# STUDENT WORKS

# GOODBYE ECONOMIC LOSS RULE, HELLO DAMAGES: DID THE FLORIDA SUPREME COURT'S *TIARA* DECISION CLEAR THE PATH FROM CONTRACT TO TORT CLAIMS?

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## *I. INTRODUCTION*

*The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort. Underlying this rule is the assumption that the parties to a contract have allocated the economic risks of nonperformance through the bargaining process. A party to a contract who attempts to circumvent the contractual agreement by making a claim for economic loss in tort is, in effect, seeking to obtain a better bargain than originally made. Thus, when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract.*[1]

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1. Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 536–37 (Fla. 2004) (internal citations omitted).

Contract law is the foundation of commercial transactions and allows parties to define their obligations, rights, and remedies in advance of entering into a business relationship with another party. When a breach occurs, contracts form the basis for a cause of action in most disputes. On the other hand, tort law has remained relatively dormant as a basis for a cause of action in contractual disputes due to the contractual-privity economic loss rule, which once provided an efficient way to dismiss claims for pure economic loss arising from a breach of contract where no independent tort was committed.[2]

The Florida Supreme Court's recent majority decision in *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*,[3] which rejected the economic loss rule and the more narrow contractual-privity economic loss rule, led some justices to assert that the divide between contract law and tort law has been blurred and that every contract claim will now be accompanied by a tort claim.[4] However, Justice Pariente's concurring opinion suggests that common law principles will continue to prohibit the recovery of economic losses where there is no independent tort.[5] Consequently, Justice Pariente stated that the end result of disputes will be as if the contractual-privity economic loss rule was still applicable and that, therefore, the majority opinion does not lead to a dramatic unsettling of Florida law.[6]

However, this analysis does not recognize that the economic loss rule prevented a tort action from being brought. By contrast, the applicability of common law principles requiring that an action in tort must be supported by a duty, breach, causation, and damage that are independent from a contract may be dependent on whether the contract can give rise to a duty. If a contract can give rise to a duty, a plaintiff could bring a tort action, which would have to be dealt with differently. For one, the tort action would require a certain amount of early discovery to establish the elements of a tort, whereas a claim governed by the economic loss rule would be dismissed by an early dispositive motion or pre-

2. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 408–09 (Fla. 2013) (Pariente, J., with Lewis and Labarga, JJ., concurring).

3. 110 So. 3d 399.

4. *Id.* at 411, 413, 414 (Canady, J., with Polston, C.J., dissenting).

5. *Id.* at 408 (Pariente, J., with Lewis and Labarga, JJ., concurring).

6. *Id.* at 408–09.

vented from being brought entirely.[7] This also means that there is a potential that parties will not be able to rely on the provisions negotiated in their contracts.[8] As a whole, relying on common law principles as opposed to the economic loss rule will affect the way in which commercial litigation disputes are handled and means that parties must rely on different defenses to economic loss claims.[9] At the very least, the *Tiara* decision means that "'[i]nitially, we can expect to see an increase in case filings until the appellate courts weigh in.'"[10]

Furthermore, although the *Tiara* decision rejected the contractual-privity branch of the economic loss rule in its entirety, it did not address whether the economic loss rule continues to recognize the former exceptions to the rule, such as fraudulent misrepresentation, specifically in a products liability context.[11] Therefore, regardless of whether the rejection of the contractual-privity economic loss rule unsettled Florida law, the main issue appears to concern the lack of clear direction for addressing two kinds of cases: (1) cases that rely on an exception to the economic loss rule in a products liability context; and (2) cases in which a tort claim is raised in a non-products liability context where the contract is alleged to have created an independent duty. Although some commentators prior to *Tiara* had stated that judges were "all desperately struggling to define the parameters of the economic loss doctrine,"[12] the economic loss rule provided an efficient

7. Although Justice Pariente's opinion in *Tiara* states that the elimination of the economic loss rule would not unsettle Florida law, *id.* at 407, this is only true with respect to the end result of litigation. The concurring opinion fails to take into consideration the cost of defeating a dispositive motion, which could be substantial, regardless of whether the claim survives at the end stage. In addition, the concurring opinion also fails to consider that the types of claims being pursued could also expand due to the elimination of the economic loss rule.

8. Oran F. Whiting, *Florida's Economic Loss Rule Limited to Products Liability Cases*, AMERICAN BAR ASS'N (July 1, 2013), http://apps.americanbar.org/litigation/litigationnews/top_stories/070113-economic-loss-rule.html.

9. *Id.*

10. *Id.* (quoting Interview with Merrick L. Gross, Co-Director, ABA Section of Litigation, Division of Substantive Law).

11. *See* Burns v. Winnebago Indus., Inc., No. 8:13-cv-1427-T-24 MAP, 2013 WL 4437246, at *3 (M.D. Fla. Aug. 16, 2013) (stating that it is unclear whether *Tiara* left intact the exceptions of fraudulent inducement and negligent misrepresentation in the products liability context).

12. *E.g.*, Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J., Nov. 1995, at 34.

way to dismiss tort claims,[13] as opposed to courts having to perform legal gymnastics to determine whether a duty was owed to the plaintiff and from what source a potential duty could stem.[14]

Part II of this Article will briefly outline the purpose of the economic loss rule. Part III will discuss the application of the economic loss rule and the contractual-privity economic loss rule prior to their reigning in, and Part IV will describe how the Florida Supreme Court proceeded to limit the application of the contractual-privity economic loss rule. Part V will then discuss the *Tiara* opinion, the lack of clarity in the *Tiara* decision, and how the contractual-privity economic loss rule provided a simple way to dismiss tort claims. Part V will also discuss the effects of the *Tiara* decision and how common law principles may result in unsettling Florida law procedurally by allowing tort claims to be brought if the contract itself gives rise to a duty. Part VI will discuss how other jurisdictions have addressed claims for economic losses where the jurisdiction has eliminated the economic loss rule. Finally, Part VII will conclude that the *Tiara* decision, while its effects are yet to be fully seen, is likely to result in uncertainty with respect to how courts will analyze claims that were previously efficiently dismissed by the contractual-privity economic loss rule.

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13. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 409 (Fla. 2013) (Pariente, J., with Lewis and Labarga, JJ., concurring). Given that the economic loss rule provides an efficient way to dismiss tort claims, it seems illogical to eliminate the rule in favor of common law principles, which previously gave way to the practicality of the economic loss rule. Further, there is nothing to say that the parameters of the economic loss rule will not expand again. The original scaled-down version of the economic loss rule was inept in dealing with novel disputes without being expanded. However, although the Florida Supreme Court consistently disapproved of the expansion of the economic loss rule, the interpretation of the *Tiara* decision has also been unclear and is unlikely to be applied without the creation of some interpretative expansions or exceptions to the Florida Supreme Court's opinion.

14. Jamie Zysk Isani, *A Year After Tiara, How Much Has Changed?*, LAW360 1, 2–4 (July 11, 2014), http://www.hunton.com/files/Publication/f96f4724-f2f2-4305-b2f4-b279c3f034ac/Presentation/PublicationAttachment/d0c63d79-2f41-4e34-a162b811ab9c4898/A_Year_After_Tiara_How_Much_Has_Changed_Isani.pdf ("Analysis of post-Tiara decisions reflects that courts have begun applying the common law principles identified by Justice Pariente. This requires a fact-intensive, case-by-case analysis. A defendant can no longer simply argue that the fact of a contractual relationship relating to the issue bars a tort claim."). The *Tiara* decision therefore means that the judicial system has to conduct the required case-by-case analysis to determine whether a duty exists despite this analysis being abandoned over twenty years ago in favor of citing to the economic loss rule to bar a claim. *Id.* at 1.

## *II. THE ECONOMIC LOSS RULE*

Economic loss consists of "'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property.'"[15] In *Ultramares Corp. v. Touche*,[16] Judge Benjamin Cardozo referred to economic loss less favorably as damages of an "indeterminate amount for an indeterminate time to an indeterminate class."[17]

The economic loss rule is a judicial doctrine that was created to address this less favorable aspect of economic loss and to prohibit a tort action from being brought where only economic losses are suffered.[18] Though its exact origin is unknown,[19] the economic loss rule was initially introduced to circumvent the application of tort remedies to contract matters, specifically in a products liability context.[20] However, its scope was soon extended to a contractual-privity context.[21] The contractual-privity economic loss rule applies when the parties are in privity and the damages sought by a party occurred as a result of a breach of contract.[22]

The purpose of the contractual-privity economic loss rule was to ensure that parties would rely on pre-negotiated contractual provisions to regulate consequential damages in an action, as opposed to bypassing the contractual provisions and seeking to recover damages in tort instead.[23] Most courts have concluded

15. Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1246 (Fla. 1993) (quoting Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)).

16. 174 N.E. 441 (N.Y. 1931).

17. *Id.* at 444.

18. *Tiara Condo. Ass'n*, 110 So. 3d at 401; Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 536 (Fla. 2004).

19. *See* Moransais v. Heathman, 744 So. 2d 973, 979 (Fla. 1999) ("The exact origin of the economic loss rule is subject to some debate and its application and parameters are somewhat ill-defined.").

20. *Casa Clara Condo. Ass'n*, 620 So. 2d at 1246.

21. *Tiara Condo. Ass'n*, 110 So. 3d at 403.

22. *Indemnity Ins. Co.*, 891 So. 2d at 536.

23. *Tiara Condo. Ass'n*, 110 So. 3d at 402 ("When the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement."); *see* Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1223 (Fla. 2010) (stating that the economic loss rule applies when "the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract"); Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 494 (Fla. 3d Dist. Ct. App. 1994) ("Where

that because contracting parties can protect their interests through "negotiation and contractual bargaining or insurance," contract principles, as opposed to tort principles, are better suited for determining the recoverability of economic loss.[24]

## *III. APPLICATION OF THE ECONOMIC LOSS RULE*

The "seminal case on the applicability of the economic loss rule"[25] in Florida is *Florida Power & Light Co. v. Westinghouse Electric Corp.*,[26] which concerned a contract for the sale of nuclear steam generators of which six leaked and were defective.[27] The certified question asked whether a buyer could recover damages for economic loss without a separate claim for injury.[28] The Florida Supreme Court, relying on the United States Supreme Court decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[29] and the California Supreme Court decision in *Seely v. White Motor Co.*,[30] held that "contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage."[31] Further, the Florida Supreme Court stated that the contractual-privity eco-

damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort.").

24. Fla. Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987). The logic in expanding the economic loss rule to the contractual-privity economic loss rule ensures that parties are bound by what they legally agree to be bound by. *Indemnity Ins. Co.*, 891 So. 2d at 536. The reason a party enters into a contract and negotiates remedies and limitation-of-liability provisions is to eliminate the element of surprise when a contractual transaction does not go as planned. Allowing parties to circumvent contractual provisions undermines the purpose of contracting and could render inefficient the measures a party may take to protect against risks and liability.

25. *Tiara Condo. Ass'n*, 110 So. 3d at 404.

26. 510 So. 2d 899 (Fla. 1987).

27. *Id.* at 900.

28. *Id.* at 899.

29. 476 U.S. 858, 868, 873 (1965) (stating that a product defect "is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain," as opposed to an action in tort, because a "manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies," which means "the purchaser pays less for the product").

30. 403 P.2d 145, 150–51 (Cal. 1965) (stating that although a purchaser could recover the purchase price and lost profits damages, which resulted from defects in a truck, on the basis of a breach of express warranty, the strict liability doctrine in tort did not supersede the contractual warranty provisions, which address damages for economic losses. This is because a manufacturer could otherwise be potentially liable to all subsequent purchasers of the product.).

31. *Fla. Power & Light Co.*, 510 So. 2d at 902.

nomic loss rule "is not a new principle of law in Florida and . . . has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting."[32] With respect to whether economic losses could be recovered in a tort action, the Florida Supreme Court held that it would not dictate the allocation of risk between contractual parties by imposing a tort duty and therefore applied the economic loss rule.[33]

The economic loss rule was therefore initially used in a products liability context but subsequently extended to cases in a contractual-privity context.[34] In applying the rule to a contractual setting, the Florida Supreme Court expanded the scope of the economic loss rule and subsequently barred tort claims that arose as a result of a breach of a contract for services.[35]

In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*,[36] AFM Corporation (AFM) had contracted with Southern Bell Telephone to include AFM's advertisement in the yellow pages.[37] AFM then moved offices and obtained a new number, but the defendants did not list the new number in the yellow pages and had already assigned the old number to another business, thereby creating an instant referral service.[38]

AFM brought an action in tort;[39] however, the Florida Supreme Court reaffirmed its holding in *Florida Power & Light Co.* and "held that contract principles are more appropriate than tort principles for resolving economic losses."[40] In expanding the scope of the economic loss rule and applying the rule where there was a contract for services, as opposed to a contract for goods, the Flori-

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32. *Id.*

33. *Id.*

34. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 403 (Fla. 2013).

35. *Id.* at 405. Common law principles were already existent at this point. *Id.* at 408 (Pariente, J., with Lewis and Labarga, JJ., concurring). However, the Florida Supreme Court had previously expanded the economic loss rule to the contractual privity context in order to specifically prohibit tort claims for a breach of contract. *Indemnity Ins. Co. of N. Am.*, 891 So. 2d at 536. This type of tort claim stemming from a breach of contract is now permitted. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239 (Fla. 1986).

36. 515 So. 2d 180 (Fla. 1987).

37. *Id.*

38. *Id.*

39. *Id.* at 181. AFM specifically withdrew its contract claims and stated that it was not basing its action on the agreement between the parties, but the underlying action did not detail why the contract claim was dropped in favor of an action to recover in tort. *Id.*

40. *Id.*

da Supreme Court held "that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses."[41]

The contractual-privity economic loss rule has also precluded parties from bringing a tort action to recover economic losses, thereby avoiding contractual remedies, when a defective building material was sold for construction projects and there were no other damages.[42] In *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*,[43] homeowners brought a tort action against the manufacturer of defective concrete that was used in the construction of new homes that the homeowners bought.[44] The Florida Supreme Court held that where there was no personal injury or property damage, the economic loss rule applied to the purchase of houses.[45] Furthermore, as a policy argument, the Florida Supreme Court stated that although plaintiffs find tort actions more attractive to secure damages,[46] contract principles are more appropriate than tort principles for addressing the recovery of economic losses.[47]

The Florida Supreme Court has therefore applied the contractual-privity economic loss rule broadly, and in a variety of situations, to efficiently prohibit the recovery of economic losses where there is no personal injury or damage to property. Although the economic loss rule was initially limited to a products liability context, the scope of the contractual-privity economic loss rule expanded and thus departed from its original roots. It is this expansion that led the Florida Supreme Court to purport to reign in the economic loss rule doctrine, as discussed in the next Part, which culminated in the *Tiara* decision eliminating the contractual-privity branch of the economic loss rule.

41. *Id.* at 181–82.
42. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 405 (Fla. 2013).
43. 620 So. 2d 1244 (Fla. 1993).
44. *Id.* at 1245.
45. *Id.*
46. *Id.*
47. *Id.* at 1246–47. It is unclear why this fundamental policy argument by the Florida Supreme Court has now been abandoned in favor of allowing plaintiffs to proceed with claims for economic losses.

## *IV. LIMITING THE APPLICATION OF THE ECONOMIC LOSS RULE*

In order to deal with the "over-expansion of the [economic loss] rule,"[48] the Florida Supreme Court began to state its intention to limit the doctrine. The economic loss rule was originally intended to prohibit parties from bringing a tort action for economic losses in a products liability context where there was no separate personal injury or damage, and the Florida Supreme Court sought to reaffirm this by taking steps to reign in the contractual-privity economic loss rule.[49]

In *Moransais v. Heathman*,[50] a house purchaser brought an action against the engineers who had inspected the house prior to its purchase because the engineers failed to detect and disclose certain defects.[51] The Florida Supreme Court stated that a fraudulent inducement claim was an independent tort and was therefore not barred by the contractual-privity economic loss rule in the same way that even when there is a breach of contract, a tort claim can still be brought when the breached duty is independent from the breach of contract.[52] Therefore, the house purchaser was permitted to bring a negligence claim against the engineers, and the Florida Supreme Court confirmed that the existence of a contract does not bar an action in tort per se in the context of professional negligence.[53]

In explaining that a professional negligence action could be brought against an engineer without the limitation of the economic loss rule, the Florida Supreme Court revisited its prior application of the rule and affirmed its original essence and purpose.[54] The court stated that its decisions after *Florida Power & Light Co.* expanded the scope of the contractual-privity economic loss rule,[55] and its subsequent decisions have unnecessarily relied

48. *Tiara Condo. Ass'n*, 110 So. 3d at 406.
49. *Id.* at 406–07.
50. 744 So. 2d 973 (Fla. 1999).
51. *Id.* at 974–75.
52. *Id.* at 981.
53. *Id.* at 983–84.
54. *Id.* at 979–80 (stating that earlier holdings explained that the essence of the rule was "to prohibit a party from suing in tort for purely economic losses to a product" because contract principles would be more appropriate to remedy the economic loss).
55. *Id.* at 980–81 (citing AFM Corp. v. S. Bell Tel. & Tel. Co., 515 So. 2d 180, 180–82 (Fla. 1987)).

on the economic loss rule, rather than common law principles, to determine the viability of a tort claim.[56] The Florida Supreme Court consequently stated its intention to reign in the contractual-privity economic loss rule[57] and held that the rule does not prohibit a professional malpractice action, even where the damages are purely economic.[58]

The Florida Supreme Court's intention to reign in the scope of the contractual-privity economic loss rule was further exemplified in *Indemnity Insurance Co. of North America v. American Aviation, Inc.*[59] In *Indemnity Insurance Co.*, the plaintiff brought an action in negligence for damage to an aircraft, which was caused by the negligent maintenance and inspection of the aircraft and American Aviation's backwards installation of part of the aircraft gear.[60]

The Middle District of Florida originally dismissed the claims on the basis of the economic loss rule.[61] However, on appeal, the Florida Supreme Court subsequently held that the economic loss rule was inapplicable because claims involving professional services are not barred[62] and this case did not involve an action for economic loss as a result of a product damaging itself.[63] Therefore, provided that American Aviation, Inc. owed a duty, the plaintiff was not barred from seeking to recover damages for purely economic losses.[64]

However, the Florida Supreme Court also stated that although the economic loss rule was designed to ensure that parties cannot circumvent contractual provisions by bringing an action in tort,[65] "[s]everal justices on this Court have supported expressly

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56. *Id.* at 981.

57. *Id.* at 983 (stating that the economic loss "rule was . . . intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations" (footnote omitted)).

58. *Id.* at 983–84.

59. 891 So. 2d 532, 536–37 (Fla. 2004).

60. *Id.* at 534–35.

61. *Id.* at 535.

62. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 411 (Fla. 2013) (citing *Indemnity Ins. Co. of N. Am.*, 891 So. 2d at 537).

63. *Indemnity Ins. Co. of N. Am.*, 891 So. 2d at 541.

64. *Id.* at 543–44. This decision seems to foresee Justice Pariente's concurring opinion by emphasizing that common law principles will determine whether a duty, and therefore a viable tort claim, exists.

65. *Id.* at 536–37 (stating that parties cannot circumvent contractual provisions because the parties already allocated risks through a bargaining process and that to sidestep

limiting the economic loss rule to its principled origins."[66] Therefore, although the Florida Supreme Court reaffirmed that contract law is more appropriate to address remedies for economic losses,[67] the Court later "clearly expressed its desire to return the economic loss rule to its intended purpose—to limit actions in the products liability context"[68]—and planted the seed to reign in the contractual-privity economic loss doctrine in *Tiara*.

Similarly, in *Comptech International, Inc. v. Milam Commerce Park, Ltd.*,[69] both the majority opinion and Justice Wells' concurring opinion reaffirmed that the economic loss rule is strictly limited to a products liability context.[70] In that case, Milam had agreed to renovate the leased property for Comptech but performed these renovations negligently and caused damage to Comptech's computers that were being stored in the property.[71] Comptech brought several claims against Milam for negligent construction, violation of a statutory provision, and negligent selection of a contractor.[72]

In its findings, the Florida Supreme Court held that the economic loss rule cannot bar a statutory cause of action and that because the contract at issue concerned a service, the damaged computers were "other property" and the contractual-privity economic loss rule did not preclude recovery for their damage.[73] Highlighting the Court's intention to reign in the economic loss rule, Justice Wells wrote a separate concurring opinion to specifically state that the application of the economic loss rule is limited to products liability claims and therefore does not apply to a contract for services.[74]

The Florida Supreme Court therefore began to limit the scope of the contractual-privity economic loss rule and receded from its

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a contractual agreement would allow the parties "to obtain a better bargain than originally made").

66. *Id.* at 542.

67. *Id.* at 536–37. The court also stated that professional malpractice, fraudulent inducement, negligent misrepresentation, or freestanding statutory causes of action are exceptions to the economic loss rule. *Id.* at 541.

68. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).

69. 753 So. 2d 1219, 1227 (Fla. 1999).

70. *Id.* at 1227.

71. *Id.* at 1221.

72. *Id.*

73. *Id.* at 1226.

74. *Id.* at 1227 (Wells, J., concurring) (stating that he "would recede from AFM Corp. v. Southern Bell Telephone & Telegraph Co." (citations omitted)).

prior decisions in which the rule had been expanded and applied to other contexts, including to contracts involving services. However, while the Florida Supreme Court reigned in the contractual-privity economic loss rule on a case-by-case basis, the court had not yet unequivocally drawn a clear doctrinal line as to when the contractual-privity economic loss rule would and would not apply.

## *V. THE* TIARA *OPINION*

In March 2013, the Florida Supreme Court issued its seminal decision in the *Tiara* case and rejected the contractual-privity economic loss rule.[75] The court thereby receded from its prior decisions[76] and held that the economic loss rule would only preclude the recovery of pure economic losses in a products liability context.[77]

In *Tiara*, a condominium association filed suit against its insurance broker after the broker incorrectly told the association that its insurance policy provided for a $100 million loss.[78] After making substantial repairs to its property following two hurricanes, the association was informed by its insurance provider, Citizens Property Insurance Corporation (Citizens), that the loss limit was only $50 million.[79] The association eventually settled an action with Citizens, but it did not recover the entire amount that it had spent on remedial work.[80] The association subsequently filed suit against the broker for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, negligence, and breach of a fiduciary duty.[81]

The Court of Appeal affirmed the district court's grant of summary judgment in favor of the broker in part and certified a question to the Florida Supreme Court.[82] The question asked was "[d]oes an insurance broker provide a 'professional service' such

75. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).

76. *Id.* at 407; Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 536–37 (Fla. 2004); Comptech Int'l, Inc. v. Milam Com. Park, Ltd., 753 So. 2d 1219, 1226 (Fla. 1999); Moransais v. Heathman, 744 So. 2d 973, 984 (Fla. 1999); Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1245 (Fla. 1993); AFM Corp. v. S. Bell Tel. & Tel. Co., 515 So. 2d 180, 180–81 (Fla. 1987).

77. *Tiara Condo. Ass'n*, 110 So. 3d at 407.

78. *Id.* at 400.

79. *Id.*

80. *Id.*

81. *Id.* at 400–01.

82. *Id.*

that the insurance broker is unable to successfully assert the economic loss rule as a bar to tort claims seeking economic damages that arise from the contractual relationship between the insurance broker and the insured?"[83] The Florida Supreme Court rephrased the question as "[d]oes the economic loss rule bar an insured's suit against an insurance broker where the parties are in contractual privity with one another and the damages sought are solely for economic losses?"[84]

The court answered its question in the negative and then reigned in its judicially created economic loss doctrine, stating that the economic loss rule would now only be applicable to products liability cases.[85] The court explained that the economic loss rule had expanded beyond its original scope, which was "unworkable in practice," and therefore the court "return[ed] the economic loss rule to its origin in products liability."[86] In other words, the Florida Supreme Court departed from its precedent by limiting the application of the economic loss rule to products liability cases and eliminating the contractual-privity economic loss rule.[87]

Justice Canady, in his dissenting opinion, questioned the majority's reasoning and highlighted the purpose behind the contractual-privity economic loss rule, namely that the rule prevented parties from circumventing contractual provisions by bringing an action in tort and reaffirmed the boundary between tort and contract law.[88] In revisiting the prior contractual-privity economic loss rule decisions of the Florida Supreme Court,[89] Jus-

83. *Id.* at 410.

84. *Id.* at 400 (original typeface altered).

85. *Id.*; *see also id.* at 410 (Polston, C.J., with Canady, J., dissenting) (stating that the answer to the certified question was no, but that the majority used the opportunity to expand tort law at the expense of contract law).

86. *Id.* at 406–07 (majority opinion). Although the economic loss rule was originally intended to be limited to a products liability context, the despair over its expansion ignores the issue that a contract is also intended to specifically deal with remedies. Allowing parties to bring an action in tort frustrates the very essence of a contract.

87. *Id.* at 407; *see* BVI Marine Constr. Ltd. v. ECS-Florida, LLC, No. 12-80225-CIV, 2013 WL 6768646, at *4 (S.D. Fla. Dec. 20, 2013) (stating that, according to the Florida Supreme Court's *Tiara* decision, the economic loss rule no longer applies in non-products liability cases).

88. *Tiara Condo. Ass'n*, 110 So. 3d at 412 (Canady, J., with Polston, C.J., dissenting) (stating that the same justices who participated in the majority opinion in *Tiara* had stated two years ago that the economic loss rule was applicable in both the products liability context and where one party seeks to recover damages in tort for conduct that is interconnected with a breach of contract).

89. *Id.* at 412–13.

tice Canady stated that the "goal of preventing contract law from drowning in a sea of tort" is compelling, that the majority did not explain why the economic loss rule is unworkable in a contractual context, and that the decision failed to justify the "dramatic unsettling of Florida law" based on the prior minority decisions of the court.[90]

In response to Justice Canady's dissenting opinion, however, Justice Pariente's concurring opinion stated that although the economic loss rule became the easiest way to address claims for economic losses where the parties were in contractual privity,[91] common law contractual principles, which were effective prior to the introduction of the contractual-privity economic loss rule,[92] would continue to dismiss tort claims when there is no independent tort committed.[93]

Although Justice Pariente's concurring opinion reaffirmed the role of common law principles in determining causes of action,[94] the future of contractual disputes in Florida is unclear[95] because the court's opinion and Justice Pariente's clarification have not been clearly interpreted in subsequent caselaw following the *Tiara* decision.[96]

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90. *Id.* at 413–14.

91. *Id.* at 409 (Pariente, J., with Lewis and Labarga, JJ., concurring).

92. *Id.* at 408–09. However, these common law principles gave way to the contractual-privity economic loss rule, which suggests that the contractual-privity economic loss rule was more practical to apply.

93. *Id.* at 409; *see also* HTP, Ltd. v. Lineas Aereas Costarricences, S.A., 685 So. 2d 1238, 1239–40 (Fla. 1996) (holding that fraudulent inducement is an independent tort and the contractual-privity economic loss rule has not eliminated tort actions independent of a breach of contract action, such as when a party alleges that it was fraudulently induced to enter into a settlement agreement); Lewis v. Guthartz, 428 So. 2d 222, 224 (Fla. 1982) (affirming the lower court's holding that there must be a tort "'distinguishable from or independent of [the] breach of contract'") (quoting Guthartz v. Lewis, 408 So. 2d 600, 602 (Fla. 3d Dist. Ct. App. 1981)).

94. *Tiara Condo. Ass'n*, 110 So. 3d at 408 (Pariente, J., with Lewis and Labarga, JJ., concurring) (stating that basic common law principles already restrict the remedies available to those who "specifically negotiated for those remedies").

95. Burns v. Winnebago Indus., Inc., No. 8:13-cv-1427-T-24 MAP, 2013 WL 4437246, at *3 (M.D. Fla. Aug. 16, 2013).

96. *See, e.g.*, Alpha Data Corp. v. HX5, L.L.C., 139 So. 3d 907, 910 (Fla. 1st Dist. Ct. App. 2013) (holding that the *Tiara* decision required it to reverse the trial court's finding that the economic loss rule bars the fraudulent inducement claim); Muñoz Hnos, S.A. v. Editorial Televisa Int'l, S.A., 121 So. 3d 100, 103 (Fla. 3d Dist. Ct. App. 2013) (stating that the Florida Supreme Court resolved the issue and held that the applicability of the economic loss rule is limited to products liability cases); Joyeria Paris, SRL v. Gus & Eric Custom Servs., Inc., No. 13-22214-CIV, 2013 WL 6633175, at *3 (S.D. Fla. Dec. 17, 2013) (citing Justice Pariente's *Tiara* concurrence to refute the plaintiff's argument that "the

### A. Post-*Tiara* Interpretation

In one of the first appellate cases to be considered after the *Tiara* decision, the Third District Court of Appeal stated that because of the *Tiara* decision, the economic loss rule is limited to products liability cases and therefore does not prohibit the recovery of economic losses in negligent misrepresentation and fraud claims.[97] In *Muñoz Hnos, S.A. v. Editorial Televisa International, S.A.*, an advertiser brought a claim against a publisher in order to get advertising credit.[98] Although the Third District Court of Appeal was correct in stating that the economic loss rule now only applies to products liability cases, its decision oversimplified why the economic loss rule does not bar a claim for negligent misrepresentation or fraud.

The opinion in *Muñoz* seems to suggest that *Tiara* changed the applicability of the economic loss rule to claims for negligent misrepresentation and fraud.[99] However, even prior to *Tiara*, the rule did not bar the recovery of economic losses where there was a tort that was independent of any breach of contract act.[100] Justice Pariente's opinion in *Tiara* specifically stated that common law principles will continue to eliminate claims that are not based on an independent breach of contract and therefore allow claims that are independent from a breach of contract.[101] However, the court in *Muñoz* instead allowed a claim for the recovery of economic losses based on the fact that the economic loss rule now only applies to products liability cases,[102] not because claims for negligent misrepresentation and fraud had always been viable, even prior to *Tiara*, as exceptions to the economic loss rule.

Similarly, in *Alpha Data Corp. v. HX5, L.L.C.*,[103] the First District Court of Appeal affirmed the trial court's decision barring

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economic loss rule in Florida no longer exists outside of the context of products liability litigation") (internal citations omitted).

97. *Muñoz*, 121 So. 3d at 103.

98. *Id.* at 101.

99. *Id.* at 103.

100. Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 543 n.3 (Fla. 2004) (stating that professional malpractice, fraudulent inducement, negligent misrepresentation, and freestanding statutory causes of action are exceptions to the economic loss rule).

101. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 408–09 (Fla. 2013) (Pariente, J., with Lewis and Labarga, JJ., concurring).

102. *Muñoz*, 121 So. 3d at 103.

103. 139 So. 3d 907 (Fla. 1st Dist. Ct. App. 2013).

a claim that HX5 breached an agreement on the basis of the Statute of Frauds.[104] In considering the fraudulent inducement claim, the court held that the *Tiara* decision required it to reverse the lower court's decision because the economic loss rule is now limited to products liability claims.[105] However, similar to the *Muñoz* decision's analysis,[106] this reasoning does not accurately reflect the status of the law prior to or after *Tiara*. Even if the contractual-privity economic loss rule were still applicable in Florida law, a claim for fraudulent inducement would still not be prohibited because the tort of fraudulent inducement is independent from a breach of contract claim and has always existed as an exception to the contractual-privity economic loss rule.[107] Therefore, despite the Florida Supreme Court's attempt to clear up the number of exceptions that existed outside the economic loss rule by eliminating the entire contractual-privity branch of the rule, it seems that the *Tiara* decision has not had this clarifying effect.[108]

Conversely, in *Joyeria Paris, SRL v. Gus & Eric Custom Services, Inc.*,[109] the Southern District of Florida quoted Justice Pariente's concurrence to refute the plaintiff's argument that the economic loss rule in Florida no longer exists outside of the context of products liability litigation.[110] In that case, the plaintiff alleged that contrary to an oral agreement where the defendant would sell the plaintiff's gold in exchange for a one-half percent commission, the defendant instead took commission and retained the proceeds from each sale.[111]

The court held that because the plaintiff did not establish a tort independent of the breach of contract claim, it had failed to properly allege a fraud claim.[112] This opinion therefore appears to be consistent with Justice Pariente's concurring opinion, which

104. *Id.* at 909.
105. *Id.* at 910.
106. *Muñoz*, 121 So. 3d at 103–05.
107. Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 542 (Fla. 2004).
108. One of the benefits of the contractual-privity economic loss rule was that it provided a simple way to dismiss claims for economic losses where there was no independent tort. However, post-*Tiara*, the courts have struggled to clearly articulate why a claim is or is not viable under common law contractual principles.
109. No. 13-22214-CIV, 2013 WL 6633175 (S.D. Fla. Dec. 17, 2013).
110. *Id.* at *3.
111. *Id.* at *2.
112. *Id.* at *3.

states that common law principles will continue to prohibit tort claims where the cause of action is not based on a tort that is independent of the contract.[113]

However, the lack of clarity in the *Tiara* decision was subsequently reinforced by the Eleventh Circuit only four months after the *Joyeria* decision. In *Lamm v. State Street Bank & Trust*,[114] the plaintiff brought, in addition to other allegations, breach of contract and negligence claims against a custodian bank for allowing his funds to be disbursed as payment for fake notes.[115] In light of the *Tiara* decision, the Eleventh Circuit held that the economic loss rule no longer barred the plaintiff's claim, but that the plaintiff had to prove that the tort was independent of the breach of contract.[116] In an attempt to resolve whether a claim in tort was viable, the Eleventh Circuit had to determine whether the bank had a duty to the plaintiff and then whether a duty was breached.[117]

In its holding, however, the court stated that the "exact contours of this possible separate limitation, as applied post-*Tiara*, are still unclear," and that although the plaintiff no longer faced the hurdle of the economic loss rule, "*Tiara* may, however, have left intact a separate hurdle."[118] Therefore, even when the *Tiara* decision appears to be interpreted correctly, the courts are still not entirely sure what the decision means.

Similarly, the application of the economic loss rule in products liability claims is also uncertain. The Middle District of Florida, for example, has stated that it is unclear whether the *Tiara* decision affects the economic loss rule exceptions of negligent misrepresentation and fraudulent inducement in a products liability context.[119] In *Burns v. Winnebago Industries, Inc.*,[120] the plaintiff bought a recreational vehicle, which he discovered had

113. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 408 (Fla. 2013) (Pariente, J., with Lewis and Labarga, JJ., concurring).

114. 749 F.3d 938, 947 (11th Cir. 2014).

115. *Id.* at 942.

116. *Id.* at 947.

117. *Id.* (holding that the plaintiff could not prove that the bank had a duty to watch over the investment advisor).

118. *Id.* Between the hurdle of the economic loss rule and the post-*Tiara* hurdle of establishing a duty and breach, it remains unclear how to overcome the latter hurdle of sufficiently establishing a duty and breach in order to give rise to a tort claim.

119. Burns v. Winnebago Indus., Inc., No. 8:13-cv-1427-T-24 MAP, 2013 WL 4437246, at *3 (M.D. Fla. Aug. 16, 2013).

120. No. 8:13-cv-1427-T-24 MAP, 2013 WL 4437246, at *3 (Aug. 16, 2013).

corrosion on the undercarriage and other components, and subsequently brought an action against the defendants for negligent misrepresentation and fraudulent concealment.[121] In agreeing that the plaintiff's claims were simply products liability claims retitled as claims for negligent misrepresentation and fraudulent concealment, the court then questioned whether negligent misrepresentation and fraudulent concealment, which were exceptions to the now-rejected contractual-privity economic loss rule, continue to be exceptions under the *Tiara* decision in the products liability context.[122]

Consequently, the *Tiara* decision does not appear to have clarified the position with respect to which claims were and were not—and are and are not—barred by some form of the economic loss rule. If anything, the economic loss rule and the contractual-privity economic loss rule simplified the analysis regarding the viability of a claim and provided a "simple way to dismiss tort claims interconnected with breach of contract claims."[123] In addition, if, as Justice Pariente stated, "[b]asic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies" and the "clarification of the economic loss rule's applicability does nothing to alter these common law concepts,"[124] then it becomes necessary to ask why rejecting the contractual-privity economic loss rule was necessary when the rule appeared to coexist harmoniously with common law principles.

### B. Effect of the *Tiara* Opinion

The rejection of the contractual-privity economic loss rule also raises another issue with respect to whether a tort claim for damages will be viable. Justice Pariente's concurring opinion states that common law principles will continue to restrict claims for economic losses where the parties are in contractual privity

121. *Id.*

122. *Id.* at *3 (stating that "given the *Tiara* court's holding that the economic loss rule no longer applies to contractual privity cases, it is unclear whether the Tiara decision affects the viability of these exceptions when negligent misrepresentation and fraudulent inducement claims are made in the product liability context").

123. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 409 (Fla. 2013) (Pariente, J., with Lewis and Labarga, JJ., concurring).

124. *Id.* at 408.

and where no tort is committed independent of the breach of contract conduct.[125]

However, where the elements of a tort are proven such that there is a duty, breach, causation, and damage independent from the contract, it seems that common law principles will not restrict parties from seeking to recover in tort as opposed to on the basis of their contractual provisions. The issue then is whether a contract can give rise to a duty for the purpose of bringing an action in tort.[126]

For example, if a builder contracted to build a house for a buyer in exchange for consideration and subsequently built the house poorly in breach of the contract, the agreed-upon contractual provisions would dictate the available remedies. However, if the poor construction did not amount to a breach of contract, the buyer's only other option to recover damages for economic losses would be to bring a claim in tort.

Prior to the *Tiara* decision, the economic loss rule would have barred a tort claim for economic losses where there was no injury to persons or property or a separate breach of duty.[127] However, post-*Tiara*, providing that there was a breach of duty, a party may now bring a claim in negligence, even if the loss is purely economic.[128]

The first issue with bringing a tort claim where there is no independent statutory or freestanding action in tort is the requirement to prove or establish a duty. In the builder hypothetical, the only relationship that compelled the builder to build a house was the contractual relationship as opposed to any independent legal duty. Therefore, the ability to bring a successful

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125. *Id.*

126. Benjamin P. Edwards, *Rolling Back the Economic Loss Doctrine in Securities Disputes Against Financial Intermediaries*, 20 NO. 1 PUB. INV. ARB. B. ASS'N B.J. 2013, 39, 53 (stating that "[a]bsent the existence of some non-contractual duty, a litigant would not have a tort claim because a key element of any tort claim is that the defendant breached a duty owed to the plaintiff"). However, this fails to recognize that if there is a duty established by way of the contract itself, a litigant could have a tort claim and therefore circumvent any negotiated and agreed upon contractual provisions.

127. *Id.* at 402.

128. Rebecca Rhoden, *The Florida Supreme Court Limits the Economic Loss Rule to Products Liability Cases*, LOWNDES DROSDICK DOSTER KANTOR & REED, P.A. (Oct. 15, 2013), http://www.lowndes-law.com/news-center/1592-the-florida-supreme-court-limits-economic-loss-rule-products-liability-cases (stating that while parties are now able to bring a tort claim regardless of what was contractually negotiated, the "double-edged sword" is that parties no longer know what their potential liability may be).

tort claim for economic losses post-*Tiara* may depend on whether a plaintiff can enforce, prove, or establish an independent duty through a contract and then set aside that same contract and the agreed upon contractual provisions to seek damages for economic losses.

In *Clay Electric Cooperative, Inc. v. Johnson*,[129] which concerned a negligence action, the issue was whether the defendant had a duty to maintain streetlights.[130] Although the case did not address the economic loss rule specifically, the Florida Supreme Court held,

> Whenever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service—i.e., the "undertaker"—thereby assumes a duty to act carefully and to not put others at an undue risk of harm. . . . The doctrine further applies not just to parties in privity with one another—i.e., the parties directly involved in an agreement or undertaking—but also to third parties. Florida courts have applied the doctrine to a variety of third-party, contract-based negligence claims and ruled that the defendants could be held liable, notwithstanding a lack of privity.[131]

In addition, the court explained that while a duty may arise from a contract even where no duty exists at common law or pursuant to statute, courts have held that "in such cases the contract itself defines the extent of the duty."[132] Consequently, it may be that in accordance with the common law principles reaffirmed in *Tiara*,[133] persons bringing a suit may be able to rely on the contract itself to establish a duty and bring a tort claim based on the Florida Supreme Court's decision in *Clay Electric*.[134]

Therefore, only the contractual-privity economic loss rule would have prevented parties from bringing a claim in tort for economic loss when there is no personal injury or property damage. Although a plaintiff would still have to prove breach, causa-

129. 873 So. 2d 1182 (Fla. 2003).
130. *Id.* at 1185.
131. *Id.* at 1186 (footnotes omitted).
132. *Id.* at 1201.
133. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d, 399, 409 (Fla. 2013) (Pariente, J., with Lewis and Labarga, JJ., concurring).
134. *Clay Elec. Co-op., Inc.*, 873 So. 2d at 1186.

tion, and damage under common law principles, the difference here is that bringing the tort claim itself may be possible, whereas the economic loss rule would have barred the claim from being brought.

Similarly, in *Manning v. Serrano*,[135] the Florida Supreme Court stated that when a transaction originates in a contract and a "duty is superimposed by or arises out of the circumstances of the transaction, the violation of which constitutes a tort, then the injured party has an election to sue in tort or for the breach of contract."[136] In that case, the plaintiff commenced an action in tort although the original complaint was based on inducement, and the issue was whether the statute of limitations was three or four years, which was dependent on what kind of action the plaintiff was bringing.[137] The court's view that a plaintiff has a choice to bring an action for breach of contract or a tort claim, if a duty arises out of the circumstances, seems to also support that a contract can give rise to a duty in tort.

Furthermore, the Fifth District Court of Appeal's decision in *Marian Farms, Inc. v. SunTrust Banks, Inc.*,[138] which was decided post-*Tiara*, seems to provide some cause for concern for defendants on the receiving end of an economic loss claim in tort. In that case, the plaintiff brought an action against its bank alleging the plaintiff suffered damages when the bank negligently accepted forged documents resulting in the wrongful disbursement of the plaintiff's funds.[139] Although the trial court originally dismissed the negligence claims,[140] the Fifth District Court of Appeal reversed the trial court decision and found that the plaintiff had alleged an independent tort.[141] The issue was that, similar to the

135. 97 So. 2d 688, 689 (Fla. 1957).

136. *Id.* at 689. Therefore, contrary to Justice Pariente's concurring opinion in *Tiara*, because it appears that a contract may give rise to a duty in tort, common law principles will not prohibit tort claims for economic losses from being brought.

137. *Id.* at 690 (holding that because the complaint clearly stated a tort action, the four-year statute of limitations applied).

138. 135 So. 3d 363 (Fla. 5th Dist. Ct. App. 2014).

139. *Id.* at 364.

140. *Id.*

141. *Id.* at 363–64. This case concerned depositor relationships and demonstrated the type of claims that could now be brought in tort as a result of the "newly established precedent regarding the use of the economic loss rule and its application" in *Tiara*. Charles B. Jimerson, *The Impact of Tiara Condominiums: Independent Tort Claims and Jury Trial Waivers Make Their Way to Florida Banking Law*, JIMERSON & COBB, P.A.

builder scenario,[142] although the bank's obligations were based on a contractual duty to its customers, the Fifth District permitted a claim in tort for damages without identifying a "noncontractual source of the duty,"[143] even though the damages being sought were the same damages that resulted from the breach of contract.[144] Furthermore, the court also rejected the application of a contractual provision that waived the right to a jury trial because the claim was based on an independent tort separate from the breach of contract.[145]

Therefore, although we have not yet had a case that specifically addresses the issue of whether a contract can give rise to a duty in tort for the purpose of recovering damages for economic losses, if a contract can give rise to a duty in tort, as the above cases appear to suggest, *Tiara* did procedurally result in a dramatic unsettling of Florida law. This is because it seems that a plaintiff, like the plaintiff in *Marian Farms*, would be able to at least bring an action in tort on the basis of a duty being established by a contract, whereas the contractual-privity economic loss rule would not even allow a tort claim to be brought where the damages occurred as a result of a breach of contract.[146] Furthermore, where a tort claim is permitted, it seems that related contractual provisions may be circumvented in favor of tort remedies.[147]

## *VI. TREATMENT OF ECONOMIC LOSS IN OTHER JURISDICTIONS*

Although the majority opinion in *Tiara* stated that it had to depart from prior precedents because the expansion of the contractual-privity economic loss rule was "unwise and unworkable

(Aug. 18, 2014), http://www.jimersoncobb.com/blawg/2014/08/impact-tiara-condominiums-independent-tort-claims-jury-trial-waivers-make-way-florida-banking-law/.

142. *Supra* p. 28.

143. Isani, *supra* note 14 (stating that the court failed to explain how the bank's actions constituted "anything other than negligent performance of its contractual duties").

144. *Marian Farms, Inc.*, 135 So. 3d at 364.

145. *Id.*

146. Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 494 (Fla. 3d Dist. Ct. App. 1994). *See also* Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1223 (Fla. 2010) (stating that the contractual-privity rule prohibits the recovery of losses in tort where the damages are sought for "matters arising out of the contract").

147. *Marian Farms, Inc.*, 135 So. 3d at 364.

in practice,"[148] Justice Pariente's concurring opinion acknowledged the effectiveness of the economic loss rule in providing a way to efficiently dismiss tort claims.[149] Although common law principles may now be able to eliminate tort claims for economic losses which stem from a breach of contract, the *Tiara* decision may also result in "every breach of contract claim being accompanied by a tort claim,"[150] which can be seen from the way in which other jurisdictions that have eliminated or do not use the economic loss rule treat claims for economic losses in tort.

The State of California, for example, has departed from the economic loss rule and allows parties to recover economic losses. For example, in *J'Aire Corp. v. Gregory*,[151] where a lessee brought an action in tort against a contractor for a delay in a construction project for a leased premises, the California Supreme Court stated that damages for economic losses are not prohibited simply because the economic loss is the only injury that occurs.[152] Instead, the court imposed a test of "foreseeable injury"[153] and explained that where a risk of harm is foreseeable, a party can be compensated for economic loss even where there is no resulting personal injury or property damage.[154] Further, the California Supreme Court also held that a duty must be established in order for there to be negligence liability and that a duty of care may arise through a contract.[155]

Therefore, if the issue of whether a contract can give rise to a duty is interpreted as it has been in California, then the rejection of the contractual-privity economic loss rule may well permit a tort claim to at least be brought. Consequently, where the economic loss rule would have barred a tort claim seeking to recover economic losses when the parties were in contractual privity, the rejection of the rule may mean that the viability of tort claims would instead need to be addressed after it is determined whether a contract can give rise to a duty in tort.

148. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).
149. *Id.* at 409 (Pariente, J., with Lewis and Labarga, JJ., concurring).
150. *Id.* at 414 (Canady, J., with Polston, C.J., dissenting).
151. 598 P.2d 60, 64 (Cal. 1979).
152. *Id.*
153. *Id.* The test of "foreseeable injury," which the California Supreme Court utilizes in lieu of the economic loss rule, parallels the proximate causation requirement in tort actions.
154. *J'Aire*, 598 P.2d at 64.
155. *Id.* at 62.

Conversely, Maryland's law on economic losses and the contractual-privity economic loss rule appears to closely mirror the post-*Tiara* situation as predicted in Justice Pariente's concurring opinion. In *Mesmer v. Maryland Automobile Insurance Fund*,[156] the plaintiff brought an action against an insurance company for failing to provide a defense to a claim brought against her.[157] The Maryland Court of Appeals held that the plaintiff's claims against the insurance company were contractual, as opposed to tort based.[158] Further, the court stated that a breach of a contractual obligation does not give rise to a tort duty and that the "duty giving rise to a tort action must have some independent basis."[159] The court also stated that the mere failure to perform a contract is not actionable in tort,[160] which could apply in Florida post-*Tiara*.

However, although the court reaffirmed that a contractual claim can be based on a dispute about the existence of a contractual provision and a failure to perform a contract,[161] the court was similarly conscious of the possibility that a breach of contract can also breach an independent duty when a defendant has performed a contractual obligation below the appropriate standard of care.[162] Maryland has thus made the distinction that when a party fails to undertake a contractual obligation in any way, a tort liability will not be imposed.[163] However, when a party performs a contract in a negligent manner or creates a dangerous condition, this conduct may constitute a breach of a duty and give rise to a tort claim.[164] The issue is still not entirely clear for post-*Tiara* Florida because the examples the Maryland Court of Appeals

156. 725 A.2d 1053 (Md. 1999).
157. *Id.* at 1056.
158. *Id.* at 1058.
159. *Id.*
160. *Id.* (citing Wilmington Trust Co. v. Clark, 424 A.2d 744, 754 (Md. 1981)).
161. *Id.* at 1059 ("There is no single principle or simple test for determining when a defendant's breach of a contract will also breach an independent duty and give rise to a tort action. Nevertheless, when the dispute is over the existence of any valid contractual obligation covering a particular matter, or where the defendant has failed to recognize or undertake any contractual obligation whatsoever, the plaintiff is ordinarily limited to a breach of contract remedy.").
162. *Id.* (stating that "[i]t is when the defendant has proceeded on the basis that a contractual obligation exists . . . and has undertaken it in violation of the appropriate standard of care, that the plaintiff may . . . maintain a tort action").
163. *Id.* at 1060 (citing Matyas v. Suburban Trust Co., 263 A.2d 16, 18 (Md. 1970)).
164. *Id.* (citing Otis Elevator Co. v. Embert, 84 A.2d 876, 881–82 (Md. 1951)).

discussed regarding when the negligent performance of a contract can give rise to a duty in tort appear to concern a resulting personal injury or damage to property,[165] which fall outside the scope of economic loss.

It is also necessary to note that the economic loss rule is still the "Majority Rule" in the United States; however, only some of those "Majority Rule" states adopting the economic loss doctrine have specifically narrowed the scope of the rule to a products liability context.[166] Therefore, although the consequences of the *Tiara* decision are not immediately clear, as seen by the decisions in Florida following *Tiara*, the rejection of the contractual-privity branch of the economic loss rule is not in itself unusual. However, one of the issues with the opinion concerns whether a contract itself can give rise to an independent duty in tort for the purposes of recovering economic losses.

## *VII. CONCLUSION*

Ultimately, the actual effect of the *Tiara* decision with respect to parties in contractual privity trying to recover economic losses in tort remains unclear. On the one hand, the effect of *Tiara* on Florida law should be minimal because the contractual-privity economic loss rule was, according to the concurring opinion in *Tiara*, never necessary to prohibit tort claims for economic losses.[167] On the other hand, if a plaintiff is able to prove the elements of a tort, it seems that the plaintiff could circumvent a contractual remedy or limitation-of-liability provision and seek

165. *Id.*

166. *Economic Loss Doctrine in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (Apr. 22, 2013), http://www.mwl-law.com/wp-content/uploads/2013/03/economic-loss-doctrine-in-all-50-states.pdf (last updated Feb. 2, 2015) (Alabama, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, North Dakota, North Carolina, New York, New Mexico, New Jersey, Nevada, Nebraska, Oklahoma, Tennessee, Wyoming, and Wisconsin have applied the economic loss rule to cases involving defective products. However, Texas has also applied the economic loss rule to non-products liability cases, and Washington, South Carolina, and Utah recognize some form of an "Independent Duty Doctrine" as an exception to the economic loss rule and hold that damages for economic losses in tort are permitted if the tort duty is independent from the contract.).

167. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 408–09 (Fla. 2013) (Pariente, J., with Lewis and Labarga, JJ., concurring).

damages for economic losses in tort, even though the contract itself gave rise to the relationship between the parties.[168]

As the current line of cases continues to address the effects of the *Tiara* decision, it is clear that courts will have to take a different approach in analyzing tort claims and determining when a contract claim is being dressed up as a tort claim. Furthermore, even when the result of a claim is the same as it would have been pre-*Tiara*, courts will no longer have the use of the contractual-privity economic loss rule to efficiently dismiss claims for economic losses where no independent breach of duty has occurred.[169]

Therefore, while the *Tiara* decision may have addressed an overexpansion of the economic loss doctrine, parties may now fear unlimited liability as a result of the opinion, at least until the appellate courts begin to address the issue consistently and provide guidance as to how *Tiara* will shape contractual disputes. Similarly, the way in which the courts will address claims for economic loss post-*Tiara* may require parties to adjust their contractual agreements and subsequent litigation strategies to defeat tort claims for economic loss.

168. Marian Farms, Inc. v. SunTrust Banks, Inc., 135 So. 3d 363, 364 (Fla. 5th Dist. Ct. App. 2014).

169. Samuel A. Danon, Laurie U. Mathews & Paulo R. Lima, *Reports of Death of Fla. Economic Loss Rule Are Exaggerated*, HUNTON & WILLIAMS, LLP, (Apr. 12, 2013), http://www.hunton.com/files/Publication/d1d28572-aa67-418b-93ef-74eb31e80afe/Presentation/PublicationAttachment/56599437-086b-426d-9b95-78ee51555d9f/Reports_of_Death_Florida_Economic_Loss.pdf.