebherr-America simply agreed to distribute updated product safety materials to certain crane owners. Because NBIS's claims are products liability

claims, the economic loss rule controls, and Liebherr-America had no duty to protect Sims's economic interests should the crane alone be damaged during its operation.

Point II.B. The parties' stipulation that the crane was not defective did not waive the economic loss rule's protections. Waiver requires an intentional relinquishment of a known right, and nothing in the stipulation intentionally relinquished Liebherr-America's economic loss rule defense—a defense the magistrate judge had already rejected as a matter of law at the summary judgment stage, long before any stipulation existed. Further, the term defect is not applicable to NBIS's negligent failure to warn claim, as Florida law can impose a duty to warn about a product's dangers even if the product is not defective, and in all events the term defect should be read to reference manufacturing and design defects, not the broader matter of failure to provide an accompanying warning.

Point II.C. No other source of duty exists. While Florida law may recognize a duty of care where persons undertake to provide a service to another and in doing so injure others or their property, the undertaker's doctrine is not an exception to the economic loss rule. If the economic loss rule applies to NBIS's failure to warn theories of

liability (and here it does), then tort law is unavailable to recover for damage to the product itself. Furthermore, contrary to the magistrate judge's rulings, Leibherr-America's undertakings did not increase the risk of harm to the crane, Liebherr-America did not assume another person's duty to protect Sims's economic expectations should the crane damage itself during operation, and Sims did not suffer harm because of reliance on Liebherr-America's actions. As a result, no duty exists that is not controlled by the economic loss rule.

In fact, in this case, Sims did exactly what the economic loss rule contemplates—it addressed its concerns about potential damage to the crane by obtaining insurance. Sims collected insurance proceeds for the damage after the crane collapsed, and it is the insurer (through a third-party administrator) that now seeks to step into Sims's shoes and improperly utilize tort law to recover economic losses for damage to the crane alone. The very purpose of the economic loss rule is to prevent such suits and leave product owners to contract-based remedies such as contracts, warranties, and insurance.

Argument

Under Florida law, "the elements of a cause of action in tort are: (1) a legal duty owed by defendant to plaintiff, (2) breach of that duty by defendant, (3) injury to plaintiff legally caused by defendant's breach, and (4) damages as a result of that injury." *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 513 (Fla. 2020) (quoting *Estate of Rotell v. Kuehnle*, 38 So. 3d 783, 788 (Fla. 2d DCA 2010)). By effectively negating the duty element, the economic loss rule precludes tort claims against a product's manufacturer or seller where the only damage at issue is to the product itself, rather than to persons or other property.

In this case, Liebherr-America was the crane's distributor in the United States, and the only damage at issue in this litigation is the amount Sims's insurer paid Sims for the crane's reduced value after it collapsed. Under the economic loss rule, Florida law imposed no duty on Liebherr-America to protect Sims's economic expectations in the crane not damaging itself, and Liebherr-America did not otherwise voluntarily undertake any such duty. The Eleventh Circuit's question should therefore be answered in the affirmative. This Court should hold that Florida law imposed no duty on Liebherr-

America to protect Sims's economic expectations in the crane not damaging itself and that NBIS's failure to warn theories fail as a matter of law.

Standard of Review

The Eleventh Circuit's certified question presents a question of law. This Court examines questions of law de novo. *See, e.g.*, *Allstate Ins. Co. v. Revival Chiropractic, LLC*, 2024 WL 1776115 (Fla. Apr. 25, 2024).

I. Under the Economic Loss Rule, Product Manufacturers and Distributors Owe No Common Law Tort Duties to Ultimate Purchasers to Protect Their Economic Interests in the Products Themselves.

Under Florida law, product manufacturers and sellers—including middleman distributors—owe tort duties to persons who may be injured by their products, but under the economic loss rule, such duties do not extend to the owners of such products with respect to damage to the products themselves. Florida law requires those with interests in a product itself to seek relief outside tort law, such as through contracts, warranties, or insurance. The magistrate judge misunderstood this foundational point and its implications in this case.

Florida law generally places a multitude of duties on those who manufacture or sell products. These products liability duties are generally recognized though claims based on negligence or strict products liability.

For example, a manufacturer must use reasonable care in the design and manufacture of its product to eliminate unreasonable risk of foreseeable injury. *Ford Motor Co. v. Evancho*, 327 So. 2d 201, 204 (Fla. 1976). In addition, "a distributor of an inherently dangerous commodity . . . assumes the duty of conveying to those who might use the product a fair and adequate warning of its dangerous potentialities to the end that the user by the exercise of reasonable care on his own part shall have a fair and adequate notice of the possible consequences of use or even misuse." *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 607 (Fla. 1958), receded from on other grounds, *Felix v. Hoffman-LaRoche, Inc.*, 540 So. 2d 102 (Fla. 1989). That duty extends not just to "inherently dangerous" products but "when the product has dangerous propensities as well." *Advance Chem. Co. v. Harter*, 478 So. 2d 444, 447 (Fla. 1st DCA 1985). *See also Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994) (following *Tampa Drug* and *Advance Chem.*).

"[A] supplier of a product who knows or has reason to know that the product is likely to be dangerous in normal use has a duty to warn those who may not fully appreciate the possibility of such danger." *Cohen v. Gen. Motors Corp., Cadillac Div.*, 427 So. 2d 389, 390 (Fla. 4th DCA 1983). A negligent failure to warn may be shown where "a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care." *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1172 (Fla. 4th DCA 1998) (quoting *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P. 2d 549, 558 (Cal. 1991)); *see also, e.g.*, *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1329 (11th Cir. 2017) ("Florida law recognizes the common law duty of failure to warn as a basis for a negligence claim.").

Under the doctrine of strict products liability, "the manufacturer of a defective product can be held liable if the manufacturer made the product in question, if the product has a defect that renders it unreasonably dangerous, and if the unreasonably dangerous condition is the proximate cause of the plaintiff's injury." *Jennings v. BIC Corp.*, 181 F.3d 1250, 1255 (11th Cir. 1999) (citing *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87

(Fla. 1976)). Strict liability law recognizes that "a product may be defective by virtue of a design defect, a manufacturing defect, or an inadequate warning." *Jennings*, 181 F.3d at 1255 (quoting *Ferayorni*, 711 So. 2d at 1170).

In a strict liability failure to warn case, the plaintiff must show that "the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." *Ferayorni*, 711 So. 2d at 1172 (quoting *Anderson*, 810 P. 2d at 558). As occurred in this case, warnings may be conveyed through a manual accompanying the product. *See, e.g.*, *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033, 1035 (Fla. 4th DCA 1994).

Since this Court decided *West*, "Florida courts have expanded the doctrine of strict liability to others in the distributive chain including retailers, wholesalers, and distributors." *Samuel Friedland Family Enters. v. Amoroso,* 630 So. 2d 1067, 1068 (Fla. 1994). That expansion is significant because, in this case, Liebherr-America was a distributor of the crane at issue, and while NBIS stipulated that the crane was not defective, NBIS proceeded to assert at trial that the

crane and its accompanying manual were "deficient" for not including warnings that the T4 pin should not be manipulated during a boom exchange.

Most critical, Florida law categorically eliminates all of these duties in negligence and strict products liability for manufacturers, distributors, and other sellers with respect to damage that occurs to the product itself. "The economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004), receded from on other grounds, *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013). Economic losses are disappointed economic expectations and include "damages for inadequate value, costs of repair and replacement of the defective product, or consequential loss of profits." *Id.* at 536 n.1 (quoting *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993)). The damage at issue may occur "through gradual deterioration" or "an abrupt, accident-like event . . . ." *See Airport Rent-A-Car v. Prevost Car*, 660 So. 2d 628,

631 (Fla. 1995) (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986)).

Thus, under the economic loss rule, "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." *Indemnity Ins.*, 891 So. 2d at 542. Simply put, the "essence" of the economic loss rule "is ***to prohibit a party from suing in tort for purely economic losses to a product or object provided to another for consideration***, the rationale being that in those cases 'contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage.'" *Tiara*, 110 So. 3d at 405 (quoting *Moransais v. Heathman*, 744 So. 2d 973, 980 (Fla. 1999)) (emphasis added).

Florida law recognizes that those who purchase products should protect their interests in the product itself through contracts, warranties, and even insurance, rather than tort law. *See, e.g.*, *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987) ("[T]he purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by

negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making."). It bears emphasis that, in this case, Sims did so by purchasing insurance, and it is Sims's insurer that now seeks to step into Sims's shoes and utilize tort law to recover the payments it made to Sims.

In *Tiara*, this Court explained that the economic loss rule's intended purpose was "to limit actions in the products liability context." *Tiara*, 110 So. 3d at 407. The Court receded from and overruled case law applying the rule outside that context, but the court left the rule intact in the context of products liability actions. *Id.* ("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.").

A useful example of the economic loss rule's role in a products liability case is this Court's decision in *Airport Rent-A-Car*. There, on certified questions from the Eleventh Circuit, the Court considered whether products liability claims could be brought under negligence

or strict liability theories against a bus manufacturer after its buses caught fire and were destroyed due to an alleged defect. The bus owner sued for the buses' value, damage from loss of use, and litigation costs. The Court held that the losses at issue—economic losses based on damage to the buses themselves—triggered the economic loss rule and that the sudden nature of the fire did not permit the rule to be circumvented. 660 So. 2d at 631–32 ("The key issue is whether there exists physical injury or other property damage; if not, then remedies in tort generally do not lie. It is of no moment that damage occurred over a period of time or that it occurred suddenly."). The Court also refused to create an exception to the rule where plaintiffs allege a duty to warn that arose from facts that came to the company's knowledge after the product's manufacture. *Id.* at 632.

In this case, in ruling that the economic loss rule simply has no application here because the claims are not against a manufacturer and relate to services, the magistrate judge misunderstood the rule's breadth and its implications for NBIS's claims. A distributor like Liebherr-America does not owe downstream purchasers like Sims any common law tort duties to protect them from disappointed

economic expectations due to any failure to warn of known dangers. The economic loss rule precludes all products liability claims against all entities in the manufacturing and distribution chain, including failure to warn claims, where the asserted damage is solely economic losses such as damage to the product itself. *Airport Rent-A-Car*.

In this case, the only alleged damage is damage to the crane itself—a form of purely economic loss. *See Indem. Ins.*, 891 So. 2d at 536 n.1. As a result, any duty asserted to apply to Liebherr-America in this case must do so both without reference to any products liability-based duties that Florida law applies to manufacturers, distributors, and other sellers and despite the economic loss rule's generally preclusive effect on tort duties to protect purely economic losses. As Liebherr-America next shows, no such duty exists.

II. Applying the Economic Loss Rule in this Case, Florida Law Imposed No Duty on Liebherr-America to Protect Sims from Damage to the Crane Itself When Liebherr-America Trained Sims's Employees on the Instruction Manual and Distributed Liebherr-Germany's Safety Bulletins.

Florida law did not impose a duty on Liebherr-America to protect Sims's economic interests in the crane not damaging itself when Liebherr-America conducted its training sessions on the crane's operator manual or when Liebherr-America distributed

Liebherr-Germany's product safety bulletins. The magistrate judge erred in finding liability based on supposed negligence in such conduct.

A. The Economic Loss Rule Applies to Both of NBIS's Failure to Warn Theories.

Liebherr-Germany manufactured and sold the crane at issue. Liebherr-America distributed that crane in the United States. As a result of those roles—manufacturer and distributor—Liebherr-Germany and Liebherr-America have numerous tort duties, generally actionable through negligence and strict liability claims, with respect to the product's dangerous propensities, including duties to warn about those dangerous propensities. However, as demonstrated above, the economic loss rule exempts manufacturers and distributors from all such duties—and no "tort action" can be brought—to the extent the consequence of their actions is the disappointment of the product owner's economic expectations. *E.g.*, *Tiara*, 110 So. 3d at 401; *Indemnity Ins.*, 891 So. 2d at 536. Such disappointed economic expectations include where the product damages itself. *See, e.g.*, *Airport Rent-A-Car*, 660 So. 2d 628 (holding that bus owner could not bring tort claims against bus manufacturer

where the only damages claimed were to the busses themselves); *Fla. Power & Light*, 510 So. 2d 899 (holding that nuclear generator purchaser could not bring tort action against seller without any claim of personal injury or damage to a product other than the generators themselves). Thus, under the economic loss rule, a distributor cannot be liable in tort for damage to its product even if that damage is caused by a negligent failure to warn of the product's dangers.

The economic loss rule is predicated, at least in part, on the view that the economic interests at stake in such matters are not the proper subject of tort law but instead are better left to other areas of law, such as contracts, warranties, and insurance. *See Fla. Power & Light*, 510 So. 2d at 902 ("[T]he purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making."). If a product owner wants protection from the economic costs of the product being damaged during its use—even if a tort claim in, say, negligence, would otherwise lie—then the owner should utilize

contracts, warranties, insurance, or some similar means other than tort law to obtain such protection.

Notably, Sims *did* utilize other means to protect its economic expectations relating to the crane. Sims obtained insurance and recovered its economic losses from the insurer after the crane collapsed. NBIS now seeks to use this subrogation action to recover the insurance payment made to Sims. NBIS cannot do so under either of its failure to warn theories.

As for NBIS's negligent training of Sims's employees theory, NBIS cannot bring a negligence claim against Liebherr-Germany or Liebherr-America for failing to warn Sims about the dangers associated with manipulation of the T4 pin during a boom exchange, including how to avoid those dangers, because the damage at issue is damage to the crane alone. That is the case even if tort claims such as negligence would otherwise exist. The claim is a products liability claim, and with exceptions not applicable here, the economic loss rule categorically precludes tort claims against a manufacturer or distributor when no personal injury or damage to other property is at issue. *See, e.g.*, *Indem. Ins.*, 891 So. 2d at 542-43 & nn.3-7 (explaining exceptions to be intentional torts, professional

malpractice, fraudulent inducement, and negligent misrepresentation).

It cannot be overemphasized that Liebherr-America was not a company that simply agreed to provide Sims with general training services. Rather, Liebherr-America was the domestic affiliate of the crane's manufacturer and the crane's actual distributor, and Liebherr-America based its training on the written manual that accompanied the product—Liebherr-Germany's operator manual. The "Objective" portion of the "Crane Operator Training" document that Liebherr-America provided to Sims, and which Sims executed, made clear that "[t]he ***content of the Liebherr Cranes operating instructions is the basis for the training***." Doc. 149-63 at 2 (A 178, 191) (bold and italics emphasis added). Liebherr-America thus agreed to train Sims based on the operator manual. No evidence supports that Liebherr-America agreed, promised, or otherwise committed to covering more topics or details than the manual covered. In fact, no evidence supports that Liebherr-America agreed, promised, or otherwise committed to cover every detail contained in the manual.

A product's manual is a set of warnings or instructions on the product's use. If the manual lacks necessary warnings, or if the inclusion of necessary warnings is not reasonably sufficient, then a negligence or strict liability claim may lie. *See, e.g.*, *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033, 1035 (Fla. 4th DCA 1994) (reversing summary judgment in defendants' favor on negligence and strict liability theories, holding that whether warnings conveyed in instruction manual should have been located on the product itself was a question for the jury).

Where a product manufacturer or distributor provides instruction on the products they sell, such as through on-site training, a customer service telephone line, an online video instruction library, or a manual, the manufacturer or distributor is simply providing warnings, or additional warnings, with the product. Such a manufacturer or distributor has not taken action that jettisons the protections, and preclusive effect, of Florida's economic loss rule. To the contrary, providing instruction, including warnings, is part and parcel with a product's sale.

Indeed, if Sims or NBIS had sued Liebherr-Germany for damage to the crane based on inadequate warnings in the manual, the claim

would certainly be precluded by the economic loss rule. The same result should follow when Liebherr-Germany's American distributor—Liebherr-America, who sold the actual crane at issue in this case—uses a training session to instruct on the same manual's contents. No evidence showed, and the magistrate judge made no finding or conclusion, that Liebherr-America gave Sims any instructions contrary to the contents of the operator manual.

Accordingly, Sims's remedy for any deficient training based on the operator manual lies outside tort law, such as through contract, warranty, or insurance, and not with a negligence claim for failure to provide proper instruction to avoid the product damaging itself. That is the economic loss rule's very point. The duty analysis should simply end here. If Liebherr-Germany and Liebherr-America cannot be liable in negligence for damage to the crane itself caused by deficient written warnings that accompanied the product—***and they cannot***—then Liebherr-America cannot be liable in negligence for damage to the crane itself caused by supposedly negligent on-site instruction based on those warnings.

The same result follows with regard to NBIS's theory that Liebherr-America negligently failed to distribute the Liebherr-

Germany product safety bulletin regarding the T4 pin. After the incident in Japan, Liebherr-Germany prepared a product safety bulletin that included not only a safety bulletin but also a cover plate for the T4 pin and warning stickers. *See* Doc. 148 at 9–10 (A 171–72); Doc. 174 at 38 (A 1657). As Liebherr-Germany's distributor in the United States, Liebherr-America agreed to distribute the product safety bulletin to American owners of the LTM 1500 crane. NBIS claims Liebherr-America failed to do so promptly, and that, without the updated warnings, the crane was "deficient," and the warnings were necessary to "kind of plug a hole where a warning needed to be . . . " Doc. 158 at 129 (A 1063). NBIS further argues that, because the updated warning information was not timely received, the accident happened, causing the damage at issue. That claim is also a products liability claim, regardless of whether NBIS asserts that the manufacturer or the distributor had any common law post-sale duty to warn—a largely undeveloped area of Florida products liability law.

Had Sims or NBIS sued Liebherr-Germany for damage to the crane based on Liebherr-Germany's delay in delivering the product safety bulletin, the claim would certainly be precluded by the economic loss rule. The same result should follow when Liebherr-

Germany's American distributor, Liebherr-America—who sold the actual crane at issue in this case—agrees to distribute the product safety bulletin and the distribution is delayed.

Simply put, both of NBIS's failure to warn theories present products liability claims by which NBIS seeks to recover solely economic losses from damage to the crane itself, not from injury to any person or from damage to any other property. Both of NBIS's theories are thus precluded by the economic loss rule.

B. The Parties' Stipulation Did Not Waive the Economic Loss Rule.

NBIS has suggested that Liebherr-America effectively waived the economic loss rule's protections by including in the parties' pretrial stipulations that the crane was not defective. No such waiver occurred.

Waiver is the voluntary and intentional relinquishment of a known right. *See, e.g.*, *Allen v. State*, 322 So. 3d 589, 598 (Fla. 2021) ("[T]he State's attempt to label Allen's statement as a 'waiver' fails because the statement does not amount to 'the voluntary and intentional relinquishment of a known right' that is necessary to establish a 'waiver.'" (quoting *Major League Baseball v. Morsani*, 790

So. 2d 1071, 1077 n.12 (Fla. 2001)). Nothing in that stipulation, which NBIS proposed and to which Liebherr-America agreed, amounted to an intentional waiver of the economic loss rule's application to NBIS's negligent failure to warn claim.

Liebherr-America was not going to assert at trial that the crane was defective. Furthermore, "defect" is a strict liability concept, whereas NBIS brought negligence claims, which turn on the breach of a standard of care, not the existence of a defect. *See, e.g.*, *Cohen v. Gen. Motors Corp. Cadillac Div.*, 427 So. 2d 389, 390 (Fla. 4th DCA 1983) ("[A] warning of a known danger in a non-defective machine is required in the exercise of reasonable care."). Thus, as the Eleventh Circuit pointed out, the duty to warn in negligence cases has been recognized even where the product is not defective. 93 F.4th at 1312 (A 19) (citing *Cohen* and additional cases).

Although the magistrate judge's post-trial findings and conclusions referenced the stipulation when discussing the economic loss rule, it bears emphasis that, at the summary judgment stage, long before trial and the entry of any stipulation, the magistrate judge had determined that NBIS's failure to warn claim was not a products liability claim and therefore the economic loss rule did not apply.

That ruling was an incorrect application of Florida law, but it demonstrates that the ruling did not turn on any stipulation, and the stipulation cannot be said to be an intentional relinquishment of the economic loss rule's application.

C. The Asserted Duty Does Not Separately Exist.

Finally, no basis exists to find that the asserted duty to warn exists apart from the products liability context. Whether a duty of care exists under Florida law based on the general facts of the case is a question of law. *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992).

In very general terms, this Court has recognized that tort duties to conform to particular standards of conduct can arise from various sources, including "the general facts of the case." *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003) (quoting *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 n.2 (Fla. 1992)). Here, the magistrate judge determined that Liebherr-America voluntarily undertook the duty to protect Sims from disappointed economic expectations regarding the crane by providing training services on its operation and agreeing to distribute the product safety bulletin. In

so ruling, the magistrate judge applied the wrong standard, applied it incorrectly, and ignored the correct standard.

Florida has adopted the undertaker's doctrine found in section 324A of the Restatement (Second) of Torts. *Clay Elec.*, 873 So. 2d at 1186. That doctrine provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. (quoting Rest. (2d) of Torts § 324A (1965)). This doctrine has no application to NBIS's failure to warn claim.

First, nothing in Florida law supports that the undertaker's doctrine is an exception to the economic loss rule in the context of products liability. If the rule applies (and here it does), then the undertaker's doctrine does not support the existence of a separate, enforceable tort duty of care.

Second, the undertaker's doctrine applies to physical harm to a third person or the third person's things. This case does not involve services provided by one person to another person and physical harm to a third person or the third person's things.

Third, and in all events, the remaining alternative elements of the undertaker's doctrine are not met with regard to either of NBIS's negligent failure to warn theories. As for NBIS's negligent failure to train Sims's employees theory, subsection (a) is inapplicable because the lack of training regarding the dangers surrounding the T4 pin did not ***increase*** the risk of harm due to those dangers. Whatever risk existed from the lack of instruction in the operator manual continued to exist after Liebherr-America performed its training ***based on the operator manual***. *See* Doc. 149-63 at 2 (A 178, 191) (training record signed by Sims's employee plainly stated, "The content of the Liebherr Cranes operating instructions is the basis for the training."). The absence of increased risk is borne out by the magistrate judge's findings and conclusions, which observed that even if Sims's employees knew everything in the operator manual, that knowledge would not have helped avoid the accident because the manual did not address the T4 pin. *See* Doc. 174 at 37 (A 1656) ("Even if they

had read and understood the entire Manual, that action would not have prevented the accident because the Manual lacked information about the risk associated with manipulating the T4 pin."). Accordingly, by not informing Sims's employees about the T4 pin, the training sessions did not increase the risk of harm.

Subsection (b) is likewise inapplicable to the failure to train theory. Liebherr-America did not take on anyone's duty to protect Sims from economic losses regarding the crane. As the prior discussion in point I.A. shows, Florida law expressly disavows that any participant in the commercial stream—manufacturer, distributor, or other seller—has a duty to protect the economic expectations of a product owner with respect to the value of the product if it damages itself.

Subsection (c) is also inapplicable. Sims did not rely on the training to protect it from economic losses, including loss of the value of the crane if it collapsed and damaged itself. The training record that Sims executed plainly stated, "The ***content of the*** Liebherr Cranes ***operating instructions is the basis for the training***." Doc. 149-63 at 2 (A 178, 191) (emphasis added). NBIS did not plead or prove that Sims relied on Liebherr-America to go beyond the operator

manual with warnings to protect Sims from disappointed economic expectations should the crane become damaged, and the trial court did not find any such reliance.

In ruling that Liebherr-America voluntarily undertook a duty, the magistrate judge cited this Court's decision in *Clay Electric*, noting parenthetically that the decision recognized an electric utility's duty in negligence to maintain a streetlight after it voluntarily undertook the obligation to do so. Doc. 174 at 32 (A 1651). The plaintiffs in that case were the estate of a young man who died after being struck by a vehicle in the darkness of an inoperative streetlight and the family member who fainted upon finding his mangled body. Their claims were for personal injuries. Furthermore, the court held that by agreeing to maintain lights that were already working and allowing them to become inoperative, the electric utility increased the risk of harm to the plaintiffs and that the plaintiffs may be able to show reliance as a factual matter. This case involves nothing similar. NBIS is not suing for personal injuries, Liebherr-America's training did not increase the risk of harm, and Sims could not have relied on Liebherr-America to provide training that the operator manual did

not provide when Liebherr-America never agreed to conduct training beyond the contents of the operator manual.

The same result follows with regard to NBIS's second failure to warn theory—the supposedly untimely provision of the product safety bulletin. In determining that Liebherr-America undertook a duty to Sims regarding the provision of product safety bulletins, the magistrate judge once again relied on the undertaker's doctrine, ruling that Liebherr-America's "failing to promptly communicate the warnings" in the product safety bulletin "increased the risk of harm to Sims." Doc. 174 at 33 (A 1652). That ruling was incorrect as a matter of law.

Whatever risk of harm existed before Liebherr-America received the product safety bulletin from Liebherr continued to exist afterwards. Liebherr-America did nothing to increase the risk of harm, and doing nothing did not increase the risk of harm. The risk of harm remained exactly the same, before and after, as it was no more likely that someone would mistakenly manipulate the T4 pin and cause the crane's collapse before Liebherr-America received the bulletin from Leibherr-Germany than it was that someone would do so after Liebherr-America received the bulletin.

In ruling to the contrary, the magistrate judge's analysis confused increased risk of harm with increased foreseeability of the risk. They are not the same. The magistrate judge stated:

> In undertaking the business of providing product safety updates, [Liebherr-America] could have foreseen failing to deliver product safety information would increase the general risk a crane accident would occur. [Liebherr-America] should have known if it did not properly maintain customer information, crane purchasers would not receive the pertinent warnings timely. An improperly operated 600-ton crane has a high probability of injuring people and causing property damage. This is especially so here given that the manufacturer specifically identified the extent of the risks.
>
> Thus, when [Liebherr-America] received the Safety Bulletin and retrofit kit, it should have known, because the Manual lacks any warnings as to the T4 pin, failing to promptly communicate the warnings in the Safety Bulletin increased the risk of harm to Sims.

Doc. 174 at 33 (A 1652). While the magistrate judge twice referenced an increased risk of harm, the full statements above show that the magistrate judge was actually considering the increased foreseeability of a collapse, "especially so here given that the manufacturer specifically identified the extent of the risks." *Id.* Notably, the bulletin did not mention damage to the crane itself. Doc. 149-15 (A 175–76). In any event, the test under subsection (a) of the undertaker's doctrine is increased risk of harm, not increased ability

to foresee the harm. Nothing in the facts of this case supports that any delay by Liebherr-America in providing the bulletin to LTM 1500 crane owners increased the risk of any harm.

The other grounds for application of the undertaker's doctrine also do not apply to NBIS's product safety bulletin theory. Subsection (b) is not met because Liebherr-America did not undertake someone else's duty to protect Sims's interest in damage to the crane alone by providing product safety bulletins. Indeed, the Florida Supreme Court's decision in *Airport Rent-A-Car* expressly rejected efforts to avoid the economic loss rule where a plaintiff alleges that a manufacturer had a duty to warn based on facts which came to the company's knowledge after the product was manufactured and distributed. 660 So. 2d at 632. Furthermore, subsection (c) is not met in this case because Sims did not plead or prove, and the magistrate judge did not determine, that Sims relied on Liebherr-America to forward the product safety bulletin.

The undertaker's doctrine being inapplicable to both of NBIS's failure to warn theories, the magistrate judge should have examined Florida tort law in the context of disappointed economic expectations. Generally, and as one of multiple reasons supporting the economic

loss rule in the products liability context, Florida law does not recognize a negligence cause of action based solely on economic losses. *E.g.*, *Monroe v. Sarasota Cnty. Sch. Bd.*, 746 So. 2d 530, 531 (Fla. 2d DCA 1999) ("[W]e continue to hold, as a general rule, that bodily injury or property damage is an essential element of a cause of action in negligence."). A product's damage to itself, rather than to other property or a person, is a purely economic loss. *See e.g., Indem. Ins.*, 891 So. 2d at 536 n.1.

Florida law holds that negligence should be expanded to encompass a plaintiff's interest in purely economic losses "only under extraordinary circumstances which clearly justify judicial interference to protect a plaintiff's economic expectations." *Monroe*, 746 So. 2d at 531. "[T]o proceed on a common law negligence claim based solely on economic loss, there must be some sort of link between the parties or some other extraordinary circumstance that justifies recognition of such a claim." *Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, 244 So. 3d 383, 393 (Fla. 2d DCA 2018). Notably, the Eleventh Circuit has engaged in this analysis at least twice, each time declining to expand tort law to cover the circumstances at issue. *See Perry v. Schumacher Grp. of La.*, 809 Fed. App'x 574, 582 (11th Cir.

2020); *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1340 (11th Cir. 2012). In both instances, the Eleventh Circuit found the circumstances of the case insufficiently extraordinary, in the language of *Monroe*, to "justify judicial interference to protect a plaintiff's economic expectations." Thus, in *Virgilio*, the court declined to expand Florida negligence law to recognize a duty on the part of landowners who sold their property to developers to inform purchasers of homes built on the land that nearby property had characteristics that, if generally known, would reduce the land's value. 680 F.3d at 1339–41. Likewise, in *Perry*, the court declined to recognize a duty in negligence for a hospital staffing company to protect a doctor from economic harm by complying with the company's contract with the hospital's operator. Neither case involved the sort of extraordinary circumstances that justify an expansion of Florida negligence law.

The magistrate judge should have evaluated the duty issue under this standard. The magistrate judge did not do so. Notably, the magistrate judge applied this standard in denying Liebherr-America's summary judgment motion. *See* Doc. 57 at 11–12 (A 93–94). There, however, the magistrate judge erroneously truncated the

analysis by relying simply on Liebherr-America's acknowledgements that its policies obligated it to perform training and provide product safety bulletins. *Id.* That, of course, was incorrect as well, as a corporation's policies and preferred procedures do not create a duty of care. *See, e.g.*, *Wal-Mart Stores, Inc. v. Wittke*, 202 So. 3d 929, 930–31 (Fla. 2d DCA 2016) ("The trial court's elevation of the alleged violation of internal policies and procedures to the status of a legal duty necessitates reversal . . . ."); *Gunlock v. Gill Hotels Co., Inc.*, 622 So. 2d 163, 164 (Fla. 4th DCA 1993) ("[W]e can find no authority that evidence of an internal policy creates a substantive duty to conform to the standard of conduct contained therein. Therefore, appellants cannot properly demonstrate that the existence of appellee's internal policy created a substantive duty to escort intoxicated guests to their hotel rooms.").

When the duty issue is properly evaluated under the correct standard, with proper regard for the economic loss rule's application, the result is clear. No extraordinary circumstances exist to justify creating new duties in negligence to protect Sims from purely economic losses—damage to the crane itself—and the economic loss

rule's preclusive effect becomes dispositive of both theories of NBIS's failure to warn claim.

In short, in this products liability context, Florida courts have determined that the interest for which NBIS seeks recovery is not protected through tort law. Accordingly, not only do extraordinary circumstances justifying the expansion of Florida negligence law not exist, Florida law through the economic loss rule affirmatively rejects the imposition of tort liability under essentially these same circumstances.

Indeed, by adopting and retaining the economic loss rule in products liability cases, Florida courts have made clear that the interest NBIS seeks to protect by imposing a duty in negligence is one that Florida courts require be addressed, if at all, outside tort law, such as by contracts, warranties, and insurance. *See Fla. Power & Light*, 510 So. 2d at 902 ("[T]he purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.").

It should not be overlooked that Sims ***did*** protect itself through insurance, and, in this subrogation action, NBIS is trying to use tort law to recover against Liebherr-America on behalf of ***the insurer***.

Two points bear final emphasis. First, this case does not involve personal injuries or even damage to other property. The interests under consideration are Sims's interest in economic losses for the very product it bought, nothing more. Second, NBIS did not plead, prove, or prevail on a claim that Liebherr-America's training included affirmative representations regarding the T4 pin that misled Sims's employees to use the crane in a way that damaged it. NBIS pled and attempted to prove that, by offering training based on the manufacturer's operator manual, Liebherr-America had a duty to provide Sims with warnings that the product manufacturer's operator manual did not provide to protect Sims from the crane damaging itself. Florida law rejects that position. As a matter of law, NBIS should not have prevailed on its failure to warn claim.

Conclusion

For all the foregoing reasons, the Court should answer the Eleventh Circuit's certified question in the affirmative. The economic loss rule bars NBIS's negligent failure to warn claim, and no other source of a duty to warn exists. As a result, both of NBIS's failure to warn theories fail as a matter of law.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief complies with the word-limit and font requirements of the Florida Rules of Appellate Procedure.

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