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The Economic Loss Rule and Florida's Exception for General Contractors

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NOTES

THE ECONOMIC LOSS RULE AND FLORIDA'S EXCEPTION FOR GENERAL CONTRACTORS

Patricia Duffy[*] [**]

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I. INTRODUCTION

Generally stated, the economic loss rule prohibits the buyer of a product or service from recovering in tort for economic loss when there has been no personal injury or damage to other property.[1] Within the

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** Special thanks to Hal Anderson, David Barksdale, and Matt Rosin.

1. Greenberg v. Mount Sinai Medical Ctr., 629 So. 2d 252, 255 (Fla. 3d DCA 1993). The economic loss rule does not affect tort actions for economic loss resulting from personal injury. *See id.* Therefore, the rule does not apply to tort damages such as loss of future earnings that stem from personal injury. *See id.* Also, the rule does not apply to economic loss from damage to property other than the product itself. *See* Casa Clara Condo. Ass'n v. Charley Toppino &

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past ten years, Florida has embraced this rule,[2] dismissing claims based on fraud,[3] conversion,[4] and breach of fiduciary duty,[5] when the

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Sons, Inc., 620 So. 2d 1244, 1246, 1247 (Fla. 1993). Property other than the product itself, often called "other property," is defined as property that is completely separate from the purchased product. *See* East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 867 (1986).

To determine whether something is other property, the Florida Supreme Court has stated that "one must look to the product purchased by the plaintiff, not the product sold by the defendant." *Casa Clara,* 620 So. 2d at 1247 (citing King v. Hilton-Davis, 855 F.2d 1047, 1051 (3d Cir. 1988)). Under this rule, component parts of a product would not be considered other property even if supplied by a different manufacturer. *See id.* Applying this rule, the *Casa Clara* court found that structural steel damaged by faulty concrete was not other property because the steel and concrete were part of one complete unit—a home. *See id.* Similarly, the *East River* Court held that turbines damaged by defectively designed turbine components were not other property because the turbine and components were sold as an integrated package. *East River,* 476 U.S. at 867. For a case holding that the damaged property was other property, see E.I. DuPont de Nemours & Co. v. Finks Farms, 656 So. 2d 171, 172 (Fla. 2d DCA 1995) (holding that tomato plants and land damaged by a chemical supplied by the defendant were other property, and the plaintiff was therefore able to recover economic damages in tort).

2. *See, e.g.,* AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 180 (Fla. 1987) (services); Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 901-02 (Fla. 1987) (goods). The economic loss rule has also been embraced by a majority of jurisdictions. William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort,* 44 U. MIAMI L. REV. 731, app. at 799-803 (1990) (listing cases adopting the rule). However, jurisdictions vary over which exceptions should apply to the rule. Exceptions recognized in some jurisdictions allow purely economic loss recovery when (1) an act of negligence is imminently dangerous to the lives or safety of others or the property at issue is inherently dangerous, Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832, 835 (Mo. Ct. App. 1993); (2) there is fraud or collusion, *id.*; (3) attorney malpractice is involved, Collins v. Reynard, 607 N.E.2d 1185, 1187 (Ill. 1992); and (4) an architect or engineer acting in a supervisory role economically harms a general contractor, Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628, 631 (Fla. 1995); Jim's Excavating Serv. v. HKM Assocs., 878 P.2d 248, 255 (Mont. 1994). This Note focuses only on the last exception.

3. *See, e.g.,* Hoseline, Inc. v. U.S.A. Diversified Prods., 40 F.3d 1198, 1199-200 (11th Cir. 1994) (holding that Florida's economic loss rule barred a manufacturer from recovering purely economic damages when the manufacturer's claim that the defendant fraudulently shipped less plastic conduit than the manufacturer ordered arose from the defendant's breach of its contract to ship certain quantities of the conduit).

Other courts also have precluded fraud claims. *See, e.g.,* Kee v. National Reserve Life Ins. Co., 918 F.2d 1538, 1540, 1543, 1544 (11th Cir. 1990) (using Florida's economic loss rule to uphold summary judgment entered against a counterclaimant's fraud and breach of fiduciary duty claims); American Eagle Credit Corp. v. Select Holding, Inc., 865 F. Supp. 800, 816 (S.D. Fla. 1994) (using Florida's economic loss rule to preclude recovery on fraud claim of financing company/lessor that had disbursed money to an equipment manufacturer based on the lessee's fraudulent representation that the equipment had been inspected and approved); Serina v. Albertson's, Inc., 744 F. Supp. 1113, 1118 (M.D. Fla. 1990) (using Florida's economic loss rule to grant the defendant's motion for summary judgment on the plaintiff's fraud claim); J. Batten Corp. v. Oakridge Invs. 85, Ltd., 546 So. 2d 68, 69 (Fla. 5th DCA 1989) (using the economic loss rule to preclude a contractor's fraud claim against a defendant who allegedly promised the contractor that he would pay the contractor the amount due under their contract if the contractor

plaintiffs suffered only monetary damage.[6] Florida courts have used this rule to bar claims even when injured plaintiffs are without any other remedy,[7] and when their injuries were wantonly inflicted.[8]

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would complete construction).

Despite precluding fraud in the performance claims based on the economic loss rule, courts have allowed fraud in the inducement claims to stand because the inducement takes place prior to any contractual agreement. *See, e.g.*, Williams Elec. Co. v. Honeywell, Inc., 772 F. Supp. 1225, 1237-38 (N.D. Fla. 1991) (stating that because fraud in the inducement addresses a situation where one party is tricked into contracting, it addresses precontractual conduct which is recognized as a tort); Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566, 1576 (S.D. Fla. 1992) (citing Burton v. Linotype Co., 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989) for the proposition that fraud in the performance is not actionable as a tort where there is only economic loss, but fraud in the inducement is an independent tort which is actionable even for purely economic loss).

4. *See, e.g.*, Leisure Founders, Inc. v. CUC Int'l, Inc., 833 F. Supp. 1562, 1573-74 (S.D. Fla. 1993) (holding that shareholders could not sue purchasers for economic loss under conversion theory where the shareholders and purchasers were in a contractual relationship and where the same actions that constituted the alleged conversion also constituted nonperformance of the contract); Burger King Corp. v. Austin, 805 F. Supp. 1007, 1012 (S.D. Fla. 1992) (holding that under Florida law, franchisee could not recover under conversion for monetary loss after the franchisor failed to purchase advertising with advertising money collected from the franchisee); Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 494-96 (3d DCA 1994) (holding that the economic loss rule barred a mortgagor from recovering under conversion the post-default rents to which the mortgagor allegedly was entitled, but which were allegedly diverted to the personal use of the mortgagee-partnerships' general partner), *review denied*, 659 So. 2d 272 (Fla. 1995).

5. *See* Interstate Sec. Corp. v. Hayes Corp., 920 F.2d 769, 776-77 (11th Cir. 1991) (using the economic loss rule to preclude a corporation from recovering monies lost because of stockbroker's alleged breach of fiduciary duty). *But see* Resolution Trust Corp. v. Holland & Knight, 832 F. Supp. 1528, 1532 (S.D. Fla. 1993) (holding that the Resolution Trust Corporation could sue a law firm for breach of fiduciary duty and malpractice which resulted in purely economic loss because the breach of fiduciary duty claim was in essence a malpractice claim, which is at root both a tort and a contract claim); *Collins*, 607 N.E.2d at 1187 (holding that a client could bring legal malpractice claim for purely economic damages despite the economic loss rule because it is inappropriate for clients to have to bargain for a guarantee or warranty against malpractice).

For critical commentary on the *Interstate* decision, see James G. Dodrill II, Casenote, Interstate Securities Corp. v. Hayes Corp.: *Should the Economic Loss Doctrine Apply to Actions Against Fiduciaries?*, 47 U. MIAMI L. REV. 1193 (1993).

6. If the plaintiff is in a contractual relationship with the defendant, the plaintiff can recover monetary damages if he or she can prove a tort separate and independent from economic loss due to breach of contract. *See, e.g.*, John Brown Automation, Inc. v. Nobles, 537 So. 2d 614, 617-18 (2d DCA 1988) (holding that negligent misrepresentation made by machine-producing company that it had all the parts necessary for the operation of a machine was not a tort separate and independent from a breach of the contract because the misrepresentation was "inherent in and inextricable from the events constituting [the] breach"), *review denied*, 547 So. 2d 1210 (Fla. 1989).

7. *See, e.g.*, *Airport Rent-A-Car*, 660 So. 2d at 631; Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1248 (Fla. 1993) (Barkett, C.J., dissenting in part). Prior

Florida courts have used the economic loss rule to exclude these otherwise valid tort claims[9] in order to foster a distinction between tort

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to 1993, Florida courts provided a "no alternative remedy" exception to the rule. *See* Latite Roofing Co. v. Urbanek, 528 So. 2d 1381, 1383 (Fla. 4th DCA 1988). However, the Florida Supreme Court expressly overruled *Latite* in *Casa Clara*. *Casa Clara*, 620 So. 2d at 1248 (Barkett, C.J., dissenting in part). The plaintiffs in *Casa Clara* were homeowners whose homes were "literally crumbling around them" because of the allegedly faulty concrete supplied by the defendant. *Id.* (Barkett, C.J., dissenting in part). The homeowners could not recover under breach of implied warranty because they were not in privity with the defendant. *Id.* (Barkett, C.J., dissenting in part). Also, the homeowners could not sue under the Florida Building Codes Act because the Act did not apply to material suppliers like the defendant. *Id.* (Barkett, C.J., dissenting in part). Finally, they could not recover under a tort theory due to the economic loss rule. *Id.* at 1248. In her partial dissent, Chief Justice Barkett noted that denying the homeowners' tort claim was unacceptable in light of the principle underlying the Florida Constitution's court access provision: wrongs must have remedies absent compelling, countervailing public policies. *Id.* (Barkett, C.J., dissenting in part) (citing FLA. CONST. art. I, § 21).

One year after *Casa Clara*, the United States Court of Appeals for the Eleventh Circuit certified the following question to the Florida Supreme Court: "WHETHER, UNDER FLORIDA LAW, THE ECONOMIC LOSS RULE APPLIES TO NEGLIGENCE CLAIMS FOR THE MANUFACTURE OF A DEFECTIVE PRODUCT WHERE THE ONLY DAMAGES CLAIMED ARE TO THE PRODUCT ITSELF AND WHERE THE PLAINTIFF CLAIMS TO HAVE NO ALTERNATIVE THEORY OF RECOVERY." Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 18 F.3d 1555, 1559 (11th Cir. 1994). The Florida Supreme Court answered this question in the affirmative, stating that "the economic loss rule cannot be circumvented by the no alternative theory of recovery exception." *Airport Rent-A-Car*, 660 So. 2d at 631.

Some commentators argue that a "no alternative remedy" exception would "undercut the very foundation of the doctrine [because] the economic loss doctrine is aimed at encouraging parties to negotiate for warranty protection or to take other steps, such as purchasing insurance, to protect their purely economic interests." Lynn E. Wagner & Richard A. Solomon, *The Supreme Court of Florida Ends the Confusion Surrounding the Economic Loss Doctrine,* FLA. B.J., May 1994, at 46, 51.

8. *See, e.g.*, *Kingston Square*, 792 F. Supp. at 1575 (using the economic loss rule to preclude a negligence and wanton conduct claim).

In Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982), the Florida Supreme Court answered the following certified question in the affirmative:

> "WHERE THE DEFENDANT FLAGRANTLY, UNJUSTIFIABLY, AND OPPRESSIVELY BREACHES A CONTRACT, AND ATTEMPTS TO CONCEAL THE BREACH BY THE CRIMINAL ACT OF MAKING FALSE STATEMENTS TO THE GOVERNMENT, MUST THE PLAINTIFFS PLEAD AND PROVE THAT THE DEFENDANT COMMITTED AN INDEPENDENT TORT [INDEPENDENT OF BREACH OF CONTRACT ACTIONS] AGAINST THEM IN ORDER TO RECOVER PUNITIVE DAMAGES?"

Id. at 223, 225.

9. Because the economic loss rule precludes otherwise valid tort claims, it has been described as a "powerful defense." Timothy J. Muldowney, *Architects, Engineers and Construction Litigation: Economic Loss Doctrine*, 60 DEF. COUNS. J. 356, 356 (1993).

The economic loss rule has been a successful procedural device at the motion to dismiss and

and contract law.[10] The distinction rests on the different allocations of risk in each body of law.[11] On one hand, tort law burdens society generally with the costs of tort compensation.[12] Historically, the judiciary has allocated risks of bodily or property injury through tort law because private agreements cannot effectively accomplish the task.[13] Purely economic loss has not been included in this societal scheme on the theory that society in general should not bear the economic losses of private parties.[14]

Contract law, on the other hand, effectively allocates purely economic loss.[15] Contract law is well suited to commercial controversies because the parties can set the terms of their

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motion for summary judgment stages. *See, e.g.*, Serina v. Albertson's, Inc., 744 F. Supp. 1113, 1118 (M.D. Fla. 1990) (using Florida's economic loss rule to grant the defendant's motion for summary judgment on the plaintiff's fraud claim); Bankest Imports, Inc. v. ISCA Corp., 717 F. Supp. 1537, 1540 (S.D. Fla. 1989) (using the economic loss rule to grant plaintiff's motion to dismiss count of defendant's counterclaim alleging breach of duty to segregate funds); City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279, 281 (Fla. 2d DCA 1994) (affirming dismissal of the city of Tampa's multi-million dollar tort claim against nonprivity subcontractor); E.C. Goldman, Inc. v. A/R/C Assocs., 543 So. 2d 1268, 1273 (5th DCA) (affirming judgment on the pleadings against plaintiff who sued in negligence for economic loss), *review denied*, 551 So. 2d 461 (Fla. 1989).

10. *See Casa Clara*, 620 So. 2d at 1245-46. *See generally* Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989) (discussing the consequences and purposes of doctrinal classification, particularly in regards to the boundary drawn between tort and contract). For a thorough analysis of economic loss rule policies of other states, see David B. Gaebler, *Negligence, Economic Loss, and the U.C.C.*, 61 IND. L.J. 593 (1986).

11. *Casa Clara*, 620 So. 2d at 1245-46; Florida Bldg. Inspection Servs. v. Arnold Corp., 660 So. 2d 730, 732 (Fla. 3d DCA 1995) (en banc).

12. *Casa Clara*, 620 So. 2d at 1245-46.

13. Sandarac Ass'n v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352-53 (2d DCA 1992), *review denied*, 626 So. 2d 207 (Fla. 1993). Noting that the law of negligence has been influenced by the theories of Hobbes and Rousseau, the *Sandarac* court stated:

> In a democracy, the social contract is an agreement between the members of society by which each member undertakes duties in consideration for the benefit received when all members fulfill similar duties. Although the analogy can be overstated, through the law of negligence, the judiciary has written an express "social contract" with limited remedies to protect interests not adequately protected in private contracts.

Id. at 1353 n.4. The *Sandarac* court also stated that whether an interest is protected, under common law tradition, is a matter of law decided by the court when it determines whether a duty exists. *Id.* at 1352 (citing McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992)).

14. *See Airport Rent-A-Car*, 660 So. 2d at 630; *Casa Clara*, 620 So. 2d at 1247.

15. *See Sandarac*, 609 So. 2d at 1353.

agreements.[16] Thus, while tort law seeks to compensate society members for bodily harm or property injury,[17] contract law seeks to protect contracting parties' economic expectations.[18] The economic loss rule is a tort doctrine that accounts for the differences between tort and contract by precluding tort compensation for purely economic harm, based on the belief that the general public " 'should [not] bear the cost of [purely] economic losses sustained by those who failed to bargain for adequate contract remedies.' "[19]

Under this rationale, the rule encourages parties in a contractual relationship to define the limitations of economic loss liability through bargaining, risk acceptance, and compensation.[20] Without question, this rule serves its purpose in defective product cases where the only harm is the purchaser's monetary loss from the product's malfunction.[21] If the courts allowed the purchaser to recover under tort in such a case, warranty law would become redundant.[22] In effect, the courts would be creating a "tort warranty" distinct from any bargained-for contractual warranty.[23] However, the rule is not as clearly justified when the parties are not in privity because the parties probably did not have the opportunity to engage in economic loss bargaining.[24] Consequently,

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16. East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 872-73 (1986).

17. *See Sandarac*, 609 So. 2d at 1352-53.

18. *Casa Clara,* 620 So. 2d at 1246. The *Casa Clara* court stated that "[f]or recovery in tort 'there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.' " *Id.* (quoting Redarowicz v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982)).

19. *Id.* at 1247 (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis,* 40 S.C. L. REV. 891, 933 (1989)). There are several other plausible explanations for the different treatment of economic loss and physical injury. *See* Gaebler, *supra* note 10, at 610-20. One such explanation is that economic interests are simply not worthy of protection against negligence because the "integrity" of such interests is less important than the "integrity" of the body and tangible property. *Id.* at 610. Perhaps the most satisfactory explanation, according to Gaebler, is the fear of virtually open-ended liability for the indirect economic repercussions of negligence. *Id.* at 611-13.

20. *See* AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987); *infra* text accompanying notes 67-83, 100-04.

21. Addressing the importance of risk allocation in contract, the *East River* Court stated that "the failure of the product to function properly . . . is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." *East River*, 476 U.S. at 868.

22. *See id.* at 867 (citing Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 330 (Alaska 1981)); *Casa Clara*, 620 So. 2d at 1247 (citing *East River*, 476 U.S. at 866).

23. The term "tort warranty" was used by two authors to describe the effect of not having an economic loss rule. *See* Wagner & Solomon, *supra* note 7, at 53.

24. *See Casa Clara*, 620 So. 2d at 1248 (Barkett, C.J., dissenting). The Florida Supreme Court has characterized "privity" as a word used to describe the relationship of persons who are

economically injured parties not in privity with wrongdoers traditionally have posed a problem for Florida courts applying the economic loss rule.[25]

After several district courts wrote conflicting opinions about the application of the economic loss rule in nonprivity settings,[26] the Florida Supreme Court clarified the issue. In a 1993 case, *Casa Clara Condominium Ass'n v. Charley Toppino & Sons*,[27] the court held that the economic loss rule applied to parties who were not in contractual privity.[28] In doing so, the court made a deliberate policy choice to extend the rule beyond contracting parties.[29]

Unfortunately, Florida courts have not applied this choice consistently. While generally using the economic loss rule to bar tort

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parties to a contract. Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1379-80 (Fla. 1993) (citing Baskerville-Donovan Eng'rs, Inc. v. Pensacola Executive House Condo. Ass'n, 581 So. 2d 1301, 1303 (Fla. 1991)).

25. *See* Southland Constr., Inc. v. Richeson Corp., 642 So. 2d 5, 7-9 (Fla. 5th DCA 1994). One Florida Supreme Court justice has noted that the economic loss rule "works well when the loss is suffered by one who is privy to [a] contract . . . [and] works a mischief . . . where . . . the injured party is not privy to the contract. . . ." *Casa Clara*, 620 So. 2d at 1249 (Shaw, J., concurring and dissenting).

Florida's economic loss rule is based on a policy decision to have parties allocate risks through contract. *See infra* text accompanying notes 99-104. On the other hand, the privity doctrine is based on a policy to prevent disproportionate and indeterminate liability. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (refusing to allow economic loss recovery to nonprivity parties for fear that it would subject the defendant to liability "in an indeterminate amount for an indeterminate time to an indeterminate class"). This rule later was relaxed, allowing recovery for specially identifiable and foreseeable nonprivity classes rather than completely barring nonprivity classes from recovery. *See* John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929, 1936 (1988).

In its first case discussing the economic loss rule, the Florida Supreme Court stated that the rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses under tort theories to parties not in privity of contract. Florida Power & Light v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987).

26. *Compare* E.C. Goldman, Inc. v. A/R/C Assocs., 543 So. 2d 1268, 1270 (Fla. 5th DCA 1989) (holding that a roofer could not recover economic loss in negligence caused by nonprivity consultants) *with* Latite Roofing Co. v. Urbanek, 528 So. 2d 1381, 1383 (Fla. 4th DCA 1988) (holding that a building buyer could sue a roofing company in negligence for purely economic loss caused by negligent roof construction despite the absence of privity between the buyer and the roofing company), *overruled by Casa Clara*, 620 So. 2d at 1248.

27. 620 So. 2d 1244 (Fla. 1993).

28. *See id.* at 1248. Specifically, the court held that the plaintiff homeowners could not recover purely monetary damages because of the economic loss rule, even though the homeowners had never contracted with the wrongdoer. *See id.* The Florida Supreme Court reiterated the *Casa Clara* holding in *Airport Rent-A-Car*, when it held that a rental car company could not recover economic loss in tort from a nonprivity manufacturer. *See Airport Rent-A-Car*, 660 So. 2d at 630-32.

29. *See Casa Clara*, 620 So. 2d at 1245-47.

claims, regardless of privity,[30] Florida courts have not used the rule to bar general construction contractors' tort claims against nonprivity supervising architects and engineers for purely economic loss.[31] Therefore, a general contractor in Florida may sue an owner's architect under negligence for purely economic loss.[32] Does allowing the contractor to sue in tort necessarily dictate that society in general must pay for the economic losses of a general contractor?[33]

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30. *See, e.g., id.* at 1248.

31. *See, e.g., Southland Construction*, 642 So. 2d at 7-9.

32. A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 399 (Fla. 1973). Instead of overruling *Moyer*, the *Casa Clara* court limited *Moyer* to its facts. *Casa Clara*, 620 So. 2d at 1248 n.9. The exception applies only when the architect or engineer acts in a supervisory role. *See Airport Rent-A-Car*, 660 So. 2d at 631; *Sandarac*, 609 So. 2d at 1354.

Courts have narrowly interpreted the *Moyer* exception. *See, e.g.*, City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279, 282 (Fla. 2d DCA 1994). In *Thornton-Tomasetti*, the City of Tampa hired architects and a construction company to build the Tampa Bay Performing Arts Center. *Id.* at 280. In turn, the architects hired consultants to assist in the design of the building. *Id.* During construction, problems arose from errors in the plans and specifications, causing the construction company to halt work on several occasions. *Id.* The construction company subsequently sued the city for $20,000,000 in damages caused by the delays. *Id.* at 280-81. The city ultimately settled with the construction company for $9,500,000. *Id.* at 281. The city sought to recover its loss by suing the architects and their consultants under negligence and breach of contract theories. *Id.* The trial court originally allowed the negligence claim against the consultants to stand despite the economic loss rule. *Id.* After the city filed an amended complaint, the consultants again attacked the negligence claim using the economic loss rule. *Id.* This time, the trial court dismissed the negligence claim. *Id.* The court recognized the inconsistency or apparent inconsistency of its rulings, explaining that although the economic loss rule is stated with ease, it is applied with great difficulty. *Id.* (citing *Sandarac*, 609 So. 2d at 1352).

The appellate court affirmed this decision, *id.* at 283, suggesting that the *Moyer* exception only applies when there is "an extremely close nexus" between defendant and plaintiff. *Id.* at 282. Here, there was not a close nexus between the city and the consultants. *Id.* The architects, not the consultants, were responsible for coordinating the work of designers, and thus, only the architects were answerable to the city. *Id.*

Furthermore, it appears that the exception is limited strictly to general contractors. *See* Spancrete, Inc. v. Ronald E. Frazier & Assocs., 630 So. 2d 1197, 1198 (Fla. 3d DCA 1994) (holding that a subcontractor could not bring a negligence action against a supervising architect for economic loss because the *Moyer* exception can only be used by general contractors).

33. In *Sandarac,* the court stated:

> When the judiciary creates a . . . duty in negligence to protect economic interests, . . . it should be aware that it is not merely creating an exception to an existing common law rule of damages. It should be convinced that the problem justifies a judicial allocation of the relevant risks among the members of society, and that an adequate remedy cannot realistically exist through private contracts and statutory remedies.

Sandarac, 609 So. 2d at 1353.

This Note argues that this exception in Florida is not sound in light of the economic loss rule's purpose. Specifically, this Note asserts that society should not be expected to bear the economic risks of a general contractor, especially because the contractor has adequate remedies under contract law. As background, part II reviews the origin and development of the economic loss rule in Florida law, and discusses the exception for general contractors. Part III presents problems with this exception and poses alternatives that make the exception unnecessary. Part IV concludes that Florida courts should abolish the exception in favor of uniform application of the economic loss rule and its policies.

II. BACKGROUND

A. Early Economic Loss Recovery for Parties Not in Privity

Although the economic loss rule is not a new doctrine,[34] the

34. The economic loss rule was first articulated by the California Supreme Court in a products liability case, Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965) (en banc). In *Seely*, the plaintiff purchased a truck for business purposes. *Id.* at 147. After driving the truck, the plaintiff discovered that it bounced violently. *Id.* After numerous unsuccessful attempts to fix the defect, the plaintiff sued the truck manufacturer for the payments he had made on the truck's purchase price and for lost profits under a breach of express warranty theory. *Id.* at 147-48. The court allowed recovery on the ground that the manufacturer had breached an express warranty. *Id.* at 148. The court further found that the recovery for breach of warranty was not superseded by the doctrine of strict liability in tort. *Id.* at 149. In the absence of the warranty, however, the plaintiff would not have been able to recover. *See id.* at 150-51. The court explained:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Id. at 151. Under this rationale, the plaintiff would not have been able to successfully sue under strict liability for the payments he had made on the truck's purchase price or for lost profits. *See id.* at 152.

Florida Supreme Court did not specifically address its applicability until 1987.[35] Before this, the court allowed economic loss recovery through

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The plaintiff also sued, on a strict liability theory, for damages sustained to the truck when the truck's brakes failed and the truck overturned. *Id.* at 147, 152. The court agreed that the doctrine of strict liability should be extended to encompass physical injury to the plaintiff's property, but found that the plaintiff failed to prove that the defect caused the physical damage to the truck. *Id.* at 152.

The United States Supreme Court in the admiralty case of *East River Steamship Corp. v. Transamerica Delaval Inc.* agreed for the most part with the line drawn in *Seely*. *See East River*, 476 U.S. at 866-71. In *East River*, a shipbuilding company contracted with the defendant to design, manufacture, and supervise the installation of turbines in four supertankers. *Id.* at 859. After the ships were completed, charterers took full control of the ships. *Id.* at 859-60. The charterers experienced trouble with the turbines and subsequently sued the defendant for the cost of repairing the ships and lost income while the ships were out of service. *Id.* at 860-61. The charterers alleged that the defendant was strictly liable for design defects and liable in tort for negligent supervision of the manufacturing process. *Id.* at 861.

The Court cited with approval the *Seely* court's statement that the distinction between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary. *Id.* at 871 (citing *Seely*, 403 P.2d at 151). Moreover, the Court agreed that tort protection for physical injuries includes damage to some property. *See id.* at 867-68. However, the Court stopped short of providing tort protection in one situation in which the *Seely* court seemingly would—when the product injures only itself. *Compare id.* at 867-68, 871-75 ("When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.") *with Seely*, 403 P.2d at 152 ("Physical injury to property [including the product] is so akin to personal injury that there is no reason for distinguishing them.").

The courts in both *Seely* and *East River* tried to draw a clear line between contract and tort recovery. In establishing the proper scope for tort and contract recovery, the *East River* court stressed:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies . . . because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties allocation of the risk.

East River, 476 U.S. at 872-73 (citations omitted) (footnote omitted). Without this tort-contract distinction, the *East River* Court recognized that contract law would "drown in a sea of tort." *Id.* at 866 (citing GRANT GILMORE, THE DEATH OF CONTRACT 87-94 (1974)).

35. *See* Florida Power & Light v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987). Prior to 1987, several Florida district courts of appeal used the economic loss rule to preclude recovery. *See* GAF Corp. v. Zack Co., 445 So. 2d 350, 352 (3d DCA) (holding that plaintiff could not use tort law to recover for purely economic loss sustained because of a defective product), *review denied*, 453 So. 2d 45 (Fla. 1984); Cedars of Lebanon Hosp. Corp. v. European X-Ray Distribs., 444 So. 2d 1068, 1070-71 (Fla. 3d DCA 1984) (affirming dismissal of count alleging strict liability because no personal injury nor damage to other property resulted from defective X ray equipment); Monsanto Agric. Prods. Co. v. Edenfield, 426 So. 2d 574, 576 (Fla. 1st DCA 1982) (prohibiting plaintiff from recovering in negligence for economic loss sustained

tort law in limited circumstances.[36] In these older cases, the court did not focus on the economic loss rule or its underlying policy of separating tort and contract law. Rather, the court focused on the concept of contract privity.[37] For instance, in *A.R. Moyer, Inc. v. Graham,*[38] the Florida Supreme Court held that a plaintiff could recover purely economic loss under a negligence theory despite lack of privity with the defendant.[39]

In *Moyer,* the court answered the certified question of whether a general contractor could sue a supervising architect or engineer for negligent preparation of plans when the architect or engineer was not in direct privity with the general contractor.[40] Even though the contractor suffered only economic loss because of the allegedly faulty plans,[41] the court did not focus on the character of the harm. Instead, the court discussed Florida's privity doctrine.[42] Citing *MacPherson v. Buick Motor Co.*[43] and two previous Florida Supreme Court cases,[44] the *Moyer* court stated that the strictures of privity had been relaxed to allow plaintiffs not in contract with the defendant to sue in negligence.[45] However, the parties in *MacPherson* and the earlier cases suffered bodily injury,[46] unlike the general contractor who suffered

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when herbicide did not perform as expected).

36. *See, e.g.*, First Am. Title Ins. Co. v. First Title Serv. Co., 457 So. 2d 467, 473 (Fla. 1984) (stating that purchasers of property, as intended and known beneficiaries of the sellers' contract for abstract services, may recover damages from the abstract company for its negligent performance); *Moyer*, 285 So. 2d at 402 (stating that a third-party general contractor who sustained an economic loss proximately caused by an architect's negligent performance of a contractual duty has a cause of action against the architect).

37. *See First American*, 457 So. 2d at 468-71; *Moyer*, 285 So. 2d at 398-402. This Note focuses mainly on cases involving negligently rendered services. In regard to defective products, Florida courts also focused attention on contract privity instead of the underlying differences between contract and tort. *See* James E. Tribble, *The Role of Privity in Florida's Law of Products Liability and the Economic Loss Doctrine: A Retrospective and Prognosis,* TRIAL ADVOC. Q., Jan. 1993, at 10, 10-23.

38. 285 So. 2d 397 (Fla. 1973).

39. *Id.* at 402.

40. *Id.* at 398, 402.

41. *See id.* at 398.

42. *See id.* at 398-402.

43. 111 N.E. 1050 (N.Y. 1916). In this case, Justice Benjamin Cardozo authored his landmark opinion which recognized that a product supplier may be liable in negligence to nonprivies for any defective product which may reasonably be expected to cause personal injury if the defendant knew nonprivies would use the product. *See id.* at 1053-57.

44. The *Moyer* court cited Mai Kai, Inc. v. Colucci, 205 So. 2d 291 (Fla. 1967) and Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956).

45. *Moyer*, 285 So. 2d at 399-400.

46. In *Mai Kai,* a metal counterweight fell from a ceiling fan and struck the plaintiff. *Mai Kai*, 205 So. 2d at 292. In *Matthews*, a metal chair manufactured by the defendant cut off the

only economic loss.[47] The court did not address this difference and instead focused on the lack of privity by stating: " '[A]ny court that accepts *MacPherson* . . . as far as chattels are concerned should likewise reject the privity doctrine where structures on land are involved. No reason appears why those who design . . . structures on land should not [also be liable for negligence against foreseeable third parties].' "[48]

Using this rationale, the court concluded that there was no restriction on the type of harm for which a general contractor could sue a nonprivity architect or engineer in negligence.[49] As to the duty owed by the architect or engineer to the general contractor, the *Moyer* court found that because the supervising architect has a great amount of authority, it should have a duty to the general contractor to supervise the construction project with due care.[50] Specifically, the court stated, " '[t]he power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.' "[51]

The *Moyer* court did not discuss the economic loss rule or whether the judiciary should allocate economic risk to the general public by allowing the contractor to sue in tort. Presumably, it did not mention the rule because the Florida Supreme Court had not addressed the economic loss rule or its purposes when *Moyer* was decided.[52] The court did recognize that the contractor could have sued the architect or engineer under a third-party beneficiary theory if the contract between the owner and architect specified a third-party arrangement.[53] However, the court did not perceive the duplicative nature of allowing the contractor tort

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plaintiff's finger. *Matthews*, 88 So. 2d at 300. In *MacPherson*, an automobile collapsed, throwing the plaintiff from the car and causing bodily injury. *MacPherson*, 111 N.E. at 1051.

47. *See Moyer*, 285 So. 2d at 398.

48. *Id.* at 402 (quoting George M. Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711, 713 (1959)).

49. *See id.*

50. *Id.* at 401 (citing United States *ex rel.* L.A. Testing Lab. v. Rogers & Rogers, 161 F. Supp. 132, 135-36 (S.D. Cal. 1958)).

51. *Id.* (quoting *Rogers & Rogers*, 161 F. Supp. at 136).

52. The discussion of a case cited by the general contractor in a recent Washington Supreme court case is particularly relevant here. The Washington Supreme court said this of the cited case, which did not discuss the economic loss rule: "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 991 (Wash. 1994) (en banc) (citing Webster v. Fall, 266 U.S. 507, 511 (1925)). Although not binding, this rule could be used to argue that *Moyer* is not a controlling case because it did not raise the economic loss rule.

53. *See Moyer*, 285 So. 2d at 402-03.

remedies when the contractor had not earlier bargained for contract remedies with the owner.

B. Establishing the Economic Loss Rule in Florida

Nearly fourteen years after *Moyer,* the court did perceive this type of problem in *Florida Power & Light v. Westinghouse Electric Corp.*,[54] a case involving defective products and parties in a contractual relationship.[55] Unlike the *Moyer* court, the *Westinghouse* court focused its attention on the fact that the plaintiff, suing in tort, suffered only economic loss.[56] In doing so, the *Westinghouse* court articulated the first version of Florida's economic loss rule.[57]

In *Westinghouse,* the plaintiff purchased steam generators from the defendant.[58] When the plaintiff discovered leaks in the generators, it sued the defendant under negligence and warranty theories, seeking damages for the cost of repair and inspection of the generators.[59] The plaintiff argued that a negligence claim, based on traditional concepts of duty, causation, and foreseeability, was the appropriate cause of action to settle the dispute.[60] It argued that its contract with the defendant created a legal duty on the defendant to use reasonable care in performing the contract.[61] It also argued that even absent a contractual

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54. 510 So. 2d 899 (Fla. 1987).

55. *Id.* at 900.

56. *See id.* at 900-02.

57. *See id.*

58. *Id.* at 900 (adopting the Eleventh Circuit Court of Appeals' statement of the applicable facts). The Florida Supreme Court received the case when the Eleventh Circuit Court of Appeals certified the following questions:

> (1) Whether Florida law permits a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or property damage to property other than the allegedly defective goods.
> (2) If Florida law precludes recovery for economic loss in tort without a claim for personal injury or property damage to other property, whether this rule should be applied retroactively in this case.

Id. at 899-900 (quoting Florida Power & Light v. Westinghouse Elec. Corp., 785 F.2d 952, 953 (11th Cir. 1986)). The Florida Supreme Court answered the first question in the negative. *Id.* at 900. The court responded to the second question in the affirmative, stating that the economic loss rule applied to the instant case as well as to all other pending cases. *Id.* at 900, 902.

59. *Id.* at 900. In *Westinghouse*, the Florida Supreme Court answered certified questions based only on the negligence count. *See id.* at 899-900. In regard to the breach of warranty claim, the trial court denied the defendant's motion for partial summary judgment. *Id.* at 900.

60. *Id.*

61. *Id.*

duty, the defendant had a general duty to avoid harming the plaintiff.[62]

The *Westinghouse* court did not accept the plaintiff's arguments.[63] Instead, it stated that contract principles are more appropriate than tort principles for resolving actions concerning economic loss when there is no accompanying physical injury or damage to other property.[64] The court reasoned that a duty of care, necessary for a negligence action, is "particularly unsuited to the vagaries of individual purchasers' product expectations."[65] Furthermore, the court reasoned that if a manufacturer could be found liable in negligence for purely economic loss, it would have to raise prices on every contract to cover the increased risk.[66]

In finding for the defendant, the court concluded that it would refrain from "intrud[ing] into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public."[67] Thus, the *Westinghouse* court clearly adopted the view that when manufactured goods malfunction and cause only economic loss, purchasers must seek recovery under contract law rather than tort law.[68]

In the same year as *Westinghouse,* the Florida Supreme Court held that the economic loss rule would apply to economic loss stemming from negligently rendered services in addition to economic loss stemming from negligently manufactured goods.[69] In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.,*[70] the plaintiff contracted

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62. *Id.* Specifically, the plaintiff argued that the defendant negligently designed and manufactured the generators, failed to furnish proper operating instructions, and failed to alert the plaintiff to potential problems. *Id.* The plaintiff also asserted that the defendant knew that the plaintiff was relying on the defendant's proffered expertise. *Id.*

63. *See id.* at 902.

64. *See id.* The court recognized that " '[t]ort law imposes upon manufacturers a duty to exercise reasonable care so that the products they place in the marketplace will not harm persons or property. However, tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers.' " *Id.* at 901 (quoting Monsanto Agric. Prods. v. Edenfield, 426 So. 2d 574, 576 (Fla. 1st DCA 1982)).

In regard to "property damage," the court was referring to damage to any property other than the particular product purchased. *See id.* at 900, 902; *supra* note 1. Tort law has traditionally protected against damage to other property because such damage is considered so akin to personal injury that the two are treated alike. Seely v. White Motor Co., 403 P.2d 145, 152 (Cal. 1965).

65. *Westinghouse,* 510 So. 2d at 901.

66. *Id.*

67. *Id.* at 902.

68. *See id.* The court also stated that the economic loss rule was not a new principle of law in Florida and should therefore apply to all pending cases. *Id.* at 900, 902. Although the basis for this proposition is unclear from the opinion, the court seemingly relied on *GAF, Cedars of Lebanon,* and *Monsanto. See id.* at 900-02.

69. *See* AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 180-82 (Fla. 1987).

70. 515 So. 2d 180 (Fla. 1987).

with Southern Bell for advertising in its yellow pages.[71] Prior to publication, the plaintiff moved its business office.[72] Because the move entailed a change in the plaintiff's telephone numbers, the parties agreed to use a telephone referral service to inform the plaintiff's customers of the new number.[73] When the yellow pages were distributed, the plaintiff's old number was listed despite Southern Bell's knowledge of the change in telephone numbers.[74] To make matters worse, Southern Bell mistakenly disconnected the referral number on two occasions.[75]

The plaintiff later sued Southern Bell in tort to recover economic losses caused by the advertising and referral mistakes.[76] In denying relief for these damages under tort, the *AFM* court reiterated its position in *Westinghouse*, stating that contract principles are more appropriate than tort principles for resolving economic loss in the absence of personal injury or damage to other property.[77] The court found that the plaintiff and Southern Bell were parties to a contract which defined the limitation of liability through bargaining, risk acceptance, and compensation.[78] Therefore, the court concluded that Southern Bell's mistakes were redressable under a breach of contract theory but not under a tort theory.[79] The court reconciled its holding with the *Moyer* decision, which also involved negligently rendered services and purely economic loss, stating: "[s]ince there was no [existing] contract under which the general contractor [the *Moyer* plaintiff] could recover his loss, we concluded he did have a cause of action in tort."[80]

AFM and *Westinghouse* established the economic loss rule: Parties in contractual relationships must negotiate for allocation of risk and economic loss, and cannot use tort law in its place.[81] These cases also asserted the policy that the court should not place the "cost burden on the public" to pay for economic loss by imposing a tort duty for such losses.[82] Instead, the parties must contractually allocate the risk among

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71. *Id.* at 180.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 180-81.
76. *Id.* at 181. The court stated that the plaintiff chose to proceed only on a tort theory at the trial level, and that the plaintiff specifically avoided basing its tort suit on any agreement between the parties. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* The court found that the plaintiff failed to prove that Southern Bell committed a tort independent of the breach of contract. *Id.*
80. *Id.*
81. *See id.*; *Westinghouse*, 510 So. 2d at 900-02.
82. *Westinghouse*, 510 So. 2d at 902.

themselves, or else bear any loss individually.[83] By distinguishing *Moyer, AFM* also seemed to make clear that the rule only applied if parties were in a contractual relationship, where the opportunity to negotiate risks had been present.[84] However, six years later, in *Casa Clara*,[85] the Florida Supreme Court held that the rule applies even if the parties are not in privity.[86]

C. Applying the Economic Loss Rule Regardless of Privity

In *Casa Clara*, faulty concrete caused the plaintiffs' condominium walls to crumble.[87] This concrete allegedly contained too much salt, which caused steel in the concrete to rust, which, in turn, caused the concrete to crack and break off.[88] The plaintiffs sued the concrete supplier under common law implied warranty, products liability, negligence, and violation of the building code, even though they never contracted directly with the supplier.[89] The trial court dismissed the claims and the district court of appeals affirmed.[90]

The Florida Supreme Court agreed that the trial court had appropriately dismissed each count.[91] The plaintiffs could not recover under breach of implied warranty because they were not in contractual privity with the defendant.[92] Also, the defendant had no duty to comply with the building code because the code did not apply to material suppliers like the defendant.[93] Finally, the plaintiffs could not recover the cost of fixing their homes under theories of products liability or negligence because of the economic loss rule.[94]

Reinforcing its *Westinghouse* and *AFM* opinions, the *Casa Clara* court applied the economic loss rule to enforce the separation of tort and contract law.[95] According to the court, the plaintiffs could not recover under tort law because tort law seeks only to protect society from

83. *See id.*
84. *See AFM*, 515 So. 2d at 181.
85. 620 So. 2d at 1244.
86. *See id.* at 1248.
87. *Id.* at 1245.
88. *Id.*
89. *Id.*
90. *Id.*
91. *See id.* at 1248.
92. *Id.* at 1248 (Barkett, C.J., dissenting in part).
93. *Id.* at 1245, 1248.
94. *See id.* at 1246-48.
95. *See id.* at 1246.

personal injury or property damage, not economic harm.[96] The court stated that when only economic harm is involved, the question determinative of whether a tort duty should apply is " 'whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies.' "[97] Unwilling to impose this burden on the public, the court held that tort law does not apply in cases where the plaintiff suffers only economic loss.[98]

Instead, the *Casa Clara* court found that contract law is more appropriate when the plaintiff suffers only economic loss.[99] According to the court, parties can allocate economic loss risks through contract, and contract law serves to protect this risk allocation.[100] In dicta, the court observed that if parties were able to recover for economic loss under tort law, warranties would become obsolete.[101] The court was reluctant to allow the homeowners to get the benefit of a lower priced home without warranties, then turn around and sue the concrete supplier under negligence for economic loss.[102] The court concluded that "[i]f a house [or negligently rendered service] causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law."[103] Thus, the Florida Supreme court again used the economic loss rule to draw a line between contract and tort.[104]

Recognizing that the plaintiffs and defendant had not been in privity because the homeowners did not contract with the concrete supplier, the court nonetheless observed that generally, homebuyers can bargain for warranty protections with the sellers of homes.[105] The court

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96. *See id.*

97. *Id.* at 1247 (quoting Barrett, *supra* note 19, at 933). It should be noted that an assumption implicit in this question is that the general public would bear the costs of economic loss if a tort duty was imposed.

98. *Id.*

99. *Id.* (citing *Westinghouse*, 510 So. 2d at 902).

100. *See id.*

101. *See id.* (citing *East River*, 476 U.S. at 866).

102. *See id.*

103. *Id.* (citing *East River*, 476 U.S. at 870).

104. *Id.* The court, in refusing to carve out an exception to the rule for homebuyers, noted that several other jurisdictions have reached similar conclusions, including Delaware, Illinois, Virginia, and Washington. *See id.* at 1247 & n.8.

105. *Id.* at 1247. The court found that both "statutory warranties" and the general warranty of habitability were available to homebuyers. *Id.* (citing FLA. STAT. §§ 634.301-48 (1991) and Gable v. Silver, 264 So. 2d 418 (Fla. 1972)). In his partial dissent, Justice Shaw noted that the economic loss rule

also noted that homebuyers have the power to bargain over price with the seller at the time of purchase, taking into consideration the presence or absence of a warranty.[106] Accordingly, the court applied the economic loss rule regardless of the absence of a contractual relationship between the litigants.[107] By doing so, the court made a clear decision to bar purely economic loss from the tort arena.[108]

This decision would seem to affect general contractors like the general contractor in *Moyer*; however, the *Casa Clara* court did not overrule *Moyer*.[109] Instead, the *Casa Clara* court chose only to limit *Moyer* to its facts.[110] The court did so without accompanying rationale,[111] creating an exception to the economic loss rule that it did not justify.[112]

Two years after *Casa Clara*, the Florida Supreme Court attempted to justify the exception in *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*[113] In *Airport Rent-A-Car*, the court stated that its *Moyer* decision

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> works well when the loss is suffered by one who is privy to the contract and involves loss that was the subject matter of the contract. It works a mischief, however, where as in this instance the injured party is not privy to the contract but injury to third parties is reasonably foreseeable.
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> . . . .
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> . . . In my mind, the economic loss theory was never intended to defeat a tort cause of action that would otherwise lie for damages caused to a third party by a defective product.

Id. at 1249 (Shaw, J., concurring and dissenting).

106. *Id.* at 1247. One factor both parties presumably would take into account in bargaining over price is the extent of warranty protection the buyer negotiates to receive from the seller.

107. *See id.*

108. *See id.*

109. *See id.* at 1248 & n.9.

110. *Id.* at 1248 n.9. In the same footnote, the court overruled several decisions which allowed tort recovery for purely economic loss, then curtly stated, "We also limit *A.R. Moyer* . . . strictly to its facts." *Id.* The court specified the parameters of *Moyer* by citing *AFM*, 515 So. 2d at 180 (holding that a corporation could not recover purely economic losses caused by phone company's advertising and referral mistakes); *Sandarac*, 609 So. 2d at 1349 (holding that a condominium association could not sue a general contractor or an architect in negligence to protect its purely economic loss arising out of defects in the condominium structure and limiting *Moyer* to "circumstances in which the defendant architect has supervisory powers over the plaintiff"); and *E.C. Goldman*, 543 So. 2d at 1270 (holding that a roofing subcontractor could not recover purely economic loss in a negligence action against nonprivity roofing experts and limiting the *Moyer* exception to cases in which there was a close relationship between the parties). *Casa Clara*, 620 So. 2d at 1248 & n.9.

111. *See Cara Clara*, 620 So. 2d at 1248 & n.9.

112. *See infra* notes 183-86 and accompanying text.

113. 660 So. 2d 628 (Fla. 1995). In *Airport Rent-A-Car*, the plaintiff owned buses manufactured by the defendant. *Id.* at 629. Two of the buses caught on fire while in transport.

was based on "the supervisory nature of the relationship between the architect and the general contractor."[114] According to the court, an architect's supervisory responsibilities carry a concurrent duty not to injure foreseeable parties who are not beneficiaries of a contract.[115] However, the court did not address the fact that *Moyer* was decided before Florida courts established the economic loss rule, or the fact that the *Moyer* analysis was based on the privity concept and not on the nature of harm to the injured party.

D. The Continued Survival of Florida's Exception for General Contractors

Based on *Westinghouse, AFM, Casa Clara,* and *Airport Rent-A-Car*, the Florida economic loss rule holds that principles of contract, not tort, govern claims for economic loss where there is no accompanying personal injury or damage to property.[116] This rule is based on the rationale that negligence is not necessary to protect purely economic loss because parties adequately manage to allocate economic interests by contract.[117] The *Moyer* exception to this general rule allows general contractors to sue nonprivity supervising architects and engineers in negligence for purely economic loss.[118] This exception is alive and

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Id. The plaintiff did not buy the buses from the defendant, and therefore could not sue the defendant under an express contract. *Id.* Rather, the plaintiff sued the defendant under a strict liability theory for economic losses caused by the fire. *Id.*

On certified questions from the United States Court of Appeals for the Eleventh Circuit, the Florida Supreme Court held that (1) the economic loss rule applies to negligence claims for the manufacture of a defective product where the only damages claimed are to the product itself, even where the plaintiff claims to have no alternative theory of recovery; (2) a cause of action otherwise precluded by the economic loss rule may not be maintained even if the product's damage was caused by a sudden calamitous event; and (3) a cause of action outside the economic loss rule does not exist where the plaintiff alleges a duty to warn which arose from facts which came to the knowledge of a company after the manufacturing process and after the contract. *Id.*

114. *Id.* at 631.

115. *Id.* (citing *AFM*, 515 So. 2d at 181).

116. *Airport Rent-A-Car*, 660 So. 2d at 630; *Casa Clara*, 620 So. 2d at 1247; *AFM*, 515 So. 2d at 181; *Westinghouse*, 510 So. 2d at 902.

117. *See Sandarac*, 609 So. 2d at 1352.

118. *Moyer*, 285 So. 2d at 401-02. There are other exceptions to this general rule, *see supra* note 2, that are beyond the scope of this Note. For instance, accountants and abstractors may be sued by third parties in negligence for purely economic loss under limited circumstances. *See, e.g.*, First Fla. Bank v. Max Mitchell & Co., 558 So. 2d 9, 14 (Fla. 1990) (holding that an accountant may be liable in tort for the economic loss of a third party when the accountant personally presents and delivers statements which suggest that the third party should loan money to or invest in one of the accountant's clients); First Am. Title Ins. Co. v. First Title Serv. Co., 457 So. 2d 467, 473 (Fla. 1984) (holding that an abstractor may be liable in tort for economic

well.[119] Florida courts continue to bar tort claims brought by economically injured consumers,[120] but permit tort claims brought by economically harmed general contractors.[121] To date, Florida courts still have not adequately justified this discrepancy.

III. THE CASE FOR ABOLISHING THE EXCEPTION

A. Recent Trends in Other Jurisdictions—Rejecting the Exception

Within the past ten years, alongside full development of the economic loss rule, several courts outside of Florida have rejected the

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loss sustained by third parties when the abstractor knows that the third parties are using and depending on the abstracts). The court in both *First Florida* and *First American*, like the court in *Moyer*, did not address the economic loss rule. *See First Florida*, 558 So. 2d at 9; *First American*, 457 So. 2d at 467.

119. *See Airport Rent-A-Car*, 660 So. 2d at 631 (recognizing the *Moyer* exception).

120. *See, e.g.*, Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc., 653 So. 2d 412 (3d DCA), *review denied*, 1995 LEXIS 1488 (Fla. Aug. 30, 1995). In *Palau*, the plaintiff purchased an airplane from International Airlines Holding Corportion in order to transport freshly caught fish. *Id.* at 413. Prior to this purchase, Narcam Aircraft had repaired the plane and verified that it was airworthy. *Id.* at 414. Six months after the plaintiff took possession of the plane, it discovered cracks in the plane's landing gear and subsequently sued Narcam for economic losses, including the cost of repairs to the plane, loss of the use of the plane, and consequential damages. *Id.* The district court affirmed a summary judgment in favor of Narcam entered by the trial court, *id.* at 418, basing its decision on the economic loss rule, *see id.* at 416.

121. *See* Southland Constr., Inc. v. Richeson Corp., 642 So. 2d 5, 7-9 (Fla. 5th DCA 1994). In *Southland*, an owner hired a general contractor to build an apartment complex. *See id.* at 7. This contractor hired an engineering firm to design a retaining wall for the complex. *Id.* After the wall was built, the contractor alleged that it cracked and bulged, and was not designed consistent with appropriate professional engineering standards. *Id.* The contractor spent $188,000 to repair the wall, *id.*, and subsequently sued both the engineering firm and the individual design engineer under breach of contract and negligence theories, *id.* at 6.

On appeal, the court addressed the issue of whether the contractor could recover purely economic loss on a negligence theory against the individual engineer, with whom it was not in privity. *See id.* at 7-9. Relying on *Moyer*, the court determined that the economic loss rule would not preclude tort recovery under the circumstances. *Id.* at 8. The court also found that the individual engineer had a duty to "perform his professional duties in a professional, competent manner." *Id.* The court concluded that whenever an engineer negligently performs an engineering service, the engineer may be liable in tort for economic loss, even if the parties are not in a contractual relationship. *Id.* at 9. In reaching this conclusion, the *Southland* court did not address the underlying policies of the economic loss rule—that the law of negligence does not recognize a protected interest in purely economic loss and that parties should allocate economic risk through contracts.

The court also found that even if the economic loss rule was applicable, the contractor still could recover economic loss under negligence because the faulty retaining walls caused damage to "other property," namely, a pool deck located next to the wall. *Id.* at 9. For a description of what constitutes "other property," see *supra* note 1.

exception for economically injured general contractors.[122] For instance, in a 1994 case, *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*,[123] the Washington Supreme Court held that the economic loss rule does not allow a general contractor to recover purely economic damages from a nonprivity architect or engineer in tort.[124]

The *Berschauer/Phillips* opinion addressed two contrasting lines of opinion in Washington law, similar to current Florida law, involving the economic loss rule and the general contractor exception.[125] The first line of cases, which did not discuss the economic loss rule, suggested that general contractors could recover purely economic loss in tort from

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122. *See, e.g.*, Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832, 835, 837 (Mo. Ct. App. 1993) (disagreeing with holding in another Missouri state appeals court); Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206, 208 (Ohio 1990); Blake Constr. Co. v. Alley, 353 S.E.2d 724, 727 (Va. 1987); Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 989 (Wash. 1994) (en banc). *But see* Jim's Excavating Serv. v. HKM Assocs., 878 P.2d 248, 250 (Mont. 1994) (allowing a general contractor to sue an engineer for purely economic loss under negligent design and supervision theories); Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding, Inc., 463 S.E.2d 85, 89 (S.C. 1995) (same). The *HKM* court stated that a majority of jurisdictions have allowed general contractors to sue nonprivity engineers in negligence for economic loss. *Id.* at 252. However, it supported this contention with an *American Law Reports* Annotation written twenty years ago. *Id.* (citing Frank D. Wagner, Annotation, *Tort Liability of Project Architect for Economic Damages Suffered by Contractor*, 65 A.L.R.3d 249 (1975)). As stated in this Note, courts have recently abolished the exception alongside development of the economic loss rule. *See supra* text accompanying note 122.

Several other jurisdictions have allowed a general contractor to recover purely economic loss from an architect or an engineer without discussing the economic loss rule. *See, e.g.*, Carroll-Boone Water Dist. v. M. & P. Equip. Co., 661 S.W.2d 345, 353 (Ark. 1983) (holding an engineering firm liable to a general contractor for negligence); Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1381-86 (Del. Super. Ct. 1990) (holding that a general contractor could sue a design engineer in negligence for purely economic loss *despite* absence of contract privity); Craig v. Everett M. Brooks Co., 222 N.E. 752, 755 (Mass. 1967) (holding that a general contractor could sue a civil engineer in negligence for purely economic loss but only discussing the privity doctrine); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1202 (Miss. 1988) (holding that a general contractor was entitled to maintain a suit against an engineer in tort for purely economic loss based on common law duty of due care); Conforti & Eisele, Inc. v. John C. Morris Assocs., 489 A.2d 1233, 1234 (N.J. Super. Ct. App. Div. 1985) (affirming lower court's judgment in favor of a general contractor against architects, engineers, and subcontracting engineers for the general contractor's purely economic loss caused by negligence).

123. 881 P.2d 986 (Wash. 1994) (en banc).

124. *Id.* at 996. In *Berschauer/Phillips*, a school district contracted with the general contractor and an architectural firm to renovate and perform new construction at an existing elementary school. *Id.* at 988. After delays allegedly due to faulty architectural plans, the contractor sued the architect for negligently preparing the plans. *Id.* at 988-89. After several motions, the trial court dismissed the claim against the architect. *Id.* at 989.

125. *See id.* at 990-93.

supervising architects and engineers.[126] The second line of cases prohibited a tort cause of action for purely economic loss, but did not involve general contractors.[127]

The *Berschauer/Phillips* court concluded that precluding the general contractor from recovering purely economic loss would "maintain the fundamental boundaries of tort and contract law . . . [and] ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract."[128] The court also noted that this bright-line distinction would encourage parties to negotiate a risk distribution that is desired or customary, preserve the incentive to adequately self-protect during the bargaining process, and provide certainty and predictability.[129] Furthermore, the court stated that allowing the exception would be "incongruous" because it would not allow economic loss recovery for an unsophisticated consumer, yet would allow recovery for a sophisticated general contractor.[130] The *Berschauer/Phillips* court determined that contracts entered into among the various parties to a construction project should govern their economic expectations, and that the preservation of the contract "represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business."[131]

Another court, in Missouri, recently reached the same conclusion. In the 1993 case of *Fleischer v. Hellmuth, Obata & Kassabaum, Inc.*,[132] the Missouri court also was presented with the issue of whether an exception to the economic loss rule existed to allow contractors to sue nonprivity architects.[133] The court stated that the jurisdictions that

126. *Id.* This Washington line of cases seems to follow *Moyer* and its progeny. *Compare id.* at 990-91 (discussing cases which stand for the contention that purely economic loss is recoverable against design professionals) *with supra* text accompanying notes 39-53 (discussing *Moyer*'s holding that general contractors could sue nonprivity architects and engineers to recover purely economic loss caused by the negligent preparation of plans) *and supra* note 121 (discussing *Southland*'s holding that a general contractor could recover purely economic loss from an individual engineer with whom it was not in privity).

127. *Berschauer/Phillips*, 881 P.2d at 990. This second line of cases seems to follow *Casa Clara. Compare Berschauer/Phillips*, 881 P.2d at 991-92 (discussing cases which held that condominium owners could recover purely economic damages from builder-vendors, architects, or building inspectors in the absence of personal injury or physical damage) *with Casa Clara*, 620 So. 2d at 1245-48 (holding that the economic loss rule precluded homeowners from recovering purely economic loss from concrete supplier).

128. *Berschauer/Phillips*, 881 P.2d at 992.

129. *Id.*

130. *Id.* at 993.

131. *Id.*

132. 870 S.W.2d 832 (Mo. Ct. App. 1993).

133. *See id.* at 834. In *Fleischer*, a ship owner contracted with the plaintiffs to be construction manager on a project. *Id.* at 833. The owner later entered into a separate contract

have rejected this exception follow a more reasoned approach than jurisdictions, like Florida, which recognize the exception.[134] The court found that " ' "[t]he architect's duties both to owner and contractor arise from and are governed by the contracts related to the construction project. While such a duty may be imposed by contract, no common-law duty requires an architect to protect the contractor from purely economic loss." ' "[135] Similar to the Washington court, the Missouri court also was persuaded by the argument that imposing a duty of care on the architect could hinder the architect's ability to negotiate risk allocation of economic loss.[136] Thus, the Missouri court also concluded that contract principles serve risk allocation better than tort principles in the construction setting.[137]

B. Problems with Applying the Exception in Florida

The Washington and Missouri courts recognized a fundamental problem in applying the exception: it blurs the line between contract and tort law which courts have sought to define clearly. Blurring this line by permitting pure economic loss recovery in tort can lead to several undesirable results.

First, allowing purely economic loss recovery in tort places a burden upon society through higher prices.[138] Specifically, architects and engineers will insure or take other steps to protect themselves from this heightened risk of tort liability to the general contractor.[139] This cost is then passed on to the consuming public, raising the price of services, and potentially pricing some consumers out of the market.[140]

The *Casa Clara* court noted that "when only economic harm is involved, the question becomes 'whether the consuming public as a whole *should* bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies.' "[141] Another Florida

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with an architect. *Id.* After problems with the architectural plans arose, the plaintiffs sued the architect for economic loss under negligence theories. *Id.* at 834.

134. *Id.* at 837. The court cited other court cases that recognized the exception: an Arizona Supreme Court case, a North Carolina Court of Appeals case, and a federal district court case that the *Berschauer/Phillips* court found was not controlling. *Id.* at 837 n.2.

135. *Id.* at 837 (alteration in original) (quoting Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206, 209 (Ohio 1990) (quoting Blake Constr. Co. v. Alley, 353 S.E.2d 724, 726 (Va. 1987))).

136. *Id.*

137. *See id.*

138. *See* Wagner & Solomon, *supra* note 7, at 49.

139. *Id.*

140. *Id.* at 53.

141. *Casa Clara*, 620 So. 2d at 1247 (quoting Barrett, *supra* note 19, at 933) (emphasis

court emphasized:

> When the judiciary creates a . . . duty in negligence to protect economic interests, . . . it should be aware that it is not merely creating an exception to an existing common law rule of damages. It should be convinced that the problem justifies a judicial allocation of the relevant risks among the members of society, and that *an adequate remedy cannot realistically exist through private contracts and statutory remedies.*[142]

In light of these considerations, imposition of a duty in negligence for supervising architects and engineers is not justified because the parties have the ability to enter into contracts to allocate risks.[143] In fact, general contractors are often better situated to bargain for contract risk allocation than the typical unsophisticated homebuyer represented in *Casa Clara.*[144]

In the typical construction setting, there is a "closed loop" of people dealing with each other, usually including the owner, contractor, subcontractors, and architects or engineers.[145] Generally, an owner will contract with an architect or engineer to design plans.[146] Also, the owner will contract with a general contractor to construct a building according to the architect's or engineer's specifications.[147] Frequently, one or more of the parties additionally contracts with subcontractors, who in turn may contract with other subcontractors.[148] Consequently,

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added).

142. Sandarac Ass'n v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1353 (2d DCA 1992) (emphasis added), *review denied*, 626 So. 2d 207 (Fla. 1993).

143. *See* Matthew S. Steffey, *Negligence, Contract, and Architects' Liability for Economic Loss*, 82 KY. L.J. 659, 690 (1993-94).

144. *See* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 105 (5th ed. 1994). According to Professor Sweet, an owner is often inexperienced and finds the construction world "strange and often bewildering." *Id.*

145. *See* George A. Smith, *The Continuing Decline of the "Economic Loss Rule" in Construction Litigation,* CONSTRUCTION LAW., Nov. 1990, at 1, 39.

146. SWEET, *supra* note 144, at 354. The traditional system separates engineering and architectural design from construction. *Id.* In a "design/build" system, the architect or contractor both designs and builds. *Id.* at 367.

147. *Id.* at 354.

148. Sidney R. Barrett, Jr., *The Center Holds: The Continuing Role of the Economic Loss Rules in Construction Litigation*, CONSTRUCTION LAW., Apr. 1991, at 3, 4. Professor Sweet discusses the chain of contracts involved in a construction setting. SWEET, *supra* note 144, at 107-09. According to Sweet, architects may contract with structural, mechanical, and electrical engineers, landscape companies, interior decorators, and fire protection experts. *Id.* at 109. The owner may contract with soils engineers, expeditors, and sheet piling experts. *Id.* A general

each party relies to a great extent on contracts.[149] Each is presumably familiar with contracting, bidding, and performing construction projects.[150] Furthermore, a general contractor is often sophisticated in business and experienced with contracting and the possible roles of parties in the construction setting.[151]

With knowledge of contracts, the typical general contractor is able to regulate warranty protection. There is no statutory or common law which prevents the contractor and the architect or engineer from entering into separate contractual agreements to allocate economic risk, or that prevents the general contractor from contracting with the owner for potential economic loss resulting from delays caused by a negligent architect or engineer.[152] In fact, the "keystone" form contract provided by the American Institute of Architects entitles the contractor to an extension of time to perform if delayed by any act or neglect of the architect.[153] Under this contract, the contractor may sue the owner for damages from such delays.[154]

Several other contractual provisions can be used to allocate economic risk among the parties. For instance, the rule permitting third-party beneficiaries to enforce contracts could provide a means for a general contractor to recover for economic loss negligently inflicted by a supervising architect or engineer.[155] Under these rules, a third-party beneficiary clause can be incorporated into the owner-architect contract to confer beneficiary status on the general contractor. As a beneficiary, the general contractor may be able to sue the architect or engineer directly for economic loss under contract theories.[156]

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contractor may contract with suppliers and installers of structural steel, cabinetry, roofing, metal stairs, fire sprinklers, cranes and manlifts, landscaping, window walls, painting, fireproofing, electrical wiring, stones, toilet accessories, elevators, and custom metals. *Id.*

149. Barrett, *supra* note 148, at 4 (asserting that members of the construction industry may depend on contracts and contract law more than members of any other industry).

150. *See id.*

151. *See id.* at 106.

152. *See* Steffey, *supra* note 143, at 681-82.

153. AMERICAN INST. OF ARCHITECTS, AIA DOCUMENT A201: GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION art. 8.3.1 (14th ed. 1987), *in* 3 AMERICAN INST. OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE (David Haviland ed., 1987).

154. *Id.*

155. Gaebler, *supra* note 10, at 610; *see also, e.g.*, Legare v. Music & Worth Constr., Inc., 486 So. 2d 1359, 1362 (Fla. 1st DCA 1986) (stating that a "person not party to a contract may sue for breach of the contract where the contract provisions clearly establish the parties' intent to create a right primarily and directly benefiting the third party"); *Moyer*, 285 So. 2d at 402-03 (appearing receptive to a cause of action under third-party beneficiary theory).

156. *See Moyer*, 285 So. 2d at 402-03.

Aside from using a beneficiary provision, a general contractor may protect its economic interests by bargaining for contractual insurance provisions.[157] The owner-contractor contract may state that the owner must purchase insurance with the general contractor as the beneficiary to cover damages resulting from architectural or engineering flaws.[158] Conversely, the contract may state that the general contractor will cover such damages.[159] Finally, the parties may incorporate an indemnification clause into their contracts.[160] With any of these provisions, project price will presumably fluctuate with economic risk allocation.[161]

In light of these different contractual provisions available to a general contractor, there is no justification for courts to impose a tort duty to protect a contractor's economic interests and to impose a corresponding cost on the consuming public. In fact, judicial imposition of such a "tort warranty" can frustrate the parties' efforts to allocate risk through contract.[162] Allowing tort recovery undermines the effectiveness of contracts by potentially imposing a higher standard of conduct than that already bargained for by the parties.[163] Imposing a "tort warranty" renders the contract provisions that had been bargained for and agreed upon meaningless.[164]

The *Casa Clara* court recognized this danger of a "tort warranty" by refusing to allow homeowners to contract for a less expensive home without warranty protection, only to later turn around and sue for purely economic loss through tort law.[165] In the construction setting, Florida's exception allows a contractor to bring a cause of action in tort to

157. *See* Steffey, *supra* note 143, at 684.

158. *See id.*

159. *Id.*

160. Under Florida Statutes § 725.06 (1993), an indemnification clause in any construction-related contract is only enforceable if it either (1) contains a monetary limit on the indemnification and this limit is part of the project specifications or bid documents, or (2) the person indemnified by the contract gives specific consideration to the indemnitor for the indemnification. *Id.*

161. *See id.*

162. *Id.* at 690.

163. *See Berschauer/Phillips,* 881 P.2d at 992; Steffey, *supra* note 143, at 698-99.

164. *See* Steffey, *supra* note 143, at 690.

165. *See Casa Clara,* 620 So. 2d at 1247 (quoting *East River,* 476 U.S. at 866, for the observation that if it held otherwise, " 'contract law would drown in a sea of tort' "). The court noted that "tort law is being used 'by litigants and courts to undermine allocations of risks agreed to by the parties and to substitute judicial solutions for contractual arrangements that are almost certainly superior in terms of both fairness and efficiency.' " *Id.* at 1247 n.7 (quoting Jones, *supra* note 2, app. at 798).

recover benefits it was unable to obtain in contractual negotiations.[166] Therefore, recognizing tort liability allows contractors to mischievously avoid contract provisions, or avoid the result of not contracting at all for architectural or engineering negligence.[167]

Not only does a judicially imposed "tort warranty" frustrate parties' intent, it also fails to recognize that every construction project is distinct. The relationships between construction parties vary with each project.[168] The variable nature of these relationships will be accounted for if parties are able to contract for risk allocation, rather than having a general risk allocation imposed by courts through a tort duty.[169] Also, maintaining the boundary between contract and tort will encourage parties to negotiate toward a risk distribution that is desired or customary for the particular construction project.[170]

Aside from recognition of parties' intent and the individuality of construction projects, using the economic loss rule to bar contractor tort claims for purely economic loss will have the desired effect of preserving incentive to adequately self-protect during contractual bargaining.[171] The Florida Supreme Court understood the importance of preserving bargaining incentive in *Westinghouse, AFM, Casa Clara,* and *Airport Rent-A-Car.* In all four cases, the court recognized that by barring tort claims, the economic loss rule encourages parties to negotiate economic risk and price.[172] Therefore, applying the economic loss rule to contractors' tort claims against architects and engineers will help preserve bargaining incentives.

Not applying the economic loss rule may have a final deleterious effect. By allowing general contractors to use the exception, courts may be creating liability disproportionate to the negligence committed.[173] An architectural or engineering firm's mistake, such as a slip of the pen, could drive the firm out of business because delay costs can be

166. *See Berschauer/Phillips,* 881 P.2d at 992-93.

167. *See Casa Clara,* 620 So. 2d at 1247. Professor Sweet summarized this problem: "A contract . . . is a *plan* under which the parties agree to exchange their performance and apportion risks in a specific manner. To disregard that plan by allowing tort claims exposes design professionals to risks they did not plan to undertake and for which they were not paid." SWEET, *supra* note 144, at 273.

Professor Sweet also noted that "parties are more likely to perform in accordance with their promises if they have participated freely in making the exchange." *Id.* at 38.

168. *See* Steffey, *supra* note 143, at 690.

169. *See id.*

170. *Berschauer/Phillips,* 881 P.2d at 992.

171. *Id.* (citing Barrett, *supra* note 19, at 933).

172. *See Airport Rent-A-Car,* 660 So. 2d at 630; *Casa Clara,* 620 So. 2d at 1247; *AFM,* 515 So. 2d at 181; *Westinghouse,* 510 So. 2d at 902.

173. *See* Siliciano, *supra* note 25, at 1944.

exorbitant.[174] In one recent case, delay costs caused by design errors were estimated at over $20,000,000.[175] As general contractors, architects, and engineers are legally and practicably able to do so, they should contract to allocate such exorbitant economic loss.

C. *Arguments Supporting the Exception*

The primary argument in favor of the exception rests on the vast amount of control a supervising architect or engineer has over the contractor.[176] This control includes the power of the architect to stop the contractor's work, which in turn can cause the contractor delay damages.[177] This argument asserts that a tort duty should be commensurate with such strong control.[178] However, this argument fails to recognize that parties can take this control into consideration when negotiating contract terms.[179] Also, as mentioned below, building codes and an architect's or engineer's business reputation will fill the role of keeping control in check without violating the economic loss rule.[180]

Another argument in favor of allowing contractors to sue architects or engineers in tort for purely economic loss is that the parties usually are not in privity with each other, and therefore have not had the opportunity to negotiate risk.[181] However, this argument fails in light of *Casa Clara*. As stated above,[182] the Florida Supreme Court justified its imposition of the economic loss rule regardless of privity on its observation that the parties *could* have contracted with the seller for warranty protection or to purchase insurance.[183] If the parties chose not to do so, presumably in exchange for a lower price, they could not then

174. *See* City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279, 280-81 (Fla. 2d DCA 1994).

175. *Id.* The general contractor's claim was settled for $9,500,000. *Id.* at 281.

176. *Moyer*, 285 So. 2d at 401 (citing United States *ex rel.* L.A. Testing Lab v. Rogers & Rogers, 161 F. Supp. 132, 135-36 (S.D. Cal. 1958)).

177. *See id.* at 401 (citing *Rogers & Rogers*, 161 F. Supp. at 136).

178. *Id.* (citing *Rogers & Rogers*, 161 F. Supp. at 136). This is the argument upon which the Florida Supreme Court based its decision to recognize the exception. *See Airport Rent-A-Car*, 660 So. 2d at 631.

179. *See Casa Clara*, 620 So. 2d at 1247.

180. *See infra* notes 190-91 and accompanying text.

181. *See* Jim's Excavating Serv. v. HKM Assocs., 878 P.2d 248, 254 (Mont. 1994) (allowing a general contractor to recover purely economic loss for an engineer's negligent design and supervision because the parties were not in direct privity of contract and the harm was foreseeable).

182. *See supra* text accompanying notes 99-104.

183. *See Casa Clara*, 620 So. 2d at 1247.

try to sue in tort for what they did not bargain for originally.[184] It would be incongruous to deprive the unsophisticated home buyer of economic damages yet allow recovery to a sophisticated contractor.[185]

Also, allowing a general contractor to sue nonprivities for economic loss gives that contractor more power than a contractor who is in privity with an architect or engineer. For example, the economic loss rule would presumably preclude a contractor who is in privity with an architect from suing in tort because their contract would govern damage for any loss. Giving parties not in privity more power to sue for economic loss than parties in privity runs counter to Florida's privity jurisprudence, which has traditionally limited a nonprivy's ability to sue for damages.[186]

A final argument in favor of the exception is that it adds safety incentives for architects whose negligence might cause serious structural damage.[187] However, architects and engineers already have numerous safety incentives. Both must follow Florida building codes[188] and federal standards.[189] Also, both have financial incentive to prepare plans carefully.[190] If either does shoddy work, it tarnishes their reputation and future revenues will decline.[191] Moreover, providing a safety incentive in addition to state and federal regulations through tort liability may have the detrimental effect of driving architects or engineers out of

184. *Id.*

185. *See Berschauer/Phillips*, 881 P.2d at 993.

186. *See* Tribble, *supra* note 37, at 11-19 (tracing the history of Florida's privity doctrine).

187. A similar argument implicating safety did not work for the homeowners in *Casa Clara*. The *Casa Clara* court disagreed with the homeowners' contention that they should be allowed to proceed on their tort claim for purely economic damages because of the possibility of physical injury. *Casa Clara*, 620 So. 2d at 1247. The court responded to this argument by stating that it "goes completely against the principle that injury must occur before a negligence action exists." *Id.*

188. Under Florida law, all plans which are required to be signed by an architect or engineer must state "that, to the best of the architect's or engineer's knowledge, the plans and specifications comply with the applicable minimum building codes and the applicable fire safety standards." FLA. STAT. § 553.79(7)(d) (1993). Also, any person damaged by a building code violation may bring a civil cause of action against the person who committed the violation. *Id.* § 553.84; *see also* Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n, 573 So. 2d 889, 892 (Fla. 2d DCA 1990) (holding that an architect had a duty to design a floor in compliance with the applicable building code and that his failure to do so made him liable).

189. *See* SWEET, *supra* note 144, at 301 (noting that an architect or engineer with a substantial supervisory position must follow federal occupational safety and health regulations while at a construction site).

190. *See* Steffey, *supra* note 143, at 689-90.

191. *Id.*

the profession.[192] Further, it may cause an architect or engineer to be too careful, which in turn could lead to mediocre design and an unwillingness to take design risk.[193]

IV. CONCLUSION

Florida courts have used the economic loss rule to maintain a bright line between tort and contract law. This bright line is important because it prevents the judiciary from intruding into parties' allocation of economic risk. The bright line also keeps economic loss outside of the tort arena because society should not bear the economic risks of individual parties.

By allowing general contractors to sue nonprivity supervising architects and engineers in tort for purely economic loss, Florida courts have blurred the line between tort and contract law. As a result, the court has intruded on the parties' contractual allocation of risk, and has forced society to bear the burden of protecting general contractors' economic interests. In future cases, Florida courts should recognize the importance of maintaining the bright line in the construction setting, and recognize that there is no justification for imposing such a burden on the general public.

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192. *See* SWEET, *supra* note 144, at 314.

193. *Id.* One author offers two other arguments in favor of recognizing the exception: simplifying litigation and owner insolvency. Steffey, *supra* note 143, at 699-700. The author states that "[i]n theory, to allow the contractor to sue the architect could eliminate an unnecessary party from the claim." *Id.* at 700. However, the author argues that negligence liability is a cumbersome, and potentially ineffectual mechanism for simplifying litigation. *Id.*

In regard to owner insolvency, the author asserts that "[t]he the issue . . . [becomes] whether the law should protect contractors who fail to protect themselves." *Id.* The author concludes that the prevalence of mechanics' lien laws makes owner insolvency less problematic and "alternative rules would entail less sweeping change than importing negligence principles." *Id.* at 700-01 & n.157.