

No. 09-0223

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IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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SHARYLAND WATER SUPPLY CORPORATION,  
*Petitioner*

VS.

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

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BRIEF OF AMICUS CURIAE  
TEXAS SOCIETY OF ARCHITECTS,  
A STATE COMPONENT OF THE AMERICAN INSTITUTE OF ARCHITECTS

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Respectfully Submitted,

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## STATEMENT OF INTEREST

This brief is tendered on behalf of the Texas Society of Architects ("TSA"). General Counsel for TSA prepared this brief as part of her employment with the Association. No additional fees, however, were expended in its preparation. See TEX. R. APP. P. 11 (c).

TSA is a 501(c)(6) nonprofit corporation established in 1939 to advocate for the architectural profession and to provide services and programs pertinent to its 6,000-plus members. In total and for this Court's information, there are approximately 10,000 registered architects in Texas and approximately 50,000 licensed engineers in the state of Texas. In the context of the Texas economy, the architecture, engineering, and construction share of Texas' gross domestic product is approximately \$76.5 billion.<sup>1</sup> The architecture/engineering/construction employment as a share of total employment in Texas is about 7.6%.<sup>2</sup> The outcome of this case could have a significant impact on our industry's business and practice, in particular as the case relates to the issue discussed in Amicus Carson Fisk's brief relating to the Economic Loss Rule. If this Court should agree with Mr. Fisk's assertions that the Economic Loss Rule should not apply, the architectural profession, as well as the engineering profession, will be faced with the realistic potential of unlimited liability by an untold number of claimants, thereby creating an unsustainable business climate for the architectural and engineering industry. This will adversely impact construction, job creation, and economic growth in Texas.

TSA submits this amicus brief in support of the Corpus Christi Court of Appeals' opinion, which reversed the trial court's judgment against the engineers. We believe this

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<sup>1</sup> *American Institute of Architects estimate based on 2008 data from the Bureau of Economic Analysis*

<sup>2</sup> *American Institute of Architects estimate based on 2005 data from the Bureau of Labor Statistics*

Appeals court opinion was the correct opinion because it upholds the Economic Loss Rule and applies it in accordance with Texas jurisprudence and comports with fundamental fairness.

## SUMMARY OF ARGUMENT

The Economic Loss Rule’s application to negligence claims between contractual strangers is not an innovation, has been around for 135 years and adopted in multiple jurisdictions. In most jurisdictions, privity of contract is not a requirement for the Economic Loss Rule (the “Rule”) to apply. Moreover, the Rule was created for important economic and social utility reasons like avoiding situations of unlimited liability and maintaining the integrity of the contractual process. If the Rule were limited to parties in privity, the fundamental utility of the rule would be eliminated and architects would be unfairly exposed to unlimited liability by an unlimited number of potential plaintiffs.

## ARGUMENT

Texas courts have long held that the Economic Loss Rule bars claims for economic damages, when there’s no accompanying claim for personal injury and/or property damages, and there’s no privity of contract between the parties. Rather than repeat the citations and arguments asserted by Amicus Texas Council of Engineering Companies, Amicus Texas Society of Architects (TSA) herein adopts the same in support on the issue of the Rule’s long-standing application where no privity of contract exists.

“Gross[] unfair[ness]” has been argued by Amicus Carson Fisk as the reason that this Court should find the concept of risk allocation in contract jurisprudence unpersuasive in upholding the Economic Loss Rule.<sup>3</sup> He asserts a hypothetical where a contractor may not be in a position to sue for economic losses related to the architectural plans and specifications provided to him by an owner, who he contracted with, because

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<sup>3</sup> Brief of Amicus Curiae R. Carson Fisk, *Sharyland Water Supply Corporation v. City of Alton et. al* (No. 09-0223) at 9.

the owner *might* be immune from suit<sup>4</sup> or *might* be insolvent. Amicus Carson Fisk states that in that scenario, the contractor has no apparent remedy in contract so he should be allowed to sue in tort directly against the architect for any economic damages. Amicus Carson Fisk goes on to state that bankruptcy and sovereign immunity are “risks [that] cannot be addressed contractually.”<sup>5</sup> This assertion is simply untrue and goes against the very essence and foundation of contract law. “It is part of every man’s civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether refusal rests upon reason or is the result of whim, caprice, prejudice or malice.”<sup>6</sup> Texas public policy strongly favors the freedom to contract.<sup>7</sup> In the posed hypothetical, a contractor is not forced, by any stretch, to do business with parties who may not be sue-able or who may be judgment-proof for breach of contract. It is a risk the contractor takes when doing business, and risk-benefit terms can be negotiated in limitless ways during the contractual process.

The argument of “fairness” put forth by Amicus Carson Fisk is so one-sided that it begs the question: What about the fairness of allowing a contractor to sue an architect for money damages (without personal injury or property damage) when the architect owed no duty to the contractor? A duty arises when there’s an interest entitled to protection.<sup>8</sup> The hypothetical posed tries to equate a contractor’s profit margin to interests that *have* traditionally been deemed entitled to protection in negligence, like “safety or

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<sup>4</sup> The statutory citation offered by Amicus R. Carson Fisk does not correlate to immunity but limitation of damages.

<sup>5</sup> Brief of Amicus Curiae R. Carson Fisk, *Sharyland Water Supply Corporation v. City of Alton et. al* (No. 09-0223) at 8.

<sup>6</sup> *Fischer v. Richard Gill Co*, 253 S.W.2d 915, 918 (Tex. Civ. App. – San Antonio 1952, writ ref’d).

<sup>7</sup> *J.P. Morgan Chase Bank, N.A. v. Texas Contract Carpet, Inc.*, 302 S.W.3d 515, 534 (Tex. App. -- Austin 2009).

<sup>8</sup> See *Blake Construction Co., Inc. v. Alley*, 353 S.E.2d 724,726 (Va. 1987).

freedom from physical harm” or “property interests.”<sup>9</sup> This was addressed by the *Bernard Johnson* Court.<sup>10</sup> In that case, the Court refused to create a general common law duty by an architect to a contractor, and instead stated that “generally speaking, any duty or power assigned to the architect in the building contract is for the benefit of the owner who employed the architect.”<sup>11</sup> The Court went on to explain that the “duty of the architect is to protect the owner to the end that the quality of the workmanship that goes into the project, and the kind and quality of the materials that are used, will be in accordance with the plans and specifications upon which the owner and architect have agreed.”<sup>12</sup> Moreover, the architect’s services are not intended “to protect and enhance the profit or any other interest of the contractor.”<sup>13</sup> The Court further explained that there could be circumstances where, depending on the scope of services the architect contracts to perform and the extent to which the architect contracts to exercise some power over the contractor (e.g. by contracting to provide construction supervision instead of the more typical construction observation responsibility), an architect’s services could create a duty of care.<sup>14</sup> But the Court stated that a “general rule”<sup>15</sup> should not apply; and that an architect, just by virtue of his named profession, should not have a duty to the contractor and there should not be a “presumption that the architect has power over the contractor’s performance.”<sup>16</sup>

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<sup>9</sup> *Id.* at 726.

<sup>10</sup> *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex. App. – Austin 1982, *writ ref’d n.r.e.*)

<sup>11</sup> *Id.* at 371.

<sup>12</sup> *Id.* at 371.

<sup>13</sup> *Id.* at 371.

<sup>14</sup> *Id.* at 374-375.

<sup>15</sup> *Id.* at 372.

<sup>16</sup> *Id.* at 372.

Moreover, the Economic Loss Rule serves an important purpose of avoiding situations of unlimited liability. The Fifth Circuit Court explained the purpose of the Rule and distinguished claims of property damage with claims of “pure economic loss” by explaining that for the latter claims: “the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended.”<sup>17</sup> Without the Rule, an architect who contracts with an owner to design a building, by providing architectural plans and specifications, could be subject to any number of potential economic claims arising out of the final plans and specifications. To understand the context, the architect is generally the first on the scene, working with the owner to program<sup>18</sup> and design a building. So in the commercial setting, an architect’s design of a building such as a hotel, for example, could trigger potentially countless economic-only claims from the hundreds upon hundreds of potential contractual strangers involved in the project such as civil engineers, mechanical engineers, structural engineers, electrical engineers, interior designers, landscape architects, project managers, construction managers, program managers, consultants, contractors, subcontractors and tradesmen -- not to mention the potential users of the building or even the public at large. If the Rule were not in place, an architect’s liability exposure (by virtue of his/her position at the top of the pyramid of the multiple parties involved in the design and construction of a building) would be so vast that insurance coverage would not be attainable, much less staying in business. The absurdity of extending such liability to one professional for what could be, in the

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<sup>17</sup> *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1022 (5<sup>th</sup> Cir. 1985) (en banc).

<sup>18</sup> “Program” in the architectural profession means defining the needs and wants of the owners. Programming answers the question: How will the building be used and occupied?

hypothetical posed by Amicus Carson Fisk, an honest mistake that doesn't rise to the level of scienter or recklessness, would be unconscionable.

In the hypothetical posed by Amicus Carson Fisk, extending a negligence claim, and therefore creating a common law duty by the architect to the contractor, based on the plans and specifications provided to the owner for his determination of whether to build or not build creates an illogical and unfair extension of liability. The plans and specifications are the instruments of an architect's professional services that help owners make decisions on whether to move forward on projects.<sup>19</sup> *If* a project is built, then "the fact that a contractor will benefit and profit from plans that are carefully and professionally drawn, and from specifications that are clear and precise, is an incidental benefit that accrues to the contractor," but does not rise to the level of creating a duty by the architect to the contractor.<sup>20</sup>

Amicus Carson Fisk's theory, as he wishes for it to be applied, would unfairly single out design professionals – of all the participants in a construction project – with the greatest risk of expanded and unlimited potential liability. Fisk urges a previously unrecognized "negligent misrepresentation" cause of action against architects and engineers. Such design professionals are generally the *only* persons tasked to create construction drawings and specifications (design documents) which will be used on the project. Such design documents would themselves become fodder, on *any* project, as

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<sup>19</sup> It is not uncommon, particularly in the non-residential sector, for plans and specifications to be provided to an owner, yet the project does not get built for funding or other reasons. For example, final plans and specifications could be rejected because the owner changes his mind about the needs of the building, or a facilities' policy for a higher educational institution, school board or other entity gets changed so the plans and specifications must comport with the new policy, or the decision makers (school board, trustees, facilities managers, etc.) are new to the process and have different priorities or ideas about the project.

<sup>20</sup> *Bernard Johnson* at 365.

alleged “misrepresentations” by the design professional. General contractors generally do not create design documents and, therefore, could rely on their negotiated contracts and remain confidently shielded from economic tort claims of persons outside of privity.<sup>21</sup>

For further example, owners on many construction projects will engage design professionals as the owner’s representative on the project or in a project management or construction observation role.<sup>22</sup> The design professional in such situations owes contractual duties to the owner. Were the Court to adopt the position of Amicus Fisk, design professionals in such a role would be wary of any acts or decisions on the project that could (rightly or wrongly) result in additional costs to the contractor. The potential liability to the contractor – with whom the design professional has no contractual obligation – could then conflict with the design professional’s contractual obligations to

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<sup>21</sup> Moreover, contractors often negotiate contract terms with property owners in relation to the sufficiency of the design documents. Some owners ask contractors to agree by contract that the contractor has reviewed the design documents and found them to be complete and accurate. On the other hand, some contractors insist that owners agree – by contract – that the contractor is entitled to rely upon the design documents and that the owner is responsible to compensate the contractor for any problems arising from same. One such common clause reads as follows:

IF THE CONSTRUCTION DOCUMENTS ARE PROVIDED OR PREPARED BY OWNER, OWNER’S ARCHITECT, ENGINEER, SURVEYOR, DESIGNER OR ANY OTHER THIRD PARTY ON OWNER’S BEHALF, OWNER SPECIFICALLY WARRANTS AND GUARANTEES TO BUILDER THAT THE CONSTRUCTION DOCUMENTS ARE SUITABLE FOR CONSTRUCTION OF THE IMPROVEMENTS AND OWNER ACKNOWLEDGES THAT BUILDER SHALL NOT BE RESPONSIBLE FOR ANY ERRORS OR OMISSIONS IN SUCH CONSTRUCTION DOCUMENTS OR ANY DAMAGES THAT MAY ARISE THEREFROM. Any changes or corrections requiring additional expense or delays shall be administered as a Change Order. If Owner fails to execute a Change Order to change or correct any deficiencies in the Construction Documents, Owner will be in breach of this Contract.

Amicus Fisk would have the Court remake the construction industry such that contractors need not even negotiate such clauses into their agreements – but instead pursue direct claims against design professionals.

<sup>22</sup> A standard American Institute of Architects (“AIA”) form agreement provides that the design professional “shall interpret and decide matters” concerning the performance of the construction contract and have authority to “act on behalf of” the owner. AIA Document B141 – 1997, ¶¶ 2.6.1.3, 2.6.1.7.

the owner. Such potential liability would distort relationships and interfere with contractually defined roles.

“Construction” can be both a risky and a profitable undertaking. It benefits from perhaps the best developed and defined contractual relationships of any industry. The contracts take into account everything from differing site conditions to ownership of documents to responsibilities for construction sequencing to dispute resolution. The position of amicus Fisk would undermine this well developed area of law to give one group – contractors – an “escape clause” from carefully negotiated agreements.

In short, Fisk’s theory would drastically reshape the construction industry in favor of contractors and to the detriment of architects and engineers – thereby creating rather than preventing actual “gross unfairness.” In so doing, Amicus Fisk would also unwittingly open the door (beyond the construction industry) for precisely the kind of unlimited potential liability the economic loss rule is designed to prevent.

### **CONCLUSION AND PRAYER**

This Court should uphold the Corpus Christi Court of Appeals decision which ruled that the Economic Loss Rule bars Sharyland Water Supply Corporation’s negligence claim because the Rule was created and has been adopted by multiple jurisdictions, has been upheld in similar circumstances for over a century for its economic and social utility and because ruling otherwise would create unlimited liability to the architectural profession.

For the foregoing reasons stated herein, Amicus Curiae Texas Society of Architects requests that this Court affirm the opinion of the Corpus Christi Court of Appeals.

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**CERTIFICATE OF SERVICE**

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