

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 701 Design Professionals
SPONSOR(S): Precourt
TIED BILLS: None **IDEN./SIM. BILLS:** None

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		Bond	De La Paz
2)	Insurance, Business & Financial Affairs Policy Committee			
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Design professionals are engineers, surveyors, architects, interior designers, and landscape architects. Like other professionals, a design professional is personally subject to claims of professional malpractice.

The economic loss rule is a common law 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 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 design professionals.

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

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 in general in the law on professional associations¹, 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

The economic loss rule is a common law rule that provides that, where there is a contract between parties and a person harmed by the 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 choose to sue in tort law. The economic loss rule tends to favor defendants because tort law damages are usually greater than contract law damages.²

The economic loss rule has long been recognized in Florida law:

Tort 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

¹ Section 621.07, F.S.

² *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993) ("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.")

law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers. Such a duty does, of course, exist where the manufacturer assumes the duty as part of his bargain with the purchaser, or where implied by law, but the duty arises under the law of contract, and not under tort law. Prosser, Law of Torts sec. 101 (4th Edition 1971).³

We agree and find no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public. We hold contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage. The lack of a tort remedy does not mean that the purchaser is unable to protect himself from loss. We note the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view. Further, the purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making. . . . [We] hold the economic loss rule approved in this opinion is not a new principle of law in Florida and has not changed or modified any decisions of this Court. In fact, the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting. Consequently, we hold that the economic loss rule should be applied to the instant case.⁴

In *Florida Power & Light Co.*, we held that contract principles are more appropriate than tort principles for resolving economic losses resulting from the purchase of a product where there are no personal injury or property damage claims. This holding is consistent with the United States Supreme Court decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), and is the majority view in this country.⁵

The [economic loss] rule is the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others.⁶

The Florida courts have differed on whether the economic loss rule applies to professionals. 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.⁷ 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.⁸ 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.

Effect of Bill

This bill provides that the economic loss rule applies to claims against a design professional. As to any design professional, this bill provides that a person does not have a cause of action against a design professional for the recovery of economic damages that result from malpractice or negligence in the

³ *Monsanto Agricultural Products v. Edenfield*, 426 So.2d 574 (1st DCA 1982).

⁴ *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987).

⁵ *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180, 181 (Fla.1987).

⁶ *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244, 1246 (Fla.1993)

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

⁸ *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999).

performance of professional services if the malpractice or negligence does not cause personal injury or damage to property other than the property that is the subject of the professional services and the licensee performs the professional services pursuant to a contract between the licensee or his or her employer and either of the following persons:

- The person claiming economic damages; or
- A consultant, subconsultant, or sub-subconsultant to a person or entity having a contract with the person claiming economic damages to provide the professional services at issue.

This bill does not affect the professional liability of design professionals where any person suffers personal injury.

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 presumably can 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 933.⁹

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

n/a

⁹ *Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244, 1246-47 (Fla.1993).
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