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A Critical Examination of Minnesota's Treatment of the Economic Loss Doctrine in Construction Cases—Is Contract Law "Drowning in a Sea of Tort?"^{OSQ}

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**A CRITICAL EXAMINATION OF MINNESOTA’S TREATMENT
OF THE ECONOMIC LOSS DOCTRINE IN CONSTRUCTION
CASES— IS CONTRACT LAW “DROWNING IN A SEA OF
TORT?”**

Jeff Coleman[†]

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I. INTRODUCTION

Defending architects, engineers, and contractors against legal actions for purely economic losses on construction projects brought by parties not in privity of contract has become common in Minnesota. However, this was not always the case. In fact, this is

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still not the case in many other jurisdictions of the United States.

Minnesota's current situation stems largely from its consideration of the economic loss rule. This rule prohibits tort recovery when a product—or here, a construction project involving a combination of products and services—suffers damage, causing economic loss, but not causing personal injury or damage to any property other than itself. The rule has been cited as “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.”¹

In Minnesota, architects and engineers are liable in tort to third parties, such as contractors, with whom they have no contractual privity.² This article will examine the development of Minnesota's treatment of the economic loss rule with respect to construction projects and, specifically, design professionals such as architects and engineers.³ This article criticizes Minnesota's treatment of the economic loss rule and suggests that, at least in Minnesota construction law, contract law has unnecessarily drowned in a sea of tort.⁴

II. HISTORY OF THE ECONOMIC LOSS DOCTRINE

Three cases form the modern foundation of the economic loss rule. The most commonly cited case to initiate the discussion is *Winterbottom v. Wright*,⁵ in which the court refused to extend contract obligations to third parties.⁶ Lord Abinger based his logic on the “infinity of actions” and the “most absurd and outrageous consequences” that might ensue if the parties who were not in privity of contract were allowed to enforce contract obligations for purely economic losses.⁷

1. Sydney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891, 894–95 (1989).

2. *Prichard Bros. v. Grady Co.*, 428 N.W.2d 391 (Minn. 1988).

3. This is not the first such critical examination. See Larry D. Espel, *Liability and Loss Allocation for Economic Losses in Construction Litigation Involving Design Professionals*, 13 WM. MITCHELL L. REV. 81, 132 (1987).

4. See generally *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (coining the phrase “contract law would drown in a sea of tort”).

5. 152 Eng. Rep. 402 (Exch. Div. 1842).

6. *Id.* at 404.

7. *Id.* at 405.

In the second case, *MacPherson v. Buick Motor Co.*,⁸ Justice Cardozo implicitly held that there was a responsibility on the part of the manufacturer of chattels—here, automobile tires—to the ultimate consumer based not upon the contract itself but upon the relation arising from the purchase and foreseeability of harm if proper care was not used in manufacturing.⁹ This “foreseeability of harm doctrine” has carried through to many of the cases in Minnesota.

The final case emerged in 1931. In *Ultramares Corp. v. Touche*, Justice Cardozo had the opportunity to once again discuss the economic loss doctrine.¹⁰ In his often-quoted statement, he expressed his concern that abandonment of the rule would expose parties to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”¹¹ The *Ultramares* opinion arose out of an audit, which incorrectly certified that capital and surplus were intact when, in reality, the underlying corporation was insolvent.¹² The plaintiff was a lender who had relied upon the audit in response to request for loans to finance the sale of rubber.¹³ Justice Cardozo started his analysis by recognizing that “[t]he defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling.”¹⁴ He went on to analyze as follows:

A different question develops when we ask whether they owed a duty to these to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.¹⁵

8. 111 N.E. 1050 (N.Y. 1916).

9. *Id.* at 1051.

10. 174 N.E. 441 (N.Y. 1931).

11. *Id.* at 444.

12. *Id.* at 442.

13. *Id.* at 443.

14. *Id.* at 444.

15. *Id.*

In recognizing the erosion of the privity barrier, Cardozo stated, "The assault upon the citadel of privity is preceding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion."¹⁶ Recognizing his earlier decision in *MacPherson*, he stated:

In the field of the law of torts a manufacturer who is negligent in the manufacture of a chattel in circumstances pointing to an unreasonable risk of serious bodily harm to those using it thereafter may be liable for negligence though privity is lacking between manufacturer and user. A force or instrument of harm having been launched with potentialities of danger manifest to the eye of prudence, the one who launches it is under a duty to keep it within bounds. Even so, the question is still open whether the potentialities of danger that will charge with liability are confined to harm to the person, or include injury to property. In either view, however, what is released or set in motion is a physical force. We are now asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words.¹⁷

Interestingly, in *Ultramares*, Justice Cardozo wrestled with the erosion of the privity barrier and questioned whether his earlier ruling in *MacPherson* should be limited to personal injury or extended to property damage.¹⁸ As we know, the erosion of the privity barrier did indeed extend to both personal injury and property damage.¹⁹ As will be seen, Minnesota abandoned the economic loss rule as it applies to construction projects and design professionals, but may now be well-poised to reexamine its position.

III. CONSTRUCTION CONTRACTS

As the economic loss doctrine evolved under case law, the structure of construction contracts advanced in the commercial sector. In fact, in the area of commercial construction, contracts utilized by the various parties to the construction project are extremely well developed; they define the scope of work obligations and limit the liability of the parties. In a typical construction project, an Owner retains a Contractor and an Architect. Typically,

16. *Id.* at 445.

17. *Id.* (citations omitted).

18. *See id.*

19. *Id.*

the Architect then retains an Engineer. In turn, the Contractor retains sub-contractors and material suppliers to supply material and labor for completion of the project.

Numerous trade and professional organizations have drafted model contracts for use in the construction industry. One of the most common is the American Institute of Architects (AIA).²⁰ However, contracts developed by the Engineer's Joint Contract Documents Committee,²¹ the Associated General Contractors of America,²² the Design-Build Institute of America,²³ and others are often used as well. For purposes of this discussion, the focus will be on the contracts developed by the AIA.

On a typical commercial construction project, significant time is spent negotiating the contracts between the various parties so as to adequately define the scope of work, liability, and limitations on liability of the various parties. The contract between the Owner and the Contractor will consist of a construction contract AIA A101²⁴ for lump sum contracts or AIA A111²⁵ for costs plus contracts, along with definitions of cost and time of completion. Also, the parties will typically incorporate AIA A201 General Conditions,²⁶ a multi-page document outlining the obligations of the parties. The Contractor will then use standard subcontracts and/or purchase orders to enter into contracts with the subcontractors and the material suppliers.²⁷ These contracts are typically coordinated so as to allow for review of provisions of the Owner-Contractor Agreement.²⁸ The agreements also coordinate insurance coverage and bonding obligations.²⁹

20. The American Institute of Architects, <http://www.aia.org> (last visited Nov. 12, 2007).

21. The Engineer's Joint Contract Documents Committee, <http://www.ejcdc.org> (last visited Nov. 12, 2007).

22. The Associated General Contractors of America, <http://www.agc.org> (last visited Nov. 12, 2007).

23. The Design-Build Institute of America, <http://www.dbia.org> (last visited Nov. 12, 2007).

24. See AM. INST. OF ARCHITECTS, AIA DOCUMENT A101 (1997), *available at* http://www.hepc.wvnet.edu/resources/pmanualforms/ConstructionServices/AIA_A101-97AgreementBetweenOwner&Contractor.pdf.

25. AM. INST. OF ARCHITECTS, AIA DOCUMENT A111 (1997).

26. AM. INST. OF ARCHITECTS, AIA DOCUMENT A201 (1997), *available at* http://www.engin.umich.edu/class/cee431/AIA/05.04.05_A201_SAMPLE_encrypted.pdf [hereinafter AIA DOCUMENT A201].

27. *Id.* at art. 5.

28. *See id.* § 5.3.

29. *See id.* § 11.1.1.

On the other side of the transaction, the Owner will enter into an agreement with the Architect—AIA document B141³⁰—and the Architect will in turn enter into an agreement with its sub-consultant for the various engineering disciplines.³¹ Again, these agreements are coordinated to allow for a pass-through of the obligations between the Owner and the Architect and the Architect and Engineers.

The agreements prepared by the AIA are also themselves carefully coordinated to allow for clear definition of scope of work and responsibilities in virtually all areas and phases of the construction project.

For example, the A201 General Conditions³² covers issues such as:

- Ownership and use of drawings, specifications, and other instruments of service.
- Information and services required of the Owner.
- Owner's right to stop work.
- Payment of taxes, permits, fees, and notices.
- Treatment of allowances by the Contractor.
- Contractor's construction schedules.
- Documents and samples required to be present on the site.
- Shop drawings, product data, and samples procedures.
- Royalties, patents, and copyrights.
- Indemnification (by the Contractor).

30. AM. INST. OF ARCHITECTS, AIA DOCUMENT B141 (1997), *available at* <http://www.designadvisor.org/pdfs/b141.pdf> [hereinafter AIA Document B141].

31. *Id.* at art. 1.1.

32. AIA DOCUMENT A201, *supra* note 26.

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- Administration of the contract (by the Architect).
- Claims and disputes procedures.
- Claims for additional time.
- Resolution of claims and disputes.
- Mediation.
- Arbitration.
- Subcontractors.
- Contingent assignment of subcontracts (effective upon termination).
- Changes in the work.
- Delays and extensions of time.
- Payments and completion.
- Certifications for payment.
- Substantial completion.
- Partial occupancy or use.
- Final completion and final payment.
- Safety precautions and programs.
- Hazardous materials.
- Emergencies.
- Insurance and bonds.

- Uncovering and correction of work (either before or after substantial completion).
- Acceptance of non-conforming work.
- Governing law.
- Successors and assigns.
- Rights and remedies.
- Tests and inspections.
- Commencement of statutory limitation period.
- Termination or suspension of the contract (both for cause and for convenience).

States that reject the economic loss doctrine, such as Minnesota, apparently have overlooked the fact that parties to construction projects define their obligations in detail in their contracts. The relationship between design professional, Owner, Contractor, and other third parties will depend on the nature of the project. Traditional construction projects will operate differently than design-build fast track projects, which will in turn operate differently than a project utilizing a construction manager. The parties themselves are best able to determine their needs and negotiate the terms of their contracts accordingly. General tort law should not be permitted to tamper with these contractual relationships.

A careful review of the current standard contracts in the industry discloses that the standard of care for the design professional is not defined in the contract. Similarly, the standard of care for contractors is not specifically defined. This was intentional on the part of the organizations drafting the contracts because they wanted those contracts to essentially default to the standard of care that would exist at the time under the circumstances and in the specific geographic area. This may have created confusion for lawyers and the courts dealing in construction disputes. Since the contract between the Owner and

the design professional is silent as to the standard of care, the standard of care is ultimately determined based upon “the exercise of that skill and judgment which [sic] can reasonably be expected from similarly situated professionals.”³³ This is the same standard of care that would be used to define the duty owed in a tort action. Thus, absent a definition of standard of care in the contract, the standard of care in a contract action and tort action are similarly defined. As a result, confusion may have ensued as to the standing of any given construction case as a tort or contract action. The new AIA B101 Owner-Architect (2007 version) does, for the first time, contain a definition of the standard of care, which may alleviate this confusion to the extent it existed.³⁴

IV. ECONOMIC LOSS DOCTRINE IN MINNESOTA

Based on this foundation of case law and private sector contract development, Minnesota, until the 1980s, generally recognized an economic loss doctrine. A review of Minnesota’s case law on this issue starts with the case of *Superwood Corp. v. Siempelkamp Corp.*³⁵ This Minnesota Supreme Court case dealt with a product liability dispute.³⁶ The plaintiff, Superwood, purchased a hotplate press manufactured in 1954 by the defendant, G. Siempelkamp.³⁷ According to the court:

The press operated without problem from 1954 to 1975, when the cylinder on the hotplate press failed and could not be repaired. On March 12, 1979, three years after the cylinder failed, plaintiff brought this Federal District Court action based on negligence, strict products liability, breach of warranty, and breach of contract.³⁸

The damages alleged were all economic loss damages in that they comprised damage to the press itself and lost profits arising out of the press’s failure to operate.³⁹ The federal district court granted the defendant’s summary judgment motion on the

33. *City of Mounds View v. Waljarvi*, 263 N.W.2d 420, 424 (Minn. 1978).

34. AM. INST. OF ARCHITECTS, AIA DOCUMENT B101 § 2.2 (2007). Note that the new B101 is the new functional equivalent of the old B141. See AIA DOCUMENT B141, *supra* note 30.

35. 311 N.W.2d 159 (Minn. 1981).

36. *Id.*

37. *Id.* at 160.

38. *Id.*

39. *Id.*

contract and warranty claims on the grounds that the statute of limitations had run on those claims.⁴⁰ The federal district court then certified three questions of “uncertain” state law to the Minnesota Supreme Court.⁴¹ The first two questions were as follows:

- (1) Is the manufacturer of defective equipment (a press) strictly liable in negligence to the user of the equipment damaged in its property and business by negligent product manufacture, inspection, or installation supervision?
- (2) Is the manufacturer of defective equipment (a press) strictly liable in tort to the user of the equipment damaged in its property and business by the product defect?⁴²

The court initially observed that “[t]o answer these questions, [we] must determine whether economic losses arising out of commercial transactions are recoverable under negligence and strict products liability theories.”⁴³ The defendant argued that the Minnesota Legislature enacted the Uniform Commercial Code⁴⁴ and that “to allow a tort action would circumvent the system of rights and remedies detailed by the legislature and the UCC.”⁴⁵

The court reviewed one of the most frequently cited cases, which also serves as a common starting point for discussions of this area of the law, the California case of *Seely v. White Motor Co.*⁴⁶ In *Seely*, the plaintiff attempted to recover the cost of repairs to a defective truck, the purchase price of the truck, and the lost business profits that resulted from the lost usage of the truck.⁴⁷ The California Supreme Court recognized that permitting a strict products liability theory would undermine the law of sales and would not reflect terms of the contract between the parties.⁴⁸ The *Seely* court held that economic losses could not be recovered under

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 160–61.

44. *See* Act of May 26, 1965, ch. 811, 1965 Minn. Laws 1290.

45. *Superwood*, 311 N.W.2d at 161.

46. *Id.* (citing *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965)).

47. *Seely*, 403 P.2d at 147–48.

48. *Id.* at 149.

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strict products liability,⁴⁹ and also indicated that even in negligence actions, the manufacturer's liability does not extend to economic losses.⁵⁰

At that time, the Minnesota Supreme Court recognized that "the majority of jurisdictions that have considered this issue have followed the holding in *Seely*."⁵¹ Recognizing that this was "a case of first impression in Minnesota," the court went on to analyze the interaction of the U.C.C. with tort law and strict liability.⁵² The court recognized that the U.C.C. "clarifies the rights and remedies of parties to commercial transactions. For example, specific provisions exist covering warranties, warranty disclaimers, liability limitations, and notice provisions."⁵³

In upholding the economic loss doctrine, *Superwood* held "that economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability."⁵⁴ The court thus recognized that the rights and remedies established by the U.C.C. should not be disrupted by the application of tort theories of recovery, at least as to economic losses arising out of the failure of the product itself. Such loss of expectation damages are adequately addressed by an action based upon contract.

In 1984, the Minnesota Court of Appeals decided *Zontelli & Sons, Inc. v. City of Nashwauk* (Zontelli I).⁵⁵ While portions of the court of appeals' decision were reversed and remanded by the subsequent supreme court case *Zontelli & Sons v. City of Nashwauk* (Zontelli II), the court of appeals' decision regarding the nature of the claim—that is, tort versus contract—was not overturned. Zontelli was a general contractor who constructed a municipal storm sewer project for the City of Nashwauk.⁵⁶ The city's engineer substantially underestimated the amount of concrete and other unsuitable materials that needed removal during construction of

49. *Id.* at 151.

50. *Id.*

51. *Superwood*, 311 N.W.2d at 161.

52. *Id.* at 161–62.

53. *Id.* at 162 (citation omitted).

54. *Id.*

55. 353 N.W.2d 600 (Minn. Ct. App. 1984) [hereinafter *Zontelli I*], *overruled in part by* *Zontelli & Sons v. City of Nashwauk*, 373 N.W.2d 744 (Minn. 1985) [hereinafter *Zontelli II*].

56. *Zontelli I*, 353 N.W.2d at 602.

the street project.⁵⁷ The dispute centered on the amount of additional costs that would be permitted as a result of the significant difference in quantities.⁵⁸ After a lengthy analysis of the contract provisions, the court of appeals determined that Zontelli was entitled to costs beyond those allowed under the contract because the extent and effect of the difference in quantities was so unusual as to not have been contemplated by the parties at the time of contracting.⁵⁹ Of significance, however, are the decisions of both the court of appeals and, ultimately, the Minnesota Supreme Court, concluding that Zontelli's claims arose out of the contract.⁶⁰ The trial court previously concluded that the underlying nature of Zontelli's claims lay in tort and therefore applied comparative fault principals under Minnesota Statutes section 604.01.⁶¹ The court of appeals addressed this issue as follows:

While we can understand why the trial court wanted to apportion fault in this case, apportionment was not proper. Regardless of the fact that some of Zontelli's claims sound in tort, the basis of each claim is rooted in a contract. The claim of breach of warranty is based on the estimates included in Zontelli's contract with the City. Zontelli's claim of negligence, a tort claim, requires proof of the existence of a duty of care flowing from Wallace to Zontelli. Such a duty, if it exists at all, could only arise from the contract between Zontelli and the City or the contract between the City and Wallace. Zontelli's third-party beneficiary claim is dependent upon the contract between the City and Wallace.⁶²

The supreme court went on to cite *Lesmeister v. Dilly*,⁶³ another case, which held "that it was error to submit the theory of 'negligent breach' of contract to the jury, or to allow apportionment of fault either based on the pure contract or the 'negligent breach' cause of action."⁶⁴ The Minnesota Supreme Court in *Zontelli II* quickly agreed that the City's duty to reimburse

57. *Id.* at 603; *Zontelli II*, 373 N.W.2d at 756.

58. *See id.*

59. *See id.* at 605.

60. *Zontelli II*, 373 N.W.2d at 751.

61. *Zontelli I*, 353 N.W.2d at 604.

62. *Id.*

63. 330 N.W.2d 95 (Minn. 1983).

64. *Id.* at 102.

Zontelli for extra work arose out of contract (not tort) and then analyzed the changed conditions clauses in those contracts.⁶⁵

The economic loss doctrine suffered a fatal blow in the case of *Waldor Pump & Equipment Co. v. Orr-Schelen-Mayeron & Assoc., Inc.*⁶⁶ Orr-Schelen-Mayeron & Associates (OSM) was an engineering firm that had prepared specifications for a municipal public works project,⁶⁷ which included certain pumping equipment.⁶⁸ The bid of Waldor Pump, a subcontractor, had been accepted by the general contractor of the project, but Waldor's equipment—the Wilden Pump—was later rejected by OSM as not conforming to its specifications.⁶⁹ Waldor Pump later contended that OSM was negligent in drafting the specifications.⁷⁰ A jury found that OSM was negligent and awarded Waldor Pump \$61,834 in damages.⁷¹ OSM appealed from the judgment, arguing that the trial court erred in submitting the issue of negligence to the jury because OSM owed no duty of reasonable care to Waldor Pump.⁷² Waldor Pump was a subcontractor on a construction project and would have had no contractual privity with OSM.⁷³ This case put the spotlight on the economic loss doctrine in Minnesota.

The *Waldor Pump* court first cited *City of Mounds View v. Walijarvi*⁷⁴ for the following:

OSM contends it is not liable in negligence to Waldor Pump because an engineer owes no duty to anyone absent a contract. This position is contrary to the prevailing rule in a majority of jurisdictions, which recognizes the liability of those rendering “professional” services in situations in which the professional is negligent in the provision of services.⁷⁵

The court continued, citing *Larson v. Larson*:⁷⁶

The reasonable skill and judgment expected of professionals must be rendered to those who foreseeably

65. *Zontelli II*, 373 N.W.2d at 751.

66. 386 N.W.2d 375 (Minn. Ct. App. 1986).

67. *Id.* at 376.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. 263 N.W.2d 420 (Minn. 1978).

75. *Waldor Pump*, 386 N.W.2d at 376–77.

76. 373 N.W.2d 287 (Minn. 1985).

rely upon the services. Therefore, OSM is liable in negligence to those who foreseeably rely on its professional services.⁷⁷

Two problems arise with a review of the appellate court's analysis in *Waldor Pump*. First, *City of Mounds View*, as will be discussed below, does not stand for the proposition cited by the court of appeals; second, *Larson* has no relation whatsoever to architects' and engineers' professional services, and held the opposite, that the "professional" — a police officer—did *not* owe a duty.⁷⁸

City of Mounds View involved an architect, Waljarvi, who designed an addition to the Mounds View city hall.⁷⁹ Shortly after construction, the basement in the city hall building began to leak.⁸⁰ Mr. Waljarvi wrote a letter where he purported to guarantee that the design of the lower level would remain free of moisture; however, he also pointed out that damp basements were common and that the architect had not constructed the building and could not guarantee that it was built in accordance with the design specifications.⁸¹

The first issue faced by the Minnesota Supreme Court was whether the original agreement had been modified to include an express warranty when Waljarvi sent the letter.⁸² The court dismissed that argument primarily based on the fact that the original letter written by the city administrator was not in evidence.⁸³ The court then turned its attention to whether an implied warranty of fitness resulted when the architectural services were provided.⁸⁴ The court stated that "[t]he majority position limits the liability of architects and others rendering 'professional' services to those situations in which the professional is negligent in the provision of his or her services. With respect to architects, the rule was stated as early as 1896 by the Supreme Court of Maine."⁸⁵

The court refused to extend the doctrine of strict liability to architects and engineers, instead holding:

77. *Waldor Pump*, 386 N.W.2d at 377 (citations omitted).

78. *Larson*, 373 N.W.2d at 288.

79. 263 N.W.2d at 421.

80. *Id.*

81. *Id.* at 421–22.

82. *Id.* at 422.

83. *Id.* at 423.

84. *Id.*

85. *Id.* (referring to *Coombs v. Beede*, 36 A. 104 (Me. 1896)).

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Because of the inescapable possibility of error which inures in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similar situated professionals. As we stated in *City of Eveleth v. Ruble*:

“One who undertakes to render professional services is under a duty to the person for whom the service is to be performed to exercise such care, skill, and diligence as men in that profession ordinarily exercise under like circumstances.”⁸⁶

Finally, the court in *City of Mounds View* stated:

[W]hile it is undoubtedly fair to impose strict liability on manufacturers who have ample opportunity to test their products for defects before marketing them, the same cannot be said of architects. Normally, an architect has but a single chance to create a design for a client which will produce a defect-free structure. Accordingly, we do not think it just that architects should be forced to bear the same burden of liability for their products as that which has been imposed on manufacturers generally.

For these reasons, we decline to extend the implied warranty/strict liability doctrine to cover vendors of professional services. Our conclusion does not, of course, preclude the city from pursuing its standard malpractice action against the architects and proving that the basement area of the new addition was negligently designed.⁸⁷

Therefore, *City of Mounds View* stands for the proposition that strict liability in tort should not be extended to the Architect in that case, but, of course, the City, having privity of contract with the Architect, could pursue a breach of contract action against that Architect.⁸⁸ The court does not further explain what it means by Mounds View’s right to pursue its “standard malpractice action against the architects.”⁸⁹ Thus, it is questionable whether the court

86. *Id.* at 424 (quoting *City of Eveleth v. Ruble*, 302 Minn. 249, 253, 225 N.W.2d 521, 524 (1974)) (citation omitted). Note that the *City of Eveleth* specifically held that the Architect is “under a duty to the person for whom the service is to be performed” and does not extend liability to parties not in privity with the Architect or Engineer. *City of Eveleth*, 302 Minn. at 253, 225 N.W.2d at 524.

87. *City of Mounds View*, 263 N.W.2d at 425.

88. *Id.*

89. *Id.*

intended to conclude that a breach of contract action would be inadequate. This statement appears to be dicta intended to reference the fact that Mounds View had a right to sue for damages arising out of Walijarvi's provision of services inconsistent with the standard of care. Minnesota has clearly recognized that the retention of an Architect is a matter of contract and the duties and limitations of the Architect's services are described in the contract.⁹⁰ Thus, the first case cited by the court of appeals to support its decision in *Waldor Pump* appears to stand for the opposite proposition to that advanced in *Waldor Pump*.

The court's reliance on *Larson* is also misguided. In *Larson*, a police officer stopped an intoxicated driver for speeding and found marijuana and liquor containers in the vehicle.⁹¹ During arrest, the driver threatened that he would "get" the officer's house.⁹² About two months later, the officer was selected to attend the Minnesota Police and Peace Officers Association Convention in Grand Rapids, Minnesota, and this fact was advertised in the newspaper.⁹³ The police officer asked his brother, respondent Larson, to look after his home while he was gone.⁹⁴ He did not tell his brother about the driver's threat from approximately two months earlier.⁹⁵ Shortly thereafter, the respondent entered the house and was blown out the door by an explosion and blast of flame; he sustained personal injuries as a result.⁹⁶

Respondent Larson sued Officer Larson for negligence, claiming that Officer Larson should have warned him of the threat to his house.⁹⁷ The jury found both police officer and respondent negligent, declaring the police officer seventy-five percent negligent and respondent twenty-five percent negligent.⁹⁸ The police officer appealed, asserting that he had no duty to warn his brother of a "vague threat received some two months" earlier.⁹⁹ *Larson* held that because "it was so speculative and unforeseeable

90. *Moundsview Indep. Sch. Dist. v. Buetow & Assocs., Inc.*, 253 N.W.2d 836 (1977) (citing *Kostohryz v. McGuire*, 298 Minn. 513, 212 N.W.2d 850 (1973)).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 289.

98. *Id.*

99. *Id.*

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that the threat would mature into harm, we conclude that the trial court should have held this as a matter of law that appellant had no duty to warn of such unforeseeable speculative danger.”¹⁰⁰

This case dealt with personal injury, not economic loss. Furthermore, the basis for the decision in *Larson* had nothing to do with the provision of a professional service.¹⁰¹ *Larson* simply stands for the proposition that the existence of a legal duty is an issue for the court to determine as a matter of law.¹⁰² Still, even on that point, the court stated that “although we have stated that in close cases foreseeability may be for a jury resolution, the foreseeability issue in the instant case was clear and should have been decided by the court as a matter of law.”¹⁰³

The Minnesota Court of Appeals in *Waldor Pump* quoted *Larson* for the proposition that “the reasonable skill and judgment expected of professionals must be rendered to those who foreseeably rely upon the services.”¹⁰⁴ *Larson*, however, simply does not stand for that proposition.¹⁰⁵ Thus, it is difficult to determine how the court in *Waldor Pump* made the quantum leap from *Superwood* and its embrace of the economic loss doctrine to rejection of the economic loss doctrine in *Waldor Pump*.

In its defense, the court of appeals in *Waldor Pump* addressed the *Superwood* decision.¹⁰⁶ The court first determined that:

[E]conomic losses are those resulting from the failure of a product performed to the level expected by the buyer. *Minneapolis Soc’y of Fine Arts v. Parker-Klein Assoc. Architects, Inc.* Waldor Pump’s damages resulted not from failure of a product, but from negligent provision of engineering services. *Superwood* does not apply to commercial transactions involving the rendition of professional services if the transaction was not governed by the UCC. *Valley Farmers’ Elevator v. Lindsay Bros. Co.* We do not read *Superwood* to limit the legal remedies

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (citation omitted).

104. *Waldor Pump & Equipment Co. v. Orr-Schelen-Mayeron & Assoc., Inc.*, 386 N.W.2d 375, 377 (Minn. Ct. App. 1986).

105. *See supra* notes 91-103 and accompanying text.

106. *Waldor Pump*, 386 N.W.2d at 377-78.

of individuals economically injured by the negligent rendition of professional services.¹⁰⁷

In this statement, the court first relied on *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects*.¹⁰⁸ The Minnesota Supreme Court in that case did not analyze whether economic loss could result from the provision of engineering services.¹⁰⁹ The court simply stated:

Generally, “economic loss” has been defined as resulting from the failure of the product to perform to the level expected by the buyer and commonly has been measured by the cost of repairing or replacing the product and the consequent loss of profits, or by the diminution in value of the product because it does not work for the general purposes for which it was manufactured and sold. The damages sought in this case by MSFA for removal and replacement of the brick and other consequential loss fall squarely within this “economic loss” definition. As such, they were recoverable in contract, if at all. Since the trial court ruled there was no breach of an express warranty and the jury found no breach of implied warranties, the rule of *Superwood* precludes their recovery in this case.¹¹⁰

Further, the court held:

“[E]conomic losses” that arise out of commercial transactions, except those involving personal injury or loss to other property, are not recoverable under the tort theories of negligence or strict product liability. Damage to the brick on MSFA’s curtain wall construction was not damage to “other property,” but such damages were recoverable, if at all, under the “expectation-bargain” protection of contract law In any event, we further hold that Hanley owed no tort duty to warn MSFA or its architects and construction engineers of proper design of the building walls because the architects and engineers knew, or should have known, the danger of spalling if a

107. *Id.* (citing *Minneapolis Soc’y of Fine Arts v. Parker-Klein Assoc. Architects, Inc.*, 354 N.W.2d 816 (Minn. 1984); *Valley Farmers’ Elevator v. Lindsay Bros. Co.*, 380 N.W.2d 874 (Minn. Ct. App. 1986)) (citations omitted).

108. *Minneapolis Soc’y of Fine Arts v. Parker-Klein Assoc. Architects, Inc.*, 354 N.W.2d 816 (Minn. 1984), *overruled in part by Hapka v. Paquin Farms*, 458 N.W.2d 683, 687 (Minn. 1990).

109. *See id.*

110. *Id.* at 820–21 (citations omitted).

recognized proper wall design was not employed in this severe weather area.¹¹¹

The court in *Waldor Pump* attempted to draw a distinction between products and the provision of engineering services.¹¹² However, the “economic losses” arising out of the provision of the architect’s services typically will arise out of the failure of components of a building—that is, products—to perform as the Owner desires.¹¹³ In contrast, the court in *Minneapolis Society of Fine Arts* drew the proper distinction between property damage and “damage to other property.” “[E]conomic losses’ that arise out of commercial transactions, *except those involving personal injury or loss to other property*, are not recoverable under the tort theories of negligence or strict product liability.”¹¹⁴ Stated differently, the court held that economic losses resulting from a personal injury or loss to other property caused by the design or construction work itself are recoverable under tort theories of negligence or strict product liability.

Waldor Pump then relied upon *Valley Farmers’ Elevator v. Lindsay Bros. Co.*¹¹⁵ for the proposition that *Superwood*¹¹⁶ does not apply to commercial transactions involving the performance of professional services if the transactions are not governed by the U.C.C.¹¹⁷ As stated in *Waldor Pump*, “we do not read *Superwood* to limit the legal remedies of individuals economically injured by the negligent rendition of professional services.”¹¹⁸ *Valley Farmers’ Elevator* observed that *Superwood* did not address professional services

111. *Id.* at 822.

112. *Waldor Pump*, 386 N.W.2d at 377. See *Minneapolis Soc’y of Fine Arts*, 354 N.W.2d at 822 (distinguishing between absolute product warrantors, architects and experienced engineers).

113. See generally Barrett, *supra* note 1, at 914-17 (discussing the “sudden and dangerous” test, which permits recovery in tort for damage to the work product itself).

114. *Minneapolis Soc’y of Fine Arts*, 354 N.W.2d at 822 (emphasis added) (relying on *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) for the economic loss doctrine).

115. 380 N.W.2d 874 (Minn. Ct. App. 1986), *aff’d*, 398 N.W.2d 553 (Minn. 1987), *overruled in part by* Hapka v. Paquin Farms, 458 N.W.2d 683, 687 (Minn. 1990).

116. 311 N.W.2d 159, *overruled in part by* Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990). The *Hapka* court ruled that “[t]he Uniform Commercial Code controls exclusively with respect to damages in a commercial transaction which involves property damage only.” *Hapka*, 458 N.W.2d at 683.

117. *Waldor Pump*, 386 N.W.2d at 378.

118. *Id.*

because the question certified in *Superwood* only addressed a defective product.¹¹⁹ Relying on the Illinois case of *Rosos Litho Supply Corp v. Hanson*,¹²⁰ the court observed that tort actions should be allowed against service providers—here Architects and Engineers—since the U.C.C. does not apply and thus a plaintiff would have no warranty remedy for economic loss.¹²¹ Of course this analysis ignores the contracts between the parties and assumes that a breach of contract action would be inadequate to address the plaintiff's injury. However, even with this observation, *Valley Farmers' Elevator* determined that the plaintiff's action involved primarily the sale of goods and was governed by the U.C.C.¹²² The court explained that “[t]o allow Valley Farmers’ to recast its claim under a negligence theory and thus evade the limitations provision of the U.C.C. would undermine the U.C.C. in the manner that *Superwood* was intended to prevent.”¹²³

The Minnesota Supreme Court did not recognize the fact that Waldor Pump had adequate remedies under Minnesota law to file a bid protest against the owner.¹²⁴ The owner, then in privity of contract with the engineer, could have brought an action against the engineer.¹²⁵

To fully understand *Waldor Pump*, one needs to look behind the scenes at what Waldor Pump accomplished by circumventing the economic loss doctrine. The bid that Waldor Pump submitted was for a municipal public-works project,¹²⁶ for which Minnesota statutes govern bid protests.¹²⁷ The bid protest statute specifically would have allowed Waldor Pump to recover only the cost of preparing the bid.¹²⁸ This is because the public bidding process exists for the benefit of the public and is designed to assure the lowest priced products, equipment, and labor that can meet the design requirements.¹²⁹ Due to the bidding statute, no direct action could have been maintained against the city for anything other

119. *Valley Farmers' Elevator*, 380 N.W.2d at 877.

120. 462 N.E.2d 566, 572–73 (1984).

121. *Valley Farmers' Elevator*, 380 N.W.2d at 877-78.

122. *Id.* at 879.

123. *Id.*

124. *Waldor Pump*, 386 N.W.2d at 377.

125. *Id.* at 376–77.

126. *Id.* at 376.

127. MINN. STAT. § 471.345 (2006 & Supp. 2007).

128. *Id.* at subdiv. 14.

129. 73A C.J.S. *Public Contracts* § 14 (2002).

than the cost of preparing the bid.¹³⁰ Waldor Pump, by convincing the Minnesota Court of Appeals that the economic loss doctrine did not apply, was allowed to circumvent Minnesota bidding law and launch a direct action against the engineer, OSM.¹³¹ Interestingly, the case states that “[t]he jury also found that OSM had violated Minnesota Public Bidding Law, but that the violation was not a direct cause of Waldor’s damages.”¹³²

Notably, in OSM’s professional judgment, the coil spring feature at issue in the case had a rational purpose.¹³³ In order to prevail on a bid dispute under Minnesota law, Waldor Pump would have to show that OSM prepared specifications excluding all but one type of product.¹³⁴ As noted above, the jury found that although OSM violated Minnesota public bidding law, that violation was not a direct cause of Waldor’s damages.¹³⁵ The analysis should have concluded at that point. To allow otherwise permits the selfsame evils that concerned Justice Cardozo in *Ultramares*; that is to say, OSM was exposed to liability in an “indeterminate amount for an indeterminate time to an indeterminate class.”¹³⁶

IV. TREATMENT OF THE ECONOMIC LOSS DOCTRINE IN OTHER STATES

Other states have treated the economic loss doctrine differently. Indeed, one of the rationales behind the court’s decision in *Waldor Pump* was that “[The defendant’s] position [was] contrary to the prevailing rule in a majority of jurisdictions, which recognized the liability of those rendering ‘professional’ services in

130. See § 471.345 subdiv. 14.

131. *Waldor Pump*, 386 N.W.2d at 377.

132. *Id.* at 376. The *Waldor Pump* case provides additional insight as to the facts underlying the dispute:

The project’s specifications require that the pump be “self-priming” and use a “coil spring.” The Wilden pump did not have a coil spring, but it was self-priming. Waldor Pump claimed the only functional purpose of a coil spring is to render the pump self-priming. OSM contends that a coil spring also “scours” or dislodges sludge from clogged pipelines. Waldor Pump’s expert witness, Garr Jones, testified at trial that the Wilden pump conformed in all material aspects to the specifications and there was no reason to reject it. *Id.* at 376 n.1.

133. *Id.* at 376.

134. *Id.*

135. *Id.*

136. 174 N.E. 441, 444 (1931).

situations in which the professional is negligent in the provision of services.”¹³⁷ That is not the case; according to an article published in 1991 in *Construction Lawyer*, “the economic loss rule is not an outmoded doctrine that should be applied only in product liability cases.”¹³⁸

In fact, the economic loss rule “continues to *grow* in vitality and is now accepted in at least twenty-three jurisdictions.”¹³⁹ In 1985, the Fifth Circuit Court of Appeals noted that “[t]he push to delete the restrictions on recovery for an economic loss lost its support and by the early 1940’s [sic] had failed [I]t is an old sword that plaintiffs have here picked up.”¹⁴⁰

Many jurisdictions hold that the economic loss rule bars recovery under a tort theory when the parties are acting under a contract and economic losses are the only damages.¹⁴¹ The Nevada Supreme Court discussed the application of the economic loss

137. *Waldor Pump*, 386 N.W.2d at 376-77.

138. Luther P. House, Jr. & Hubert J. Bell, *The Economic Loss Rule: A Fair Balancing of Interests*, CONSTRUCTION LAW., at 29 (1991).

139. *Id.*

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

141. *See* *Alpine Bank v. Hubbell*, 506 F. Supp. 2d 388 (D. Colo. 2007) (stating that Colorado’s economic loss rule mandates that “a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care from tort law”); *In re Nat’l Century Fin. Enters., Inc.*, 504 F. Supp. 2d 287 (S.D. Ohio. 2007); *Cont’l Airlines, Inc. v. Mundo Travel Corp.*, 412 F. Supp. 2d 1059, 1069 (E.D. Cal. 2006) (stating that economic loss rule bars recovery in tort for the breach of a duty that is founded solely on the basis of a contract); *RLI Ins. Co. v. John H. Hampshire Inc.*, 461 F. Supp. 2d 364 (D. Md. 2006) (finding that contractor’s surety could not sue university’s architect in tort for allegedly failing to detect that contractor was installing wall panels incorrectly); *Sofi Classic v. Hurowitz*, 444 F. Supp. 2d 231 (S.D.N.Y. 2006); *Waytec Elecs. Corp. v. Rohm & Haas Elec. Materials, L.L.C.*, 459 F. Supp. 2d 480 (W.D. Va. 2006); *Millenkamp v. Davisco Foods Int’l., Inc.*, 391 F. Supp. 2d 872 (D. Idaho 2005); *Lexington Ins. Co. v. W. Roofing Co.*, 316 F. Supp. 2d 1142 (D. Kan. 2004) (stating that under Kansas law, economic loss doctrine is designed to preclude plaintiffs from circumventing the law of contracts and seeking to recover in tort for what is in essence a claim for breach of contract); *Me. Rubber Int’l v. Evtl. Mgmt. Group*, 298 F. Supp. 2d 133 (D. Me. 2004); *All-Iowa Contracting Co. v. Linear Dynamics, Inc.*, 296 F. Supp. 2d 969 (N.D. Iowa 2003); *City Express, Inc. v. Express Partners*, 959 P.2d 836 (Haw. 1998); *Young v. City of Plaquemine*, 818 So. 2d 892 (La. Ct. App. 2002); *Calloway v. City of Reno*, 993 P.2d 1259, 1262 (Nev. 2000); *Plourde Sand & Gravel v. JGI E. Inc.*, 917 A.2d 1250 (N.H. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, No. 05-0832, 2007 WL 2459193 (Tex. 2007); *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1 (Utah 2003); *Springfield Hydroelectric Co. v. Copp*, 779 A.2d 67 (Vt. 2001); *Alejandre v. Bull*, 153 P.3d 864 (Wash. 2007).

doctrine in a class action lawsuit brought by townhouse owners against a real estate developer, a contractor, subcontractors, and the city,¹⁴² which arose from alleged defects in a townhouse development in Reno, Nevada.¹⁴³ The plaintiffs complained “that their homes were built with defective roofing and siding that was responsible for extensive water damage from rain and snow.”¹⁴⁴ The claims included breach of express and implied warranties, negligence, strict liability, fraud, and misrepresentation.¹⁴⁵ After some of the defendants settled, the district court granted the remaining defendants summary judgment.¹⁴⁶ On appeal, the Nevada Supreme Court upheld application of the economic loss doctrine because the defective construction created only economic loss.¹⁴⁷ Refusing to apply a foreseeability exception, the court stated that “foreseeability of damages plays no role with respect to the economic loss doctrine. Purely economic losses fall outside the purview of tort recovery, even if such losses are foreseeable.”¹⁴⁸ In another instance, a Virginia court held that “[p]ursuant to Virginia’s economic loss rule, losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts.”¹⁴⁹

Wisconsin recently applied the economic loss rule to construction cases in *1325 North Van Buren, LLC v. T-3 Group, Ltd.*¹⁵⁰ The Supreme Court of Wisconsin observed that three principles underlie application of the economic loss doctrine. These include:

- (1) to maintain the fundamental distinction between tort and contract law;
- (2) to protect commercial parties’ freedom to allocate economic risk by contract; and

142. Calloway v. City of Reno, 993 P.2d at 1262.

143. *Id.* at 1261.

144. *Id.* at 1261–62.

145. *Id.* at 1262.

146. *Id.*

147. *Id.* at 1270.

148. *Id.*

149. Waytec Elecs. Corp. v. Rohm & Haas Elec. Materials, LLC, 459 F. Supp. 2d 480, 482–83 (W.D. Va. 2006).

150. 716 N.W.2d 822 (Wis. 2006).

(3) to encourage the party best situated to assess the risk of economic loss, the commercial purchaser, to assume, allocate or insure against that risk.¹⁵¹

A. *Florida's Treatment of the Economic Loss Doctrine*

One particularly interesting consideration of the economic loss doctrine arose in 1993 when the Florida Supreme Court examined the doctrine in *Casa Clara Condominium Ass'n v. Charlie Toppino & Sons, Inc.*¹⁵² The defendant, Charlie Toppino & Sons, Inc., supplied concrete for numerous construction projects in Monroe County; the case involved homeowners who were suing the concrete supplier under a negligence theory for purely economic losses.¹⁵³ The concrete allegedly contained a high salt content that led to rusting of the reinforcing steel in the concrete.¹⁵⁴ The plaintiffs were condominium owners whose property suffered from badly deteriorating concrete, to the point that it was cracking and breaking off the building.¹⁵⁵ The court squarely addressed the issue of whether the homeowners could pursue a direct negligence action against the concrete supplier for purely economic losses.¹⁵⁶

The Florida Supreme Court started with an analysis of the economic loss rule set out in *Seely v. White Motor Co.*¹⁵⁷ The analysis of *Seely* led the court to define economic losses as:

damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property In other words, economic losses are 'disappointed economic expectations' which are protected by contract law rather than tort law.¹⁵⁸

The court recognized the basic difference between contract law, which protects expectations, and tort law, which determines the duty owed to an injured party.¹⁵⁹ The court went on to explain

151. *Id.* at 831 (quoting *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 842 (Wis. 1998)).

152. 620 So. 2d 1244 (Fla. 1993).

153. *Id.* at 1245.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1245–46 (quoting *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965)).

158. *Id.* at 1246.

159. *Id.*

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.”¹⁶⁰

Thus, the Florida Supreme Court recognized that the homeowners were seeking purely economic damages.¹⁶¹ No one sustained any physical injuries and no other property, other than the structures built with the supplier’s concrete, sustained any damage.¹⁶²

The Florida Supreme Court continued its analysis by reviewing strict liability in a product manufacturing setting.¹⁶³ The court recognized that a manufacturer or producer of goods was liable under a theory of strict liability because “public policy demands that responsibility be fixed where it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.”¹⁶⁴ The court further recognized that 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.”¹⁶⁵

Finally, the Florida Supreme Court recognized that the homeowners could rely on statutory warranties as well as a duty on the part of sellers to disclose defects.¹⁶⁶ Moreover, the homeowners could also rely on the opportunity to inspect houses for defects before purchase.¹⁶⁷ The court determined that the various remedies available to the homeowners “coupled with homebuyers’ power to bargain over price, [were] . . . sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses.”¹⁶⁸ The court then held:

Therefore, we again “hold contract principals more appropriate than tort principals for recovering economic loss without an accompanying physical injury or property

160. *Id.* (citing *Redarowicz v. Ohlendorf*, 441 N.E.2d. 324, 327 (Ill. 1982)) (internal quotation marks omitted).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (citing *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1247 (alteration in original).

damage.” If we held otherwise, “contract law would drown in a sea of tort.” We refuse to hold that homeowners are not subject to the economic loss rule.¹⁶⁹

VI. MINNESOTA CASES FOLLOWING *WALDOR PUMP*

Like other states, Minnesota continued to grapple with the economic loss doctrine, a fact demonstrated by two 1987 cases. On August 7, 1987, the Minnesota Supreme Court decided *McCarthy Well Co. v. St. Peter Creamery, Inc.*¹⁷⁰ St. Peter Creamery, Inc. (the Creamery) hired McCarthy Well Company, Inc. (McCarthy) to restore the Creamery’s artesian well to its original capacity.¹⁷¹ McCarthy proceeded with the work, pulling a copper liner out of the well casing and attempting to clean sand out of the bottom of the well.¹⁷² The attempt, however, was unsuccessful. McCarthy then exploded dynamite at the bottom of the well, increasing the flow of water.¹⁷³ McCarthy billed the Creamery for \$34,573.20, which included a charge of \$8,329.45 for a new pump.¹⁷⁴ The Creamery did not pay the entire bill and McCarthy commenced suit to recover the balance.¹⁷⁵ Shortly after the commencement of the lawsuit, the pump’s shaft broke three times, and the Creamery subsequently hired a different company to install a new pump, which also broke.¹⁷⁶ A later inspection revealed a hole in the well casing, and, as a result, the Creamery dug a new well and installed a new pump.¹⁷⁷

The court first analyzed whether the *Superwood* decision would apply “so as to bar the [C]reamery from recovering economic losses under a negligence theory.”¹⁷⁸ Here, the Creamery and McCarthy entered into a written contract to perform the work, which was in the form of an acknowledgement-of-order form sent to the Creamery.¹⁷⁹ “The reverse side of the form contained an extensive listing of terms and conditions, one of which provided that the

169. *Id.* (citations omitted).

170. 410 N.W.2d 312 (Minn. 1987).

171. *Id.* at 313.

172. *Id.* at 314.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 315.

'contractor shall not be liable for Any other damage or liability of any nature whatsoever arising or growing out of the Contractor's work hereunder.'¹⁸⁰

A jury found that McCarthy was responsible for seventy-five percent of the Creamery's claimed damages.¹⁸¹ The Minnesota Court of Appeals upheld this decision and found the placement of the exculpatory clause in the contract was unconscionable and/or invalid because it was not limited to liability for acts of negligence.¹⁸²

At the time, under Minnesota Statutes section 337.02, the indemnification clause was unenforceable:

An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates.¹⁸³

Thus, because the indemnity clause was unenforceable under Minnesota law, nothing prevented the Creamery from pursuing a breach of contract claim under its contract with McCarthy.

Instead, the court analyzed whether the *Superwood* decision would apply so as to bar the Creamery's ability to bring a negligence action against McCarthy, even though it appears there was no reason to do so.¹⁸⁴ The supreme court first observed that, "[a]lthough we did not define 'commercial transaction,' a review of our decision in *Superwood* shows that, as used in *Superwood*, a 'commercial transaction' is a transaction governed by Article 2 of the Uniform Commercial Code"¹⁸⁵ The court then articulated that "[t]he *Superwood* rule is premised on the existence of certain rights and remedies provided for in the U.C.C.. . . . To allow tort liability in commercial transactions would totally emasculate [the warranty and liability provisions] of the U.C.C."¹⁸⁶ The court

180. *Id.* (omission in original).

181. *Id.* at 313.

182. *Id.*

183. MINN. STAT. § 337.02 (1986).

184. *McCarthy*, 410 N.W.2d at 314.

185. *Id.* (citing MINN. STAT. ch. 336 (1986)).

186. *Id.* at 314-15 (quoting *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) (alteration in original)).

explained that “[t]he rationale behind the *Superwood* rule is that a recognition of tort actions in cases under the U.C.C. would upset the remedies contained in the U.C.C.; when the rationale is not applicable, *i.e.*, when the U.C.C. does not apply, there is no reason for the *Superwood* rule to apply.”¹⁸⁷ The court concluded by stating, “[a]ccordingly, we hold that ‘commercial transaction,’ as that phrase is used in *Superwood*, means a transaction governed by the U.C.C. When the U.C.C. does not apply, the transaction is not a ‘commercial transaction,’ and the *Superwood* rule does not apply.”¹⁸⁸

Thus, *McCarthy* recognized that the statutory U.C.C. provisions should not be “emasculated” by converting the case to a tort action. The court opted not to analyze—as many other jurisdictions have—the logic behind the *Superwood* rule as it would apply to construction projects. Just as with the U.C.C., which “clarifies the rights and remedies of parties to commercial transactions,”¹⁸⁹ the contracts between the parties in a commercial construction project also clarify the rights and remedies of the parties to commercial transactions. Why should the contractually agreed upon rights and remedies in a commercial construction project be ignored and yet the rights and remedies to commercial transactions as described in the U.C.C. be allowed special protection? Why is contract law allowed to drown in a sea of tort?

VII. REVIVAL OF THE ECONOMIC LOSS DOCTRINE

A. Briefly, the *Prichard Bros. Cases*

In 1987, at the time the Minnesota Supreme Court heard *McCarthy Well*, the Minnesota Court of Appeals heard *Prichard Bros. v. Grady Co. (Prichard Bros. I)*.¹⁹⁰ The decision by the court of appeals resulted in a short-lived resuscitation of the economic loss doctrine as it applied to design professionals, but the decision was reversed the following year by the Minnesota Supreme Court.¹⁹¹ This case arose out of the addition and remodeling of a school building for Independent School District No. 353 in Karlstad,

187. *Id.* at 315.

188. *Id.*

189. *Id.* at 314 (quoting *Superwood*, 311 N.W.2d at 162).

190. 407 N.W.2d 423 (Minn. Ct. App. 1987).

191. *Prichard Bros., Inc. v. Grady Co. (Prichard II)*, 428 N.W.2d 391 (Minn. 1988).

Minnesota.¹⁹² The School District and Grady executed a standard AIA contract as Owner and Architect, incorporating the AIA document governing general conditions.¹⁹³ Prichard Brothers, Inc. was the successful low bidder as general contractor on the project and also entered into a Standard AIA Contract with the School District for the general construction of the project, incorporating the AIA A201 General Conditions.¹⁹⁴ Due to a series of delays, the project was not completed on time and Prichard Brothers commenced a negligence action against Grady to recover increased costs and lost earnings allegedly caused by the delays.¹⁹⁵ The School District was later brought into the action.¹⁹⁶ Trial proceeded on three counts: (1) Architect's negligence against Grady; (2) agency as to Grady; and (3) a claim against the School District for the contract balance of \$25,465.¹⁹⁷ "By special verdict, the jury found that both Prichard Brothers and Grady had been negligent, [and] that Grady was *not* acting as an agent of the School District at the time of its negligence"¹⁹⁸ Prichard Brothers was entitled to no damages on the contract balance of \$25,465.¹⁹⁹ Liability was apportioned between Prichard Brothers (thirty-six percent) and Grady (sixty-four percent).²⁰⁰ The special verdict form indicated that Prichard Brothers suffered damages of \$257,940, \$165,081 "of which 'were the direct results of the negligence of [Grady]. . . .'"²⁰¹ Judgment was subsequently entered for Prichard Brothers against Grady in the amount of \$165,081.²⁰²

The single issue analyzed by the appellate court was whether the trial court properly allowed the case to proceed on a negligence theory.²⁰³ The 1987 *Prichard Bros. I* court of appeals decision is significant because it is one of the few Minnesota decisions that attempts to analyze fully the economic loss doctrine.²⁰⁴ The court started by identifying Prichard Brothers'

192. *Prichard Bros. I*, 407 N.W.2d at 424.

193. *Id.*; AIA DOCUMENT A201, *supra* note 26.

194. *Prichard Bros. I*, 407 N.W.2d at 424.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 425.

199. *Id.*

200. *Id.*

201. *Id.* (alteration in original).

202. *Id.*

203. *Id.*

204. *See id.* at 426 (discussing the inapplicability of tort theories to disputes

negligence claims against Grady that related to “1) preparation of the plans and specifications for a roof expansion joint and finish hardware; 2) interpretation of specifications and response to shop drawings submitted; and 3) inspection of the project site.”²⁰⁵ The damages awarded were for delays allegedly caused by Grady’s negligent interpretation of the plans and shop drawings.²⁰⁶ The court first quoted *D & A Development Co. v. Butler* by stating that “[t]o prevail in tort, it was necessary for Prichard Brothers to establish that Grady breached ‘some duty imposed by law, not merely one imposed by contract.’”²⁰⁷ Tort duties are independent of contract. The again referenced *D & A Development Co.*:

The fundamental difference between tort and contract lies in the nature of the interest protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or the intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent. . . .²⁰⁸

The court of appeals then got to the heart of the matter: “A definite conflict exists between tort and contract principles in the area of construction litigation. At least one commentator has concluded that tort theories are inappropriate to resolution of these disputes, particularly where the parties’ duties are imposed by contract and represent negotiated limitations and remedies.”²⁰⁹ The court recognized that the Minnesota Supreme Court “never

where the parties’ duties are imposed by contract and represent negotiated limitations and remedies, and distinguishing between economic losses and injury to people and property).

205. *Id.* at 425.

206. *Id.*

207. *Id.* (quoting *D & A Dev. Co. v. Butler*, 357 N.W.2d 156, 158 (Minn. Ct. App. 1984) (quoting *Keiper v. Anderson*, 138 Minn. 392, 398, 165 N.W. 237, 238 (1917))).

208. *Id.* at 425–26 (citing *D & A Dev. Co.*, 357 N.W.2d at 158 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92 at 613 (4th ed. 1971) (alteration in original))).

209. *Id.* at 426. See Martha C. Coleman, *Liability of Design Professionals for Negligent Design and Project Management*, 33 TORT & INS. L.J. 923, 934–36 (1998) (citing Espel, *supra* note 3, at 132) (asserting that to permit parties to ignore privity requirements increases the likelihood that the wrong party will bear the loss).

squarely decided whether these types of claims for economic loss involving design professionals sound[ed] in contract or tort,” but that the court had been “disinclined to allow tort theories to supersede rules of contract law in other commercial settings.”²¹⁰ *Prichard Bros. I* further observed that “[r]ecent cases have rejected negligence or strict liability theories [for] the sale of goods and the provision of services [] involved, and have held that such cases are governed by the Uniform Commercial Code and the principles of *Superwood*.”²¹¹

The court was influenced by the fact that “[a]t various times during [the] proceedings, both Grady and the school district [had] argued that the gravamen of the complaint [is] strictly contractual and that the Prichard Brothers should not be allowed to convert [the] contract claim into a tort action.”²¹² The trial court rejected these arguments based on *Waldor Pump*.²¹³ Recognizing the conflict, the court of appeals observed in *Waldor Pump* that “a design engineer owed a duty to a subcontractor to reasonably draft and interpret project specifications, and that the engineer could be liable in negligence to that subcontractor”²¹⁴ The subcontract was considered “a third party who foreseeably relied on its professional services.”²¹⁵

The court distinguished *D & A Development Co.*²¹⁶ “on the basis that it only alleged breach of a contractual duty to complete plans by a specified date, while the engineer in *Waldor Pump*²¹⁷ performed

210. *Prichard Bros. I*, 407 N.W.2d at 426. See also *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) (holding that “economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability.”).

211. *Prichard Bros. I*, 407 N.W.2d at 426. See also *Valley Farmers’ Elevator v. Lindsay Bros. Co.*, 398 N.W.2d 553, 556–57 (Minn. 1987) (holding that the transaction was governed by *Superwood* and the U.C.C.), *overruled by Hapka v. Paquin Farms*, 458 N.W.2d 683, 687 (Minn. 1990); *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 389 N.W.2d 514, 517–18 (Minn. Ct. App. 1986) (finding that *Superwood* does not preclude the recovery of economic losses), *aff’d in part, rev’d in part by McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987).

212. *Prichard Bros. I*, 407 N.W.2d at 426.

213. *Id.* (citing *Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs., Inc.*, 386 N.W.2d 375 (Minn. Ct. App. 1986)).

214. *Id.* (construing *Waldor Pump*, 386 N.W.2d at 377).

215. *Id.*

216. *D & A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. Ct. App. 1984).

217. *Waldor Pump*, 386 N.W.2d 375.

its contract but breached a tort duty owed to draft specifications in a professional manner.”²¹⁸ The court aptly observed that “[a]lthough *Waldor Pump* expressly states that a contract existed between the subcontractor and the general contractor [which] implies that a contract [] existed between the general contractor and the city and [also] between the city and the engineer, those contracts were not mentioned further.”²¹⁹

Accordingly, the court of appeals found that the school district’s argument that Prichard Brothers’ claim stemmed from contract was distinguishable based upon the facts of this case.²²⁰ The court of appeals defined Grady’s duties by reference to the terms of the contract and found that Prichard Brothers’ claim was based on a breach of those contractual duties.²²¹ The court of appeals declined to read *Waldor Pump* as holding that a cause of action necessarily exists in negligence where the parties’ duties and remedies are imposed by contract.²²²

Thus, the court of appeals held as a matter of law that the case was governed by contract rather than tort law.²²³ It was error to allow Prichard Brothers to circumvent its contract with the school district based on a vicarious liability or agency theory. It was also error to hold Grady liable in tort where any duty he owed to Prichard Brothers was imposed by contract.

The court of appeals could have pointed out that the framework for Prichard Brothers’ claim for delays and additional costs was contained in its contract with the school district. The AIA General Conditions would have contained dispute resolution procedures, claim procedures, formulas, and processes for the calculation of additional costs and a timeframe for making such claims.

The court of appeals, however, did not analyze the various provisions of the AIA General Conditions.²²⁴ For instance, it identified that:

[b]y the plain language of the contract in this case, Grady is not liable for any interpretation rendered in good faith

218. *Prichard Bros. I*, 407 N.W.2d at 426.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 427.

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which [sic] is consistent with the intent of and reasonably inferable from the contract. Our review of the record reveals no evidence that would suggest that Grady did not act in good faith.²²⁵

The court also observed that no “evidence to suggest that Grady’s interpretations were inconsistent with the terms of the contract” existed.²²⁶ Thus, the court of appeals in *Prichard Bros. I* upheld the economic loss doctrine and did not permit a negligence action by the General Contractor against the Architect so as to defeat the economic loss rule.²²⁷ This decision analyzed and properly recognized the sanctity of the contractual scheme entered into between the Owner, Architect, and General Contractor.²²⁸

Prichard Brothers appealed the court of appeals’ decision to the Minnesota Supreme Court.²²⁹ In its short decision, the Minnesota Supreme Court, without any real analysis, overturned *Prichard Bros. I* and dealt a blow to the economic loss doctrine.²³⁰

After discussing the decision in *Prichard Bros. I*, the Minnesota Supreme Court held:

It is our view that the *McCarthy* decision, to the effect that *Superwood* does not bar negligence recovery in service transactions, is dispositive and that the appellant Prichard’s claim against Grady is not barred. It is unnecessary to determine the contractual relationship, if any, between Prichard and Grady and the “potential contract claims,” if any, which Prichard may have against Grady.²³¹

The *Prichard Bros.* cases are quite significant. To begin, *Prichard Bros. I* is important because the court of appeals—and the parties arguing the case—took the time to analyze the contract scheme that existed between the Owner, the contractors, and the design professionals. The court of appeals recognized that the

225. *Id.*

226. *Id.* at 428.

227. *See id.* at 427–28 (stating that there is no liability for any good faith interpretation reasonably inferred from the contract); *see also id.* at 428 n.2 (reasoning that the jury instructions wrongly commingled the concepts of bad faith and negligence).

228. *Id.* at 424.

229. *Prichard Bros. II*, 428 N.W.2d 391 (Minn. 1988).

230. *Id.* at 392.

231. *Id.* (referencing *McCarthy Well Co. v. St. Peter Creamery*, 410 N.W.2d 312 (Minn. 1987)).

contract scheme had been carefully negotiated and crafted and that the terms, conditions, and operation of those contracts should not be ignored or “emasculated” by converting the matter to a tort action. Following *Prichard Bros. I*, the Minnesota Supreme Court in *Prichard Bros. II*, with little analysis, found it “unnecessary to determine the contractual relationship, if any, between Prichard and Grady”²³² No court in Minnesota seems to have offered an explanation as to why the carefully crafted contract scheme should be emasculated by a tort action.

VIII. MINNESOTA IN THE 1990S

A. *Hapka v. Paquin Farms, the Case of the Bad Potatoes*

In 1990, the Minnesota Supreme Court was given another opportunity to analyze the *Superwood* decision and its progeny. *Hapka v. Paquin Farms*²³³ began with the Hapkas’ purchase of seed potatoes from Paquin Farms, which they then planted.²³⁴ “The planting process included cutting the potatoes into smaller pieces for propagation. The machinery used for cutting and planting those seed potatoes was later used for cutting and planting other potatoes bought from a third source and planted in another field.”²³⁵ A state inspection discovered ring rot in the fields planted with the Paquin seed potatoes and also in the fields planted with the machinery used to plant the seeds from the third source.²³⁶ Presumably, the machinery had been contaminated by the Paquin seed potatoes and thus had passed the ring rot on to the non-Paquin potato fields.²³⁷ This distinction is critical because under *Superwood*, the original Paquin seed potatoes fields would have constituted “economic loss relating to the product itself.”²³⁸ But, the ring rot in the non-Paquin potato fields that was passed on by the machinery would have qualified under *Superwood* as “damage to other property.”²³⁹ It is necessary to recall that the *Superwood* court

232. *Id.*

233. 458 N.W.2d 683 (Minn. 1990).

234. *Id.* at 685.

235. *Id.*

236. *Id.*

237. *Id.*

238. *See id.* at 691.

239. *See id.* at 686 (quoting *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981)).

held that “economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability.”²⁴⁰

Hapka pointed out numerous state supreme and appellate court decisions that had wrestled with the “other property” issue, citing *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.*,²⁴¹ *S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.*,²⁴² *Valley Farmers’ Elevator v. Lindsay Bros.*,²⁴³ *Thofson v. Redex Industries, Inc.*,²⁴⁴ *Holstad v. Southwestern Porcelain, Inc.*,²⁴⁵ *American Home Assurance Co. v. Major Tool & Machine, Inc.*,²⁴⁶ and *Agristor Leasing v. Guggisberg*.²⁴⁷ After reviewing the decision in *Superwood*, the *Hapka* court criticized *Superwood*:

Having set the stage for an exception designed to preserve the availability of tort remedies based on negligence and strict products liability in actions arising out of consumer transactions, the court instead carved out an exception for cases arising out of commercial transactions involving personal injury or damage to other property.²⁴⁸

Hapka then discussed the complete adequacy of remedies in the U.C.C. and pointed out that “[t]he Code itself indicates that the U.C.C. is intended to displace tort liability. The Code contains

240. *Superwood*, 311 N.W.2d at 162 (emphasis added).

241. 354 N.W.2d 816, 819–20 (Minn. 1984) (“To hold that buildings constitute ‘other property’ would effectively overrule *Superwood* as to every seller of basic building materials such as concrete, brick or steel because the ‘other property’ exception would always apply. The UCC provisions as applicable to component suppliers would be totally emasculated.”).

242. 374 N.W.2d 431, 434 n.2 (Minn. 1985).

The certified question indicates that in addition to personal injury, a ‘nominal amount’ of other property was damaged. . . . We have previously recognized that to allow a party to sue in tort to recover substantial damages because of relatively minor damages to ‘other property’ ‘would thwart the policy implications of *Superwood*[.]’ . . . *Id.* (citations omitted).

243. 398 N.W.2d 553, 555 (Minn. 1987).

244. 433 N.W.2d 901, 903 (Minn. Ct. App. 1988) (“The loss of the Thofsons’ grain was the type of damage ‘which could ordinarily be contemplated by the parties to a commercial transaction.’ Accordingly, the damage to the grain did not constitute damage to ‘other property’ within the meaning of *Superwood*.”) (citations omitted).

245. 421 N.W.2d 371, 375 (Minn. Ct. App. 1988).

246. 767 F.2d 446, 447–48 (8th Cir. 1985) (applying Minnesota law).

247. 617 F. Supp. 902, 908 (D. Minn. 1985) (applying Minnesota law).

248. *Hapka v. Paquin Farms*, 458 N.W.2d 683, 687–88 (Minn. 1990).

provision for the recovery of incidental and consequential damages 'in a proper case.'"²⁴⁹ The court then drew a distinction between consumer transactions and commercial transactions.²⁵⁰ The court's logic in this distinction was as follows:

Despite the U.C.C. provisions with respect to the limitation of remedies, Minn. Stat. §§ 336.2–701 to 336.2–725 (1982), we continue to regard the Code remedies as something less than adequate in the ordinary consumer transaction. Generally speaking, a consumer has neither the skill nor the bargaining power to negotiate either warranties or remedies. If a defective coffee pot causes a fire which destroys a consumer's home, the panoply of liability theory should be available to the consumer—strict products liability and negligence as well as breach of warranty—whether or not personal injuries accompany the property damage.

On the other hand, the law is entitled to expect the parties to commercial transactions to be knowledgeable and of relatively equal bargaining power so that warranties can be negotiated to the parties' mutual advantage. Having negotiated the warranties and any limitations of liability, that a defective product causes damage to other property should not defeat the liability parameters the parties have set by opening the door to tort theories of recovery. While there is reason to sacrifice consistency in order to preserve tort remedies for personal injuries arising out of commercial transactions, as well as those arising out of consumer transactions, there is no similar reason in cases of property damage arising out of commercial transactions to heap tort theories of negligence and strict products liability atop those remedies already available by the U.C.C. Accordingly, in our judgment the Uniform Commercial Code must control exclusively with respect to damages in a commercial transaction which involves property damage only, and any statement or implication to the contrary in *Superwood* and its progeny is hereby expressly overruled. If the Code is to have any efficacy, parties engaged in commercial activity must be able to depend with certainty

249. *Id.* at 688.

250. *Id.*

on the exclusivity of the remedies provided by the Code in the event of a breach of their negotiated agreement.²⁵¹

Justice Yetka dissented, stating that he would have allowed recovery on negligence theories with respect to the damage to “other property;” in other words, he would have permitted recovery on the potatoes planted in the non-Paquin potato fields that had been contaminated by the planting equipment.²⁵² Interestingly, Justice Yetka also dissented in part in the *Superwood* opinion in 1981.²⁵³ “I must dissent, however, to that portion of the majority opinion that concludes that the negligence of a manufacturer cannot be asserted by a commercial plaintiff as a ground for recovery of economic injury.”²⁵⁴

B. Minnesota Statutes Section 604.10

As a result of continued litigation in the products liability arena, including asbestos cases, the Minnesota Legislature in 1991 attempted to codify the economic loss doctrine in Minnesota Statutes section 604.10 for economic losses that arise from the sale of goods. The statute stated:

- (a) Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort.
- (b) Economic loss that arises from a sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort.
- (c) The economic loss recoverable in tort under this section does not include economic loss due to damage to the goods themselves.²⁵⁵

251. *Id.*

252. *Id.* at 688–89 (Yetka, J., dissenting).

253. *Superwood*, 311 N.W.2d at 162 (Yetka, J., dissenting).

254. *Id.*

255. MINN. STAT. § 604.10 (1992). Since 1992, section 604.10 has been expanded to include subsection (d) and (e):

(d) The economic loss recoverable in tort under this section

In 2000, the Minnesota Legislature enacted Minnesota Statutes section 604.101, which provided additional definitions and limits on product defect tort claims and common law misrepresentation claims.²⁵⁶ This section limits tort actions to “economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold.”²⁵⁷ Tort actions for damage to the goods themselves are not permitted and tort actions are also not permitted under the statute for sales of goods between parties “who are merchants in goods of the kind.”²⁵⁸ Unfortunately, Minnesota Statutes sections 604.10 and 604.101 were crafted for pure sales of goods transactions and did not contemplate construction projects that involve a combination of goods, services, and labor. Whether a construction contractor is a “merchant in goods of the kind” is an open question, especially with respect to such components as concrete, structural steel, electrical wiring, switch gears, or an elevator. Since the statute applies to “sale of goods” it would appear on its face to be inapplicable to services provided by architects, engineers, or other design professionals.²⁵⁹

Section 604.10 represents a positive step for the economic loss doctrine as it relates to construction projects to the extent that it recognizes the economic loss doctrine for “(a) Economic loss due to the goods themselves; and (b) Sales of goods between parties who are merchants in goods of the kind.”²⁶⁰

It appears, however, that the application of the economic loss doctrine to construction projects and their unique contractual scenarios is otherwise left to the courts to wrestle with in the years to come.

does not include economic loss incurred by a manufacturer of goods arising from damage to the manufactured goods and causes by a component of the goods.

(e) This section shall not be interpreted to bar tort causes of action based upon fraud or fraudulent or intentional misrepresentation of limit remedies for those actions.

MINN. STAT. § 604.10 (2006).

256. MINN. STAT. § 604.101 (2000).

257. *Id.* § 604.10.

258. *Id.* § 604.10(a).

259. *Id.*

260. *Id.* § 604.10

C. Major Industries, Inc. v. Krech, Ojard & Associates

In 2004, the Minnesota Court of Appeals again wrestled with the economic loss doctrine in the unpublished case of *Major Industries, Inc. v. Krech, Ojard & Associates*.²⁶¹ Krech, an architectural and engineering firm, was retained to prepare bid specifications for a school project containing skylights.²⁶² Major Industries was a skylight manufacturer that proposed use of its skylights to a bidder on the project, St. Germain's Glass Co.²⁶³ However, after award of the contract, Krech informed Major Industries that its skylights were not "equal" and could not be used on the project even though they had been listed as an approved manufacturer.²⁶⁴ St. Germain's used a competitor's skylights that cost \$4000 more than Major Industries' skylights.²⁶⁵ Major Industries sued, and the trial court granted summary judgment for Krech on the grounds that Krech did not owe a duty to Major Industries.²⁶⁶ This case appears to be in sharp contradiction to *Waldor Pump*, and Major Industries appealed the dismissal of the tort claim on that basis.²⁶⁷ The court of appeals distinguished *Waldor Pump* and upheld the trial court's dismissal of the negligence action.²⁶⁸ The basis of the distinction of *Waldor Pump*, while reaching a result consistent with the application of the economic loss doctrine, is interesting. The court distinguished *Waldor Pump* as follows:

Here, appellant was not bound to follow the specifications prepared by Krech because no contract yet existed. In addition, there is no evidence that appellant changed its position as a result of the specifications; appellant does not allege that it had already manufactured the skylights . . . or that it passed up other work. . . . Therefore, *Waldor Pump* is distinguishable and the district court properly refused to extend its holding here.²⁶⁹

It appears the court found that no "reliance" resulted upon Krech's services by Major Industries and that no damages were

261. No. A04-1052, 2004 WL 2940912 (Minn. Ct. App. Dec. 21, 2004).

262. *Id.* at *1.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at *4.

268. *Id.*

269. *Id.*

proximately caused by such reliance and breach of duty.²⁷⁰ However, Waldor Pump's damages resulted in it being required to supply a more expensive pump as a result of OSM's rejection of the Wilden pump.²⁷¹ St. Germain's also was required to supply more expensive goods, but apparently did not sue Krech.²⁷² Thus, it appears that *Major Industries* is not based upon a recognition of the economic loss doctrine, but instead a failure to establish that Major Industries "foreseeably relied" upon Krech's services and a lack of damages proximately caused by Krech's negligence. Presumably St. Germain's could have maintained an action against Krech for negligence following the rationale in *Waldor Pump*.²⁷³

IX. ECONOMIC LOSS IN CONSTRUCTION CONTRACTS

At least two arguments exist in favor of applying the economic loss rule to construction projects for purely economic losses. The first arises from Justice Cardozo's logic as articulated in *Ultramares Corp. v. Touche*,²⁷⁴ contending that to allow parties to pursue purely economic losses based on tort theories in a construction project would expose parties to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."²⁷⁵ The second is the application of the logic behind the *Superwood* decision that the parties on construction projects have already defined, typically in intricate detail, their obligations in their contracts between the parties and that those carefully crafted contractual schemes should not be defeated by opening the door to tort theories of liability.²⁷⁶

In *Hapka*, the Minnesota Supreme Court recognized the sanctity of commercial transactions between knowledgeable parties of relatively equal bargaining power.²⁷⁷ It is confusing, then, that such a rule would not apply to construction projects that contain detailed contract schemes outlining the rights, responsibilities, liabilities, and limitations of the parties. The *Hapka* decision seems

270. *Id.*

271. *Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs., Inc.*, 386 N.W.2d 375, 376 (Minn. Ct. App. 1986).

272. *See Major Indus., Inc.*, 2004 WL 2940912, at *1.

273. *See id.*

274. 174 N.E. 441 (N.Y. 1931).

275. *Id.* at 444.

276. *See Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981).

277. *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990).

to set the stage for the recognition by courts in Minnesota, consistent with other states, that purely economic losses arising out of commercial construction projects, except those involving personal injury, should not be recoverable under tort theories of negligence or strict products liability. While some may think that this rule benefits design professionals and not contractors, it would clearly apply to both contractors and design professionals. A design professional who incurs additional costs to remedy an error by a construction contractor is as able to sue the contractor directly in a tort theory as a contractor who has been damaged by delay or additional costs due to errors caused by a design professional. This rule would benefit all parties to commercial construction projects in that the contracts negotiated between the parties to a commercial construction project would not be emasculated by application of tort theories of liability. The party who spends hours negotiating a detailed indemnification clause or limitation of liability or limitation on consequential damages should not have those provisions defeated by another party to the construction process who elects to bring an action based on tort rather than contract.

A. *What is the Status of the Economic Loss Doctrine Today?*

Even with Minnesota Statutes sections 604.10 and 604.101,²⁷⁸ confusion still exists over the economic loss doctrine that will prompt debate and litigation in the Minnesota courts. One issue that has not been addressed in this article is the original pleading of construction cases. To date, Minnesota practitioners will commonly plead a construction case on multiple theories of breach of contract and tort action with attendant cross-claims for tort contribution and indemnity. If Minnesota strictly followed the economic loss rule—meaning that parties to construction contracts should only be permitted to bring breach of contract actions for economic losses arising out of property damage—then clearly a Rule 12²⁷⁹ motion to dismiss the tort actions on the pleadings would be appropriate. Tort actions in a construction case along with apportionment of liability and contribution and indemnity have simply become “convenient” for the courts and the practitioners.

278. MINN. STAT. §§ 604.10, 604.101 (2006).

279. MINN. R. CIV. P. 12.

Unfortunately, contract law should be granted greater respect than to be dismissed simply as a matter of convenience.

X. CONCLUSION

It is undeniable that the boundaries of contract law have been consistently eroded since Justice Cardozo authored his *MacPherson* opinion in 1916.²⁸⁰ Of significance, however, is that by the time of his *Ultramares* decision in 1931, Justice Cardozo was questioning how much erosion of the privity barrier was too much.²⁸¹ Just as he questioned his decisions, it appears to be time for Minnesota to address the “definite conflict” that exists between tort and contract principals in the area of construction litigation as observed by the court in *Prichard I.*²⁸² After *Waldor Pump*, Minnesota courts clearly wrestled with the boundary between contract and tort actions in both the *Prichard Bros.* cases and *Hapka*. Perhaps some practitioners would argue that tort actions are necessary to allow apportionment of damages and contribution and indemnity theories. While it might be somewhat inconvenient for a design professional or contractor to sue an owner—the party with whom they are in privity of contract—rather than each other, absolutely no rational reason exists to defeat a carefully crafted contract scheme by such a direct action. No reason exists that at trial the special verdict form could not be crafted as a breach of contract action. While there would, by definition, not be a classic apportionment of damages, a jury could certainly determine the damages that naturally flow from the breach of contract by a party. In a breach of contract action, a damaged party is entitled to be put in the same position as if the contract had been performed. Part of the confusion in construction cases is that multiple parties are typically accused of breaching their contracts and failing to perform their services properly. There is no reason, however, that a jury cannot sort out damages as between multiple parties who have been found to have breached their contracts. Contribution and indemnity actions are not entirely lost; a reading of the contracts between the parties frequently discloses rights to indemnification by and between the various parties to a

280. 111 N.E. 1050 (N.Y. 1916).

281. 174 N.E. 441, 444 (N.Y. 1931).

282. 407 N.W.2d 423 (Minn. Ct. App. 1987).

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construction project.²⁸³ Clearly, the sanctity of contracts can be maintained while achieving results similar to the classic tort theory of damages apportionment, contribution, and indemnity. Contract law should not have to drown in a sea of tort.

283. See AIA DOCUMENT A201, *supra* note 26, § 3.18.