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Liability of Design Professionals for Purely Economic Loss in South Carolina

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LIABILITY OF DESIGN PROFESSIONALS FOR PURELY ECONOMIC LOSS IN SOUTH CAROLINA

I. INTRODUCTION

"The economic loss rule is stated with ease but applied with great difficulty."[1] Such difficulties are patent in the construction context.[2] The economic loss rule "requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise."[3]

A. Introductory Hypothetical

GNL Contractors, Inc. was the low bidder on the construction of a new law school for the University of South Carolina, and it subsequently contracted with the University for this project.[4] Acme Engineering, Inc. was the design engineer of the law school project, and it contracted with the University for the design supervision of the project. Acme and GNL were not in contractual privity.

Acme and GNL had numerous disagreements once construction began. Acme made demands of GNL which were not in the contract between GNL and the University. Furthermore, Acme delayed the job for over a month by falsely accusing GNL of Occupational Safety and Health Administration (OSHA) violations. Acme also mistakenly interpreted the contract between GNL and the University, thus requiring GNL to spend more money to hire an expert to interpret the contract. Ultimately, the University paid GNL the extra costs caused by the school, but it refused to pay GNL for the extra costs caused by Acme. What remedies does GNL have against Acme? Can GNL sue in contract or tort? Why does it matter?

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1. Sandarac Ass'n v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352 (Fla. Dist. Ct. App. 1992); *see also* Emily M. Usow, *Redefining the Professional Service Contract: The Evolution and Deconstruction of Florida's Economic Loss Rule*, 8 U. MIAMI BUS. L. REV. 1, 1 (1999) (noting that the economic loss doctrine "has caused a lot of confusion in courts throughout the United States").

2. Usow, *supra* note 1, at 20-21. According to Usow, "[t]he field of construction in particular presents some unique and troublesome questions in the [economic loss rule] debate." *Id.* at 21.

3. R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1795-96 (2000) (citing Redarowicz v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982)). The economic loss rule is also referred to as the "economic loss doctrine." *See* Reeder R. Fox & Patrick J. Loftus, *Riding the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later*, 64 DEF. COUNS. J. 260, 260 (1997). The terms are used interchangeably throughout this Comment.

4. The facts of this hypothetical are based on *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995).

under Acme's contract with the University by disclaiming any liability to possible third-party beneficiaries. Thus, "[g]enerally speaking, the tort remedy is likely to be more advantageous to the injured party in the greater number of cases . . . ."[6] This is true because: (1) tort law will often permit the recovery of greater damages, (2) the contract may further limit damages, (3) punitive damages are rarely allowed in contract actions, and (4) a tort action may lie where a contract action fails for want of consideration, illegality, the statute of frauds, uncertainty, the parol evidence rule, or lack of proof.[7]

This Comment specifically addresses the liability of design professionals to third parties with whom they are not in privity of contract. Design professionals normally contract with the owner and not the general contractor.[8] The general contractor will often seek to recover purely economic loss from the design professional, thus forcing the court to decide whether or not to invoke the economic loss doctrine.[9] Traditionally, nearly every state, including South Carolina, has invoked the economic loss rule to bar plaintiffs from recovering damages for purely economic loss from design professionals.[10] However, South Carolina has recently joined the growing list[11] of states refusing to apply the economic loss rule to suits against design professionals.[12]

This Comment analyzes South Carolina's decision to extend liability for economic loss to design professionals. Part II considers the traditional bars to recovery in this context[13] and also discusses the origin[14] and expansion of the economic loss doctrine.[15] This discussion is based on the often conflicting, yet

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6. *Id.*

7. *Id.* at 665-66.

8. *See infra* notes 98-106 and accompanying text.

9. *See Griffin*, 320 S.C. at 52, 463 S.E.2d at 87.

10. *Id.*

11. *Id.* at 53 n.1, 463 S.E.2d at 87 n.1 (citing an extensive list of cases); *see also* Milton F. Lunch, *"Economic Loss Rule" Dealt Another Blow*, BUILDING DESIGN & CONSTRUCTION, Aug. 1, 1992, at 23, *available at* 1992 WL 3119417 (noting that the "trend appears to be toward abandonment of the long-standing 'economic loss rule' and in favor of an approach that recognizes the realities of multiparty involvement in construction projects").

12. *Griffin*, 320 S.C. at 55, 463 S.E.2d at 89.

13. The privity requirement and an early reluctance to award purely economic loss in tort are the two traditional barriers to recovery and were major impetuses behind the development of the economic loss doctrine. *See* Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891, 897-901 (1989).

14. The economic loss doctrine originated in the field of products liability. *See* Usow, *supra* note 1, at 3 (citing Amanda K. Esquibel, *The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter Than the Morals of the Marketplace?*, 42 VILL. L. REV. 789, 791 (1997); Moransais v. Heathman, 744 So. 2d 973, 983 (Fla. 1999)).

15. One scholar, addressing the rapid expansion of the Florida courts' use of the doctrine, termed it "[t]he monster that ate commercial torts." Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J. 34, 34 (1995).

equally meritorious, policy goals advanced by contract and tort law.[16] Part III analyzes the modern application of the economic loss doctrine generally, as well as the application of the doctrine in South Carolina.

II. BACKGROUND

A. The Traditional Bars to Recovery

A plaintiff seeking to recover purely economic loss from a design professional in tort traditionally faced the following two obstacles: (1) the doctrine of privity and (2) judicial reluctance.[17] An extended discussion of privity is beyond the scope of this Comment; however, it is worth mentioning because the privity concept in tort is interwoven with the development of the economic loss doctrine.[18] The privity doctrine is linked to the economic loss doctrine in that both were applied by courts to reach the same result—insulating defendants from liability to third parties.[19] Furthermore, the contractual privity requirement traditionally forced many plaintiffs to pursue tort remedies.[20]

The traditional common-law privity requirement was recognized in South Carolina in 1909.[21] However, *MacPherson v. Buick Motor Co.*,[22] a New York case, began the abrogation of the privity requirement in products liability cases, and thus in tort, involving personal injury.[23] South Carolina eventually followed suit in *Salladin v. Tellis*.[24] Privity remains relevant to the discussion of the economic loss doctrine because some courts view recovery of economic loss as the logical

16. "The economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." Barrett, *supra* note 13, at 894-95.

17. Barrett, *supra* note 13, at 898. Barrett also notes that judicial hostility to recovery of purely economic loss in tort predates the twentieth-century products liability debate. *Id.* at 897.

18. Courts originally interpreted *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842), to mean that "a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in construction, manufacture, or sale of the articles he handles." Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 868 (8th Cir. 1903). The concept of privity thus restricted negligence actions to those that arose out of a contractual duty. *See also* Martha Crandall Coleman, *Liability of Design Professionals for Negligent Design and Project Management*, 33 TORT & INS. L.J. 923, 931 (1998) (same).

19. *See* Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74, 80, 374 S.E.2d 897, 901 (Ct. App. 1988) (noting that the "traditional common law reached the same result [as the economic loss rule] by applying the doctrine of privity of contract"), *overruled by* Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 345, 384 S.E.2d 730, 736 (1989).

20. *See* Barrett, *supra* note 13, at 898 (listing lack of privity as a reason plaintiffs sought to recover in tort instead of contract).

21. *See* Ancrum v. Camden Water, Light & Ice Co., 82 S.C. 284, 293, 64 S.E. 151, 154 (1909).

22. 111 N.E. 1050 (N.Y. 1916).

23. Coleman, *supra* note 18, at 926.

24. 247 S.C. 267, 271, 146 S.E.2d 875, 877 (1966).

extension of *MacPherson*.[25] Ultimately, foreseeability and proximate cause replaced the requirement of privity of contract.[26] In sum, the abrogation of a strict privity requirement was caused by factors similar to those responsible for the abrogation of the economic loss doctrine.[27]

Prior to judicial construction of the economic loss doctrine, plaintiffs faced opposition when attempting to recover pure economic loss.[28] *Ultramares Corp. v. Touche*[29] and *Stevenson v. East Ohio Gas Co.*[30] are the two leading cases on point. In *Ultramares*, the court refused to hold an accounting firm liable to a third party who relied on a balance sheet that was negligently certified by the defendant.[31] The plaintiff loaned money to the party for whom the erroneous balance sheet was prepared and suffered purely economic loss.[32] In an opinion authored by Judge Benjamin Cardozo, the New York Court of Appeals held that the accountants owed no duty to the plaintiff because to rule otherwise would expose accountants to liability to an indeterminate class for an indeterminate amount.[33] The accountants' liability for negligence was bounded by the contract which created their duty.[34]

In *Stevenson*, the plaintiff claimed damages in tort for purely economic loss due to a fire caused by the defendant's negligence.[35] The damages sought were the amount of wages due to the plaintiff under an employment contract he was unable to perform because of the fire.[36] The court had no trouble in denying recovery because of the potentially overwhelming mass of litigation that would ensue if it were to hold otherwise.[37]

Robins Dry Dock & Repair Co. v. Flint[38] also illustrates the early judicial reluctance to award economic loss in tort. The plaintiffs in *Robins Dry Dock*, who had time-chartered a steamship from its owners, sustained economic loss because of the defendant dock company's negligence.[39] The U.S. Supreme Court held that such loss was not recoverable because "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person

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25. Barrett, *supra* note 13, at 908 (citing Conforti & Eisele, Inc. v. John C. Morriss Assocs., 418 A.2d 1290, 1292 (N.J. Super. Ct. Law Div. 1980); State *ex rel.* Western Seed Prod. Corp. v. Campbell, 442 P.2d 215, 218-19 (Or. 1968)).

26. *See* Huber, Hunt & Nichols, Inc. v. Moore, 136 Cal. Rptr. 603, 617 (Ct. App. 1977).

27. *See* Barrett, *supra* note 13, at 908.

28. *Id.* at 898.

29. 174 N.E. 441 (N.Y. 1931).

30. 73 N.E.2d 200 (Ohio Ct. App. 1946).

31. *Ultramares*, 174 N.E. at 448.

32. *Id.* at 443.

33. *Id.* at 448. *But cf.* Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922) (holding defendant liable in negligence for purely economic loss to third party with whom he was not in privity).

34. *Ultramares*, 174 N.E. at 448.

35. *Stevenson*, 73 N.E.2d at 201.

36. *Id.*

37. *Id.* at 203-04.

38. 275 U.S. 303 (1927).

39. *Id.* at 307.

was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far."[40]

B. *The Origin of the Economic Loss Doctrine*

Judicial reluctance to award economic loss ultimately manifested itself in the economic loss rule.[41] The doctrine originated in the products liability context.[42] *Seely v. White Motor Co.*[43] contains the first articulation of the economic loss doctrine.[44] The defendant in *Seely* manufactured a truck that was used by the plaintiff in his hauling business.[45] The truck overturned, but the plaintiff was not injured in the crash.[46] The plaintiff sought recovery in tort from the defendant for lost profits and for damage to the truck.[47]

The court held that the defendant was not liable in tort for the lost profits.[48] The plaintiff's potential recovery was in warranty, not in strict liability or negligence.[49] The rule of *Seely* prevented manufacturers from being exposed to indefinite liability to unanticipated plaintiffs.[50] However, from the outset,[51] courts were split on the appropriateness of imposing liability for damage to the product and for consequential loss, and that controversy is not yet resolved.[52]

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40. *Id.* at 309 (citation omitted).

41. Judge Cardozo's concern about potentially boundless liability in tort for purely economic loss, originally expressed in *Ultramares*, continues to be "one of the most persuasive arguments in favor of the modern economic loss rule." Barrett, *supra* note 13, at 900 (citing Leadfree Enters., Inc. v. United States Steel Corp., 711 F.2d 805, 808 (7th Cir. 1983); Moorman Mfg. Co. v. Nat'l Tank Co., 435 N.E.2d 443, 447 (Ill. 1982)); Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 128 (Iowa 1984); Ore-Ida Foods, Inc. v. Indian Head Cattle Co., 627 P.2d 469, 473 (Or. 1981); Rodriquez v. Carson, 519 S.W.2d 214, 216 (Tex. App. 1975).

42. *See supra* note 14.

43. 403 P.2d 145 (Cal. 1965).

44. Barton, *supra* note 3, at 1794.

45. *Seely*, 403 P.2d at 147.

46. *Id.*

47. *Id.* at 147-48. The court termed these losses "commercial losses." *Id.* at 150. Judge Richard Posner also asserts that it would be better to call such losses commercial. *Miller v. United States Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990). Judge Posner reasons that the name "commercial loss doctrine" is a more appropriate than economic loss doctrine because: (1) injuries to person or property are economic as well, in that both destroy values capable of being monetized and (2) commercial connotes Posner's belief that the law of contract is designed to resolve such disputes. *Id.*

48. *Seely*, 403 P.2d at 151.

49. *Id.*

50. *See* W. Dudley McCarter, *The Economic Loss Doctrine in Construction Litigation*, 18 CONSTRUCTION LAW. 21, 22 (July 1998).

51. The *Seely* court recognized the contrary position taken by the New Jersey Supreme Court in *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 312 (N.J. 1965). *Seely*, 403 P.2d at 151; *see also* Barrett, *supra* note 13, at 912 (noting that *Seely* and *Santor* represent opposing views on the issue of whether damage to the product itself represents compensable physical harm).

52. Many modern courts respond to the unlimited liability concern by limiting plaintiffs to an identifiable class. *See* Mattingly v. Sheldon Jackson Coll., 743 P.2d 356, 360 (Alaska 1987).

The U.S. Supreme Court first recognized the economic loss rule in *East River Steamship Corp. v. Transamerica Delaval, Inc.*,[53] an admiralty case. The Court noted that it was "charting a course between products liability and contract law."[54] Ultimately, the Court "adopt[ed] an approach similar to *Seely* and [held] that a manufacturer in a commercial relationship ha[d] no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself."[55] The *East River Steamship* rationale basically traced that of *Seely*.[56] The Court also stressed that the tort-law concern with safety was not implicated when only the product itself was injured.[57] In sum, the Court believed that contract law was better suited to address injury to the product itself.[58]

C. *The Dividing Line Between Contract and Tort*

East River Steamship stands for the proposition that contract law and tort law are separate and that "the economic loss rule operate[s] to separate them."[59] The South Carolina Supreme Court recognized this point in the following explanation of the economic loss doctrine:

> This rule exists to assist in determining whether contract or tort theories are applicable to a given case. Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses. Conversely, where a purchaser buys a product which is defective and physically harms him, his remedy is in either tort or contract. This is so, the analysis provides, because his losses are more than merely "economic."[60]

This notion that the economic loss rule is the dividing line between the law of contract and the law of tort is important to an understanding of the arguments for and against the doctrine. The same line divides the opposing policy arguments.[61] Thus, arguments encouraging judicial application of the economic loss doctrine are framed in terms of contract law, while arguments favoring the abrogation of the doctrine in a particular context look to the goals of tort law for justification.[62]

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53. 476 U.S. 858 (1986).

54. *Id.* at 859.

55. *Id.* at 871. The Court specifically declined to reach the issue whether purely economic loss could ever be recovered in tort in an admiralty case. *Id.* at 871 n.6.

56. *Id.* at 871.

57. *Id.*

58. *Id.* at 872.

59. Barrett, *supra* note 13, at 917.

60. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 345, 384 S.E.2d 730, 736 (1989).

61. *See* Barton, *supra* note 3, at 1796 ("The distinction drawn by the economic loss rule reaches to the heart of the differences between the underlying purposes of tort and contract law.").

62. *See infra* notes 63-70 and accompanying text.

For example, proponents of the economic loss doctrine believe that it "promote[s] efficiency and predictability in commercial settings by limiting liability to that contemplated in the contract."[63] The economic loss rule "prevent[s] the law of contract and the law of tort from dissolving one into the other."[64] The merit of contract law vis-à-vis tort law is thus the foundation of the economic loss debate.[65] Tort law serves to protect the societal interest in freedom from harm.[66] Policy considerations, rather than agreements between the parties, give rise to tort duties.[67] A contractual duty, by contrast, "arises from society's interest in the performance of promises."[68] Therefore, tort law better serves unanticipated physical injury claims.[69] Contract law is more appropriate for redressing claims for damages that the parties have (or could have) dealt with in their agreement.[70]

III. ANALYSIS

A. The Modern Application of the Economic Loss Doctrine

The modern application[71] of the economic loss doctrine may be best understood in terms of its exceptions. In a number of jurisdictions, one such exception applies to design professionals.[72] The ebb and flow of the exceptions over time represents the courts' struggle with the doctrine.

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63. Usow, *supra* note 1, at 10-11 (citing Reeder R. Fox & Patrick J. Loftus, *Riding the Choppy Waters of* East River*: Economic Loss Doctrine Ten Years Later*, 64 DEF. COUNS. J. 260, 261 (1997)). *But cf.* Kelly M. Hnatt, Note, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181, 1184 (1988) (noting that most courts which hold a negligent defendant liable for economic loss do so with the perspective that a defendant should be liable for all foreseeable harm without regard to the nature of the harm).

64. Rich Prods. Corp. v. Kemutec, Inc., 66 F. Supp. 2d 937, 969 (E.D. Wis. 1999).

65. *See* N. Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 326 (Alaska 1981) (noting the split in authority from the time of *Seely* and *Santor* is "primarily a result of different attitudes as to what area of law should govern").

66. Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660, 672 (N.J. 1985).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. As one commentator explains:

> The modern economic loss doctrine developed in response to three different jurisprudential concerns: (1) the theoretical difficulties of using conduct-oriented tort standards to protect expectancy interests created by contract; (2) the practical difficulty in fashioning a rule that permits recovery for economic loss without subjecting the defendant to potentially limitless liability; and (3) conflict between an expanded duty in tort and the manufacturer's rights under the Uniform Commercial Code.

Barrett, *supra* note 13, at 897.

72. *See generally* Coleman, *supra* note 18, at 923-43 (addressing the economic loss doctrine as it applies to negligence claims against design professionals).

1. Intentional Torts

The economic loss doctrine does not apply to intentional torts.[73] "In such cases, the very object of the wrongful conduct is to harm the plaintiff's economic interests, and recovery is allowed."[74]

2. Injury to Person or Other Property

The economic loss rule traditionally did not apply in cases of injury to the person or to property other than the product itself in either the negligence or strict liability context.[75] Recovery for injury to the person or to other property is not barred by the economic loss doctrine because these interests are generally protected by tort law.[76] Essentially, when a defective product causes physical harm to an individual or damages other property, "the resultant loss is *not* considered 'economic' and recovery for the damage is permitted in tort."[77] Damage to property other than the product itself presumably invokes tort law's concern with safety.

3. The Sudden-and-Dangerous Exception

Courts have also carved out a "sudden-and-dangerous" exception to the economic loss rule in the strict liability context.[78] The sudden-and-dangerous test is an "intermediate position."[79] The test attempts to resolve the issue of whether harm to the product itself is property damage compensable in tort or whether such harm is economic loss for which tort recovery is barred by the economic loss doctrine.[80] The sudden-and-dangerous exception stands for the proposition that a tort remedy is available for damage caused by an inherently dangerous product.[81]

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73. *See* Barrett, *supra* note 13, at 892 n.2 (citing Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc., 564 F. Supp. 970, 981 (C.D. Ill. 1983), *aff'd in part sub nom.* Waldinger Corp. v. CRS Group Eng'rs, Inc., 775 F. 2d 781 (7th Cir. 1985); Santucci Constr. Co. v. Baxter & Woodman, Inc., 502 N.E.2d 1134, 1139 (Ill. 1986)); *see also* Frank D. Wagner, Annotation, *Tort Liability of Project Architect for Economic Damages Suffered by Contractor*, 65 A.L.R.3d 249, 261-65 (1975) (noting that an action would lie for purely economic damages for intentional torts).

74. Barrett, *supra* note 13, at 892 n.2.

75. *Id.* at 895.

76. *Id.* Barrett notes that the majority of courts have little difficulty distinguishing injury to property other than the product and injury to the person from so-called economic loss. *Id.* at 895-96.

77. *Id.* at 895.

78. *Id.* at 914-19. The sudden-and-dangerous test or exception may also be termed the "inherently-dangerous-product exception." *See generally* McCarter, *supra* note 50, at 24-25 (noting that a number of courts have recognized the inherently-dangerous-product exception where a toxic or hazardous product damages other property and endangers life or health).

79. Barrett, *supra* note 13, at 915.

80. *Id.* at 915-16.

81. *See* N. Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981) (holding that "when a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself") (footnote omitted).

By distinguishing between inherently dangerous products—those that can cause "sudden and calamitous" damage—and those that are not so dangerous, courts draw the line between "products which simply do not live up to their economic expectations and those which, although they did not break down in a manner which proved hazardous to persons or to other property, could foreseeably have done so."[82]

4. Professional Malpractice

Some courts have also refused to apply the economic loss doctrine to negligence claims in the context of professional malpractice.[83] Professionals excluded from using the economic loss doctrine as a defense include abstractors, engineers, appraisers, and accountants.[84] The exception also applies to attorneys[85] and is based on the attorney-client relationship and on the attorney's expertise.[86] Courts generally frame legal malpractice in terms of negligence, but a minority of courts consider legal malpractice a breach of contract and limit recovery to economic losses.[87] One commentator concludes that courts are correct in refusing to apply the economic loss doctrine to professional malpractice cases because "[t]o the extent that most professionals must comply with the standards set forth for other professionals in their community, these duties are extracontractual and therefore cannot be barred by the economic loss rule."[88] Furthermore, professional service relationships are characterized by an information disparity between the parties.[89] This disparity conflicts with the economic loss rule because the rule is "based upon the presumption that parties to a contract have pre-negotiated liability in the event of a breach."[90] Ultimately, some "[c]ourts have found it just to impose liability on defendants who, by virtue of special training or other unique preparation for their work, knew (or had reason to know) that their conduct would negligently harm plaintiffs."[91]

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82. *Id.* at 328.

83. *See, e.g.*, Moransais v. Heathman, 744 So. 2d 973, 983-84 (Fla. 1999) (holding that the economic loss rule does not bar negligence claims against professionals even though the damages are purely economic and the parties were in a contractual relationship).

84. Usow, *supra* note 1, at 14.

85. *See* Mitchell v. Holler, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993).

86. *See* Hnatt, *supra* note 63, at 1199.

87. Usow, *supra* note 1, at 15.

88. *Id.* at 27.

89. *Id.*

90. *Id.*

91. Hnatt, *supra* note 63, at 1199. The professional duty exception is closely related to the special relationship exception. *Id.* "Courts have rationalized [the special relationship] exception on the theory that a duty of care existed because the plaintiffs were foreseeable and the defendants' negligence proximately caused the injuries." *Id.* at 1196-97; *see also* Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922) (holding public weigher liable in tort to buyer of beans).

5. Construction Context

The above exceptions are relevant to the application of the economic loss doctrine in the construction context. The exception to the economic loss rule applicable to professionals has also been held to apply in construction cases.[92] One commentator, discussing the Florida Supreme Court's decision in *Moransais v. Heathman*,[93] articulates two problems with applying the exception in the construction context: (1) the distinction between a "service contract" and a "sale of goods" is blurred and (2) Florida's definition of a "profession" is too broad for application in construction cases.[94]

Additionally, the sudden-and-dangerous exception was applied in the construction context in *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*[95] The *Whiting-Turner* court considered whether an architect was liable in tort for creating a serious fire hazard.[96] The court ruled that the architect was liable, even in the absence of privity, if the "risk [was] of death or personal injury."[97]

The two leading cases in which courts refused to apply the economic loss doctrine and thus held design professionals liable for economic loss in the absence of privity are *United States v. Rogers & Rogers*[98] and *A.R. Moyer, Inc. v. Graham*.[99] The *Rogers* court held an architect liable to the general contractor and others with whom the architect was not in privity for purely economic loss.[100] The test articulated by the *Rogers* court for determining whether a defendant will be held liable for negligence to a third party with whom he is not in privity is as follows:

> [The imposition of liability is] a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[101]

92. *See* Moransais v. Heathman, 744 So. 2d 973, 979 (Fla. 1999).
93. 744 So. 2d 973 (Fla. 1999).
94. Usow, *supra* note 1, at 20-21.
95. 517 A.2d 336, 338 (Md. 1986).
96. *Id.* at 338-45.
97. *Id.* at 345.
98. 161 F. Supp. 132 (S.D. Cal. 1958).
99. 285 So. 2d 397 (Fla. 1973); *see* Coleman, *supra* note 18, at 926.
100. *Rogers*, 161 F. Supp. at 136.
101. *Id.* at 135 (quoting Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958)).

The architect's power is equivalent to a "power of economic life or death over the contractor."[102] Such control, coupled with the architect's relationship with the general contractor imposes a legal duty upon the architect.[103] Recovery for a breach of this duty is not limited by the economic loss doctrine.[104]

The *Moyer* court similarly held an architect could be liable in tort for purely economic loss to a general contractor "who may foreseeably be injured or sustain[] an economic loss proximately caused by the negligent performance of a contractual duty of an architect."[105] The progeny of *Rogers* and *Moyer* have generally justified architects' liability for purely economic loss on the basis of the professional nature of their work and on the foreseeability of harm.[106]

6. *Economic Loss in Florida*

Although the Florida Supreme Court refused to apply the economic loss doctrine to design professionals in *Moyer*, Florida's economic loss jurisprudence evolved and eventually "threatened to extinguish many commercial tort causes of action."[107] Florida's district courts increasingly began to apply the economic loss doctrine to bar tort actions.[108] The economic loss rule alarmingly spread to bar claims for conversion, civil theft, tortious interference, breach of fiduciary duty, negligence, strict liability, product liability, negligent misrepresentation, and fraud.[109] Therefore, the economic loss rule was prohibiting legitimate commercial tort claims.[110]

The Florida Supreme Court responded to this concern in *Moransais v. Heathman*.[111] The court "agree[d] with the observations of those who ha[d] noted that because actions against professionals often involve[d] purely economic loss without any accompanying personal injury or property damage, extending the economic loss rule to these cases would effectively extinguish such causes of action."[112] Thus, the court in *Moransais* held that the economic loss rule does not bar negligence actions against professionals, even if the professionals' torts result in no personal injury or property damage.[113]

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102. *Id.* at 136.
103. *Id.*
104. *Id.*
105. A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 402 (Fla. 1973).
106. *See, e.g.*, Hubert, Hunt & Nichols, Inc. v. Moore, 136 Cal. Rptr. 603, 617 (Ct. App. 1977); Nat'l Sand, Inc. v. Nagel Constr., Inc., 451 N.W.2d 618, 620 (Mich. Ct. App. 1990); *see also* Coleman, *supra* note 18, at 927. Additionally, other courts have based their decisions on negligent misrepresentation while still others have allowed recovery in tort with no theoretical basis. *See* Coleman, *supra* note 18, at 927.
107. Usow, *supra* note 1, at 1; *see supra* note 15.
108. Usow, *supra* note 1, at 6-7.
109. *Id.* All of the listed causes of action are "commercial torts designed to redress primarily economic losses." *Id.* at 7.
110. *Id.*
111. 744 So. 2d 973 (Fla. 1999).
112. *Id.* at 983.
113. *Id.* at 983-84.

Florida's struggle with the economic loss rule exhibits, among other things, the validity of retaining exceptions to the rule. The economic loss doctrine should not be construed to bar tort claims that have traditionally protected economic interests.[114] Purely economic loss has always been recoverable under a variety of tort theories.[115] However, there remains some debate over the scope of the exceptions.[116]

B. South Carolina Law

The South Carolina Court of Appeals' initial stance on the economic loss doctrine, discussed in *Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc.*,[117] leaned heavily toward the contract side of the argument. The plaintiff homeowners' association sought recovery from its general contractor for damage to the exterior brick walls.[118] The homeowners' association was not in contractual privity with the general contractor.[119] The court held that the brick damage was purely economic loss and that recovery was therefore barred by the economic loss doctrine.[120] The plaintiff's damages were described as the "benefit of [the] bargain."[121] As the court stated, "[u]nlike the law of contract, the law of negligence does not protect the expectancy interest in the performance of a promise."[122] Such loss "can be fairly allocated by agreement."[123] The court also emphasized the importance of avoiding unrestricted liability to remote parties.[124]

The South Carolina Supreme Court moved the state across the dividing line between tort and contract in *Kennedy v. Columbia Lumber & Manufacturing Co.*[125] In *Kennedy*, the court overruled *Carolina Winds* and held that a plaintiff has a cause of action in negligence, whether or not he is in privity of contract with a builder, "where a builder has violated a legal duty, no matter the type of resulting

114. *See* Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) (noting that South Carolina law "has long recognized tort actions when the damages are purely economic") (citing Mitchell v. Holler, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (legal malpractice); Beachwalk Villas Condo. Ass'n v. Martin, 305 S.C. 144, 147, 406 S.E.2d 372, 374 (1991) (architect liability)).

115. *Tommy L. Griffin Plumbing*, 320 S.C. at 54, 463 S.E.2d at 88.

116. *See* Usow, *supra* note 1, at 10-13 (delineating the arguments for and against reducing the scope of the economic loss rule).

117. 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988).

118. *Id.* at 77, 374 S.E.2d at 899.

119. *Id.* at 80, 374 S.E.2d at 901.

120. *Id.* at 89, 374 S.E.2d at 906.

121. *Id.* at 78, 374 S.E.2d at 900.

122. *Id.* at 82, 374 S.E.2d at 902.

123. *Carolina Winds*, 297 S.C. at 83, 374 S.E.2d at 902.

124. *Id.* at 83, 374 S.E.2d at 902-03.

125. 299 S.C. 335, 384 S.E.2d 730 (1989).

damage."[126] The decision was based primarily on public policy grounds.[127] Specifically, South Carolina's policy of protecting new home buyers influenced the court's analysis.[128] In the court's words, "[t]he practical difficulties facing today's new home buyer mandate that we allow a buyer to ordinarily proceed against both the builder and seller, or either of them."[129] The court also reached its decision based on its criticism of the economic loss doctrine.[130] The rule adopted by the court purported to focus on actions, not consequences.[131] Therefore, "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage."[132]

Beachwalk Villas Condominium Ass'n v. Martin[133] extended the holding of *Kennedy* to architects. In *Beachwalk Villas*, the plaintiffs sought to recover from the defendant architect in negligence for the cost of repairing structural deficiencies.[134] The court concluded that architects could be found liable to homeowners for negligence even absent contractual privity between the parties.[135] Other than stating that the decision was consistent with *Kennedy*, the court offered no explanation for its holding.[136] Thus, after *Beachwalk Villas*, it was not clear exactly why South Carolina imposed liability upon architects for purely economic loss.

The South Carolina Supreme Court resolved this ambiguity in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*[137] In *Griffin*, the plaintiff contractor sought to recover purely economic loss from the engineer of a water trunk construction project.[138] The court offered three rationales for exposing architects and design professionals to liability for economic loss. First, the reality of modern tort law is that purely economic loss may be recoverable under a variety of tort theories.[139] The dividing line between tort and contract is precisely defined by a "determination of the source of the duty [the] plaintiff claims the defendant

126. *Id.* at 347, 384 S.E.2d at 737. The court also concluded that the economic loss doctrine would still apply where duties were created solely by contract. *Id.*

127. *Id.* at 346, 384 S.E.2d at 737. The court admitted that "the Court of Appeals' reasoning in *Carolina Winds* appear[ed] to be a seamless web of proper legal analysis." *Id.* at 341, 384 S.E.2d at 734.

128. *Id.* The court also noted South Carolina's tendency to embrace the maxim *caveat venditor* (let the seller beware) and to reject *caveat emptor* (let the buyer beware). *Id.* at 343, 384 S.E.2d at 735.

129. *Id.* at 344, 384 S.E.2d at 736.

130. *Id.* at 345-46, 384 S.E.2d at 736-37. The court criticized the doctrine for focusing on consequences, not action. *Id.* at 345, 384 S.E.2d at 737. The court described the following anomaly: "Builder 'A' and Builder 'B' can be equally blameworthy, and build equally shoddy housing, but because Builder 'A's' negligence happened to be discovered early enough, no one was harmed. It hardly seems fair that Builder 'A' should profit from a diligent buyer's discovery, or because he was fortunate." *Id.*

131. *Kennedy*, 299 S.C. at 345, 384 S.E.2d at 737.

132. *Id.* at 347, 384 S.E.2d at 737.

133. 305 S.C. 144, 406 S.E.2d 372 (1991).

134. *Id.* at 145, 406 S.E.2d at 373.

135. *Id.* at 147, 406 S.E.2d at 374.

136. *Id.*

137. 320 S.C. 49, 463 S.E.2d 85 (1995).

138. *Id.* at 51-52, 463 S.E.2d at 86-87.

139. *Id.* at 54, 463 S.E.2d at 88.

owed."[140] The court described this determination as follows: "A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action."[141]

Second, the court noted that a "special relationship" between the parties will support a tort action even though the parties are in privity of contract.[142] The special relationship creates a duty of care outside the terms of the contract.[143]

Third, the court emphasized the professional nature of architectural work.[144] The court stated that it saw "no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff [was] such that the design professional owe[d] a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties."[145] Liability ultimately depends on the facts and circumstances of each case.[146]

IV. CONCLUSION

The proponents of a bright-line application of the economic loss rule would say that *Griffin* blurs the line between tort and contract. However, in reality, the line between tort law and contract law has always been blurred.[147] The dividing line will continue to be unclear so long as (1) a number of tort claims protect commercial or economic interests[148] and (2) the relationships are such that one party can potentially harm another economically, thus forcing the judiciary to protect that party in tort as a matter of public policy.[149] Characterizing the damages as the "benefit of the bargain" is not dispositive because defendants may tortiously interfere with the benefit of the bargain.[150] The *Griffin* rationale adequately maintains the distinction between tort and contract by focusing on the source of the duty.[151] This distinction should continue to be observed so that the economic loss "monster" does not consume commercial torts in South Carolina.[152] However, it is simplistic to think that the economic loss doctrine is a talismanic device, capable of always correctly categorizing claims as tort or contract. The doctrine is merely relevant as a guidepost, particularly in the strict liability context.

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140. *Id.*
141. *Id.* at 54-55, 463 S.E.2d at 88.
142. *Id.* at 55, 463 S.E.2d at 88.
143. *Griffin*, 320 S.C. at 55, 463 S.E.2d at 88.
144. *Id.* at 55, 463 S.E.2d at 89.
145. *Id.*
146. *Id.* at 55-56, 463 S.E.2d at 89.
147. *See supra* Part II.C.
148. *See supra* note 139 and accompanying text.
149. *See supra* notes 127-29 and accompanying text.
150. *See supra* notes 121-23 and accompanying text.
151. *See supra* notes 140-41 and accompanying text.
152. *See supra* notes 15, 107-16 and accompanying text.

Proponents of a bright-line application of the economic loss doctrine would further argue that the *Griffin* holding ignores the parties' sophistication and their ability to intelligently allocate risk.[153] However, this view ignores the practice of using standard-form contracts and the realities of the construction field where "contracts do exist, but often get lost in the hierarchy of contractors, subcontractors, suppliers, architects and engineers."[154]

The concerns of *Ultramares*[155] and *Seely*[156] with regard to potentially limitless liability are legitimate. However, *Griffin's* focus on foreseeability and special relationships adequately addresses this issue to the extent that potential plaintiffs are an identifiable class.[157]

In sum, a bright-line economic loss defense is not available to architects in South Carolina because the courts have made a conscientious policy decision to protect home buyers and third parties who are at the economic mercy of the architect.[158] In so doing, South Carolina may have better preserved the distinction between contract and tort than would a bright-line rule by focusing on the source of duty rather than on an antiquated characterization of damages. The source-of-duty test may seem circular in that the contract is, in a sense, the source of the duty because it creates the relationships which give rise to a duty in tort. However, it should be recognized that the true sources of the duty are the inherent authority given to the design professional and South Carolina's public policy concern with adequate protection from abuses of such authority.

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153. *See, e.g.*, Barrett, *supra* note 13, at 932-33 (arguing that the economic loss doctrine is a barrier to recovery for only two classes of owners: (1) those who fail to contract effectively and (2) those who contract with an insolvent seller).

154. Usow, *supra* note 1, at 21.

155. *See supra* notes 31-34 and accompanying text.

156. *See supra* notes 43-52 and accompanying text.

157. *See supra* notes 142-46 and accompanying text.

158. *See supra* notes 127-29 and accompanying text.

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