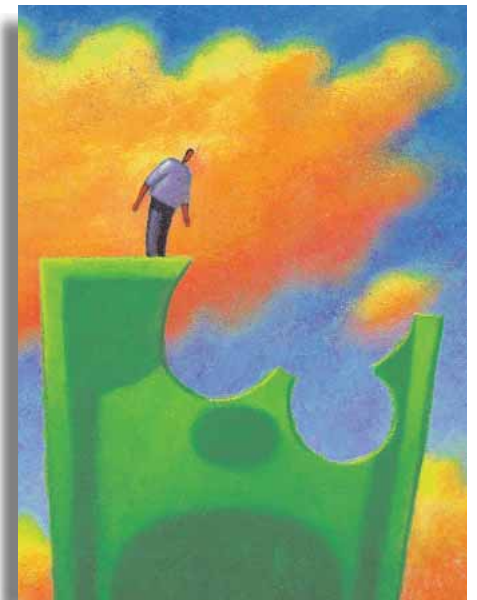


# The Economic Loss Rule in North Carolina: Time to Wake the Sleeping Giant

BY GREGORY L. SHELTON

The economic loss rule continues to seep into North Carolina's common law. Consider the court of appeals' recent decision in *Land v. Tall House Building Co.*, 602 S.E.2d 1 (N.C. App. 2004), where the court defined the economic loss rule in expansive terms. The *Tall House* decision practically invites North Carolina lawyers and courts to exercise the full potential of the economic loss rule. We should accept the invitation.



## The Economic Loss Rule in 344 Words or Less

The economic loss rule is a doctrine created by the courts to police the borderland between contract law and tort law. The economic loss rule is a sound and necessary reaction to the expansion of tort law into the realm of contract law. If courts consistently observed the distinction between tort duties and contractual obligations, the economic loss rule would not be necessary. Unfortunately, the importation of tort principles into contract law and the unprincipled extension of tort liability has resulted in a “nebulous and

troublesome margin between tort and contract law.” *Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000).

The economic loss rule stops tort creep by focusing on the damages claimed, not the duty owed. Classic examples of losses recoverable in tort are medical expenses resulting from a slip and fall (personal injury) and the costs incurred to repair an automobile damaged in a fender bender (physical property damage). Losses not caused by personal injury or damage to other property (property that is not the subject of the contract) are economic losses, and economic losses fall within the

realm of contract law. The economic loss rule prevents recovery of economic losses in tort even where the court stretches the duty to exercise due care beyond its doctrinal limits. If the plaintiff seeks recovery of economic loss, and if an exception to the economic loss rule does not apply, the plaintiff must look to contract law for recovery.

The economic loss rule also prevents parties from walking away from their contractual obligations. If the law permitted a party to shirk its contractual duties and undermine the agreed upon allocation of risks by clothing its claim in negligence, (all together now) “con-

tract law would drown in a sea of tort.” *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986). The economic loss rule thus reinforces the distinction between contract law, which is designed to enforce the expectancy interests of parties to an agreement, and tort law, which is designed to encourage citizens to avoid causing harm to others.

### Ode to a Shapeless but Sensible Doctrine

While the concepts that underpin the economic loss rule are easily stated, the economic loss rule does not lend itself to simple application or definition. Indeed, lawyers and judges often resemble the English Romantic poets in their musings dedicated to capturing the essence of the rule. One commentator observed that “judges, lawyers, and commercial clients alike are desperately struggling to define the parameters of the economic loss rule.” Paul J. Schweip, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 Fla. B. J. 34 (Nov. 1995). “Commentators and critics have used vivid metaphors when they have analyzed the impact and import of the multifaceted, seemingly inconsistent and ever changing doctrine known as the ‘economic loss rule[.]’” F. Malcolm Cunningham Jr. & Amy L. Fischer, *The Economic Loss Rule: Deconstructing the Mixed Metaphor in Construction Cases*, 33 Tort & Ins. L. J. 147 (1997). Such criticism overlooks the fact that a certain amount of ambiguity (that is, agility) is necessary for the economic loss rule to effectively weed the garden of contract.

The economic loss rule is both misunderstood and underestimated. To some, the economic loss rule simply means that parties to a contract cannot sue one another in tort in the absence of a tort independent of the contract. Bruner and O’Connor accurately refer to this rule as the “contract constraint” limitation on tort damages. Philip L. Bruner & Patrick J. O’Connor Jr., *Bruner & O’Connor on Construction Law* § 19:9 (2002). The economic loss rule is an entirely different animal. The contract constraint limitation leaves open the possibility of tort claims by outsiders to the contract for purely economic losses. The economic loss rule bars such claims.

Another source of confusion surrounding the economic loss rule stems from the failure of courts to address the distinction between duty and damages when discussing the rule.

Courts frequently open their discussion of the economic loss rule in terms of duty (just as this article does), but then, without warning, turn to the nature of the damages. In analyzing economic loss rule opinions, insert the following sentence before the court addresses the nature of the damages: “In the past, we so ignored and muddled the distinction between the duty imposed upon everyone to exercise due care to protect others from harm, and the obligations created by an exchange of promises made in contract, that we must now look to the damages claimed by the plaintiff before we decide whether the defendant breached a duty to society, or a contractual obligation, or neither.”

An example of how some courts eagerly disregard the distinction between contract and tort is found in a 1989 case from south of the border. In *Kennedy v. Carolina Lumber & Manufacturing Co., Inc.*, 384 S.E.2d 730 (S.C. 1989), the South Carolina Supreme Court went out of its way to overrule the unrelated but well-reasoned decision of the Court of Appeals of South Carolina in *Carolina Winds Owners’ Association, Inc. v. Joe Harden Builder, Inc.*, 374 S.E.2d 897 (S.C. App. 1988).

In *Carolina Winds*, a condominium association representing individual condominium unit owners asserted negligent construction claims against the general contractor and the masonry subcontractor. Neither the association nor the unit owners shared privity with the contractors. The court of appeals properly held that the economic loss rule barred the negligence claims because the owners did not suffer personal injury or damage to other property. Apparently troubled by *Carolina Winds*, the *Kennedy* court overruled the decision, announcing that “we once again join those states which strive to protect the modern new home buyer.” *Id.* at 737. For a thorough analysis of the *Carolina Winds* and *Kennedy* decisions, see Luther P. House Jr. & Hubert J. Bell, *The Economic Loss Rule: A Fair Balancing of Interests*, 11 Constr. Law. 1 (Apr. 1991).

### History of North Carolina’s Economic Loss Rule, Part I: A Question of Duty

Shadows of the economic loss rule first appeared in North Carolina jurisprudence in *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 240 S.E.2d 345 (N.C. 1978). In that case, the North Carolina State Ports Authority (“Ports Authority”), as owner,

entered a contract with Dickerson, Inc. (“Dickerson”), as general contractor, to construct a transit building and a warehouse at Ports Authority’s facility in Carteret County. The roofs of the buildings leaked. Ports Authority asserted a negligence claim against Dickerson and Dickerson’s roofing subcontractor, E.L. Scott Roofing Company (“Scott”), to recover the cost of repair.

The Supreme Court of North Carolina rejected Ports Authority’s negligence claim, holding that “[o]rordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor.” *Id.* at 350. The court acknowledged case law holding a party to a contract liable in tort for “personal injury or damage to property” resulting from the promisor’s “negligent, or wilful, act or omission in the course of his performance of his contract.” *Id.* (citations omitted). “Such decisions,” observed the court, “appear to fall into one of four general categories” that did not apply to the circumstances in *Ports Authority*:

**Personal injury or property damage to an outsider.** The first general exception under *Ports Authority* arises where “[t]he injury, proximately caused by the promisor’s negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee[.]” *Id.* As support for this exception, the supreme court cited its earlier decision in *Council v. Dickerson’s, Inc.*, 64 S.E.2d 551 (N.C. 1951). *Council* deserves a closer look not only because the decision deftly illustrates the first *Ports Authority* exception, but also because *Council* superbly captures the oil and water relationship between contract and tort.

Mrs. T.C. Council (“Council”) brought a negligence action against a highway contractor, Dickerson’s, Inc. (“Dickerson”), after suffering personal injury and property damage in an automobile accident. Council alleged that Dickerson failed to provide flagmen and warning signs as required by a contract between Dickerson and the State Highway and Public Works Commission (the “Commission”). The contract provided that “[t]he contractor shall place and maintain such signs, danger lights, and furnish watchmen and flagmen to direct traffic as in the opinion of the engineer may be deemed necessary.” *Id.* at 552. Council further alleged that Dickerson’s failure to comply with this contractual requirement caused Council’s injuries and property damage. *Id.* Dickerson

moved to strike a portion of the complaint alleging the existence of the contract and portions of the contract referring to Dickerson's contractual duty to provide flagmen and signage. Dickerson correctly argued that Dickerson's duty of care should not be pulled from promises in a contract. The trial court denied Dickerson's motion to strike.

The Supreme Court of North Carolina affirmed the trial court's decision not to strike the allegation that Dickerson contracted with the Commission to perform the work. "Although the plaintiff sues in tort and not in contract, the contract between the defendant and [the Commission] created the state of things which furnished the occasion for the tort[.]" *Id.* The fact that Dickerson performed the work pursuant to the contract did not relieve Dickerson of "the positive legal duty devolved upon him to exercise ordinary care for the safety of the general public traveling over the road on which he was working." *Id.* at 553. And so, the first *Ports Authority* exception: The duty imposed by law to exercise due care to prevent damage to the person or property of others applies even to actions undertaken in performance of a contract.

But *Council* has more to teach. The supreme court found error in the trial court's refusal to strike the averments setting forth Dickerson's contractual obligation to provide signage and flagmen. The allegations "aver a breach of a contractual obligation," observed the court, "and not a violation of a duty imposed by law." *Id.* at 553-54. The court noted that "[a]n omission to perform a contract obligation is never a tort, however, unless that omission is also the omission of a legal duty." *Id.* at 553 (citations omitted). The supreme court reversed and remanded the case based upon this error.

The *Ports Authority* court also cited *Pinnix v. Toomey*, 87 S.E.2d 893 (N.C. 1955) as support for this first exception. As in *Council*, the issue in *Pinnix* was whether references to a contract should be stricken from a negligence claim. Unfortunately, the *Pinnix* decision contains language that, taken out of context, lends credence to the oxymoronic claim of "negligent breach." In the midst of a free-wheeling exposition of tort law, the supreme court stated that the duty of care in tort "may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, that a negligent performance con-

stitutes a tort as well as a breach of contract." 87 S.E.2d at 898. The court went on to clarify that the contract "merely creates the state of things which furnishes the occasion of the tort" and are not relevant to the standard of care in negligence. *Id.*

In its unpublished opinion in *Nudelman v. J.A. Booe Building Contractor, Inc.*, No. COA02-267, 2003 WL 722190 (N.C. App. March 4, 2003), *cert. denied*, 357 N.C. 165, 580 S.E.2d 371 (May 1, 2003), the court of appeals rejected a "negligent breach" claim asserted by homeowners in a construction defect case. The homeowners based their argument on the out-of-context language in *Pinnix*. The court of appeals concisely held that "a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if the failure to properly perform was due to the negligent or intentional conduct of that party." *Nudelman*, 2003 WL 722190 at \*\*5.

**Personal injury to the promisee or damage to "other property" of the promisee.** The second general exception in *Ports Authority* arises where "[t]he injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee[.]" *Ports Authority*, 240 S.E.2d at 350. The duty to exercise due care runs to members of society, even those members in privity. If a roofer fails to secure his hammer, and the hammer injures the homeowner who hired him, the homeowner may sue in negligence. Similarly, the homeowner may sue the roofer in negligence if the hammer falls on "other property" such as the homeowner's car. However, if the hammer punctures the roof, the homeowner must sue in contract.

The meaning of "other property" frequently poses difficult factual questions for courts. Consider the facts in *Wilson v. Dryvit Systems, Inc.*, 206 F.Supp.2d 749 (E.D.N.C. 2002), where the Wilsons contracted with a general contractor, NCW Development, Inc. ("NCW"), to construct their home. NCW subcontracted with D.T. Glosson Construction, Inc. ("Glosson") to install the exterior cladding. Glosson applied the Direct-Applied Exterior Finish System ("DEFS") exterior cladding system manufactured by Dryvit Systems, Inc. ("Dryvit").

Five years after construction, the Wilsons filed suit against Dryvit alleging that the

DEFS cladding failed, resulting in "widespread and extensive moisture intrusion behind the faces of the house, probable deterioration of the sheathing, and rotting of framing members, doors, windows, and sub-flooring." *Wilson*, 206 F.Supp.2d at 753. Sharing no privity with Dryvit, the Wilsons asserted negligence, gross negligence, negligent misrepresentation, fraud, and unfair or deceptive trade practices. Dryvit moved for summary judgment based upon the economic loss rule.

The court addressed whether the water intrusion, sheathing deterioration, and rotting constituted "other" property damage for purposes of the economic loss rule. *Wilson*, 206 F.Supp.2d at 753. The court, citing three North Carolina state court cases, concluded that "when a component part of a product or system injures the rest of the product or system, only economic loss has occurred." *Id.* (citing *Moore v. Coachmen Indus., Inc.*, 499 S.E.2d 772 (N.C. 1998); *Gregory v. Atrium Door & Window Co.*, 415 S.E.2d 574 (N.C. App. 1992); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 391 S.E.2d 211 (N.C. App. 1990)). In the context of construction defects, the *Wilson* court held that only economic loss occurs even if the defect at issue causes damage to other parts of the structure. *Id.* (citations omitted). The DEFS cladding, observed the court, constituted an integral component of plaintiffs' house. The *Wilson* court concluded that the damage caused by the allegedly defective DEFS constituted damage to the house itself. Based upon the lack of "other" property damage, the court granted Dryvit's motion for summary judgment. Judge Britt's analysis in *Wilson* conforms to the majority of courts facing the same issue. *See, e.g., Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000); *Calloway v. City of Reno*, 993 P.2d 1259 (Nev. 2000).

The Middle District recently refined the meaning of "other property" in *Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, No. 1:03CV949, 2005 WL 1610653 (M.D.N.C. July 8, 2005). In that case, the plaintiff, Indemnity Insurance Company of North America ("IICNA"), asserted multiple claims after the crash of a helicopter owned by its insured, Duke University Medical Center. Among many other issues, the court considered whether IICNA could assert a negligence claim against American Eurocopter LLC ("American Eurocopter"), the entity that allegedly installed an oil

pump with a pump driver gear that did not meet production specifications during its overhaul of the main gearbox. American Eurocopter argued that the economic loss rule precluded recovery in tort because the helicopter was the subject of the contract. IICNA argued that the gearbox was the subject of the contract and that the rest of the helicopter constituted “other property.”

After an extensive discussion of the state of the economic loss rule in North Carolina, the court concluded that “for purposes of the economic loss doctrine, as to the negligence claims against American Eurocopter, the ‘product itself’ was the gearbox, and the helicopter was ‘other property[.]’” *Id.* at \*16. To support its holding, the court analogized the replacement parts in the gearbox to a light bulb installed in a home: “[I]f the light bulb were negligently manufactured and as a result exploded, causing a fire that destroyed the user’s home in which it was installed, the economic loss rule would not preclude the homeowner from pursuing a negligence claim against the light bulb manufacturer for damage to his home.” *Id.* at \*14.

**Bailments, etc.** The third exception arises where “[t]he injury, proximately caused by the promisor’s negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee’s property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper, or other bailee.” *Ports Authority*, 240 S.E.2d at 350-51. This exception developed in Elizabethan England, where the courts permitted negligence suits against gratuitous bailees to avoid the requirement of consideration in contract. J.H. Baker, *An Introduction to English Legal History* at 446-47 (Butterworths 1990).

**Conversion.** The fourth exception includes cases where “[t]he injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the promise, by the promisor.” *Ports Authority*, 240 S.E.2d at 351.

*Ports Authority* puts to rest the idea that the economic loss rule and the contract constraint limitation are synonymous. Recall that *Ports Authority* also asserted a negligence claim against Scott, the roofing subcontractor with whom *Ports Authority* shared no privity. The Supreme Court of North Carolina upheld the

dismissal of this claim, explaining that *Ports Authority*’s allegation that Scott negligently installed the roofs was “simply an allegation that Scott did not properly perform its contract with Dickerson and, for the reasons above set forth [in the supreme court’s discussion of *Ports Authority*’s negligence claim against Dickerson], does not allege a cause of action in tort in favor of [*Ports Authority*] against Scott.” *Id.* at 353.

The Middle District rejected an attempt to masquerade the contract constraint limitation as the economic loss rule. In *Higginbotham v. Dryvit, Inc.*, No. 1:01CV00424, 2003 WL 1528483, 50 U.C.C.Rep.Serv.2d 128 (W.D.N.C. March 20, 2003), the Higginbothams sued Dryvit in negligence for the alleged failure of the DEFS cladding system. The Higginbothams argued that the economic loss rule did not apply because the parties lacked privity. The court rejected the argument, citing as controlling precedent *Gregory v. Atrium Door and Window Co.*, 415 S.E.2d 574 (N.C. App. 1992), where the court of appeals rejected a homeowner’s implied warranty claims against a door manufacturer because the parties lacked privity. The economic loss rule applies without regard to privity.

### History of North Carolina’s Economic Loss Rule, Part II: A Question of Damages (or, alternatively, Will the Real Economic Loss Rule Please Stand Up?)

North Carolina recognizes the true economic loss rule. In *Moore v. Coachmen Industries, Inc.*, 499 S.E.2d 772 (N.C. App. 1998), flames engulfed a recreational vehicle (the “RV”) as the RV was being driven by friends of the owners. The fire destroyed the RV but caused no personal injuries. The owners of the RV, the Moores, sued the manufacturer of the RV, Coachmen Industries, Inc. (“Coachmen”), Coachmen’s subsidiary, Sportscoach Corporation of America (“Sportscoach”), and MagneTek, Inc. (“MagneTek”), the supplier of the RV’s electrical system. The Moores alleged negligence and breach of implied and express warranties against Coachmen and Sportscoach, and negligence and breach of the implied warranty of merchantability against MagneTek.

The court of appeals held that the economic loss rule barred the Moores’ negligence claims. “North Carolina has adopted the economic loss rule,” declared the court, “which prohibits recovery for economic loss in tort.” *Id.* at 780. The court, citing *Ports Authority*,

further stated that “such claims are governed by contract law—in this case, the UCC.” *Id.* The court concluded that permitting the Moores to sue the defendants in negligence “would permit the party to ignore and avoid the rights and remedies granted or imposed by the parties’ contract.” *Id.* (citing *Reece v. Homette Corp.*, 429 S.E.2d 768 (N.C. App. 1993)).

The latest pronouncement of the economic loss rule by a North Carolina court is *Land v. Tall House Building Co.*, 602 S.E.2d 1 (N.C. App. 2004). In *Tall House*, the Lands hired Tall House Builders, Inc. (“Tall House”) to construct their house. Tall House’s stucco subcontractor, Southern Synthetic, installed the DEFS system manufactured by Dryvit. The Lands sued Tall House for negligent construction, alleging failure of the DEFS system. Tall House, in turn, filed a third-party complaint against Dryvit and the installer, Southern Synthetic. Tall House settled with the Lands for \$199,900.00. As part of the settlement agreement, the Lands assigned “all claims, rights and causes of action they may have against any other person or entity concerning and damage to the house” to Tall House’s insurer, Assurance Company of America (“ACA”). ACA, standing in the shoes of Tall House, sued Dryvit for contribution and indemnity. The trial court granted summary judgment in favor of Dryvit and against ACA on both claims.

The court of appeals, citing the rule that a breach of contract does not give rise to a tort action, rejected ACA’s contribution and indemnity claims. “Since there can be no recovery based on a negligence theory,” reasoned the court, “ACA’s contribution claim must also fail.” 602 S.E.2d at 3 (citations omitted). The court presented two distinct and independent reasons for upholding summary judgment against ACA.

As its first reason, the court of appeals echoed the *Ports Authority* rule that “the law of contract, not the law of torts, defines the obligations and remedies of the parties.” *Id.* at 4 (emphasis in original). Nothing new here. However, as its second reason, the court subjected ACA’s claim to the damages-based economic loss rule. “Second,” began the court, “the economic loss rule ‘prohibits recovery for economic loss in tort.’” *Id.* (emphasis added) (citing *Moore v. Coachmen Industries, Inc.*, 499 S.E.2d 772, 780 (N.C. App. 1988)). The court cited the Eastern District’s decision in

*Wilson* to support its conclusion that the DEFS was a component of the house and that no damage to “other property” was present. *Id.* (The Court of Appeals of North Carolina reached the same conclusion in its unpublished decision in *Nudelman v. J.A. Booe Building Contractor, Inc.*, No. COA02-267, 2003 WL 722190 (N.C. App. March 4, 2003), cert. denied, 357 N.C. 165, 580 S.E.2d 371 (May 1, 2003)).

*Tall House* illustrates the continued acceptance and approval of the economic loss rule in North Carolina. The supreme court and the court of appeals should continue to employ the economic loss rule in all civil cases, subject to a handful of exceptions.

## But What About . . . ? Existing and Proposed Exceptions to the Rule

### 1. Fraud in the Inducement

North Carolina should carve out an exception for fraud in the inducement. Fraud in the inducement, which normally occurs before the parties contract, is a tort independent of a contractual breach. *HTP Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238, 1239 (Fla. 1996). “Fraud in the inducement presents a special situation where the parties to a contract appear to negotiate freely—which normally would constitute grounds for invoking the economic loss doctrine—but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party’s fraudulent behavior[.]” *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 532 N.W.2d 541, 545 (Mich. App. 1995).

Unlike fraud in the inducement claims, the economic loss rule should bar common law fraud claims relating to the performance of a contract. However, as a practical matter, the economic loss rule will affect the form but not the substance of fraud claims in North Carolina. The economic loss rule poses no obstacle to fraud claims brought under our expansive Unfair or Deceptive Trade Practices Act, codified at Chapter 75-1.1 *et seq.* of the North Carolina General Statutes.

### 2. Malpractice

Malpractice is a creature of both tort and contract. *Handex of Carolinas, Inc. v. County of Haywood*, 607 S.E.2d 25 (N.C. App. 2005); *United Leasing Corp. v. Miller*, 298 S.E.2d 409 (N.C. App. 1982); *Chicago Title Ins. Co. v. Holt*, 244 S.E.2d 177 (N.C. 1978). The law has long imposed a duty upon professionals to act within the applicable standard of care of

their profession. North Carolina courts should make clear that malpractice claims survive the economic loss rule. Otherwise, North Carolina will experience the judicial chaos and backsliding that occurred in Florida. *See, e.g., Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999) (receding from perfectly good economic loss rule opinions due to confusion over application of economic loss rule to malpractice actions).

The malpractice exception dovetails nicely with the “supervisory architect” doctrine recognized in *Shoffner Industries, Inc. v. W.B. Lloyd Const. Co.*, 257 S.E.2d 50 (N.C. 1979). The supervisory architect doctrine relates to the tort liability concept of foreseeability; it is not a true exception to the economic loss rule. Under this doctrine, architects may be liable to participants on a construction project even where there is no privity. The *Shoffner* court observed that an architect possesses the “power of economic life or death” over a contractor. *Id.* at 55 (quoting *United States v. Rogers*, 161 F.Supp. 132, 136 (S.D. Cal. 1958)). The court then held that an architect has a duty of care to the contractor, even where there is no privity. With *Shoffner*, North Carolina joined other jurisdictions that recognize the doctrine. *See, e.g., A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973).

The Middle District recently addressed the supervisory architect doctrine in *Ellis-Don Construction, Inc. v. HKS, Inc.*, 353 F.Supp.2d 603 (M.D.N.C. 2004). *Ellis-Don Construction, Inc.* (“*Ellis-Don*”) served as general contractor for the construction of a hospital project. The defendants constituted the design team for the project. *Ellis-Don* alleged that the defendants performed their duties negligently and in bad faith. One of the defendants, Corley Redfoot Zack, Inc. (“*CRZ*”), argued that dismissal was required under the economic loss rule. To support its argument, *CRZ* cited the expansive language contained in *Tall House*.

The Middle District refused to apply the economic loss rule, citing *Davidson*. The court should have stopped there. But alas, it did not. In dicta, the court stated that the economic loss rule applied to products liability cases, but not to other cases. “North Carolina’s economic loss rule bars claims in tort for purely economic losses in the sale of goods covered by contract law, including the UCC.” 353 F.Supp.2d at 606. North Carolina courts should ignore this dicta and

continue to extend the reach of the economic loss rule.

### 3. Section 552 of the Restatement of Torts

A related exception comes from Section 552 of the Restatement of Torts, which imposes liability upon one who, in his business or profession, negligently supplies information for the guidance of others. The supreme court recognized Section 552 in *Davidson & Jones, Inc. v. County of New Hanover*, 255 S.E.2d 580 (N.C. App. 1979). In that case, a general contractor and its subcontractors sued the owner’s architect for economic damages resulting from an allegedly defective soil investigative report prepared by the architect’s consultants. The supreme court held that the general contractor and its subcontractors stated a claim in negligence against the architect, with whom they shared no privity, by alleging that the architect negligently misrepresented the subsurface soil conditions and that the contractors’ reliance upon the report proximately caused their injury.

### 4. Breach of Fiduciary Duty

Finally, the economic loss rule should not trump the special duty that the law imposes upon fiduciaries. *See* Amanda K. Esquibel, *The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter Than the Morals of the Marketplace?*, 42 Vill. L. Rev. 789 (1997).

## Bringing It All Back Home

The economic loss rule serves the important function of preserving the expectancy interests of contracting parties while at the same time allowing claims in negligence where there is injury to person or other property. North Carolina courts have developed a solid foundation upon which to broadly apply the economic loss rule beyond the realm of products liability and the sale of goods. Based upon the expansive language in *Tall House*, the court of appeals appears willing to exercise the full potential of the economic loss rule. Subject to the existing and recommended exceptions listed in this article, consistent application of the economic loss rule in all civil cases will maintain balance and order in the common law of this state. ■

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