

HOUSE PRINCIPLES

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Negligence Law, in general

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

However, professionals are held personally liable for their negligent acts, regardless of whether they are an employee of a business entity. This personal liability, known as malpractice, is set forth generally in the law on professional associations¹, and is specifically created by statute as to design professionals:

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

Economic Loss Rule

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

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

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

¹ Section 621.07, F.S.

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

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

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

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

Effect of Bill

This bill provides that the economic loss rule applies to construction defect claims against a licensed design professional providing design services pursuant to a contract to provide such services, with certain limitations. Specifically, the bill provides that a person does not have a cause of action in tort against a design professional for the recovery of economic damages resulting from a construction defect. However, this limitation will not apply, and the design professional will be liable, if either:

- There is economic damage resulting from personal injury or damage to property other than the property that is the subject of the contract.

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

³ See *Id.* at 1247 ("When only economic harm is involved, the question becomes whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies").

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

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

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

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

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

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

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

- The contract with the design professional required the professional to carry professional liability insurance, but the design professional did not maintain the required insurance coverage.

This bill also provides that, if a contract with a design professional requires professional liability insurance, the limit of damages under the contract may not be less than the amount of the insurance coverage.

This bill does not affect the contractual liability of the employer of design professionals.

This bill only applies to contacts with design professionals entered into on or after July 1, 2010.

B. SECTION DIRECTORY:

Section 1 creates s. 558.0035, F.S., creating a limitation of liability applicable to design professionals.

Section 2 amends s. 471.023, F.S., referencing s. 558.0035, F.S., in the laws applicable to engineers.

Section 3 amends s. 472.021, F.S., referencing s. 558.0035, F.S., in the laws applicable to surveyors.

Section 4 amends s. 481.219, F.S., referencing s. 558.0035, F.S., in the laws applicable to architects and interior designers.

Section 5 amends s. 481.319, F.S., referencing s. 558.0035, F.S., in the laws applicable to landscape architects.

Section 6 provides that this act applies to contracts or agreements for professional services entered into on or after July 1, 2010.

Section 7 provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Article I, s. 21 of the Florida Constitution provides the constitutional right of access to courts. It provides:

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

In *Johnson v. R. H. Donnelly Company*,¹¹ the Florida Supreme Court held that the constitutional right of "access to courts guarantees the continuation of common law causes of action [in effect in 1968] and those causes of action may be altered only if there is a reasonable substitution which protects the persons protected by the common law remedy." In *Kluger v. White*,¹² the Florida Supreme Court also held that the Legislature cannot abolish a common law cause of action "unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."

In *Moransais v. Heathman*,¹³ the Florida Supreme Court stated that Florida's common law and statutory scheme recognizes tort claims against professionals for negligence based on the professional's violation of a duty of care to injured persons. On the other hand, in *Florida Power & Light Co. v. Westinghouse Electric Corp.*¹⁴, the Florida Supreme Court found that the "economic loss rule has a long, historic basis," apparently before 1968.

By limiting such claims against licensed engineers, surveyors and mappers, architects, and landscape architects, it could be argued that the bill implicates concerns relating to the constitutional right of access to courts to the extent that the bill limits causes of actions for professional negligence and professional malpractice that existed in 1968. On other hand, it could be argued that the economic loss rule applied to such claims when the access to courts provision was enacted, and that this bill does not limit a cause of action but instead restores the law to where it was prior to 1968.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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

In tort, a manufacturer or producer of goods "is liable whether or not it is negligent because 'public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.'" *East River*, 476 U.S. at 866, 106 S.Ct. at 2300 (quoting *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150

¹¹ *Johnson v. R. H. Donnelly Company*, 402 So. 2d 518 (Fla. 1981).

¹² *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

¹³ *Moransais v. Heathman*, 744 So. 2d 973, 975, 976 (Fla. 1999).

¹⁴ *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987).

P.2d 436, 441 (1944) (Traynor, J., concurring). Thus, the “basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault ... or to one who is better able to bear the loss and prevent its occurrence.” *Barrett*, supra at 935. The purpose of a duty in tort is to protect society's interest in being free from harm, *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. *Id.* When only economic harm is involved, the question becomes “whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies.” *Barrett*, supra at 933.¹⁵

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On April 6, 2010, the Criminal & Civil Justice Policy Council amended the bill. The amendments did the following:

- The bill as first filed created an limitation on liability in each of the design professional chapters, this bill created the limitation on liability in one place, and then amended each of the chapters to reference the limitation.
- The limitation was narrowed to only apply to construction defects.
- The provision linking limits to coverage was added.
- The requirement to maintain insurance coverage, where coverage was required by the contract, was added.
- The effective date was changed to July 1, 2010, and was amended to provide that this bill does not affect any contract entered into prior to July 1, 2010.

The bill was then reported favorably as a council substitute.

¹⁵ *Casa Clara*, 620 So.2d at 1246-47.
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