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Replacing a Solid Wall with a Chain-Link Fence: Special Relationship Analysis for Tort Recovery of Purely Economic Loss

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REPLACING A SOLID WALL WITH A CHAIN-LINK FENCE: SPECIAL RELATIONSHIP ANALYSIS FOR TORT RECOVERY OF PURELY ECONOMIC LOSS

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I. INTRODUCTION

This case note addresses the significance of two relatively recent West Virginia Supreme Court of Appeals decisions, *Aikens v. Debow*¹ and *Eastern Steel Constructors, Inc. v. City of Salem*,² concerning the expansion of tort recovery in West Virginia for purely economic losses.³ In *Aikens*, the court estab-

¹ 541 S.E.2d 576 (W. Va. 2000).

² 549 S.E.2d 266 (W. Va. 2001).

³ Purely economic loss is generally “economic harm [that] stands alone, divorced from injury

lished a new basis regarding potential liability for negligent infliction of purely economic loss in the form of a “special relationship” analysis.⁴ In answering a certified question from the circuit court, the Supreme Court of Appeals held that a plaintiff may be able to recover purely economic damages, even in the absence of physical injury to person or property, if the parties had some sort of special relationship that compels the conclusion that the alleged tortfeasor had a duty to the particular plaintiff and the injury was clearly foreseeable to the tortfeasor.⁵

In *Eastern Steel*, the court applied this special relationship analysis in a construction industry setting. The plaintiff, a general contractor, brought an action against Kakanui Associates, a design professional, and the City of Salem for economic loss sustained by Eastern allegedly due to errors in the design plans drafted by Kakanui, which failed to disclose sub-surface rock and existing utility lines on the construction site.⁶ Applying the special relationship analysis, the court held that a design professional (for example, an architect or engineer) providing plans to be followed by a contractor, “owes a duty of care to [the] contractor . . . notwithstanding the absence of privity of contract between the contractor and the design professional due to the special relationship that exists between the two.”⁷ As a consequence, “the contractor may, upon proper proof, recover purely economic damages in an action alleging professional negligence on the part of the design professional.”⁸ In other words, if the contractor suffers economic loss proximately caused by negligent preparation of the design plans, the architect is potentially liable for the contractor’s economic injury.⁹

This pair of cases indicates that West Virginia has broken away from the traditional “economic loss rule” that denied any tort recovery in negligence for claims of purely economic loss, which is generally defined as “economic harm [that] stands alone, divorced from injury to person or property.”¹⁰ In its place, the court has adopted an analysis primarily based on foreseeability with an emphasis on the nature of any relationship between the plaintiff and defendant. In *Aikens*, the court took what Justice Starcher applauded as a “bold step forward”¹¹ in recognizing that a tortfeasor may owe a “certain, clearly foresee-

to person or property” DAN B. DOBBS, *THE LAW OF TORTS* § 452 (2000), or “pecuniary loss not consequent upon injury to [one’s] person or property.” VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE, AND SCHWARTZ’S TORTS, CASES AND MATERIALS* 435 (10th ed. 2000).

⁴ 541 S.E.2d at 589.

⁵ *Id.*

⁶ *E. Steel Constructors*, 549 S.E.2d at 269.

⁷ *Id.* at 275.

⁸ *Id.*

⁹ *Id.* at 268, Syl. Pt. 6.

¹⁰ DOBBS, *supra* note 3, § 452; *see also* FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 25.18A (2nd ed. 1986).

¹¹ 541 S.E.2d at 592 (Starcher, J., concurring).

able party a duty of care to avoid causing ‘an interruption in commerce’ which results in purely economic loss.”¹² *Eastern Steel* represents an example of circumstances where the special relationship analysis can be applied to permit recovery for a purely economic injury.¹³

This special relationship analysis is designed to permit recovery for meritorious claims while still guarding against three traditional fears surrounding recovery for negligent infliction of purely economic loss: a limitless expansion of the concept of duty, disproportionate liability, and a flood of litigation.¹⁴ The analysis also serves two fundamental goals of tort law: compensating victims of another’s carelessness and deterring wrongful conduct.¹⁵

The bright line distinction drawn by the economic loss rule between recovery and non-recovery has now shifted outward to encompass purely economic injuries in special situations. Viewed through another lens, the line has become permeable. It is now capable of allowing meritorious claims to pass through the barrier while filtering out unworthy ones. However the change is viewed, West Virginia tort law will impose liability on defendants, under certain circumstances, for failure to exercise reasonable care to avoid causing purely economic harm to a certain class of persons.

This change in policy, from a focus on the type of injury involved to the foreseeability of the particular injury, is appropriate since whether recovery is permitted in tort law is generally based on the foreseeability of injury, through the concept of duty, not on whether the injury was physical or purely economic.¹⁶ Also, this flexible approach can adequately handle the traditional concerns over recovery of purely economic losses that have justified the application of the economic loss rule.¹⁷ Although the traditional rule offers ease of application by a clearly identifiable bright line, denying recovery for all purely economic losses is not justified simply by claims of judicial efficiency and potential uncertainty. Plaintiffs are just as susceptible to purely economic injuries as they are to physical ones and requiring a physical impact as a prerequisite to recovery “capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants.”¹⁸

The special relationship analysis recognizes the artificial nature of the economic loss rule and applies traditional tort principles to permit recovery for deserving plaintiffs when the circumstances indicate that an injured party was

¹² *Id.*

¹³ 549 S.E.2d at 275.

¹⁴ *See infra* Parts II.A., III.B.

¹⁵ *See infra* Part III.B.3.

¹⁶ *See* Syl. Pt. 3, *Sewell v. Gregory*, 371 S.E.2d 82, 83 (W. Va. 1988); *see also* SCHWARTZ ET AL., *supra* note 3, at 398.

¹⁷ *See infra* Part III.B.

¹⁸ *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985).

clearly foreseeable and particularly susceptible to a defendant's careless conduct. Although the traditional rule is somewhat arbitrary in its distinction between physical and purely economic injuries, its main purpose must still be fulfilled: preventing a limitless expansion of the concept of duty.¹⁹ This current expansion must be applied carefully – only in those truly special circumstances. If this analysis is applied too expansively, the traditional fears surrounding recovery of purely economic losses may come to fruition. Thus, the court must tread lightly into this new realm lest we fall victim to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”²⁰

On a more specific note, the application of the special relationship analysis in the construction industry may have some unique complications.²¹ Providing contractors with a direct cause of action against a designer for negligence, whether in the preparation of plans or supervision of the project, may interfere with contractual negotiations in the industry.²² This could lead to increased construction costs and conflict of interest problems for design professionals.²³ However, these potential problems, which are not necessary consequences, do not justify allowing designers to act with impunity toward contractors when performing professional services, especially when contractors are required to rely upon the quality of the designer's work in estimating costs and performing the construction.²⁴ The special relationship that arises from the clearly foreseeable consequences of a designer's negligence and the contractor's required reliance creates a duty on behalf of the designer, separate and distinct from any contractual obligations, to perform professional services with the appropriate level of skill.²⁵

Part II of this article discusses the history, foundation, and policy behind the traditional economic loss rule along with a discussion of some recognized exceptions to the rule. Part III will comment on the court's analysis in both cases, attempt to define the parameters of this special relationship test, and offer a few predictions of future sources of special relationships in West Virginia. Finally, Part IV will focus on the implications of *Eastern Steel* in particular and address the concerns over how this change in policy may affect the construction industry.

¹⁹ See *infra* Part II.A.

²⁰ *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

²¹ See *infra* Part IV.

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ *E. Steel Constructors*, 549 S.E.2d at 275.

II. NO RECOVERY IN NEGLIGENCE FOR PURELY ECONOMIC LOSS: THE TRADITIONAL RULE

When injury results from physical harm to person or property, the general rules of negligence apply.²⁶ If a defendant breaches some duty of care, which proximately causes physical injury to the plaintiff's person or property, the defendant will be held liable for the injury.²⁷ The existence of a duty on behalf of a defendant is based on the foreseeability that harm may result if care is not exercised.²⁸ If the harm was not foreseeable, then no duty existed. Consequently, if no duty existed, the defendant is not liable for the plaintiff's losses even if the defendant's conduct fell below a reasonable standard of care.²⁹

However, in the area of recovery for negligently inflicted economic loss, courts have traditionally drawn a bright line in the sand, beyond which recovery will not be permitted regardless of the foreseeability of injury.³⁰ This line is generally referred to as the economic loss rule.³¹ The stated rule is simple: if a plaintiff suffers only purely economic loss, being "economic harm [that] stands alone, divorced from injury to person or property"³² caused by a defendant's negligence, the plaintiff is barred from recovering any damages. Unless some type of contractual relationship exists that may provide another remedy, recovery of damages such as lost profits, revenues, opportunities, and so on, will not be available because tort law has generally not recognized a duty of care to avoid causing purely economic harm.³³ Negligence liability is generally based on a duty not to cause *physical* harm.³⁴ To recover purely economic losses, some physical impact on the plaintiff's person or property resulting from a defendant's negligence must be shown.³⁵ Without this physical impact, recovery of the purely economic damages is not permitted. "No action for negligence will lie without a duty broken"³⁶ and a duty cannot be broken if it does not exist at the outset.

²⁶ See DOBBS, *supra* note 3, § 452.

²⁷ See *id.* § 377.

²⁸ See Syl. Pt. 3, *Sewell*, 371 S.E.2d at 83; SCHWARTZ ET AL., *supra* note 3, at 398.

²⁹ See SCHWARTZ ET AL., *supra* note 3, at 398.

³⁰ See *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985).

³¹ See HARPER ET AL., *supra* note 10, § 25.18A.

³² DOBBS, *supra* note 3, § 452.

³³ See *id.*

³⁴ See RESTATEMENT (THIRD) OF THE LAW OF TORTS: GENERAL PRINCIPLES § 3 (Council Draft No. 1, 1998).

³⁵ See generally DOBBS, *supra* note 3, § 452.

³⁶ *Aikens*, 541 S.E.2d at 580 (quoting Syl. Pt. 1, *Parsley v. Gen. Motors Acceptance Corp.*, 280 S.E.2d 703, 704 (W. Va. 1981)).

An example may make the rule clearer. ABC Retailer³⁷ is having a weekend holiday sale at its new store. The day before the sale, Jones negligently causes a major accident on Walnut Avenue, the main street leading to the store. In the course of the accident, major utility lines are damaged causing Walnut Avenue to be shut down for several weeks during repairs. After the accident, access to ABC is limited and the store is unable to reap full benefit from the heavily advertised holiday sale. Additionally, the closed Walnut Avenue, which is the most popular access route to ABC, is unusable to holiday traffic traveling to and from a nearby shopping center for the remainder of the holiday season. Although ABC can be reached by other routes, these alternative routes are less convenient than Walnut Avenue and ABC realizes significantly less patronage while the street is closed.³⁸

After the accident, ABC suffers a significant loss of patronage and revenue. The economic loss rule prevents ABC from recovering any damages from Jones. The injury to ABC is purely economic since ABC was not *physically* injured in any way. The law does not impose a duty on behalf of Jones not to cause economic injury to ABC. Jones only has a duty not to physically damage ABC.³⁹ Since there is no duty on behalf of Jones, there is no cause of action in negligence for ABC to recover its lost revenues. The law simply provides no remedy for ABC against Jones in this situation.

Changing the facts, let us suppose that Jones negligently crashed his car directly into the ABC storefront and produced similar damage. In this scenario, ABC would certainly be permitted to recover for the physical damage to its building since the law clearly imposes a duty on Jones not to cause physical harm to ABC.⁴⁰ Additionally, ABC could recover all lost revenue, including the lost profits from the holiday sale, proximately caused by the crash since these damages stem from the physical injury to the building.⁴¹ The only difference between the two scenarios is the physical impact to ABC's property. The physical impact requirement represents a distinct line marking the point at which the law will impose a duty of reasonable care. This line demarcates where economic damages can be recovered and beyond which no recovery may be had.

This bright line drawn by the economic loss rule has been the traditional rule in American jurisprudence since the 1927 United States Supreme Court case *Robins Dry Dock & Repair Co. v. Flint*.⁴² In *Robins*, the plaintiffs had chartered a ship to transport cargo.⁴³ The defendant dock company had been

³⁷ A fictional company.

³⁸ These facts are similar to those of *Aikens*, 541 S.E.2d 576.

³⁹ See RESTATEMENT (THIRD) OF TORTS, *supra* note 34, §3.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² 275 U.S. 303 (1927).

⁴³ *Id.* at 307.

hired by the ship's owner to perform some repairs to the vessel before the plaintiffs gained use of the ship.⁴⁴ While repairing the ship, the defendant negligently damaged the ship's propeller, which caused the plaintiffs to incur a fourteen-day delay while the propeller was repaired.⁴⁵ The plaintiffs subsequently brought a tort action against the defendant in federal court. The jury returned a verdict in favor of the plaintiffs in the amount of \$32,550.57 plus interest for damages resulting from the delay, which was upheld by the Second Circuit Court of Appeals.⁴⁶ On a grant of certiorari, the Supreme Court reversed the decision.⁴⁷ Justice Holmes, writing for the majority, denied recovery to the plaintiffs, stating that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other The law does not spread its protection so far."⁴⁸ Since the defendant's negligence only resulted in interference with the plaintiffs' charter contract with the ship owner, the plaintiffs had no cause of action against the defendant.⁴⁹

The actual holding of *Robins* was not based on an economic loss rule; rather it was based on an already well-settled principle of English law that denied recovery for negligent interference with contractual rights.⁵⁰ Nevertheless, *Robins* has since been interpreted to require a physical impact on person or property as a prerequisite to recovery in negligence of purely economic losses.⁵¹

A. *The Policies Behind the Economic Loss Rule*

The general policy behind the rule prohibiting recovery of purely economic losses is the need to "limit damages to reasonably foreseeable consequences of negligent conduct."⁵² Without this limitation, liability would extend endlessly down the chain of cause and effect. "There would be no bounds to actions and litigious intricacies, if the ill effects of the negligences of men could be followed down the chain of results to the final effect."⁵³ This foundation of

⁴⁴ *Id.*

⁴⁵ *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 4 (2nd Cir. 1926).

⁴⁶ *Id.*

⁴⁷ *Robins Dry Dock & Repair Co.*, 275 U.S. at 310.

⁴⁸ *Id.* at 309.

⁴⁹ *Id.*

⁵⁰ *See Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985).

⁵¹ *See id.* at 1022. For a more detailed discussion of the history and evolution of the "economic loss rule" see Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111 (1998); Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. MICH. J.L. REF. 403 (1999).

⁵² *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 110 (N.J. 1985).

⁵³ *Aikens v. Debow*, 541 S.E.2d 576, 585 (W. Va. 2000) (quoting *Kahl v. Love*, 37 N.J.L. 5

tort law is traditionally addressed through the general principles of foreseeability and proximate cause analysis, which are fact determinative and are usually applied on a case-by-case basis.⁵⁴ However, in the province of purely economic loss, there has existed a perceived need to artificially restrict the scope of foreseeable plaintiffs and proximately caused injuries to those derived from a physical impact on another's person or property. This apparent need stems from three basic concerns arising from the general policy prohibiting recovery of purely economic losses caused by another's negligence: limitless liability, disproportionate liability, and a proverbial flood of litigation.

1. Limitless Liability

One of the underlying principles used to justify the economic loss rule is the prevention of limitless liability.⁵⁵ Since any act can conceivably cause an indeterminate amount of effects, the physical impact requirement serves to limit potential liability only to those physically affected. "[O]nly a limited amount of physical damage can ever ensue from a single act, while the number of economic interests a tortfeasor may destroy in a brief moment of carelessness is practically limitless."⁵⁶ Extending liability to the purely economic consequences of minor deviations from the acceptable standard of care could prove too burdensome for society to handle. Socially useful and productive activities may be deterred because the risk of liability is so great.⁵⁷ The law can only extend its protection so far and the traditional rule provides a bright line that will easily determine the scope of potential liability.

One example sometimes used to illustrate the potential burden of liability is a hypothetical situation where an unlucky motorist causes an accident that shuts down the New York Battery Tunnel during rush hour, thus delaying thousands of people:

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

(1874)).

⁵⁴ See generally DOBBS, *supra* note 3, §§ 181, 187.

⁵⁵ HARPER ET AL., *supra* note 10, § 25.18B (quoting Comment, 20 U. CHI. L. REV. 283, 298 (1953)).

⁵⁶ *Id.*

⁵⁷ See generally Ann O'Brien, *Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss*, 31 ARIZ. L. REV. 959, 967-68 (1989).

was surely foreseeable that among the many who would be delayed would be truckers and wage earners.⁵⁸

Should the law really hold such an unlucky soul liable for all economic injuries that would not have occurred but for this unfortunate incident? One can imagine the thousands of people who would be delayed as a result of the accident. Should our motorist be held liable for the docked pay of every tardy worker, additional expenses arising from every delayed shipment, or even far more significant injuries that could arise through the chain of cause and effect in our complex commercial world?

The economic loss rule answers these questions in the negative. It cuts off the endless chain of cause and effect without the arduous task of performing foreseeability and proximate cause analyses for each and every fact scenario. It clearly eliminates those plaintiffs who suffered no initial physical injury. Without this clear limitation on recovery, decisions as to whether a claim for damages is “too remote” or “too tenuous” would be made on a case-by-case basis. There would “be no rationale for the differing results save the ‘judgment’ of the trier of fact.”⁵⁹ The imposition of liability in tort could lose any character of foreseeability and cease to be the result of a predictable rule of law.⁶⁰ Potential defendants could be exposed “to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”⁶¹ No one would know how far liability might extend, to what class of plaintiffs, or to what kinds of harm.

By simply requiring a physical impact before a cause of action will even be entertained, the economic loss rule, in one fell swoop, eliminates a great number of potential plaintiffs in our tunnel crash scenario. The amorphous line generated by foreseeability and proximate cause analysis is solidified by the economic loss rule: no physical impact, no recovery. This reduces the number of suits that can be brought in the courts and also identifies the potential plaintiffs to which the defendant may be held accountable. By confining the scope of duty to only physical harms, the rule provides a greater degree of predictability.

2. Disproportionate Liability

In a similar vein, permitting recovery for purely economic loss could also “create a disproportion between the large amount of damages that might be recovered and the extent of the defendant’s fault.”⁶² The level of negligent con-

⁵⁸ *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 825 n.8 (2d Cir. 1968), *quoted in Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1035 (5th Cir. 1985); Silverstein, *supra* note 51, at 422.

⁵⁹ *Guste*, 752 F.2d at 1028.

⁶⁰ *Id.*

⁶¹ *Ultramares v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

⁶² *Aikens v. Baltimore & Ohio R.R. Co.*, 501 A.2d 277, 279 (Pa. Super. Ct. 1985).

duct may be slight, but the far-reaching implications may be great. Referring to the example of the unlucky motorist who crashes in the tunnel, what if the crash delayed a group of corporate executives on their way to the closing of a multi-billion dollar trade deal with a foreign nation? The dignitaries become offended at the tardiness of the executives and view the delay as a dilatory tactic. Preferring not to do business with a company whose executives cannot attend a meeting on time, the disgusted dignitaries call off the deal and the company loses millions in potential profits.

It is foreseeable that a crash in a tunnel will delay many motorists on a busy highway. It is also foreseeable that these motorists will be late for their appointments or work obligations and this may result in lost wages, discipline, loss of employment, or worse as in the case of our tardy executives. Even if we assume the economic loss to the executives was proximately caused by the motorist's negligence, holding the motorist liable for the millions in lost profits of the corporation seems highly disproportional to the extent of fault. The rule seeks to prevent situations such as this where, through the chain of cause and effect, a minor deviation from the reasonable standard of care causes harm resulting in the imposition of crushing liability clearly disproportional to the culpability of the defendant. Again, the economic loss rule provides a clear limit beyond which the law will not provide a remedy by restricting the duty of due care to avoid causing only physical harm.⁶³

3. A Flood of Litigation

A third concern behind the economic loss rule is the prevention of the proverbial flood of litigation that may ensue if purely economic losses could be recovered in a negligence suit. Allowing such a cause of action could not only lead to administrative overload for the court system, but it could also saddle the public with a "crushing burden of litigation."⁶⁴ Referring to our tunnel crash example, every person delayed by the accident would have a potential cause of action for economic damages whether it be for lost wages, increased transportation expenses, or any other possible delay damages. If recovery against the driver is permitted for the commercial carrier who incurs lost profits because of late deliveries, then can the manufacturer that expected the on-time shipment recover for any damages it may sustain? What about distributors of the manufacturer that expected the product to be available? What about the retailers, the consumers? The number of potential plaintiffs could climb into the thousands. Limiting the pool of potential plaintiffs to only those physically impacted eliminates this potential flood of claims for economic loss.

⁶³ See RESTATEMENT (THIRD) OF TORTS, *supra* note 34, §3.

⁶⁴ Aikens v. Debow, 541 S.E.2d 576, 586 (W. Va. 2000) (quoting Dundee Cement Co. v. Chemical Labs., Inc., 712 F.2d 1166, 1172 (7th Cir. 1983)). See generally O'Brien, *supra* note 57, *passim*.

Serving these concerns, the economic loss rule has stood as a traditional bulwark against the fear of an explosion in tort liability. It has provided a clear and easy-to-apply standard for how far, or over what interests, the law will spread its protection. The location of this bright line is ultimately a matter of public policy,⁶⁵ which has for the most part disapproved of tort liability for purely economic losses.⁶⁶ However, even though the economic loss rule is intended to serve as a distinct limit beyond which the law will not allow recovery of damages, some exceptions to the rule have developed over the years to allow recovery for purely economic losses to special classes of plaintiffs in special situations.

B. *Exceptions to the Rule*

One widely noted exception to the economic loss rule covers damages suffered by a plaintiff whose business is based, at least partly, on the use of maritime resources. If a defendant negligently causes harm to a maritime resource, usually by pollution of the water, some courts have allowed recovery for purely economic damages to a limited class of plaintiffs such as commercial anglers.⁶⁷ For example, in *Union Oil Co. v. Oppen*,⁶⁸ the defendant oil company negligently released large amounts of crude oil into the Pacific Ocean while performing drilling operations off the coast of California.⁶⁹ The wind and ocean currents carried the oil spill over a large surface area of the water and also onto the coastline.⁷⁰ The pollution resulted in damage to the aquatic resources and a loss of profits to the commercial anglers in the area.⁷¹

Imposing liability on the defendants, *Oppen* concluded that the deadly effects of pollution on aquatic life and the resulting adverse impact on commercial fishing were clearly foreseeable: “[t]o assert that the defendants were unable to foresee that negligent conduct resulting in a substantial oil spill could diminish aquatic life and thus injure the plaintiffs is to suppose a degree of general

⁶⁵ *Aikens*, 541 S.E.2d at 592.

⁶⁶ *See DOBBS, supra* note 3, § 452.

⁶⁷ *See generally* Louisiana *ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th 1985) (en banc) (holding defendants liable to all commercial fishermen, shrimpers, crabbers and oystermen for causing pollution of Mississippi River); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Masonite Corp. v. Steede*, 23 So. 2d 756 (Miss. 1945) (en banc) (allowing operator of fishing resort to recover lost profits due to pollution); *Columbia River Fishermen's Protective Union v. City of St. Helens*, 87 P.2d 195 (Or. 1939) (same as *Union Oil Co.*). *See also* *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973) (allowing commercial fisherman to recover lost profits, on a nuisance theory, caused by an oil spill).

⁶⁸ 501 F.2d 558 (9th Cir. 1974).

⁶⁹ *See id.* at 559.

⁷⁰ *See id.*

⁷¹ *See id.*

ignorance of the effects of oil pollution not in accord with good sense.”⁷² Since the potential harm was so clearly foreseeable if the defendants did not exercise reasonable care, the court held “that the defendants are under a duty to commercial fishermen to conduct their drilling and production in a reasonably prudent manner so as to avoid the negligent diminution of aquatic life”⁷³

Commercial anglers are not the only class of deserving plaintiffs. Courts have allowed recovery of pecuniary losses when a defendant’s negligence results in damage or diminution in the value of riparian property.⁷⁴ Recovery of lost wages has also been permitted for crewmembers of a fishing boat who lost their share of the catch when the ship was damaged by a defendant’s negligent conduct.⁷⁵

The common idea shared by these cases is the particular foreseeability of the plaintiffs:

The theory running throughout these cases, in which the plaintiffs depend on the exercise of the public or riparian right to clean water as a natural resource, is that the pecuniary losses suffered by those who make direct use of the resource are particularly foreseeable because they are so closely linked, through the resource, to the defendants’ behavior.⁷⁶

Courts have recognized that these particular plaintiffs suffered damages greater in degree than the general public.⁷⁷ In regard to the commercial anglers, the pollution had interfered with the public right to fish which was a “*special interest* quite apart from that of the general public.”⁷⁸ By elevating the plaintiffs’ interest above that of a common interest in a public resource to the level of a special interest, courts have expanded the concept of duty on behalf of defendants to include that class of plaintiffs who are directly impacted by damage to marine resources.⁷⁹ Since these defendants owe a duty to the potential plaintiffs

⁷² *Id.* at 569.

⁷³ *Id.* at 570.

⁷⁴ See, e.g., *Hampton v. North Carolina Pulp Co.*, 27 S.E.2d 538 (N.C. 1943) (holding polluter liable for economic losses of downstream riparian landowners); cf. *Birchwood Lakes Colony Club v. Borough of Medford Lakes*, 449 A.2d 472 (N.J. 1982) (allowing residents whose use of lake-side properties were diminished by pollution from defendant’s sewage treatment plant to sue for compensatory damages on nuisance theory).

⁷⁵ See *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 818-20 (11th Cir. 1984); *Carbone v. Urisch*, 209 F.2d 178, 181-82 (9th Cir. 1953).

⁷⁶ *People Express Airlines v. Consol. Rail Corp.*, 495 A.2d 107, 114 (N.J. 1985).

⁷⁷ See *Burgess v. M/V Tamano*, 370 F. Supp. 247, 250 (D. Me. 1973).

⁷⁸ *Id.* at 250 (emphasis added).

⁷⁹ See *Union Oil Co. v. Oppen*, 501 F.2d 558, 559 (9th Cir. 1974).

not to interfere with the natural resources, tort law can grant recovery if the plaintiff's loss, even a purely economic loss, was proximately caused by a breach of that duty of care.⁸⁰

Apart from the well-recognized maritime exception, various courts have also acknowledged a smattering of other exceptions to the rule when the plaintiff and defendant shared some sort of special relationship. Although the parties shared no direct relationship, such as by contract, liability has been imposed on "defendants who, by virtue of their special activities, professional training, or other unique preparation for their work, had particular knowledge or reason to know that others . . . would be economically harmed by negligent conduct."⁸¹ When the parties share a special relationship, the general duty of care is expanded to include reasonable care to avoid causing purely economic injury.⁸² This situation can arise when a clearly foreseeable plaintiff relies on the quality of a defendant's professional services, and the plaintiff suffers an injury proximately caused by the defendant's negligence.⁸³ It is important to re-emphasize that these cases do not involve any breach of contract claim,⁸⁴ rather, "they involve tort claims by innocent third parties who suffered purely economic losses at the hands of negligent defendants with whom no *direct* relationship existed."⁸⁵

For example, accountants have been held liable to third parties for the negligent preparation of financial reports in the absence of privity of contract.⁸⁶ Surveyors⁸⁷ and termite inspectors⁸⁸ have been held liable to remote purchasers of homes for negligent performance of professional services. Attorneys⁸⁹ and notaries public⁹⁰ have also been subject to liability when their negligence proximately caused an intended beneficiary of a will to be deprived of its pro-

⁸⁰ *See id.*

⁸¹ *People Express Airlines v. Consol. Rail Corp.*, 495 A.2d 107, 113 (N.J. 1985).

⁸² *See Aikens v. Debow*, 541 S.E.2d 576 (W. Va. 2000); *People Express Airlines*, 495 A.2d at 107; DOBBS, *supra* note 3, § 452.

⁸³ *People Express Airlines, Inc.*, 495 A.2d at 112.

⁸⁴ Damages for breach of contract are always purely economic. The purpose of breach of contract damages is to compensate the injured party for its monetary loss from reliance on the breaching party or loss of expected benefit under the contract. *See generally* MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 147-79 (1998).

⁸⁵ *People Express Airlines, Inc.*, 495 A.2d at 112 (emphasis added).

⁸⁶ *See H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983); *First Natl. Bank v. Crawford*, 386 S.E.2d 310 (W. Va. 1989).

⁸⁷ *See Rozny v. Marnul*, 250 N.E.2d 656 (Ill. 1969).

⁸⁸ *See Hardy v. Carmichael*, 24 Cal. Rptr. 475 (Cal. Ct. App. 1962).

⁸⁹ *See Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).

⁹⁰ *See Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958); *Galloway v. Cinello*, 423 S.E.2d 875 (W. Va. 1992) (citing W. Va. Code § 29C-6-101 (1999)).

ceeds. Contractors performing work on a building have been impressed with a duty to tenants to complete construction in a timely manner to avoid economic injury to the tenants.⁹¹ Also, as we shall see in *Eastern Steel*, design professionals such as architects and engineers have been held responsible to non-privity contractors for economic damages caused by the designer's negligence in supervising the project or preparing the design specifications.⁹²

In each of these cases, the defendant possessed some special knowledge and was clearly aware of the particular plaintiff and possible consequences she may suffer if the defendant were negligent. Economic injury in these situations was foreseeable in the sense that the defendants had reason to know the particular consequences of their negligent conduct and specifically who may suffer as a result. Thus, the courts expanded the duty of reasonable care to include a limited scope of purely economic injuries.

These exceptions to the traditional rule have only been made in limited circumstances. When liability has been imposed, it has been because of the special situation in which the plaintiff and defendant found themselves. Apart from these special situations, the traditional rule has still persisted to deny recovery for purely economic injuries. However, a handful of jurisdictions, which now includes West Virginia, have overtly discarded the traditional rule. Instead of continuing to devise exceptions to the rule, these jurisdictions have chosen to adopt a special relationship analysis in its place.⁹³ As discussed above, this analysis is primarily anchored by foreseeability with an emphasis on the nature of any relationship between the parties. The next section comments on the two West Virginia decisions in which the court adopts and then applies the special relationship analysis to cases involving negligent infliction of economic loss. Along with a discussion of the court's analysis, the next section will attempt to define the parameters of the special relationship analysis and offer some forecast into future sources of other special relationships in West Virginia.

⁹¹ See *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979).

⁹² See *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292 (Ariz. 1984); *Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones, & Goulding, Inc.*, 463 S.E.2d 85 (S.C. 1995) (see note 1 for a list of jurisdictions imposing liability); *E. Steel Constructors v. City of Salem*, 549 S.E.2d 266 (W. Va. 2001). But see *Blake Constr. Co., Inc. v. Alley*, 353 S.E.2d 724 (Va. 1987) (refusing to impose liability on architect for economic damages suffered by contractor caused by negligent preparation of design plans).

⁹³ See generally *Mattingly v. Sheldon Jackson Coll.*, 743 P.2d 356 (Alaska 1987); *J'Aire Corp.*, 598 P.2d 60; *Hawthorne v. Kober Constr. Co.*, 640 P.2d 467 (Mont. 1982); *People Express Airlines v. Consol. Rail Corp.*, 495 A.2d 107 (N.J. 1985).

III. AIKENS AND EASTERN STEEL

A. Aikens: *Establishing the Special Relationship Analysis*

In *Aikens v. Debow*,⁹⁴ the court set the stage for the expansion of tort liability in West Virginia by adopting the special relationship analysis for recovery of purely economic losses.⁹⁵ *Aikens* involved a motel owner who was seeking to recover lost profits from a truck operator who crashed into an interstate overpass.⁹⁶ The facts were as follows: while the defendant was transporting a large piece of earth moving machinery on Interstate 81, the machine proved too tall to fit under an interstate overpass.⁹⁷ The collision caused substantial damage to the bridge and it was closed for nineteen days.⁹⁸ The plaintiff claimed that his motel suffered decreased revenues during this period.⁹⁹ The crash did not physically harm the motel in any way, nor did the plaintiff have any property interest in the damaged interstate bridge.¹⁰⁰ The plaintiff simply claimed that the overpass closure, which prevented convenient access to the motel for potential patrons, was the cause of the decreased revenue.¹⁰¹ Although the motel could still be accessed by other routes, the overpass provided the shortest, most convenient access to the motel for south-bound travelers on Interstate 81.¹⁰² Since the defendants' negligence caused the bridge to be closed, the plaintiff alleged that the defendants proximately caused the decrease in revenue.¹⁰³

After the defendants' motion for summary judgment was denied, the parties agreed to certification of the issue regarding liability in West Virginia for economic loss in the absence of physical damage to person or property. The Circuit Court of Berkeley County certified the following issue and answered it in the affirmative:

Whether a claimant who has sustained no physical damage to his person or property may maintain an action against another

⁹⁴ 541 S.E.2d 576 (W. Va. 2000).

⁹⁵ *Id.* at 579, Syl. Pt. 9.

⁹⁶ *Id.* at 579.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

for negligent injury to another's property which results consequentially in purely economic loss to the claimant.¹⁰⁴

The West Virginia Supreme Court of Appeals chose not to address this specific certified question.¹⁰⁵ Apparently believing the question did not properly frame the legal issue, possibly being too narrow in scope,¹⁰⁶ the court reformulated the question to the following:

May a claimant who has sustained purely economic loss as a result of an interruption in commerce caused by negligent injury to the property of a third person recover damages absent either privity of contract or some other *special relationship* with the alleged tortfeasor?¹⁰⁷

This question was answered in the negative early in the opinion.¹⁰⁸ However, this answer did not indicate a refusal to impose liability for purely economic loss in West Virginia. On the contrary, this opinion actually laid the foundation for the court to extend liability for purely economic losses in certain circumstances.¹⁰⁹ The reformulation of the certified question seems to hint at the direction the court was willing to take with regard to the economic loss rule. In the original question, there was no mention of privity of contract or special relationship.¹¹⁰ In addition, the court redefined the damages issue to include "purely economic loss" that results from an "interruption in commerce."¹¹¹ Also properly reflecting the fact pattern at hand, the question was addressed to damages caused by negligent injury to the property of a third person.¹¹² While apparently denying recovery to this plaintiff,¹¹³ the court seized the opportunity to outline the newly expanded scope of recovery for purely economic losses in West Virginia.

¹⁰⁴ Aikens v. Debow, 541 S.E.2d 576, 579-80 (W. Va. 2000).

¹⁰⁵ *Id.* at 580.

¹⁰⁶ *Id.* ("[W]e reframe the question presented in the case sub judice to more thoroughly encompass the full breadth of the question to be answered.")

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 579, Syl. Pt. 9 (indicating that if a special relationship exists between the parties, recovery of purely economic losses may be permitted).

¹¹⁰ *Id.* at 579-80.

¹¹¹ *Id.* at 580.

¹¹² *Id.*

¹¹³ *See infra* note 160 and accompanying text.

The court began its analysis with a discussion of basic tort law and the existence of a duty as a fundamental prerequisite for the imposition of liability.¹¹⁴ The existence of duty, or more particularly the non-existence of a duty, has been the traditional barrier against claims for purely economic loss. As discussed above, the economic loss rule simply refused to find that a defendant breached any duty to a plaintiff in cases of purely economic loss.¹¹⁵ Thus, the determination that a duty existed on behalf of a defendant to avoid causing economic injury to a particular plaintiff is a precondition for recovery. “No action for negligence will lie without a duty broken.”¹¹⁶

The court also clearly stated that the issue of whether a defendant in a particular case owes a duty to a plaintiff is not a question to be resolved by the jury. The determination of this issue “must be rendered by the court as a matter of law.”¹¹⁷ Thus, before a plaintiff can assert a negligence claim against a defendant for economic injury, the court must first conclude, as a matter of law, that the defendant owed a duty of care to the particular plaintiff.

Next, the court progressed to the question of *how* this determination of duty is to be made. In accordance with traditional tort principles, the court emphasized that “foreseeability of risk is a primary consideration” in determining the existence and scope of a duty one may owe to another.¹¹⁸ Foreseeability, however, is not the only consideration. Finding the existence of a duty is also an issue of public policy.¹¹⁹ How far should the scope of the legal system’s protection extend? At what point does the law cease to provide a remedy? Where is the line beyond which recovery cannot be granted by a court of law?

In addressing this public policy issue, *Aikens* appears to deny recovery to the motel operator,¹²⁰ but at the same time expands the traditional scope of duty into the realm of pure economic loss under the special relationship analysis. The court apparently concluded that the traditional line represented by the economic loss rule should be pushed outward to allow recovery under limited circumstances. However, the line may not have moved at all; it may simply have become more fluid, more flexible – no longer an ironclad rule. The concept is stated as follows:

[A]n individual who sustains purely economic loss from an interruption in commerce caused by another's negligence may not

¹¹⁴ *Aikens*, 541 S.E.2d at 580 (quoting Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 280 S.E.2d 703, 704 (W. Va. 1981)).

¹¹⁵ See DOBBS, *supra* note 3, § 452.

¹¹⁶ *Aikens*, 541 S.E.2d at 580 (quoting Syl. Pt. 1, *Parsley*, 280 S.E.2d at 704).

¹¹⁷ *Id.* at 581.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 583 (citing *Harris v. R.A. Martin, Inc.*, 513 S.E.2d 170, 176 (W. Va. 1998) (Maynard, J., dissenting)).

¹²⁰ The certified question, addressing the facts of *Aikens*, was answered in the negative.

recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, *or some other special relationship* between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor.¹²¹

In short, to maintain an action for purely economic damages, the court must first determine that the defendant owed a duty to the particular plaintiff, by virtue of a contract or some special relationship.¹²² Also, the plaintiff's injury must have been clearly foreseeable to the defendant.¹²³

Of course this begs the question: when does a special relationship exist? The court suggested that this "will be determined largely by the extent to which the particular plaintiff is affected differently from society in general."¹²⁴ The court elaborated on the existence of a special relationship:

[I]t may be evident from the defendant's knowledge or specific reason to know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered. Such special relationship may be proven through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff or an identifiable class and can arise from contractual privity or other close nexus.¹²⁵

Is the plaintiff in a special situation that justifies imposing liability? Should the defendant have known that its carelessness would clearly cause injury to a particular person? Was the plaintiff particularly susceptible to injury by the defendant? If these questions are answered in the affirmative, it appears West Virginia tort law will impose a duty of care to avoid causing economic injury to a particular plaintiff and consequently permit recovery for this injury if proximately caused by the defendant's negligence.

On its face, the special relationship analysis appears to be no more than traditional foreseeability analysis in basic tort law. The key difference is that the plaintiff must be *particularly* foreseeable – of a *particularly* identifiable class.¹²⁶ The potential tortfeasor must have knowledge of the probable conse-

¹²¹ *Aikens*, 541 S.E.2d at 589 (emphasis added).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

quences of its carelessness – the *particular* damage that could be inflicted.¹²⁷ This emphasis on particularity is an apparent attempt to confine the scope of recovery for economic loss to specifically identifiable plaintiffs, and to prevent liability from extending out to all that might, in a general sense, be foreseeably injured.

But how is a *particular* class of plaintiffs to be identified? The court provided the vague guidelines quoted above and noted that “[a]ny attempt . . . to more specifically define the parameters of circumstances which may be held to establish a ‘special relationship’ would create more confusion than clarity.”¹²⁸ Thus we have a flexible, elastic approach to recovery of purely economic losses. The scope of the general duty of care now depends on the circumstances surrounding the injury. The key question is whether the plaintiff and the injury were particularly foreseeable, rather than the traditional approach which first asked whether the plaintiff had been physically damaged in any way.¹²⁹

The court adopted this special relationship analysis, dubbing it a “hybrid approach” to the recovery of purely economic losses.¹³⁰ It is designed to “authorize recovery of meritorious claims while simultaneously providing a barrier against limitless liability.”¹³¹ It is intended to satisfy the historical concern regarding the potential for limitless expansion of duty while still providing recovery for deserving plaintiffs. Allowing recovery for economic losses only upon a showing of a special relationship “narrowly tailors the recovery”¹³² to prevent the feared limitless expansion of duty.

Aikens acknowledged that a line must be drawn beyond which the law will not offer a remedy, but noted that the location of this line is “ultimately a matter of ‘practical politics.’”¹³³ “Tort law is essentially a recognition of limitations expressing finite boundaries of recovery.”¹³⁴ The drawing of this line “is not a matter of protection of a certain class of defendants; nor is it a matter of championing the causes of a certain class of plaintiffs. It is a question of public policy.”¹³⁵ This issue of public policy is the extent to which the courts should recognize an injury, being physical, economic, or otherwise, as one entitling the

¹²⁷ *Aikens v. Debow*, 541 S.E.2d 576, 589 (W. Va. 2000).

¹²⁸ *Id.* at 590.

¹²⁹ *See supra* Part II.

¹³⁰ *Aikens*, 541 S.E.2d at 590.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 591 (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

¹³⁴ *Id.* at 592.

¹³⁵ *Id.*

injured party to a legal remedy, usually monetary damages.¹³⁶ The court ultimately concluded that a purely economic injury will only be entitled to a judicial remedy when this amorphous special relationship exists between the plaintiff and defendant.¹³⁷

Before dispatch, the court recognized the utility of the traditional rule; it provides an easily identifiable bright line beyond which recovery will not be permitted.¹³⁸ It also recognized the concern over the “limitless expansion of duty” that the traditional rule is designed to prevent.¹³⁹ However, it noted that an inability to design a standard for recovery to fit the “differing facts of future cases simply does not justify the wholesale rejection of recovery in all cases.”¹⁴⁰ The special relationship analysis will allow recovery of economic losses for meritorious claims while still guarding against the potential expansion of tort liability to a limitless degree by adjusting the location of the line between recovery and non-recovery.

Viewed from another perspective, the line may not have moved at all. Rather, it has become *fuzzier* than the traditional bright line. It is no longer a fortress wall protecting defendants from an onslaught of plaintiffs armed with claims of economic losses. Nor is it any longer an insurmountable barrier that cannot be breached by plaintiffs seeking recovery for injuries clearly caused by the wrongful conduct of another. The line has become fluid, more flexible – no longer a hard and fast rule. It is now *permeable*, if you will. It is structured to allow only the meritorious claims to pass through while filtering out the unworthy ones, allowing liability for economic losses to attach only in those special circumstances. However one chooses to conceptualize the analytical shift, the concept of duty in West Virginia tort law has changed to encompass negligently inflicted economic losses in special situations.

The court has apparently concluded that public policy will be better served by replacing the traditional barrier to recovery with a more flexible approach.¹⁴¹ In balancing the merits of allowing recovery for purely economic losses against the potential burden of litigation, the court determined that recovery for purely economic losses could be permitted without subjecting society to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”¹⁴²

¹³⁶ See DOBBS, *supra* note 3, § 377.

¹³⁷ *Aikens*, 541 S.E.2d at 589.

¹³⁸ See *id.* at 581-83.

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 595 (Starcher, J., concurring) (quoting *People Express Airlines v. Consol. Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985)).

¹⁴¹ See *generally id.*

¹⁴² *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

As discussed earlier, the concern over a possible explosion of liability has served as the fundamental justification for denying recovery for negligently inflicted economic loss.¹⁴³ However, this rationale “supports only a limitation on, not a denial of, liability.”¹⁴⁴ Innocent victims of another’s carelessness are just as susceptible to purely economic injury as they are to physical injury, but the requirement of a physical impact “capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants.”¹⁴⁵ “The asserted inability to fix chrySTALLINE formulae for recovery on the differing facts of future cases simply does not justify the wholesale rejection of recovery in all cases.”¹⁴⁶ Requiring plaintiffs to first meet the special relationship requirement should prevent the feared explosion of liability by restricting claims of economic loss to only special situations.

B. *Dealing with the Traditional Fears*

By confining liability to a particularly foreseeable class of plaintiffs, this prerequisite of a special relationship addresses the three concerns for allowing recovery for purely economic loss.

1. Limitless Liability

First, allowing recovery only under special circumstances will not expose a defendant to limitless liability. Rather, it will be confined to particularly foreseeable economic injuries sustained by a particularly foreseeable class. Defendants will not be liable for all possible consequences of their negligence, but only for the “natural and probable consequences”¹⁴⁷ of their negligent acts which harm particularly foreseeable plaintiffs. Liability is limited only to those within the close nexus that defines the parameters of the special relationship.¹⁴⁸ It will not extend beyond this special class of plaintiffs and, additionally, recovery is permitted only for a particularly foreseeable type of injury. Thus, the endless chain of cause and effect is cut off at the close nexus. As discussed above, there is still a line beyond which recovery will not be permitted; it has only shifted, or become less bright.

¹⁴³ See *supra* Part II.A.

¹⁴⁴ *People Express Airlines*, 495 A.2d at 111, *quoted in Aikens*, 541 S.E.2d at 595 (Starcher, J., concurring).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Aikens*, 541 S.E.2d at 584 (citing *Rickards v. Sun Oil Co.*, 41 A.2d 267, 269 (N.J. Sup. 1945)).

¹⁴⁸ See *id.* at 589.

2. Disproportionate Liability

Next, allowing recovery under the limited terms of a special relationship should not expose defendants to any more disproportionate liability than possible under traditional tort law. A brief moment of carelessness on the highway could lead to a multi-vehicle calamity causing massive and extensive physical damage to both persons and property. Even though the level of negligence may be slight, the results are disastrous. Nevertheless, the party at fault will be liable for all proximately caused physical damage and consequential economic harms, which may be greatly disproportional to the culpability of the negligent party. In light of the multi-billion dollar payouts in lawsuits over asbestos, Benedectin, silicone breast implants, and other mass torts,¹⁴⁹ liability for a limited scope of purely economic losses seems no more disproportional. Recovery under the special relationship analysis is also limited to clearly foreseeable injuries, which further restricts the scope of potential liability. Furthermore, economic injuries are provable and can be calculated with a reasonable amount of certainty.¹⁵⁰ They are not subjective or speculative like monetary damages for pain and suffering and other physical injuries.¹⁵¹ The distinction between physical and purely economic injuries is an inadequate solution to the problem of disproportionate liability, and recovery under the special relationship analysis will not likely aggravate the problem.

3. A Flood of Litigation

Finally, restricting recovery of economic losses to a limited, particularly foreseeable class of plaintiffs also prevents the potential flood of litigation by continuing to eliminate all remotely injured parties from the sphere of a defendant's duty. Only the limited class of plaintiffs existing within the nexus requirement, those *special* plaintiffs, would be entitled to seek recovery. Since the pool of potential plaintiffs has only expanded to include a limited class, the corresponding amount of potential litigation should likewise be only limited.

By opening the door to a new class of plaintiffs, the number of claims for economic loss is likely to rise as more litigants claim entitlement to recovery under the special relationship analysis. Accordingly, the number of cases appearing on the docket may increase. However, the special relationship analysis enables the courts to dismiss undeserving claims early in the litigation since the existence of a special relationship is a question of law: whether the defendant

¹⁴⁹ See generally Deborah R. Hensler & Mark A. Peterson, *Symposium: Reinventing Civil Litigation: Evaluating Proposals for Change: Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993) (cited in Silverstein, *supra* note 51, at 423).

¹⁵⁰ See generally Randall R. Bovbjerg et al., *Public Policy: Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989) (cited in Silverstein, *supra* note 51, at 423).

¹⁵¹ See generally *id.*

owed a duty to the plaintiff.¹⁵² If the court determines that the defendant did not owe a duty to the plaintiff, then the plaintiff cannot recover, as a matter of law, and summary judgment is appropriate.¹⁵³ Any potential increase in tort litigation should not be so great as to cause administrative overload in the judicial system.¹⁵⁴

In addition to addressing the traditional concerns, further support for allowing recovery of purely economic losses can be found in the goals of modern tort law. First, one goal of tort law is to compensate those victims who have been injured by the wrongful conduct of another.¹⁵⁵ A party responsible for another's injury should shoulder the burden of restoring the injured party to its original condition.¹⁵⁶ Since the concept of duty in tort law is designed to impose liability only for the foreseeable consequences of negligent conduct,¹⁵⁷ whether those consequences are physical or purely economic injury is irrelevant to the question of foreseeability.

Second, another fundamental policy of tort law, and law in its broadest purpose, is to deter wrongful conduct.¹⁵⁸ "Imposing liability on defendants for their negligent conduct discourages others from similar tortious behavior."¹⁵⁹ Allowing recovery for purely economic losses in limited circumstances thus encourages socially responsible behavior. Although one may speculate as to how the law can effectively deter an unintentional act, the narrow scope of the special relationship analysis applies only to limited scenarios. It encourages parties who work closely with one another, who rely on one another to perform certain tasks properly, to be cognizant of the possible harm that could result from careless conduct. The potential for liability encourages parties to exercise the appropriate level of skill to prevent economic harm to those vulnerable to

¹⁵² Syl. Pt. 5, *Aikens*, 541 S.E.2d at 578.

¹⁵³ See Syl. Pt. 3, *Atkinson v. Harmon*, 158 S.E.2d 169, 171 (W. Va. 1967) ("Liability of a person for injury to another cannot be predicated on negligence unless there has been on the part of the person sought to be charged some omission or act of commission in breach of duty to the person injured.") (quoting Syl. Pt. 6, *Morrison v. Roush*, 158 S.E. 514, 515 (W. Va. 1931)); Syl. Pt. 1, *Davis v. Cross*, 164 S.E.2d 899, 900 (W. Va. 1968) ("[I]f the plaintiff fails to establish such primary negligence the court should direct a verdict for the defendant.").

¹⁵⁴ As evidenced by *Aikens*, the economic loss rule does not prevent a plaintiff from hauling a defendant into court. It only prevents recovery by declaring, as a matter of law, that the defendant did not owe a duty of care to prevent purely economic losses to the plaintiff. Frivolous lawsuits can always be filed, thereby forcing a defendant to spend money to defend the claim. The economic loss rule and the special relationship only prevent such suits from progressing to trial.

¹⁵⁵ See *People Express Airlines v. Consol Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985); see also SCHWARTZ ET AL., *supra* note 3, at 1.

¹⁵⁶ See *People Express Airlines*, 495 A.2d at 111; see also SCHWARTZ ET AL., *supra* note 3, at 1.

¹⁵⁷ See DOBBS, *supra* note 3, § 452.

¹⁵⁸ See *People Express Airlines*, 495 A.2d at 111; see also SCHWARTZ ET AL., *supra* note 3, at 1.

¹⁵⁹ See *People Express Airlines*, 495 A.2d at 111.

injury. In other words, it deters careless conduct by imposing a punishment where one did not exist before.

By adjusting the location of the line beyond which recovery will not be granted, or replacing a solid wall with a chain link fence, West Virginia has expanded the bounds of the concept of duty to encompass only special cases of economic loss while simultaneously guarding against the traditional fears surrounding tort recovery for purely economic loss and also serving two fundamental goals of tort law.

Applying the special relationship model to the facts of *Aikens*, it appears that the parties did not have any type of relationship whatsoever, be it contractual or special. These defendants did not have any knowledge or specific reason to know that their negligence would cause economic harm to this particular plaintiff. Therefore, in the absence of any close nexus between the parties, it appears the defendants did not have a duty to the plaintiff to avoid causing economic harm. In the absence of a duty broken, no action for negligence will lie.¹⁶⁰ Thus, Mr. Aikens could not seek retribution from these defendants. In this case, the protection of the law did not spread so far.

Although the facts of *Aikens* do not appear to justify recovery, *Aikens* established the special relationship analysis and opened the door for the right case to come to the docket where recovery of economic loss would be permitted in West Virginia – a case where this special relationship exists and the plaintiff would be clearly foreseeable to the defendant.

Interestingly, the right case was apparently already on the court's calendar.¹⁶¹ Now that the analytical framework had been erected, the court was ready to provide its first example of when a special relationship does exist, and how the new analysis can be applied to expand the concept of duty in West Virginia into the realm of purely economic injury.

C. Eastern Steel: *The Court Finds a Special Relationship*

In *Eastern Steel Constructors, Inc. v. The City of Salem*,¹⁶² the plaintiff, a general contractor, brought suit to recover damages for lost profits allegedly due to defective plans and specifications prepared by one of the defendants, Kakanui Associates, a design professional.¹⁶³ The facts were as follows: Kakanui was under contract with the City of Salem to provide engineering and architectural services for certain improvements to Salem's existing sewer

¹⁶⁰ *Aikens v. Debow*, 541 S.E.2d 576, 580 (quoting Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 280 S.E.2d 703, 704 (W. Va. 1981)).

¹⁶¹ *Aikens* was submitted to the court on June 7, 2000, and decided on November 6, 2000. The brief of plaintiff/appellant Eastern Steel had been filed with the Court Clerk on October 11, 2000, which is 26 days before *Aikens* was decided.

¹⁶² 549 S.E. 2d 266 (W. Va. 2001).

¹⁶³ *See id.* at 269.

system, including the design of a new sewage treatment plant to be built under one construction contract, and the design of two sewer lines to the new plant to be built under two additional construction contracts.¹⁶⁴ Kananui prepared plans and specifications to be used in soliciting bids from construction companies and to be further used by the successful bidders in constructing the project.¹⁶⁵ The plaintiff, Eastern Steel Constructors, Inc., (“Eastern”) was awarded a contract to build one of the sewer lines to the new plant.¹⁶⁶

After beginning construction on the sewer line, Eastern experienced significant delays allegedly caused by sub-surface rock conditions and existing utility lines that had not been disclosed in the documents prepared by Kananui.¹⁶⁷ Kananui responded by contending that under the contract between Eastern and Salem, Eastern was responsible for construction “regardless of the type, nature, or quantity of sub-surface conditions.”¹⁶⁸ In any event, Eastern claimed it incurred substantial financial damages resulting from delays and allegedly improper management by Kananui.¹⁶⁹

Eastern subsequently filed tort actions against both Salem and Kananui for negligence and breach of implied warranty of the plans and specifications.¹⁷⁰ Alternatively, Eastern also argued that it was entitled to damages as a third party beneficiary of the contract between Salem and Kananui.¹⁷¹ Kananui responded by filing a motion for summary judgment, which was granted by the Circuit Court of Harrison County.¹⁷² The circuit court concluded that under West Virginia law, “there is not a duty owed by the engineer/architect to the building contractor” regarding the adequacy of the plans created for the construction project.¹⁷³ Furthermore, any action for recovery by the building contractor was limited to a breach of contract action.¹⁷⁴ Since Eastern was not in privity of contract with Kananui, Eastern was limited to suit against Salem.¹⁷⁵

Reviewing the circuit court’s grant of summary judgment *de novo*, the West Virginia Supreme Court of Appeals applied the analysis set forth in *Aikens*

¹⁶⁴ See *id.* at 268-69.

¹⁶⁵ See *id.* at 269.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ *E. Steel Constructors v. Salem*, 549 S.E. 2d 266, 269 (W. Va. 2001).

¹⁶⁹ *Id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

and concluded that a design professional does owe a duty of care to a contractor who is working on the same project and therefore the contractor may bring a tort action against the design professional for negligence and recover purely economic losses.¹⁷⁶

Beginning with the principle that privity of contract is not a necessary prerequisite for a negligence action in the context of the construction industry,¹⁷⁷ the court proceeded to analyze the question of whether a design professional owes a duty of care to a contractor notwithstanding the absence of a contractual relationship. Building on the *Aikens* decision and taking note of several other jurisdictions that have examined this issue,¹⁷⁸ the court expressly held:

A design professional (e.g. an architect or engineer) owes a duty of care to a contractor who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the owner, notwithstanding the absence of privity of contract between the contractor and the design professional, due to the *special relationship* that exists between the two. Consequently, the contractor may, upon proper proof, recover purely economic damages in an action alleging professional negligence on the part of the design professional.¹⁷⁹

This expanded duty of care is a product of the special relationship created when the two parties are both hired to work on the same construction project. "[T]he contractor must rely on design documents to calculate a bid, and if successful in bidding, to construct the project, and may be further subject to oversight by the design professional during actual construction of the project."¹⁸⁰ This clearly foreseeable, if not required, reliance by a contractor is a key factor in imposing a legal duty on the part of the designer to use the proper level of care in the preparation of the plans.¹⁸¹ In other words, a contractor is in

¹⁷⁶ See *id.* at 275. The court affirmed the grant of summary judgment as to the third-party beneficiary claim explaining that under W. Va. Code § 55-8-12, "a person who is not a party to a contract can maintain a cause of action arising from that contract only if it was made for his or her 'sole benefit.'" *Id.* at 277. "While it is clear that the contracting parties knew the contract would result in professional work product by Kanakanui that would ultimately be *relied* upon by a construction contractor building the project, it is equally clear that the contract itself was for the benefit of the contracting parties." *Id.* at 278 (emphasis in original).

¹⁷⁷ *Id.* at 270.

¹⁷⁸ See *id.* at 272; see also *Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding, Inc.*, 463 S.E.2d 85, 87 n.1 (S.C. 1995).

¹⁷⁹ *E. Steel Constructors*, 549 S.E.2d at 275 (emphasis added).

¹⁸⁰ *Id.*

¹⁸¹ See *Aikens v. Debow*, 541 S.E.2d 576, 589 (W. Va. 2000) (discussing the existence of a special relationship: "It may be evident from the defendant's knowledge or specific reason to

a *special* situation. It would seem unfair not to allow the contractor to recover its losses caused by the negligence of a design professional when the contractor has no choice but to rely on the plans provided.¹⁸² The contractor's bid is based on these plans and the construction must be performed accordingly.¹⁸³ Substantial errors in the plans may result in unanticipated delays or require significant additional work, not accounted for in the bid calculation.¹⁸⁴ The result could be serious financial loss to the contractor.

Since a duty exists, its parameters must be defined. Generally speaking, the scope of any professional's duty is to render "professional services with the ordinary skill, care and diligence commensurate with that rendered by members of [the] profession in the same or similar circumstances."¹⁸⁵ This duty may further be defined on a case-by-case basis or through reference to the professional rules of conduct promulgated by the proper agency overseeing the specific profession of which a defendant is a member.¹⁸⁶

Accordingly, the court found that a design professional owes a duty of care to a contractor to perform its services with the appropriate level of care, notwithstanding the lack of privity of contract between the parties.¹⁸⁷ Thus, a design professional is potentially liable to the contractor for economic damages proximately caused by a breach of that duty of care. The court also held that a design professional "impliedly warrants to the contractor"¹⁸⁸ that the plans and specifications "have been prepared with the ordinary skill, care and diligence commensurate with that rendered by members of [the] profession."¹⁸⁹ Therefore, where a contractor has suffered economic loss due to negligence in the preparation of plans and specifications by a design professional, the contractor may not only have a cause of action sounding in tort, but also in implied warranty as well.¹⁹⁰

West Virginia jurisprudence now has its first example, under the new analysis, of when a special relationship exists between parties that will persuade the court to allow tort recovery for purely economic losses. But where will the next "sufficiently close nexus" be found? *Aikens* offers a number of past exam-

know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered.").

¹⁸² *E. Steel Constructors*, 549 S.E.2d at 275.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 268, Syl. Pt. 7.

¹⁸⁶ *See id.* at 275.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 268, Syl. Pt. 9.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

ples of special relationship exceptions in West Virginia before the economic loss rule was formerly buried. These include holding accountants liable to third parties for the negligent preparation of financial reports even in the absence of privity of contract.¹⁹¹ Surveyors¹⁹² and termite inspectors¹⁹³ have been responsible to remote purchasers of homes for negligent performance of professional services. Also, attorneys¹⁹⁴ and notaries public¹⁹⁵ have been liable when their negligence causes injury to a third party.

Possible areas of future special relationships can also be found in other jurisdictions. For instance, California has imposed a duty on behalf of contractors performing work on a building to complete construction in a timely manner to avoid economic losses to a tenant of the building.¹⁹⁶ If the West Virginia Supreme Court of Appeals is willing to treat the special relationship analysis expansively, it could follow the lead of New Jersey where a chemical manufacturer was held liable for purely economic damages when a chemical leak compelled the evacuation of neighboring businesses, leading to lost revenues and other expenses.¹⁹⁷ With the significant presence of chemical companies in the Kanawha Valley, this example of a special relationship could prove very significant if the court is willing to apply this new standard liberally.

Expansive interpretation of the special relationship analysis could lead to a wide range of relationships being dubbed "special." The complex and intricate nature of our commercial world could present a number of intimate working relationships that could possibly satisfy the close nexus requirement. Although the court previously declined to offer specific examples of possible new special relationships,¹⁹⁸ the expansion of liability for purely economic losses will likely have the greatest impact on the professional services industry. Professionals who provide services that have clear ramifications beyond the imme-

¹⁹¹ See *First Natl. Bank of Bluefield v. Crawford*, 386 S.E.2d 310 (W. Va. 1989); *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983); *RESTATEMENT (SECOND) OF TORTS* § 522 (1977).

¹⁹² See *Capper v. Gates*, 454 S.E.2d 54 (W. Va. 1994); see also *Rozny v. Marnul*, 250 N.E.2d 656 (Ill. 1969).

¹⁹³ See *Stemple v. Dobson*, 400 S.E.2d 561 (W. Va. 1990); see also *Hardy v. Carmichael*, 24 Cal. Rptr. 475 (Cal. Ct. App. 1962).

¹⁹⁴ See *Keister v. Talbott*, 391 S.E.2d 895 (W. Va. 1990); see also *Heyer v. Flaig*, 449 P.2d 161 (Cal. 1969) (attorney held liable for failing to inform plaintiff-beneficiary's mother of the testamentary consequences of a planned remarriage, reducing beneficiary's share of estate); *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).

¹⁹⁵ See *Galloway v. Cinello*, 423 S.E.2d 875 (W. Va. 1992) (citing W.Va. Code § 29C-6-101 (1999)); *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1979).

¹⁹⁶ See *J' Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979).

¹⁹⁷ See *People Express Airlines Inc. v. Consol. Rail Corp.*, 495 A.2d 107 (N.J. 1985).

¹⁹⁸ "Any attempt . . . to more specifically define the parameters of circumstances which may be held to establish a 'special relationship' would create more confusion than clarity." *Aikens v. Debow*, 541 S.E.2d 576, 590 (W. Va. 2000).

diate client will be particularly susceptible to claims for liability arising out of negligent performance of those services – especially when the professional has special knowledge of the possible consequences to particular third parties.

Distribution networks could present a possible source of special relationships. While no long-term contractual obligations may be involved, retailers depend on distributors, who depend on manufacturers, who depend on suppliers for product availability. Disputes could arise between these parties over economic losses caused by an unavailable product. Depending on the closeness of the relationship, one may owe a legal duty to another to ensure a supply. However, the imposition of liability in this setting should be very limited. Purchasers are usually free to seek products from any supplier in the market and similarly sellers can sell to almost anyone willing to buy. The choice of one party to rely on the other for future business relations should not be sufficient to create the close nexus required for a special relationship. Neither should a lengthy course of dealing suffice since either party would be free to discontinue the relationship without notice. Only when a party is in some manner compelled, outside of any contractual relationship, to rely on the adequate performance of the other should a special relationship possibly come into being.

Unless the court takes a very narrow view of the special relationship analysis, the holding of *Aikens* is unlikely to remain confined to the contractor-architect example provided by *Eastern Steel*. These two cases were decided almost within three months¹⁹⁹ of each other with *Aikens* setting the stage by abandoning the economic loss rule in favor of the special relationship analysis. *Aikens* could have easily been decided by applying the traditional rule.²⁰⁰ Instead, while effectively denying recovery to that plaintiff, the court conducted an extensive review of the history, purpose, and policy behind the economic loss rule and determined that it should be replaced by the more flexible special relationship analysis. Additionally, *Eastern Steel* could have been decided without the foundation of *Aikens* by simply creating another exception to the traditional rule and support the exception by citing the numerous jurisdictions that permit a specific cause of action in tort for contractors against designers.²⁰¹ The detailed analysis provided in *Aikens*, even when the court effectively denied recovery, and the relative ease with which *Eastern Steel* could have been decided without the *Aikens* precedent, stand as strong evidence that the examples of special relationships in West Virginia are likely to go beyond the construction industry setting.

¹⁹⁹ *Aikens* was decided on November 6, 2000, and *Eastern Steel* was decided on February 9, 2001.

²⁰⁰ Since the defendant did not owe a duty to *Aikens* to avoid causing purely economic injury, the court simply could have dismissed the suit for failure to state a claim upon which relief could be granted. See W. VA. R. CIV. P. 12(b)(6).

²⁰¹ See *Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding, Inc.*, 463 S.E.2d 85, 87 n.1 (S.C. 1995).

The court is clearly cognizant of the potential consequences of an overly broad interpretation of this analysis and expressed its concern on this matter: "There would be no bounds to actions and litigious intricacies, if the ill effects of the negligences of men could be followed down the chain of results to the final effect."²⁰² Thus, the application of this analysis should be approached with caution to avoid realization of the traditional fears surrounding a "limitless expansion of duty."²⁰³

IV. IMPLICATIONS OF SPECIAL RELATIONSHIP ANALYSIS IN THE CONSTRUCTION INDUSTRY

While each profession or industry will likely have its own unique complications with the special relationship analysis, expansion of liability into the construction industry may have the most unique complications. Providing contractors with a direct cause of action against a designer for negligence, whether in the preparation of plans or supervision of the project, may interfere with contractual negotiations in the industry. This could lead to increased construction costs and a possible conflict of interest for design professionals. However, these potential difficulties, which may not come to pass, do not justify allowing designers to act with impunity toward contractors when performing professional services. Contractors should have a mode of legal recourse when financially injured by the negligence of a design professional.

A. *Distribution of Risk and Contractual Negotiations*

One criticism of this expansion of tort law is that it represents an unneeded invasion into the realm of contract law.²⁰⁴ "The controlling policy underlying tort law is . . . the protection of persons and property from losses resulting from injury. The controlling policy underlying the law of contracts is the protection of expectations bargained for."²⁰⁵ The issue arising in disputes between contractors and designers is fundamentally "one of dividing risks and responsibilities among the participants in a commercial transaction according to their intentions, rather than one of protecting person and property (including profits) from injury with rules that promote safety and reasonable conduct."²⁰⁶ Since loss of bargained for expectation (profit) or standard of quality are issues of party expectation, they should accordingly be governed by the rules of con-

²⁰² *Aikens*, 541 S.E.2d at 585 (quoting *Kahl v. Love*, 37 N.J.L. 5 (1874)).

²⁰³ *Id.* at 581.

²⁰⁴ Matthew S. Steffey, *Negligence, Contract, and Architects' Liability for Economic Loss*, 82 KY. L.J. 659 (1994).

²⁰⁵ *Id.* at 681 (quoting *Sensenbrenner v. Rust, Orling, & Neale*, 374 S.E.2d 55, 58 (Va. 1988)).

²⁰⁶ *Id.* at 680 (quoting *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 503 N.E.2d 246, 251 (Ill. 1987) (Simon, J., specially concurring)).

tract law. "Protections against economic losses caused by another's failure properly to perform is but one provision the contractor may require in striking his bargain."²⁰⁷

However, one problem with relying on contractual negotiations is that a contractor is not in any type of privity with the designer to negotiate this risk.²⁰⁸ The contractual relationships run between the owner and the designer and also between the owner and the contractor.²⁰⁹ The contractor has no ability to negotiate with the designer, who has no obligation to negotiate with the contractor. Therefore, there is no opportunity to divide the risks and responsibilities between the contractor and designer according to their intentions. Despite this inability, the contractor is forced to rely on the designer for almost every aspect of the project. "[T]he contractor must rely on design documents to calculate his or her bid and, if successful in bidding, to construct the project, and may be further subject to oversight by the design professional during actual construction of the project."²¹⁰ This required reliance by the contractor on the accuracy of the designer's specifications is a key factor in imposing a duty upon the designer to use the proper level of care in preparing the plans.²¹¹ Since the contractor has no choice but to base its bid on the plans, it is clearly foreseeable that errors in the plans may negatively impact the contractor.²¹² Again, the concept of duty in tort liability is not based on whether contractual negotiations are available; it is based on foreseeability.²¹³

Another criticism of the introduction of tort law into this area of the construction industry concerns potential inflation of the costs of construction.²¹⁴ The allocation of risk in construction projects is a factor in determining the fees charged by the parties involved. "The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract."²¹⁵ This potential threat of litigation interferes with the allocation of risk through the contracting process by adding uncertainty of liability to the mix of factors. If a designer cannot properly estimate its potential liability with respect to the contractual

²⁰⁷ *Id.* at 681.

²⁰⁸ See Michael T. Terwilliger, *Economic Loss in the Construction Context: Should Architects Be Liable for the Commercial Expectations of Contractors?*, 31 VAL. U. L. REV. 257, 262 (1996).

²⁰⁹ See *id.*

²¹⁰ *E. Steel Constructors v. City of Salem*, 549 S.E.2d 266, 275 (W. Va. 2001).

²¹¹ See *Aikens v. Debow*, 541 S.E.2d 576, 589 (W. Va. 2000); see also *E. Steel Constructors*, 549 S.E.2d at 275.

²¹² *E. Steel Constructors*, 549 S.E.2d at 275.

²¹³ See Syl. Pt. 3, *Sewell*, 371 S.E.2d at 83; SCHWARTZ ET AL., *supra* note 3, at 398.

²¹⁴ *E. Steel Constructors*, 549 S.E.2d at 278. (Maynard, J., dissenting).

²¹⁵ *Id.* at 279 (quoting *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 881 P.2d 986 (Wash. 1994)).

provisions, the fee charged will likely have to be increased to insure against possible liability to a contractor. Also, the availability of a lawsuit may discourage a contractor from “going the extra mile” to minimize delay damages if it can simply hold the architect liable for the delay.²¹⁶ This additional potential liability increases the net cost of the designer’s services and thus increases the net cost of the entire project.²¹⁷

On the other hand, although this new legal liability creates some uncertainty for the designers, it correspondingly relieves some uncertainty on behalf of contractors. If a contractor cannot rely on the accuracy of a designer’s specifications, it cannot accurately calculate a bid. Also, if a designer has no legal obligation toward a contractor, the designer has less incentive to refrain from conduct that could cause economic injury to a contractor. Since a contractor is not a party to the contractual negotiations between the owner and the designer, it has no opportunity to negotiate this risk.²¹⁸ Just as the fees charged by designers are based on expected exposure, so are the fees charged by contractors. Imposing liability on designers for negligence alleviates the uncertainty that the contractors face, which should result in *lower* contractor fees.

In regard to delay damages, contractors will still have adequate incentive to minimize delay: the desire to maximize profit. Delays are an unavoidable reality in construction and contractors do anticipate them.²¹⁹ When delay can be avoided, or at least minimized, a contractor’s profit will increase. Additionally, designers can only be held responsible for delays when they result from negligent conduct and recovery by a contractor will require litigation and time, which both cost money. Unless the economic injury is significant, a contractor’s desire to maximize profit will provide ample incentive to minimize delay.

B. *A Superficial Conflict of Interest*

Another potential problem arising from this new expansion of liability concerns the triangular relationship between the project owner, the designer, and the contractor.²²⁰ The traditional delivery system of construction contracts involves a project owner hiring a designer to draft plans for the project.²²¹ The owner then solicits bids from prospective contractors to complete the project.²²² These bids submitted are based on the plans prepared by the designer.²²³ This

²¹⁶ See Steffey, *supra* note 204, at 685.

²¹⁷ See *id.*

²¹⁸ See Terwilliger, *supra* note 208, at 262.

²¹⁹ See Steffey, *supra* note 204, at 688.

²²⁰ See Terwilliger, *supra* note 208, at 262.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

setting is designed to create an adversarial relationship between the designer, as the owner's agent, and the contractor.²²⁴ The owner wants no privity between the architect and the contractor so the owner can receive the lowest possible price through competitive bidding among prospective contractors.²²⁵ Also, the designer supervises the project on behalf of the owner to insure the contractor does not overcharge the owner or deviate from the contract documents in constructing the project.²²⁶ The designer's interest in the quality of the contractor's materials and workmanship, as an agent of the owner, is in conflict with the contractor's interest in maximizing its profit.²²⁷

Eliminating the economic loss rule's barrier to recovery in this context could potentially jeopardize this adversarial relationship and the owner's interest in maximizing its benefits.

If courts do not apply the economic loss doctrine in the traditional delivery system, all [designers], negligent and non-negligent, will be forced to consider the commercial expectations of contractors. The effect on non-negligent [designers] is that, even though the plans and specifications are prepared without breaching the professional standard of care, they might consider the commercial expectations of the contractor more important than those of the owner.²²⁸

A threat of litigation from both the owner and contractor could compromise the contractual duties owed to the owner by forcing the designer to consider potential litigation from both the owner and the contractor when making decisions.²²⁹ This may create a conflict of interest between the designer's duty to the owner to ensure quality work and its interest in avoiding a suit from a contractor.²³⁰

For example, in approving a newly developed building material for use, if the designer approves without proper testing, the material could be inadequate and the designer would have breached its duty to the owner to ensure quality materials.²³¹ On the other hand, if the designer insists upon testing the material before approval, this could lead to significant delays in construction, which may

²²⁴ Terwilliger, *supra* note 208, at 263.

²²⁵ *See id.*

²²⁶ *Id.*

²²⁷ *Id.* at 303.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ This example is similar to that provided in Terwilliger, *supra* note 208, at 303.

cause economic damage to the contractor who now has a potential suit against the designer.²³² Even if requiring the testing is not a breach of the designer's duty of care to the contractor, a concern over a possible lawsuit from a contractor may influence the designer's decision, thus compromising the designer's duty to the owner to ensure quality materials.

This conflict of interest concern is likely to prove unfounded. Although imposing a duty of care on behalf of a designer toward a contractor does compel the designer to be cognizant of the contractor's interests, it does not necessarily create a conflict of interest for the designer. This duty does not increase the level of care required by the designer. The duty of care is only extended to contractors who must rely on the plans for bidding purposes and actual construction. Imposing a duty on behalf of the designer to competently perform its profession does not require it to serve two masters.

A designer's inability to completely ignore the financial interests of a contractor does not create a conflict of interest for the designer. The designer is still only required to exercise the appropriate level of care in the performance of its profession, which any responsible professional should do in a commercial setting, especially in a setting where there will be clear reliance by others on the adequacy of the professional's work. Any conflict of interest is superficial.

Despite the concerns over expanding tort liability into the construction setting, imposing a duty to contractors on behalf of a design professional to perform professional services with the proper level of skill is appropriate in light of the special relationship between the designer and the contractor.²³³ The law should impose a duty of care in situations where there will be clearly foreseeable, if not required, reliance by one party on the quality of another party's work.²³⁴ This duty is especially important when the relying party has no opportunity to "shop around" or contractually negotiate with the party providing the services. The risk of designer negligence has been properly allocated to the party who is in the best position to guard against the negligence.²³⁵ This re-allocation of risk may require an increase in the fee charged by the former, but may decrease the fee charged by the latter. Additionally, any potential conflict of interest for the designer proves to be superficial since the duty of care on behalf of the designer has not been elevated; it has merely been extended. An inability to completely disregard the interests of other parties involved on a project should not jeopardize the designer's relationship with the project owner. It requires the designer to simply be cognizant of the potential consequences of its carelessness and perform its professional duties in a competent fashion.

²³² See *id.* at 258-59.

²³³ See Syl Pt. 6, *E. Steel Constructors v. City of Salem*, 549 S.E.2d 266, 268 (W. Va. 2001).

²³⁴ Syl. Pt. 9, *Aikens v. Debow*, 541 S.E.2d 576, 579 (W. Va. 2000).

²³⁵ *E. Steel Constructors*, 549 S.E.2d at 275.

V. CONCLUSION

The adoption of the special relationship analysis to allow recovery of purely economic losses in limited circumstances is both a bold and appropriate step forward for West Virginia. Since innocent plaintiffs are just as susceptible to purely economic injuries as they are to physical ones,²³⁶ replacing the traditional economic loss rule with a more flexible, elastic approach will allow recovery of economic damages for meritorious claims. When the consequences of a defendant's carelessness are clearly foreseeable, because of the special circumstances or relationships involved, liability for purely economic damages is appropriate.

Additionally, recovery can be permitted while simultaneously guarding against the traditional concerns over recovery of purely economic losses. Allowing liability to attach only in special situations will prevent potential liability from becoming too burdensome. It will preclude the potentially countless claims for economic losses that may arise from every interruption of commerce. Our poor soul who crashed in the tunnel will not be subjected to liability for all the consequences of his carelessness. This new analysis would not apply since no close nexus existed between him and all the delayed motorists. Neither would our hypothetical ABC Retailer be able to recover its economic damages because no special relationship existed between it and the motorist who crashed near its store. The line demarcating the limits of legal redress for injury is still present, but the location, or the nature, of the line has been altered.

This new line will require maintenance to function properly. The proper balance must be struck and the court is fully aware of its role in reflecting public policy to avoid "socially and economically ruinous"²³⁷ liability. This expansion of liability into the realm of purely economic losses must be kept in check lest we fall victim to the fear of "liability in an indeterminate amount for an indeterminate time to an indeterminate class,"²³⁸ and I believe our judicial system is well suited for the task.

*Robert M. Stonestreet**

²³⁶ *People Express Airlines Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985).

²³⁷ *Aikens*, 541 S.E.2d at 583.

²³⁸ *Ultramares v. Touch*, 174 N.E. 441, 444 (N.Y. 1931).

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