

NO. 09-0223

IN THE SUPREME COURT OF TEXAS

SHARYLAND WATER SUPPLY CORPORATION

Petitioner

vs.

**CITY OF ALTON, CARTER & BURGESS, INC., CRIS EQUIPMENT
COMPANY AND TURNER, COLLIE & BRADEN, INC.**

Respondents

**CARTER & BURGESS, INC.'S RESPONSE TO BRIEF OF AMICUS CURIAE
R. CARSON FISK**

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Record References

For clarity, references to the Clerk's Record and Reporter's Record will appear as follows:

1. Clerk's Record – CR [Vol. #] [page #]
2. Reporter's Record – RR [Vol. #] [page #]
3. Reference to the Amicus Curiae brief will appear as: Fisk Brief p.____

**RESPONSE TO BRIEF OF AMICUS CURIAE
R. CARSON FISK**

INTRODUCTION

Respondent Carter & Burgess (“C&B”) hereby responds to the Amicus Curiae brief filed by R. Carson Fisk in this case. In his brief, Mr. Fisk inaccurately describes the developing jurisprudence of this state relating to the economic loss rule as being the result of the leadership of one or two of Texas’ Courts of Appeal (Fisk Brief p. 4). He also incorrectly contends that the United States Court of Appeals for the Fifth Circuit has disapproved of the application of the economic loss rule by those “outlier” courts (*Id.* pp. 5-7) and that it and numerous Federal District Courts have refused to apply the rule as the Court below and as several other Courts of Appeal have done to properly identify the presence or absence of a duty upon which liability can and should be based. In fact, as will be shown below, Federal courts have frequently applied the economic loss rule consistently with the Court below and other Courts of Appeal in this state. Far from being an aberrance lead by one or more Texas courts, the application of the economic loss rule by the Court below reflects a developing jurisprudence that attempts to achieve a balance that prevents the duty of a party to a design/construction/engineering contract from extending beyond any reasonable scope or limit.

The limitation of the economic loss rule to parties in privity of contract, as the Amicus advocates, would eliminate or jeopardize what has been generally regarded as one of the most important reasons for the doctrine, to extend the duty that persons owe others only to certain known limits and no further.

Even if this Court is inclined to consider a modification of the economic loss rule, this is not the case to do so. The Court below did not reach the evidentiary problems underlying the trial court's judgment, but they are significant. There is no evidence of any property damage to Sharyland's system other than what Sharyland did itself when it dug up several locations in an unsuccessful search for leaks, and there is no evidence of any contamination or illness suffered by any Sharyland customer.

Finally, if this Court chooses to modify the economic loss rule and eliminate its application to parties not in privity, as the amicus suggests, it will create the potential for massive, multi-party litigation in every construction dispute.

The present jurisprudence, as correctly applied by the Court below and by a majority of the Courts of Appeals in Texas, properly allows contracting parties to allocate risk, and it preserves and restricts tort claims to cases where actual injury is suffered and actual duty exists.

I. Background

As described in Powers & Niver "Negligence, Breach of Contract And The Economic Loss Rule" 23 Texas Tech L. Rev. 477 (1992) ("Powers"), this Court's development of a distinction between losses recoverable in tort and losses recoverable under a breach of contract theory is of three types. The first involves situations in which the plaintiff and defendants have no contractual relationship. *Powers* at p. 481. At the time the article was written the authors pointed out that there was no Texas case expressly addressing the economic loss rule involving actual strangers. *Id.*

The second type of case the authors identified involved situations in which the parties were not strangers, i.e., they either were in privity or they were “at least indirect parties to a market transaction.” *Id.* at p. 482. The third type is products liability cases.

The situation in this case between C&B and Sharyland is a case of the first type. Sharyland and C&B are strangers. There is no evidence of any contractual relationship between them, and the Court of Appeals correctly found that Sharyland was not a third party beneficiary of, and therefore had no indirect relationship arising out of C&B’s contract with the City of Alton. Since the date of the Powers article, a consistent jurisprudence has developed in Texas regarding the operation of the economic loss rule in this situation that belies the amicus’ comment that two or three “outlier” courts are inappropriately applying the doctrine. (Fisk Brief p. 4). The result of this orderly development of the doctrine since this Court’s opinions in *Mid-Continent Aircraft Co. v. Curry County Spraying Service*, 572 S.W.2d 308 (Tex. 1978), *Jim Walter Homes v. Reed*, 711 S.W.2d 617 (Tex. 1986) and *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977) has clearly indicated that the Court of Appeals in this case correctly analyzed and applied the economic loss rule in a manner consistent with other Texas Courts.

However, if this Court is inclined to modify the rule to change its application when parties are not in privity, as the Amicus suggests, which it should not, this is not the case to do it. As presented to, but not reached by the Court of Appeals, there is no evidence of any damage that Sharyland could recover from C&B. Thus, Amicus’

complaint that the application of the economic loss rule precludes any recovery by Sharyland is moot. There is no damage for which recovery would be appropriate.

II. The Economic Loss Rule Has Been Widely Applied By Texas Courts

Contrary to the Amicus' claim that the economic loss rule is developing in secret in several appellate courts, the rule has been given widespread attention by many Texas Courts and the development has been largely consistent. An arbitrary beginning point illustrates the inaccuracy of the Amicus' concern and highlights the orderly development of economic loss rule jurisprudence.

In *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282 (Tex. App. – Houston [14th Dist.] 2000 no pet.) the Court addressed a fact situation similar to the one this case presents. Coastal Conduit provides trenching used to install electrical connections to individual houses. Forty eight hours before such a trench is dug, Coastal notifies a telephone service center of its intent to dig, so that local utility companies, in this case Noram (d/b/a Entex) can mark the location of any natural gas lines in the vicinity of the proposed trench.

Coastal Conduit brought suit alleging that about 25% of the time Entex failed to mark or mismark its line and that in many cases the gas lines are not buried at the proper depth. *Id.* Coastal sued Entex to recover the additional expense it incurred when Entex failed to mark or incorrectly marked the gas lines. *Id.* The expense involved the added time required for Coastal crews to use hand tools to find the correct location of the gas lines. *Id.*

Coastal sued Entex for negligence, negligence per se and gross negligence. Entex moved for summary judgment on the ground that the economic losses forming the basis of Entex' claims were "precluded in the absence of any accompanying claim for personal injury or property damage." (*Id.*) In other words, Entex' damages were precluded by the economic loss rule. Entex argued that there was no contract between Coastal and Entex, (and thus no duty arising from any such contract). *Id.* at 285. Because the economic loss rule precludes any duty by, in this case Entex, not to make Coastal's performance of its work more costly, there was no duty upon the breach of which a negligence claim could be brought.

The Court in *Coastal Conduit* noted that while there was little Texas precedent on the question of whether economic losses were recoverable in "a negligence action when the parties are contractual strangers and when there is no claim for an accompanying injury to property or person," the question had been addressed. *Id.* at p. 287. The Amarillo Court of Appeals had so held in *Rodriquez v. Carson*, 519 S.W.2d 214, 216 (Tex. App. – Amarillo 1975 writ ref'd. n.r.e.), and the United States Supreme Court had so held in an admiralty case in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-309, 48 S. Ct. 134, 72 L. Ed. 290 (1927). Finally, the Court in *Coastal Conduit* listed a number of other jurisdictions that had reached the conclusion that absent privity of contract, a party cannot recover for economic losses in a negligence case. *Id.* at pp.

287-288.¹ Summarizing the economic loss rule and its applicability arising from a determination turning on the existence or lack of a duty, the Court held:

Because Entex did not owe a duty of care to Coastal Conduit in the marking of its lines, in the absence of personal injury and property damage, we find that the trial court did not err in granting summary judgment on Coastal Conduit's negligence, negligence per se, and gross negligence claims.

Id. at p. 290.

The analysis in *Coastal Conduit* was next adopted in *Express One International, Inc. v. Steinbeck*, 53 S.W.3d 895 (Tex. App. – Dallas 2001, no pet.) (not one of the Courts of Appeal that the Amicus accuses of the rogue development of this jurisprudence. Fisk Brief p. 4). In that case, Steinbeck, a former employee of Express One, utilized Express One's name in e-mails sent in opposition to an election in which some Express One employees were voting whether to join a union. *Id.* at 897.

After Express One discovered that Steinbeck had authored the message, it sued Steinbeck for trade name dilution, invasion of privacy, defamation and negligence. All of the damages sought involved the cost of identifying Steinbeck, dealing with the National Mediation Board (which oversaw the election and certified its results), costs of suit and

¹ See e.g. *Canal Electric Co. v. Westinghouse Electric Co.*, 973 F.2d 988 (1st Cir. 1992); *Leadfree Enterprises Inc. v. U.S. Steel Corp.*, 711 F.2d 805 (7th Cir. 1983); *Willis v. George N. Ry. Co.*, 169 Ga. App. 743, 314 S.R. 2d 919 (1984); *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978); *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984); *FMR Corp. v. Boston Edison Co.*, 415 Mass. 393, 613 N.E.2d 902 (1993); *D&A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. Ct. App. 1984); *Local Joint Executive Bd v. Stern*, 98 Nev. 409, 651 P.2d 637 (1982); *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Ohio App. 1946); *Mandal v. Hoffman Constr. Co.*, 270 Or. 248, 527 P.2d 387 (1974); *Aikens v. Baltimore & Ohio R.R. Co.*, 348 Pa. Super. 17, 501 A.2d 277 (1985); *United Textile Workers of Am. v. Lear Siegler Seating Corp.*, 825 S.W.2d 83 (Tenn. App. 1990).

administrative costs incurred by Express One in dealing with the effects of Steinbeck's postings. *Id.* at 898.

The trial court granted Steinbeck's Motion for Summary Judgment and Express One appealed. The Court of Appeals affirmed the dismissal of the negligence claims by noting that "[d]amages resulting solely from economic harm generally are not recoverable in simple negligence actions." *Id.*, citing *Coastal Conduit* and several other cases from other jurisdictions. The court echoed the policy reasons behind the economic loss rule discussed in *Coastal Conduit*:

Among the policy reasons supporting [the economic loss] rule is the difficulty, if not impossibility, of placing a reasonable limit on a defendant's liability to those who suffer solely economic damages caused by a negligent action.

Id. at p. 899. Finding all of Express One's damages to be economic loss with no accompanying injury to person or property, the court affirmed the summary judgment on Express One's negligence claims. *Id.*

The Court in *Goose Creek Cons. Ind. School District of Chambers and Harris Counties, Tex. v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486 (Tex. App. – Texarkana 2002 pet. denied),² dealt with a situation illustrating when the economic loss rule does not apply. In *Goose Creek*, three new elementary schools were built, and defects in the plumbing and sewer systems were discovered shortly after the schools were occupied.

² The Texarkana Court of Appeals is also not included in the Courts the Amicus accuses of being engaged in developing this doctrine. See Fisk Brief p. 4.

Id. at 491. The School Districts sued the plumbing contractor, Jarrar, for negligence and breach of warranty. *Id.* A jury awarded damages to the districts based on Jarrar's negligence. On appeal, Jarrar complained of the trial court's failure to grant judgment notwithstanding the verdict on the school districts' direct negligence action. *Id.* at 493. The Court of Appeals affirmed the judgment. *Id.* at 494.

The Court engaged in a detailed discussion of the interplay between contract and tort liability. It noted that a party's actions can, at the same time, breach duties in contract and tort, and that examining the nature of the resulting damage is useful and has been deemed determinative of the question of whether the action causing the damage was in breach of a tort or contract duty, thus describing and recognizing the economic loss rule. *Id.* The Court then noted that there was actual damage to property in question, consisting of the loss of use of the school buildings due to the venting of sewer gas and the leaking of raw sewage into the structures, that was not the subject of Jarrar's contract with the general contractor. On that basis, the *Goose Creek* court found that the damages from the loss of use of the property "did not constitute pure economic loss for which *Goose Creek* could only recover in contract." *Id.* at p. 495.³

In *Trans-Gulf Corporation v. Performance Aircraft Services Inc.*, 82 S.W.3d 691 (Tex. App. – Eastland 2002, no pet.), *Trans-Gulf* sued *Performance* for defective repair work on the fuel tanks of a Boeing 727 airplane. It asserted claims of negligence, negligence per se, negligent misrepresentation and breach of warranty, and the trial court

³ Significantly, there is no evidence of any such contamination resulting from the construction of the sewer system in this case that was not caused by the act of digging up the lines to determine how they had been laid. (*See e.g.*, *Turner Collie & Braden Brief on the Merits* pp. 14-15).

granted summary judgment on all of the claims. *Id.* The motion was granted on the negligence and negligence per se claim based on the economic loss rule.

Affirming the summary judgment, the Court began by noting and adopting the observation in *Powers* that “[t]he economic loss rule is a rule of ‘duty’ which focuses on the nature of the loss claimed in order to determine the duty in tort owed by the alleged tortfeasor.” Finding that Performance was a contractual stranger to Trans-Gulf and that Trans-Gulf only sought economic damages, the Court affirmed the dismissal of Trans-Gulf’s negligence claim, adopting and agreeing with the analysis of this issue in *Coastal Conduit, supra* and *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103 (Tex. App. – Houston [14th Dist.] 2000 no pet.) *Id.* at p. 695.

The Court in *Sterling Chemicals, Inc. v. Texaco Inc.*, 259 S.W.3d 793 (Tex. App. – Houston [1st Dist.] 2007, pet. denied) engaged in a thorough analysis of the economic loss rule and the reasons for its application in holding that business interruption damages resulting from the failure of a part of a synthesis gas production facility were barred by the economic loss rule. In so doing, and based on the great weight of Texas case law, the Court specifically rejected the Amicus’ position (supported by the same cases the Amicus offers in his analysis) that the economic loss rule should not apply when there is no privity of contract between the parties. *Id.* at p. 799.

Similar holdings are found in *Pugh v. General Terrazzo Supplies, Inc.*, 243 S.W.3d 84 (Tex. App. – Houston [1st Dist.] 2007, pet. denied); *DeWayne Rogers Logging, Inc. v. Propac Industries, Ltd.*, 299 S.W.3d 374, 2009 WL 2712324 (Tex. App.

– Tyler 2009 pet. filed); and *Clems Ye Olde Homestead Farms Ltd. v. Briscoe*, 2008 WL 5146964 (E.D. Tex. Dec. 8, 2008). Contrary to the Amicus’ representation regarding Federal authority⁴ for the proposition that it is unclear whether Texas Courts would apply the economic loss rule in the absence of privity between the parties, the Fifth Circuit found that this Court would so hold in *Hininger v. Case Corp.*, 23 F.3d 124, 127 (5th Cir. 1994), (economic loss rule applies to a supplier of a component part of a product with whom the plaintiff did not have privity).

III. Policy Considerations

The importance of the economic loss rule to design professionals such as C&B has been noted by Texas courts and courts from many other jurisdictions. Those courts have recognized that the doctrine’s purpose “to shield [defendants] from unlimited liability for all of the economic consequences of a negligent act,⁵ particularly in a commercial or professional setting, and thus keep the risk of liability reasonably calculable.” *Local Joint. Exec. Board v. Stern, supra fn. 1, p. 6*. The application of the economic loss rule in construction and design contexts has been widely accepted for this reason. *See e.g., Goose Creek Sch. Dist. v. Jarrar’s Plumbing, supra p. 7; Holden Farms, Inc. v. Hog Slat Inc.*, 347 F.3d 1055 (8th Cir. 2003); *Maine Rubber International v. Environmental Management Group*, 298 F. Supp. 2d 133 (D. Me. 2004); *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004); *City Exp. Inc. v. Express Partners*, 87 Haw. 466, 959 P.2d

⁴ *Juarez v. Chevron USA*, 911 F. Supp. 257 (S.D. Tex. 1995); *Elk Corp. v. Valmet Sandy-Hill Inc.*, 2000 WL 303637, 2000 U.S. Dist. LEXIS 3586 (N.D. Tex. 2000); *Crawford Pharms. v. Amerisource Bergen Drug Corp.*, 2008 U.S. Dist. LEXIS 18666 (S.D. Tex. Mar. 11, 2008).

⁵ C&B is by no means conceding that it, or any other Respondent, was negligent in this case.

836 (Haw. 1998); *Fireman's Fund Ins. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 679 N.E.2d 1197, 223 Ill. Dec. 424 (Ill. 1997); *Prendiville v. Contemporary Homes, Inc.*, 32 Kan. App. 2d 435, 83 P.3d 1257 (Kan. Ct. App. 2004); *Lempke v. Dagenais*, 130 N.H. 782, 547 A.2d 290 (N.H. 1988); *Floor Craft v. Parma Com. Gen. Hosp.*, 54 Ohio St. 3d 1, 560 N.E.2d 206 (Ohio 1990); *American Towers Owners v. CCI Mechanical*, 930 P.2d 1182 (Utah 1996); *Carlson v. Sharp*, 99 Wn. App. 324, 994 P.2d 851 (Wash. Ct. App. 1999); *1325 North Van Buren v. T-3 Group*, 2006 WI 94, 293 Wis. 2d 410, 716 N.W.2d 822 (Wis. 2006).

The application of the economic loss rule beyond parties in privity in the construction/design context is justified for another reason. The contracts existing between various components in any construction context achieved a level of sophistication so that risks could be properly and foreseeably allocated among the usually numerous participants in a typical project. The allocation process must and does recognize and deal with the various contractual relationships that exist between the various components of a project, any one of which could potentially justify a damage claim against a negligent contractor or subcontractor if some act causes a delay in the project or the necessity for remedial work. And that potential is not limited to the actual design and construction companies. Suppose, in a high rise apartment construction project, a future tenant had made commitments assuming occupancy by a certain date. Any delay in occupancy could cost the tenant penalties. Absent the shield of the economic loss rule regardless of the existence of privity, a careless subcontractor that

causes the delay would be exposed to claims from the project's tenant, the prospective tenant who planned to move into the space vacated by the tenant of the high rise, and so on.

That potential for unlimited and unforeseeable liability similarly exists within the large community of owners, design professionals, contractors, subcontractors and suppliers that comprise any construction project. Courts have seen fit to apply the economic loss rule in the design and construction context to eliminate the potential for limitless and unforeseeable liability based on the policy "that the need for useful commercial activity and the desire to make injured plaintiffs whole is best balanced by allowing tort recovery only to those plaintiffs who have suffered personal injury or property damage." *Terracon Consultants Western, Inc. v. Mandalay Resort Group et al*, 125 Nev. Adv. Rep. 8, 206 P.3d 81, 87 (Nev. 2009). That purpose would be limited or prevented, if the economic loss rule is applied only to parties in privity.

CONCLUSION

The argument that the application of the economic loss rule to parties not in privity of contract can preclude deserving parties from compensation is a straw man. If there are property or personal injuries suffered, the aggrieved party can recover in tort. If the damages are economic, this Court has held that a manufacturer can be held responsible regardless of privity for economic losses resulting from a breach of the implied warranty of merchantability. *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977).

Further, this case does not present a situation in which this Court should completely overturn the availability of a doctrine the Courts of Appeal have been developing in one direction for 19 years. As fully discussed in C&B's brief before the Court of Appeals, there is no evidence of any damage to anything resulting from the construction of the sewer system. There has been no contamination of Sharyland's fresh water system, there have been no reports of leaks and no reports of illness. Further, there are several other legal and factual bases for the reversal of the trial court's judgment. If this Court is inclined to significantly modify a legal doctrine of long-standing like the economic loss rule, it should wait for a situation that more completely highlights the basis of this Court's ruling.

Where as here, a company chooses to spend money in a vain attempt to detect potential damage, (causing more potential harm to the sewer system than had resulted from the construction) that decision should properly be at its cost. When that process uncovers no damage or leaks of any kind (See e.g. Turner Collie & Braden Brief on the Merits pp. 14-15), and where the construction sites have been inspected by representatives of the Texas Commission on Environmental Quality and have been determined by that agency to be acceptable and compliant with agency regulations, two things are true and support the jurisprudential underpinning of the economic loss rule as applied by the Court below and numerous Courts of Appeal in Texas. First, there is no compensable expense incurred by Sharyland that it did not itself choose to incur with no real reason to do so. Second, there is no physical damage present that would represent a

breach of any duty that C&B or TCB or any respondent should have to compensate Sharyland for.

In potential multiple party litigation (which is true of most construction disputes), application of the economic loss rule only to parties in privity to one another permits the kind of unlimited potential liability that this Court sought to avoid when it held that Texas did not recognize a cause of action for negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993). The economic loss rule, as applied by the Court below, strikes an appropriate balance between the right of persons harmed by something other than their own decisions to recover from those who have violated a duty owed to them specifically, and unlimited potential liability. Texas legal system does not need to be burdened by the uncertain limits of a duty that the Amicus' position invites. The opinion of the Corpus Christi Court of Appeals should be affirmed as it applies to Carter & Burgess.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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