

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 701

Design Professionals

**SPONSOR(S):** Precourt

**TIED BILLS:** None

**IDEN./SIM. BILLS:** SB 1964

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	Civil Justice & Courts Policy Committee	10 Y, 0 N	Bond	De La Paz
2)	Insurance, Business & Financial Affairs Policy Committee	12 Y, 1 N	Marra	Cooper
3)	Criminal & Civil Justice Policy Council		Bond	Havlicak
4)				
5)				

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### SUMMARY ANALYSIS

Design professionals are engineers, surveyors, architects, interior designers, and landscape architects. Design professionals are personally subject to claims of professional malpractice.

The economic loss rule is a court-created legal concept that provides that contract law, not tort law, applies where one party to a contract suffers a purely economic loss occasioned by another party to the contract. It sets a line between contract law and tort law. The theory supporting the rule is that the parties to a contract are free to negotiate remedies and to price their goods and services based in part on the potential remedies.

Florida courts have inconsistently applied the economic loss rule to malpractice claims against individual professionals. Current case law provides that the economic loss rule does not bar any action for professional malpractice, including an action for professional malpractice against a design professional.

This bill provides that the economic loss rule applies to individuals acting as design professionals.

This bill does not appear to have a fiscal impact on state or local governments.

The bill is effective upon becoming law.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Negligence Law, in general**

Negligence law provides that a person injured by the wrongful conduct of another is entitled to a judgment against the wrongdoer for the damages caused. In general, where the wrongdoer was an employee of a business entity and was acting within the normal scope of his or her duties as an employee, the business entity is liable for damages, but the employee is not.

However, professionals are held personally liable for their negligent acts, regardless of whether they are an employee of a business entity. This personal liability, known as malpractice, is set forth generally in the law on professional associations<sup>1</sup>, and is specifically created by statute as to design professionals:

- Engineers, at s. 471.023(3), F.S.
- Surveyors, at s. 472.021(3), F.S.
- Architects and interior designers, at s. 481.219(11), F.S.
- Landscape architects, at s. 481.319(6), F.S.

##### **Economic Loss Rule**

Traditionally, contract law and tort law (including negligence and malpractice) are separate in their application: contract law enforces expectancy interests created by an agreement between parties; tort law compensates people for personal injury or property damage caused by tortious conduct, without regard to contract.

The division between the two areas of law matters in the results attainable: contract law limits recovery to expectation damages - damages reasonably expected to flow from the contractual breach. On the other hand, tort law allows all damages proximately resulting from tortious conduct.

Tort law protects the interests of society as a whole by imposing a duty of reasonable care to prevent property damage or physical injury, while contract law protects the economic expectations of the

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<sup>1</sup> Section 621.07, F.S.

contracting parties.<sup>2</sup> Parties entering a contract allocate their risk in the contract, keeping the risk contained to the contracting parties. This can be contrasted with tort law, under which risk is borne by the party in the best position to prevent injury, and the costs are borne by the public through increased costs for services and insurance.<sup>3</sup>

The economic loss rule was developed by courts to more accurately draw the distinction between contract and tort law. This common law rule provides that, where there is a contract between parties and a person harmed by wrongful conduct suffers only economic damages (that is, there is no personal injury involved), the lawsuit must proceed under contract law. Where the economic loss rule applies, the person harmed cannot sue in tort law. The economic loss rule tends to favor defendants because tort law damages are usually greater than contract law damages.<sup>4</sup>

The economic loss rule has long been recognized in Florida law.<sup>5</sup> It is firmly established in products liability cases, where it is based on the notion that tort law imposes a duty on manufacturers to take reasonable care so that their products will not harm persons or property, but imposes no duty for manufacturers to ensure their products will meet the economic expectations of purchasers.<sup>6</sup>

The rule's applicability to service contracts has been less clear, as Florida courts have disagreed. In 1992, the Second District ruled that the economic loss rule barred a tort action against an architect who was alleged to have negligently designed a condominium building.<sup>7</sup> In 1999, however, the Supreme Court expressly provided that the economic loss rule would not bar a negligence action against an engineer who was alleged to have negligently inspected a home.<sup>8</sup> Based on the 1999 case, it appears that, under current law, the economic loss rule would not protect a design professional from tort damages related to negligent design, even if there is a contract detailing and limiting damages related to the design services.<sup>9</sup> However, it appears the economic loss rule would protect a nonprofessional performing the same services from tort damages related to negligence, if there was a contract.<sup>10</sup>

## Effect of Bill

This bill provides that the economic loss rule applies to claims against a licensed design professional providing design services pursuant to a contract to provide such services. Therefore, a party claiming purely economic loss based on a design service contract will not be able to bring an action based in malpractice or negligence against the contracted design professional. Instead, the injured party will be limited to contract claims.

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<sup>2</sup> *Casa Clara Condominium Assoc. v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla. 1993).

<sup>3</sup> See *Id.* at 1247 ("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").

<sup>4</sup> *Id.* at 1244 ("Plaintiffs find a tort remedy attractive because it often permits the recovery of greater damages than an action on a contract and may avoid the conditions of a contract.")

<sup>5</sup> See, e.g., *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987)(ELR barred negligence claim for defective nuclear steam generators); *Casa Clara*, 620 So.2d 1244 (ELR barred negligence claim for defective concrete); *Airport Rent-A-Car. v. Prevost Car*, 660 So.2d 628 (Fla. 1995)(ELR barred negligence claim for defective buses).

<sup>6</sup> See *Monsanto Agricultural Products v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982).

<sup>7</sup> *Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So.2d 1349 (Fla. 2d DCA 1992).

<sup>8</sup> *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). See also, Lesser, *Chipping Away at the Economic Loss Rule*, The Florida Bar Journal, October 1999, at pages 22-37.

<sup>9</sup> *Witt v. LaGorce Country Club, Inc.*, 34 Fla. L. Weekly D1161 (Fla. 3d DCA 2009)(upholding negligence judgment against a professional geologist in design of a golf course irrigation system despite clear contractual limitation of damages).

<sup>10</sup> See *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla. 1987)(The Court extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional services context. The Court in *Moransais*, 744 So.2d 973, and in *Comptech International v. Milam Commerce Park*, 753 So.2d 1219, declined to directly overrule *AFM.*)

Design professionals may still be subject to negligence and malpractice suits, if:

1. A personal injury is claimed;
2. Property damage to property not subject to a design contract is claimed; or
3. The design services at issue were not performed pursuant to a contract between the design professional and either the person claiming economic damages or a consultant contracting with the person claiming economic damages to provide the professional services at issue.

Also, this bill does not affect the contractual liability of the employer of design professionals.

**B. SECTION DIRECTORY:**

Section 1 creates s. 471.046, F.S., creating a limitation of liability applicable to engineers.

Section 2 creates s. 472.0367, F.S., creating a limitation of liability applicable to surveyors.

Section 3 creates s. 481.23, F.S., creating a limitation of liability applicable to architects and interior designers.

Section 4 creates s. 481.333, F.S., creating a limitation of liability applicable to landscape architects.

Section 5 provides an effective date of upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

In any bill limiting liability, there are a number of possible direct economic impacts. In this bill, design professionals will likely see lower costs for professional liability insurance and may charge lower prices to their customers. Insurance agents may earn lower commissions. Correspondingly, injured persons may receive lower recoveries upon their claims, and if so their attorneys would earn lower fees.

**D. FISCAL COMMENTS:**

The courts have described the basic economic theory supporting adoption of an economic loss rule:

In tort, a manufacturer or producer of goods "is liable whether or not it is negligent because 'public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.'" *East River*, 476 U.S. at 866, 106 S.Ct. at 2300 (quoting *Escola v. Coca*

*Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). Thus, the “basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault ... or to one who is better able to bear the loss and prevent its occurrence.” *Barrett*, supra at 935. The purpose of a duty in tort is to protect society's interest in being free from harm, *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. *Id.* 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.” *Barrett*, supra at 933.<sup>11</sup>

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.

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<sup>11</sup> *Casa Clara.*, 620 So.2d at 1246-47.  
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