

No. 09-0223

**In the
Supreme Court of Texas**

Sharyland Water Supply Corp.,

Petitioners

vs.

Carter & Burgess, Inc., et al.,

Respondents

From the Court of Appeals for the
Thirteenth Judicial District of Texas at Corpus Christi
No. 13-06-00038-CV

Turner Collie & Braden's Post-Submission Brief

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Table of Contents

	<u>Page(s)</u>
Table of Contents	i
Index of Authorities	ii
Argument and Authorities	1
A. The Court should adopt the economic loss rule, which properly bars a negligence recovery by Sharyland	1
1. Some history about the economic loss rule	1
2. Other high courts apply the economic loss rule in suits between strangers	3
3. The Court does not impose duties solely based on foreseeability; it should follow other courts in adopting the economic loss rule	6
B. A plaintiff should not recover economic losses when it has no present injury	9
1. Sharyland’s water system has not been injured	9
2. There is no threat of a probable future injury	10
3. Sharyland’s recourse, if any, lies in the regulatory system, not in the tort system through a claim for unmaterialized economic losses	14
Certificate of Service	16

Index of Authorities

<u>Cases</u>	<u>Page(s)</u>
<i>532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.</i> , 96 N.Y.2d 280, 750 N.E.2d 1097 (N.Y. Ct. App. 2001)	3
<i>Aas v. Superior Court</i> , 12 P.3d 1125 (Cal. 2000)	6, 14
<i>Barcelo v. Elliott</i> , 923 S.W.2d 575 (Tex. 1996)	6
<i>Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.</i> , 192 S.W.3d 780 (Tex. 2006)	6
<i>Bird v. W.C.W.</i> , 868 S.W.2d 767 (Tex. 1994)	4, 6
<i>Blahd v. Richard B. Smith, Inc.</i> , 108 P.3d 996 (Idaho 2005)	2, 3
<i>BRW, Inc. v. Dufficy & Sons, Inc.</i> , 99 P.3d 66 (Colo. 2004)	2, 3
<i>Byrd v. English</i> , 117 Ga. 192, 43 S.E. 419 (1903)	2
<i>Cattle v. Stockton Waterworks Co.</i> , 10 QB 453 (1875)	1
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004)	5
<i>City of Tyler v. Likes</i> , 962 S.W.2d 489 (Tex. 1997)	7, 14
<i>Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.</i> , 29 S.W.3d 282 (Tex. App.—Houston [14th Dist.] 2000, no pet.)	8
<i>Dundee Cement Co. v. Chem. Lab., Inc.</i> , 712 F.2d 1166 (7th Cir. 1983)	4
<i>E. Tex. Motor Freight Lines v. Loftis</i> , 223 S.W.2d 613 (Tex. 1949)	10
<i>Express One Int’l, Inc. v. Steinbeck</i> , 53 S.W.3d 895 (Tex. App.—Dallas 2001, no pet.)	8
<i>Fifield Manor v. Finston</i> , 354 P.2d 1073 (Cal. 1960)	4

<i>Ford Motor Co. v. Miller</i> , 260 S.W.3d 515 (Tex. App.—Houston [14th Dist.] 2008, no pet.)	14
<i>Graff v. Beard</i> , 858 S.W.2d 918 (Tex. 1993)	7
<i>J’Aire Corp. v. Gregory</i> , 598 P.2d 60 (Cal. 1979)	4, 5
<i>Local Joint Executive Bd. of Las Vegas, Culinary Workers Union v. Stern</i> , 651 P.2d 637 (Nev. 1982)	4, 5
<i>Mattingly v. Sheldon Jackson College</i> , 743 P.2d 356 (Alaska 1987)	5
<i>Military Hwy. Water Supply Corp. v. Morin</i> , 156 S.W.3d 569 (Tex. 2005)	7
<i>Neb. Innkeepers, Inc. v. Pittsburgh–Des Moines Corp.</i> , 345 N.W.2d 124 (Iowa 1984)	3
<i>Neighbor’s Drilling, U.S.A., Inc. v. Escoto</i> , 288 S.W.3d 401 (Tex. 2009)	7
<i>People Express Airlines, Inc. v. Consol. Rail Corp.</i> , 495 A.2d 107 (N.J. 1985)	4, 5
<i>Robins Drydock & Repair Co. v. Flint</i> , 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927)	1, 2
<i>Van Horn v. Chambers</i> , 970 S.W.2d 542 (Tex. 1998)	6

Record References

For clarity, respondent Turner Collie & Braden Inc. will be called “TCB”; respondent Carter & Burgess, Inc., will be called “Carter & Burgess”; respondent Cris Equipment Company, Inc., will be called “Cris”; petitioner, Sharyland Water Supply Corp., will be called “Sharyland.” Citations in this brief to the record are as follows:

CR—clerk's record (i.e., # [volume] CR # [page]);

RR—reporter's record (i.e., # [volume] RR # [page]);

Briggs RR—the portion of the reporter's record prepared by court reporter Bill Briggs (i.e., Briggs RR # [page]).

Turner Collie & Braden's Post-Submission Brief

To the Honorable Supreme Court of Texas:

Turner Collie & Braden Inc. ("TCB") files this post-submission brief on the economic loss rule and why it properly applies here and would respectfully show as follows:

Argument and Authorities

A. The Court should adopt the economic loss rule, which properly bars a negligence recovery by Sharyland.

1. Some history about the economic loss rule.

For more than a century, courts have barred a recovery in negligence for purely economic harm. A plaintiff who suffers no injury to person or property cannot recover on a negligence theory.

One case often cited for this proposition is *Cattle v. Stockton Waterworks Co.*, 10 QB 453 (1875). There, Cattle agreed to build a tunnel for a landowner. He noticed water dripping into the construction area from a nearby waterworks company and asked the company to fix the problem. The company delayed fixing the problem, causing a construction delay. Cattle brought a negligence suit for delay damages. In rejecting Cattle's suit, the court held that Cattle did not suffer bodily injury or property damage and could not recover purely economic loss.

In this country, the genesis of the economic loss rule is often traced to the United States Supreme Court decision in *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927). A steamship charterer lost the use of the steamer for two

weeks because of a drydock's negligence and sued the drydock for damages. Speaking for the court, Justice Holmes denied recovery, saying that "no authority need be cited" for the general rule that a tortfeasor is not liable when an injury to one person's property causes economic harm to a second person. 275 U.S. at 309. The court cited three cases for a "good statement" on the law, including the non-admiralty case *Byrd v. English*, 117 Ga. 192, 43 S.E. 419 (1903).

In *Byrd*, the defendants negligently allowed a wall of dirt to fall on conduits used for conveying power to Byrd's publishing business. The business had no power for several hours. Byrd sued in negligence for economic damages and lost on demurrer. In affirming that Byrd could not recover in negligence for purely economic loss, the Georgia Supreme Court pointed out that if the publishing company could recover, there was no principled way to disallow recovery by the company's customers, customers of those customers, and so forth. *Id.* at 420.

Today, courts in many states find that the economic loss rule provides helpful boundaries on the scope of a defendant's duty. One subset of those cases arises in the construction context. Courts have held that those who are part of a construction project can only sue the specific parties with whom they are in privity for purely economic losses. *See, e.g., Blahd v. Richard B. Smith, Inc.*, 108 P.3d 996 (Idaho 2005); *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004). Courts offer several rationales for disallowing negligence recoveries for economic losses. One rationale is that the economic loss rule

provides a reasonable, bright-line rule for the otherwise vexing problems arising with determining which economic losses to compensate and how and where to limit the ripples of negligently caused economic losses. *See, e.g., Bland*, 108 P.3d at 1000. Another rationale is that a construction project involves a constellation of interrelated contracts and that economic losses in the context of the construction project will be distributed more efficiently and fairly through contract. *See, e.g., BRW, Inc.*, 99 P.3d at 72.

Sharyland's suit against TCB does not fall within the latter rationale. Sharyland and TCB did not have a contract. Further, Sharyland was not part of the construction project and its claims do not fall within the constellation of contracts involving the project.

2. Other high courts apply the economic loss rule in suits between strangers.

Thus, this case involves the economic loss rule as applied between strangers. High courts in various states deny recovery in negligence for purely economic losses to plaintiffs who have no relationship with the defendant. For example, businesses could not recover their economic losses resulting from street closures caused by defendants' negligence. *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 750 N.E.2d 1097 (N.Y. Ct. App. 2001). A motel, its employees, and other similarly situated businesses and individuals could not recover economic losses caused by defendant's negligence, which resulted in the closing of a bridge that served as an artery of commerce to plaintiffs. *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984). A plant owner could not recover its lost profits from a truck driver whose overturned

truck caused the closure of a highway for five hours. *Dundee Cement Co. v. Chem. Lab., Inc.*, 712 F.2d 1166 (7th Cir. 1983). Employees could not recover lost wages and benefits from a defendant who negligently started a fire at a hotel where the employees worked, causing the closure of the hotel. *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union v. Stern*, 651 P.2d 637 (Nev. 1982). A plaintiff with a contract to provide a third party all medical expenses needed could not sue the defendant for its economic losses caused when the defendant negligently injured the third party, resulting in six weeks of medical care until the third party died. *Fifield Manor v. Finston*, 354 P.2d 1073 (Cal. 1960).

The damages to the plaintiffs from the defendant's negligence were foreseeable, as most of those courts admitted. They found that a rule of duty and liability based only on foreseeability was unworkable in setting boundaries. This Court has also said that foreseeability alone is not enough to establish a duty. *See Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994).

TCB acknowledges that the highest courts in some other states have rejected the economic loss rule in negligence suits between parties without any prior relationship, favoring a foreseeability-based rule. Two leading examples come from New Jersey and California. *See People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107 (N.J. 1985); *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979). In *J'Aire Corp.*, the California Supreme Court held that an airport restaurant owner could recover lost profits resulting from a contractor's negligent failure to complete its construction work on time, causing the

restaurant's closure for one month. 598 P.2d at 63–64. In *People Express Airlines*, the New Jersey Supreme Court held that a commercial airline forced to close its terminal for twelve hours because of a burning tank car nearby could sue the railroad yard and other defendants for economic damages resulting from the cancellation of flights, loss of reservations for future travel, and payment of fixed operating expenses allocable to the time of closure. 495 A.2d at 118.

Though some courts have followed the reasoning in *J'Aire* and *People Express Airlines*, other courts have rejected the reasoning and liability rules set out in those cases because, in reality, the foreseeability rule would require a fact intensive, ad hoc determination in every case, would promulgate inconsistent results, and would expose defendants to an indeterminate number of claims from indeterminate plaintiffs for indeterminate damages. Compare, for example, *Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (Alaska 1987) (following the holding in *People Express Airlines*), to *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1142–43 (Ill. 2004) (declining to follow *People Express*), and *Stern*, 651 P.2d at 638 (declining to follow *J'Aire*). The latter courts rejected the *J'Aire* and *People Express Airlines* holdings and embraced the economic loss rule because the game was not worth the candle. *See id.* And although the California Supreme Court did not expressly overrule *J'Aire*, it distinguished *J'Aire* in a construction defect case, holding that the economic loss rule barred a homeowner's suit against a contractor for building code

violations that allegedly diminished the home's value. *Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000).

3. The Court does not impose duties solely based on foreseeability; it should follow other courts in adopting the economic loss rule.

In other contexts, this Court has also decided that the game was not worth the candle. For example, in *Barcelo v. Elliott*, the court held that an attorney who drafts a will owes no duty to beneficiaries who later allege that the will was improperly drafted. *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996). There, the decedent's grandchildren sued when an inter vivos trust was declared invalid. *Id.* The court held that the attorney did not owe a duty to the beneficiaries, only to the testator or trust settlor or (in a later case) to the estate. *Id.* at 578–79; *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). An attorney could undisputedly foresee injury to the intended beneficiaries from a poorly drafted trust. Yet the court rejected even a narrow duty to specifically identified beneficiaries because of problems of intent and proof; a bright-line privity rule served the greater good. *Barcelo*, 923 S.W.2d at 578–79.

The Court has held that a doctor owes no duty to nonpatients. *See Van Horn v. Chambers*, 970 S.W.2d 542 (Tex. 1998); *Bird*, 868 S.W.2d 767. That restriction on duty is not based on a foreseeability analysis. A doctor could certainly foresee, for example, the potential harm to a father of a negligent diagnosis that the father sexually abused his daughter. *See Bird*, 868 S.W.2d at 769. The Court's limitation on duty arose from

countervailing issues of social utility in eliminating sexual abuse and from concerns about the burden of guarding against a misdiagnosis.

The Court has also decided that, despite the foreseeability of the alleged injury, other considerations prevailed against imposing a duty on employers for the negligence of a fatigued, off-duty employee, on landowners for hazards near public roadways, on social hosts for serving alcohol, and on defendants generally for the negligent infliction of emotional distress. *See Neighbor's Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex. 2009) (fatigued-employee case); *Military Hwy. Water Supply Corp. v. Morin*, 156 S.W.3d 569 (Tex. 2005) (excavation near public roadway); *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993) (social host); *City of Tyler v. Likes*, 962 S.W.2d 489, 494–96 (Tex. 1997) (emotional distress). Although foreseeability sometimes drives the imposition of a duty, the Court recognizes many other factors in analyzing and answering the duty issue.

Analyzing the duty issue here, as part of an economic loss claim, TCB did not harm a legally protected interest of Sharyland. The installed system has not injured a single Sharyland water line. (4 RR 209–12). Sharyland does not own the dirt around those lines. And, contrary to a statement made at oral argument, Sharyland does not have an exclusive easement. It has a nonexclusive easement in the City's right-of-way and simply does not like sharing the easement. (3 RR 96:18 – 97:25; 4 RR 210:21 – 211:22). Sharyland cannot recover against TCB by creating a duty where none exists.

If the Court decides that strangers may owe each other a duty in negligence to prevent purely economic losses when the defendant does not harm a plaintiff's protected interest in person or property, then it must also consider what boundaries, if any, apply to recoveries for negligent infliction of economic losses. May an employer recover from a tortfeasor the costs of temporarily or permanently replacing an employee injured by the tortfeasor? May businesses that lose profits from temporary road closures caused by a stranger's negligence recover from the tortfeasor? May homeowners recover the value of internet service or electrical service or water service interrupted by the negligence of a stranger?

As discussed in Carter & Burgess's reply brief to the amicus brief of Carson Fisk, intermediate courts of appeals in Texas generally embrace the economic loss rule. Those courts have embraced the economic loss rule because the foreseeability of economic loss, even when modified by other factors, is a standard that sweeps too broadly, because the defendant has not harmed a legally protected interest in person or property, and because of the difficulty of placing a reasonable limit on a defendant's liability to those who suffer solely economic damages caused by a negligent act. *See, e.g., Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 288 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 899 (Tex. App.—Dallas 2001, no pet.). The Court should adopt the economic loss rule for the same policy reasons that Texas intermediate courts of appeals and the Court's sister high courts have adopted the rule.

B. A plaintiff should not recover economic losses when it has no present injury.

This case illustrates some of the problems with claims by strangers for purely economic losses. Those problems include questions about the true nature of the alleged injury, the true nature of the alleged damages, and whether the compensation awarded bears a true relationship to the compensatory purposes of the tort system.

1. Sharyland's water system has not been injured.

The problems begin with identifying the injury being compensated. A jury awarded Sharyland over \$1 million in future damages for the costs of “repairing” Sharyland’s undamaged water system. Sharyland’s hired experts based their repair estimate on the alleged costs of putting the Sharyland water system into compliance with a regulation, Rule 317.13. Does an alleged violation of a regulation, standing alone, constitute an injury? Could an average citizen sue and recover from a sewer company because a sewer line was five inches rather than six inches from a water line? No, because that is a regulatory function.

Here, when Sharyland complained about the alleged regulatory violations, Carter & Burgess spoke directly with the agency responsible for the regulations. It found no violation of the regulations and it did not instruct the City to stop or correct work. (11 RR 113–22).

Thus, the agency with authority over water and sewer systems did not find a violation. It did not find anything worth regulating. And since the City was installing a sewer system

after installation of the water system, any regulation would have fallen on the City, not Sharyland. A regulatory body could have required compliance with the allegedly violated regulations, a proper function of a regulatory agency, and not an issue that the tort system directly addresses.

An alleged violation of a regulation, standing alone, is not compensable under a negligence theory. *See, e.g., E. Tex. Motor Freight Lines v. Loftis*, 223 S.W.2d 613 (Tex. 1949) (trucker's violation of parking ordinance did not proximately cause accident; no recovery). Some true injury is required.

2. There is no threat of a probable future injury.

Sharyland recognizes the absence of an injury for purposes of an economic loss and tries to remedy that absence by arguing an alleged threat of future contamination. No record evidence supports that argument, only hyperbole and speculation.

Sharyland has never had a contamination incident, even when City residents used septic tanks:

Q. Okay. What were the sanitary sewer conditions of Alton before the project?

A. I have no idea. I didn't inspect them. I don't know what they were. They had septic tanks, I know that.

Q. And are you aware that in some instances some Colonias had mere open ditches for their sewer?

A. No, I did not.

- Q. You did not?
- A. No.
- Q. What does an open sewer ditch create for your water lines?
- A. If it crosses our water line or it comes in contact with our water line?
- Q. Just the existence of a ditch into which every time the house - - if they have a toilet and they flush it and it goes into a ditch, what kind of risk does that cause to your water line?
- A. According to where the water line is.
- Q. Okay.
- A. If it's within - - if it's 100 feet away, it doesn't cause us any problems.
- Q. And what if it's 2 feet away?
- A. Causes a lot of - - could cause a lot of problems.
- Q. Could, right?
- A. Yes.
- Q. Did it ever?
- A. Not that I know of.
- Q. In fact, in the time you have been head of the Sharyland Water Supply Corporation, you've never had one instance of contamination, right?
- A. No.
- Q. Not one? Not when there was sewer on the ground and not when there was sewer in the pipes, right?
- A. Not that I know of.

(2 RR 279:16 – 281:2). Sharyland’s expert admitted that he had never heard of a contamination incident throughout South Texas:

Q. Have you known of an instance of cryptosporidium outbreaks in south Texas?

A. Not to my knowledge, no, ma’am.

Q. Do you know, or can you tell me, if there has ever been an instance, in your knowledge, of contamination of a water supply system in south Texas by the mechanism you kept describing of a negative pressure, and water having leaked from a sewer pipe, getting into the soil, and there be negative pressure in the water system, have you - - have you ever heard of a, an instance of contamination, through that mechanism?

A. Trying to recall back, I - - -

Q. You haven’t, have you?

A. Well, right offhand, no, I can not think of - - you know, think of one.

(Briggs RR 9:17 – 10:6). He had heard of cryptosporidium outbreaks in “northern states” where it slipped through water plants. (5 RR 71). A later witness confirmed that the one known incident occurred not because of leaking pipes but because cryptosporidium slipped through the water system’s intake and cleaning process. (9 RR 198).

Sharyland ignores that uncontroverted evidence in favor of speculation about potential contamination. No record evidence supports the speculation, though.

As Sharyland employees admitted, the soil around the water lines is already contaminated—from animal sources, industrial sources, and human sources. (4 RR 129–30,

186–89). Because of that ever-present contamination in the soil, Sharyland must take steps to clean and disinfect every time it deals with a water line. Normally, water runs through the water system under pressure. Any hole in a pipe will send water out, not draw water in.

What Sharyland calls a “negative pressure” situation, when a water line actually loses all pressure, will first pull in contamination from the surrounding soil. Sharyland is required to shut off the water line, fix the line, then thoroughly decontaminate the line before putting it back into service. (4 RR 188–89; 6 RR 54–55). Even when the whole water system lost pressure for days in 1989, Sharyland was able to decontaminate the system without incident; no one got sick. (4 RR 188–89). There is no evidence that alleged contamination from a single sewer service line would exceed, or incrementally affect, the preexisting contamination in the surrounding soil.

Sharyland claims that one of its hired experts testified to a reasonable probability of future contamination, but Sharyland’s record cites do not support its claim. It cites the Court to 4 RR 57–60; 5 RR 39–41, 65–71, 194–95. As TCB discussed in its brief on the merits (pp. 17–18), those cites do not support a claim for future contamination. More tellingly, despite scaring the jury with claims that the sewer system might leak and cause contamination, Sharyland’s expert eventually admitted that he has not warned Sharyland about a huge health menace nor has he instructed Sharyland to “fix” its system into compliance with regulations. (8 RR 76:8–24).

3. Sharyland's recourse, if any, lies in the regulatory system, not in the tort system through a claim for unmaterialized economic losses.

Sharyland has failed to prove either an injury or damages. It asked for future repair costs for moving undamaged pipes even though no agency has ordered that it do so and no one has testified that its system will likely fail as a result of the sewer system. It has not experienced increased costs of servicing its water system, either. It has no damages as well as no injury.

Generally, the tort system does not compensate a plaintiff for an injury that has never occurred; there must be a present injury. *See, e.g., Likes*, 962 S.W.2d at 500; *Ford Motor Co. v. Miller*, 260 S.W.3d 515, 517–18 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (applying Mich. law); *Aas*, 12 P.3d at 1138 (claim for building code violations that allegedly diminished the home's value did not state an appreciable, nonspeculative, present injury for tort purposes). The tort system compensates actual injuries. It also compensates future damages caused by a present injury. It does not, however, compensate injuries that will allegedly occur in the future.

For example, an individual living near a chemical plant may believe that the plant is emitting particulate matter into the air or the water at a rate that exceeds government regulations. The individual might buy a sophisticated meter to test for particulate matter. Assume that benzene levels exceed federal regulatory levels by tenfold and that the individual becomes a plaintiff, suing the chemical plant in negligence for a future cancer that

the plaintiff or one of plaintiff's children might contract. That plaintiff could not recover future damages in a negligence case because of the lack of an injury.

Maybe the plaintiff would argue for an award based on the costs to insulate the plaintiff's house and yard from the particulate matter, though. Plaintiff still could not recover in negligence without a present injury. And a court might be concerned with what happened to any money awarded for the cost of insulating the house and yard from particulate matter.

Instead, plaintiff's recourse would lie through the regulatory system. Plaintiff would file a complaint with the appropriate agency. If the agency agreed that the chemical plant was emitting more than five times the allowable levels of benzene, the agency could act to require compliance. That action would alleviate the alleged public health problem.

Here, agency action, not a negligence suit, is the proper response to the alleged health issue. If the agency finds a violation that threatens public health, it can act. But a negligence-based damages award in the absence of a compensable injury does nothing. Sharyland has no more obligation to spend the money it receives on "fixing" an undamaged water system than any other plaintiff. Negligence cases compensate particular injuries to particular plaintiffs. They affect public health indirectly at best. A negligence case requires a particular injury as a predicate to a recovery of compensatory damages. Sharyland has not shown a particular injury or damages for tort purposes.

Because Sharyland cannot recover for its alleged economic loss, because Sharyland has not sustained a compensable injury, and for many other reasons, the Court should affirm the judgment of the Thirteenth Court of Appeals.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the parties listed below by the method of service indicated on the _____ day of _____, 2010.

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