

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

BRIEF OF AMICUS CURIAE
TEXAS COUNCIL OF ENGINEERING COMPANIES, INC.

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Interest of Amicus Texas Council of Engineering Companies, Inc.

The Texas Council of Engineering Companies is a statewide organization committed to the business of consulting engineering and is comprised of 325 member firms. The Council is devoted to the advancement of the practice of consulting engineering, to the promotion of private enterprise, protection of public welfare, and to the improvement of the economic status of professional engineers engaged in the practice of consulting engineering. The Texas Council of Engineering Companies has paid a fee to Allensworth and Porter, L.L.P. for preparing this brief.

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Statement of the Case

Nature of the Case

The City of Alton contracted with Sharyland Water Supply Corporation, which installed and maintains potable water pipes to provide water to the City. The City later contracted with Carter & Burgess, Inc., Cris Equipment Co., and Turner, Collie & Braden Inc. (“the sewer engineers”), which constructed sewer lines for the City. The sewer lines were constructed with connections allegedly too close to the potable water line connections, in contravention of state law, and in violation of Alton’s contract with Sharyland. Sharyland therefore sued the City for a breach of contract and sued the sewer engineers for breach of contract and negligence.

Trial Court Proceedings and Disposition

The jury found that the City breached its contract with Sharyland, that the sewer engineers breached their contracts with the City and Sharyland was a third-party beneficiary of the contracts, and that the sewer engineers had been negligent and had proximately caused damages to Sharyland.

The trial court entered judgment on the verdict against Sharyland and the sewer engineers.

Requested Disposition from this Court

This court should affirm the Court of Appeals’ reversal of the trial court’s judgment against the sewer engineers.

Issue Presented

1. Does the economic loss rule bar Sharyland's negligence claims against Carter & Burgess, Inc., Cris Equipment Co., and Turner, Collie & Braden, Inc.?

Statement of Facts

The City of Alton entered into a contract with Sharyland Water Supply Corporation under which Sharyland installed and maintained potable water lines to supply the City's residents with potable water. Later, the City contracted with several entities, including engineers Carter & Burgess, Inc., Cris Equipment Co., and Turner, Collie & Braden Inc., ("the sewer engineers") to construct sewer lines. The sewer lines were allegedly constructed too close to the potable water lines. *See* Tex. Admin. Code § 317.13(1)(B); Tex. Admin. Code §§ 217.1–217.33. A jury found that installation of the lines within close proximity of the potable water lines violated the City's contract with Sharyland, which required the lines to remain "a required distance" apart. 277 S.W.3d at 142 .

Regarding Sharyland's claims against the sewer engineers, the jury found that the engineers breached their contracts with Alton, and that Sharyland was a third-party beneficiary of those contracts. The Court of Appeals held that Sharyland was not a third-party beneficiary of the sewer contracts, and therefore Sharyland could not recover in contract from the sewer engineers.

The jury also found that the sewer engineers were guilty of negligence, proximately causing damages to Sharyland. The Court of Appeals reversed, holding that Sharyland's damages were purely economic losses, which were barred by the economic loss rule.

Summary of Argument

The Court of Appeals correctly applied the economic loss rule to bar Sharyland's negligence claims against the sewer engineers.

Argument

I. The economic loss rule bars recovery of economic losses in negligence when plaintiff has sustained no bodily injury or physical damage.

The economic loss rule applies in three circumstances. First, the rule bars products liability claims where a product injures only itself.¹ Second, the rule bars recovery of economic losses where the sole injury is damage to the subject matter of a contract.² Third, the rule bars recovery of economic losses in negligence when the plaintiff has sustained no bodily injury or physical property damage.³ “Economic loss

¹ The seminal case on this application is *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), which has been followed in Texas by *Mid-Continent Aircraft Co. v. Curry County Spraying Service*, 572 S.W.2d 308, 314 (Tex.1978). No one argues that this version of the rule applies to this case.

² *S.W. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991), *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex.1986); *Sunridge Dev. Corp. v. RB & G Eng’g, Inc.*, 649 UT Adv. Rpt. 28, 2010 WL 391858 at *6 (Utah 2010).

³ *Rodriguez v. Carson*, 519 S.W.2d 214, 217 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.); *Express One Int’l, Inc. v. Steinbeck*, 53 S.W.3d 895, 898–99 (Tex. App.—Dallas 2001, no pet.) (“Damages resulting solely from economic harm generally are not recoverable in simple negligence actions To be entitled to damages for negligence, a party must plead and prove either a personal injury or property damage as contrasted to mere economic harm.”); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 287–89 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“[I]n the absence of privity of contract and accompanying personal injury or property damage, a plaintiff cannot recover for purely economic losses resulting from another’s negligence.”); *Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 453 (Tex. App.—Dallas 2002, no pet.) (“To be entitled to damages for negligence, a party must plead and prove something more than mere economic harm.”); *Zurich Am. Ins. Co. v. Hughes*, No. 11-05-00044-CV, 2006 WL 1914689 at *2 (Tex. App.—Eastland July 13, 2006, pet. denied) (“The economic loss rule provides that, in tort cases, economic damages are not recoverable unless they are accompanied by actual physical injury or property damage.”); *Dana Corp. v. Microtherm, Inc.*, No. 13-05-00281-CV, 2010 WL 196939 at *27–28 (Tex. App.—Corpus Christi Jan. 21, 2010 pet. filed) (“In tort cases where there is an absence of privity of contract, economic damages are not recoverable unless they are accompanied by actual physical injury or property damages.”); *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc) (declining to overturn “the prevailing rule [that] denied a plaintiff recovery for economic loss if that loss resulted from physical damage to property in which [plaintiff] had no proprietary interest.”) (citing *Byrd v. English*, 117 Ga. 191 (1903); *Robins Dry Dock v. Flint*, 275 U.S. 303, 307–8 (1927) (Holmes, J.)); *Sunridge Dev. Corp. v. RB & G Eng’g, Inc.*, 649 UT Adv. Rpt. 28, 2010 WL 391858 at *6 (Utah 2010).

has been defined as ‘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.’”⁴

The economic loss rule bars Sharyland’s negligence claims regardless of whether it is in privity with the defendants unless Sharyland suffered physical injury or damage to its property.⁵ Even if Sharyland were in privity with any of the defendants, the economic loss rule would bar recovery under a negligence theory if the only damaged property was the subject of a contract.⁶

⁴ *Goose Creek Consol. Indep. Sch. Dist. v. Jarrar’s Plumbing, Inc.*, 74 S.W.3d 486, 494 (Tex. App.—Texarkana 2002, pet. denied) (quoting *Bass v. City of Dallas*, 34 S.W.3d 1, 9 (Tex. App.—Dallas 2000, no pet.), which quotes *Thomson v. Espey Huston & Assocs., Inc.*, 899 S.W.2d 415, 422 (Tex. App.—Austin 1995, no writ)).

⁵ See *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 287–89 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“[I]n the absence of privity of contract and accompanying personal injury or property damage, a plaintiff cannot recover for purely economic losses resulting from another’s negligence.”); *Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 453 (Tex. App.—Dallas 2002, no pet.) (“To be entitled to damages for negligence, a party must plead and prove something more than mere economic harm.”); *Zurich Am. Ins. Co. v. Hughes*, No. 11-05-00044-CV, 2006 WL 1914689 at *2 (Tex. App.—Eastland July 13, 2006, pet. denied) (“The economic loss rule provides that, in tort cases, economic damages are not recoverable unless they are accompanied by actual physical injury or property damage.”).

⁶ The property that is the subject of a contract does not necessarily have to be the subject of a contract **between the parties**, particularly if the property is the subject of a contract between closely related entities. *Sterling Chems., Inc. v. Texaco, Inc.*, 259 S.W.3d 793, 797 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (“Texas courts have applied the economic loss rule to preclude tort claims between parties who are not in contractual privity.”); *CBI NA-CON, Inc. v. UOP Inc.*, 961 S.W.2d 336, 339–341 (Tex. App.—Houston [1st Dist.] 1997, writ denied) (economic loss rule barred negligence claim where parties were not in privity because the damage consisted of economic loss to the subject matter of a contract between defendant and another party).

Contrary to the argument presented by Amicus Carson Fisk,⁷ application of the economic loss rule to bar negligence claims between contractual strangers is not a “trend,” but at least a 135-year-old doctrine⁸ that has been ratified by the Supreme Court of the United States⁹ and the Fifth Circuit,¹⁰ among others. Mr. Fisk notes that, in Texas, the Houston and Corpus Christi courts of appeals have applied the economic loss rule to bar negligence claims between parties who are not in privity of contract. Houston and Corpus Christi are by no means outliers; this application of the rule has also been adopted in one fashion or another by the Amarillo,¹¹ Dallas,¹² and Eastland¹³ Courts of Appeals

⁷Br. of Amicus Carson Fisk at 4.

⁸ *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (C.A. 1875). The case is similar to the apparently unjust hypothetical described in pages 8 and 9 of Mr. Fisk’s Amicus Brief. Defendants owned and maintained a pipe along a road. One Mr. Knight owned the land on either side of the road, and hired the plaintiff, Cattle, on a lump-sum contract to dig a tunnel underneath the road. During the course of the contract Cattle encountered substantial difficulty due to a leak in defendants’ pipes, and defendants neglected to fix it for some time; as a result, though Cattle finished the contract, the delay cost him (an early example of office overhead expenses?) 26l. Justice Blackburn denied that Cattle, who was not in privity of contract with the defendants, could “sue in his own name for the loss which he has in fact sustained, in consequence of the damage, which the defendants have done to the property of Knight, causing him, Cattle, to lose money under his contract[.]”

⁹ *Robins Dry Dock v. Flint*, 275 U.S. 303, 307–8 (1927) (Holmes, J.).

¹⁰ *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc); see also *Hininger v. Case Corp.*, 23 F.3d 124, 127 (5th Cir. 1994).

¹¹ *Rodriguez v. Carson*, 519 S.W.2d 214, 217 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.). Texas courts, recognizing the need to limit liability even, perhaps especially, between parties who are not in privity of contract, refuse to recognize any duty owed to a plaintiff absent some property damage or physical injury to the plaintiff. In *Rodriguez v. Carson*, the Amarillo Court of Appeals denied the plaintiff recovery for lost wages suffered because a truck that plaintiff drove for plaintiff’s employer was damaged by an employee of the defendant. The Court, assuming that the defendant’s employee negligently destroyed the truck, refused recovery because the plaintiff, who was not party to the accident, “did not suffer any bodily injuries, and in the absence of any showing that he had any vested interest in the truck he did not suffer any injury to personal property.”

as well.¹⁴ Mr. Fisk cites no Texas authority that ever rebuked this application of the economic loss rule, nor has counsel for Texas Council of Engineering Companies found any such authority.¹⁵ Indeed, at least one Texas court recognized that “a majority of [other jurisdictions] . . . hold that, in the absence of privity of contract and accompanying personal injury or property damage, a plaintiff cannot recover for purely economic losses resulting from another’s negligence.”¹⁶

¹² *Express One Int’l, Inc. v. Steinbeck*, 53 S.W.3d 895, 898–99 (Tex. App.—Dallas 2001, no pet.); *Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 453 (Tex. App.—Dallas 2002, no pet.); *Prospect High Income Fund v. Grant Thornton, LLP*, 203 S.W.3d 602 (Tex. App.—Dallas 2006, pet. denied).

¹³ *Zurich Am. Ins. Co. v. Hughes*, No. 11-05-00044-CV, 2006 WL 1914689 at *2 (Tex.App.—Eastland July 13, 2006, pet. denied).

¹⁴ *Accord*, W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 657 (5th Ed. 1984) (“Generally speaking, there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.”). The Fifth Circuit has explained that in Texas, no duty exists in tort when a plaintiff has suffered solely economic losses. *Mem’l Hermann Healthcare Sys., Inc. v. Eurocopter Deutschland, GMBH*, 524 F.3d 676, 678 (5th Cir. 2008) (citing *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.) and *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986)).

¹⁵ Older Texas cases have allowed recovery of economic losses in instances involving unlawful blockage of a public right-of-way or blockage of ingress or egress from property. Most, if not all, of these cases have been decided on grounds other than a negligence cause of action and have involved damage to what would be considered “other property” for purposes of the economic loss rule. None of them address the economic loss rule itself. *E.g.*, *Powell v. Houston & T.C.R. Co.*, 135 S.W. 1153 (1911) (allowing recovery for economic damages resulting from blocked access to property under Article 1, § 17 of the Texas Constitution); *Texas & P. Ry. Co. v. Mercer*, 90 S.W.2d 557 (Tex. 1936) (allowing recovery of lost profits where road construction unlawfully blocked delivery truck’s usual route, resulting in damage to perishable goods, the truck, and plaintiff’s good will.).

¹⁶ *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 287–89 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Canal Elec. Co. v. Westinghouse Elec. Co.*, 973 F.2d 988 (1st Cir. 1992); *Leadfree Enters., Inc. v. United States Steel Corp.*, 711 F.2d 805 (7th Cir. 1983); *Willis v. Georgia N. Ry. Co.*, 169 Ga. App. 743, 314 S.E.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,

Amicus Fisk nevertheless contends that the “very purpose of the economic loss rule” is to prevent recovery in negligence where the economic loss is the subject matter of a contract between the parties involved in the suit.¹⁷ This is incomplete. The rule was originally adopted to prevent contractual strangers from recovering against one another for negligence where the only damages suffered by plaintiff were economic losses.¹⁸ The rule has been extended to apply to cases where parties are in contractual privity in order to prevent parties from masking contractual claims as negligence actions. Applying the economic loss rule to parties in privity of contract thus makes enormous sense; it is a useful tool for enforcing contracts and holding parties to them. Otherwise “contract law would drown in a sea of tort.”¹⁹ Mr. Fisk, however, has cast this incidental benefit of using the rule as a reason to narrow it. We urge the Court to reject this reasoning.

651 P.2d 637 (1982); *Stevenson v. E. 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)).

¹⁷ Br. of Amicus Carson Fisk at 5.

¹⁸ See, e.g., *Robins Dry Dock v. Flint*, 275 U.S. 303, 307–8 (1927) (Holmes, J.); *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (C.A. 1875); *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931); *Rodriguez v. Carson*, 519 S.W.2d 214, 217 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.); *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903). *Byrd* is particularly relevant to the present case. In that case, as here, the defendants were alleged to have violated the law during negligent construction of an underground structure that injured a plaintiff, who was not in privity of contract with defendants. The Georgia Supreme Court nonetheless held that the defendants owed only the duty to plaintiff not to injure his property or person, and that extending a duty beyond that would lead to liability “without limit to the number of persons who might recover on account of the injury done to the property of the company [that suffered actual property damages] To state such a proposition is to demonstrate its absurdity.”

¹⁹ *E. River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986).

A hypothetical²⁰ demonstrates the rule's *original* utility as applied to contractual strangers: Suppose Driver A²¹ negligently crashes into Driver B on I-35. Drivers C, and D, and E, and F and on, are not injured in the accident, yet all are substantially delayed on their way to work. All have suffered economic damages in the form of lost wages. Their employers, similarly, have suffered lost productivity damages. If Amicus Fisk successfully dispatches the economic loss rule, then Driver A's lack of privity with any of the injured parties will subject him to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."²²

The economic loss rule was originally designed to combat the evil of unlimited liability, because extending liability so far "may not always be the more moral course, especially in cases . . . where the extension [of liability to] unnumbered claimants for injuries that are unavoidably speculative, may well visit destruction on enterprise after enterprise, with the consequent loss of employment and productive capacity which that

²⁰ The hypothetical is borrowed substantially from *Petition of Kinsman Transit Co.*, 388 F.2d 821, 825 n.8 (2d Cir.1968) ("To anyone familiar with N.Y. traffic there can be no doubt that a foreseeable result of an accident in the Brooklyn Battery Tunnel during rush hour is that thousands of people will be delayed. A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers who suffered provable losses because of the delay or to the wage earner who was forced to 'clock in' an hour late. And yet it was surely foreseeable that among the many who would be delayed would be truckers and wage earners.").

²¹ The hypothetical is not limited to drivers. Driver A could be replaced by any participant in the construction industry who, through negligent work, causes purely economic damages.

²² *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (Cardozo, J.).

entails.”²³ Barring recovery for purely economic losses shields defendants from unlimited liability for all of the economic consequences of a negligent act, particularly in commercial settings, which keeps the risks of liability reasonably calculable.²⁴ This policy applies equally regardless of whether the parties are in privity, and this may be why, as the Illinois Supreme Court pointed out, so many courts and commentators conclude that the rule bars recovery for negligence.²⁵

In the commercial setting of the construction industry, architects and contractors are not sureties for the owner, although, if *Amicus* succeeds, they will be. To the extent this Court abandons the economic loss rule where no privity exists between the plaintiff and defendant, the resulting multiplicity of claims and theories of liability will so complicate construction disputes that no one will ever be able confidently to opine as to judicial outcomes. To hold that every entity on a construction project owes a duty to protect against purely economic harm to everyone else on the project—or, for that matter, to everyone possibly affected by the project—will unnecessarily complicate the resolution of disputes in this already complicated area of the law. Moreover, the specter of unknown and unknowable economic damages in every construction dispute will make

²³ *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1034 (5th Cir. 1985) (en banc) (Gee, J., concurring).

²⁴ *Terracon Consultants W., Inc. v. Mandalay Resort Group*, 206 P.3d 81, 83 (Nev. 2009).

²⁵ *See Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 451 (Ill. 1982) (citing decisions that address the question of whether the economic loss rule bars negligence claims and noting that, although some courts have allowed recovery of economic losses in negligence, most do not, and stating that “The policy considerations against allowing recovery for solely economic loss in strict liability cases apply to negligence actions as well.”).

it even more difficult for the parties to allocate the risks of the construction process in either their contracts or their insurance policies.

Amicus Fisk suggests that the economic loss rule might “work an injustice on potential claimants.”²⁶ On the contrary, the rule ensures that tort liability will not be imposed so capriciously as to create obligations to contractual strangers where none exist; the rule wards off “fear that the purely economic consequences of a defendant’s negligence are not limited by the normal tort limit[s] on the scope of a negligent defendant’s liability, foreseeability on a case-by-case basis.”²⁷ This Court should uphold the rule in its current form, and affirm that defendants owe no duty in tort, regardless of contractual privity, to those who suffer economic losses in the absence of physical injury or property damage.

II. The application of the economic loss rule to negligent misrepresentation claims is not at issue in this case.

Although no claim for negligent misrepresentation has been asserted in this case, Amicus Fisk asks the Court to carve out a negligent misrepresentation exception to the

²⁶ Br. of Amicus Carson Fisk at 3.

²⁷ William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the “Economic Loss” Rule*, 23 Tex. Tech. L. Rev. 477, 481 (1992); Harvey S. Perlman, *Interference With Contract and Other Economic Loss Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 71–72 (1982).

economic loss rule.²⁸ Because any comment upon this issue would be purely advisory, the Court should decline this invitation.

Prayer

For these reasons, we request that this Court affirm the Court of Appeals.

Respectfully submitted,

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²⁸ The following Texas cases have permitted the economic loss rule to bar negligent misrepresentation claims: *Thomson v. Espey Huston & Assocs., Inc.*, 899 S.W.2d 415, 422 (Tex. App.—Austin 1995, no writ); *Sterling Chems., Inc. v. Texaco, Inc.*, 259 S.W.3d 793, 797 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document served on
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