THE ECONOMIC LOSS DOCTRINE IN ALASKA AND THE DESIGN PROFESSIONAL EXCEPTION

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ABSTRACT

The economic loss doctrine has prevented countless plaintiffs from recovering their economic losses in tort. However, over the last several decades, numerous courts have found exceptions to this doctrine. Alaska currently provides two important exceptions: the independent duty exception and the design professional exception. These two exceptions as applied provide for inconsistent results which create liability for design professionals and cut off liability for non-design professionals. Providing the same approach and analysis for all professionals creates greater consistency and predictability and provides an opportunity for design professionals to limit their exposure to negligence claims.

I. INTRODUCTION

Sally invests her entire life savings into a business. The business hires an attorney. The attorney provides negligent legal advice because he is distracted during the meeting. Sally follows the negligent legal advice, resulting in the failure of the business and the loss of her entire life savings. Sally has no contract remedies available to her because she is not in privity of contract with the attorney, so her only recourse is in tort. In Alaska, Sally *will not* be able to recover her economic losses in tort because the economic loss doctrine bars her recovery against non-design professionals.

In a different scenario, Sally is a sub-subcontractor on a construction project with no direct contract with the architect. The architect on the project creates faulty designs and is negligent in developing the plans it provides to Sally. Sally follows the architect's design, but various issues

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arise due to design defects and Sally incurs significant costs as a result. In this scenario, Sally *will* be able to recover her economic loss against the architect because Alaska recognizes an exception to the economic loss doctrine for design professionals.

These two scenarios demonstrate that, although Sally incurs a purely economic loss in both situations, she will only be able to recover those losses against design professionals. Alaska's exception to the economic loss doctrine for design professionals opens the door to unlimited liability to design professionals for parties not in privity of contract. Additionally, it prevents individuals such as Sally from recovering economic losses from other professionals. If, instead, the same analysis applied to all professionals, parties would have results that are more consistent, the liability of design professionals could be limited, and parties could recover economic losses from non-design professionals. This Article explores this alternative.

Part II examines the economic loss doctrine generally and specifically to Alaska and discusses some of the exceptions to the economic loss doctrine including the independent duty exception and the design professional exception. Part III argues that the Alaska courts should apply a consistent rule for all professionals and not just design professionals in order to provide better consistency and limit liability.

II. ECONOMIC LOSS DOCTRINE & EXCEPTIONS

The economic loss doctrine prevents individuals from recovering purely economic losses in tort if the losses do not stem from physical injury or property damage.[1] The seminal case for this doctrine is *East River Steamship Corp. v. Transamerica Delaval, Inc.*,[2] where the United States Supreme Court unanimously held that "a manufacturer in a commercial relationship has no duty under either negligence or strict products-liability theory to prevent a product from injuring itself."[3] This doctrine has changed significantly over the last fifty years and various courts have numerous exceptions and different interpretations of what is permissible recovery.

States that follow the economic loss doctrine and bar recovery for economic losses in tort only permit recovery under a breach of warranty claim. The rationale for this approach is that parties who are in privity of contract can utilize warranty remedies and those who are not in privity

1. Christopher Scott D'Angelo, *The Economic Loss Doctrine: Saving Contract Warranty Law from Drowning in a Sea of Torts*, 26 U. TOL. L. REV. 591, 591 (1995).

2. 476 U.S. 858 (1986).

3. *Id.* at 871. Such product damage is "most naturally understood as a warranty claim." *Id.* at 872.

of contract did not have the opportunity to bargain with the manufacturer or seller for any type of protection from defective products.[4]

Alaska has adopted the economic loss doctrine, thereby preventing individuals from recovering economic loss in tort.[5] However, Alaska and various courts around the country allow for different exceptions to the economic loss doctrine. To better understand these differences, this Part will highlight the general consensus from various jurisdictions and then highlight Alaska's interpretation of these exceptions.

Potentially Dangerous Exception

Some states allow economic recovery in tort for strict liability claims when the product poses a threat of bodily harm.[6] These courts argue that the plaintiff should be able to recover economic losses because there was real potential that individuals or other property could have been injured as a result of the defect.[7] These courts find that allowing this exception incentivizes manufacturers to ensure that their products are safe to consumers.[8]

Alaska follows this exception and allows recovery for economic loss in tort when faced with the potential for danger to persons or other

4. Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 555–56 (2009).

5. *See* Morrow v. New Moon Homes, Inc., 548 P.2d 279, 286, 291 (Alaska 1976) (holding that a consumer could not recover for purely economic losses under a strict liability claim and instead must bring a claim for breach of warranty).

6. *See* Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 345 (Md. 1986) (holding that plaintiff could recover the cost of fixing damaged property when there were no actual injuries but a serious risk of injury); Wash. Water Power Co. v. Graybar Elec. Co., 774 P.2d 1199, 1210, amended sub nom. Wash. Power Co. v. Graybar Elec. Co., 779 P.2d 697 (Wash. 1989) (internal citations omitted) ("[T]he fact that a hazardous product defect has injured only the product itself, and not persons or other property, is properly regarded as a 'pure fortuity'. Thus, the same remedy is made available for this sort of injury as would be available if the product defect had injured something or someone else.").

7. *See* Okla. Gas & Elec. Co. v. McGraw-Edison Co., 834 P.2d 980, 985 (Okla. 1992) ("[A] defective product is still dangerous even though it did not reach its full potential for harm by causing personal injury or damage to other property."*); Council of Co-Owners Atlantis*, 517 A.2d at 345 (Md. 1986). The Maryland Supreme Court stated:

> [W]hether a duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage. Where the risk is of death or personal injury the action will lie for recovery of the reasonable cost of correcting the dangerous condition. *Id.*

8. *See* N. Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 328–29 (Alaska 1981).

property.[9] In *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*[10] the Alaska Supreme Court stated:

> when a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself.[11]

Under this theory, the plaintiff must show (1) that the loss was foreseeably caused by a dangerous defect and (2) the dangerous circumstance was the cause in fact for the loss..[12]

"Other Property" Exception

In *East River*, the Supreme Court distinguished between two types of damages. First, damage to the property itself was held to be barred by the economic loss doctrine and not recoverable.[13] By contrast, damage done to "other property" was held to not be barred by the economic loss doctrine and was therefore recoverable.[14] However, the Court left unclear what constitutes "other property," making it difficult for courts to determine which types of damages are recoverable in tort as opposed to restricted to contract remedies.[15]

The U.S. Supreme Court provided some guidance on the issue in *Saratoga Fishing Co. v. J.M. Martinac & Co*,[16] where the Court addressed whether a product that is added to the initial product is considered "other property" and therefore recoverable in tort, or is considered part of the product itself and therefore not recoverable in tort.[17] In that case, Saratoga Fishing Co. brought a claim against J.M. Martinac & Co. for the loss of its fishing vessel and other equipment on the boat after a fire in the engine room.[18] The Court held that the extra skiff, nets, spare parts, and other

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870 (1986) (stating that when damage is done to the product itself and does not harm any person or other property, then the loss is purely economic and should be remedied in contract law).
14. *Id.*
15. *See N. Power & Eng'g Corp.*, 623 P.2d at 330 (failing to distinguish between the property itself and other property and holding that tort liability is appropriate for damage confined to the product itself).
16. 520 U.S. 875 (1997).
17. *Id.* at 879.
18. *Id.* at 877.

equipment which were added to the ship after the ship was delivered by the manufacturer were "other property" and were therefore recoverable under a tort theory.[19] The Court reasoned that a subsequent user who may purchase a used product does not have the opportunity to contract with the manufacturer and obtain the same warranties as the original purchaser, and therefore should be able to recover in tort when no privity of contract exists.[20]

Courts around the country have tried to draw the distinction between the product itself and other property when a product is part of an integrated system. This can be particularly challenging in the construction context. Some courts have held that damage to a component part of a system is damage to the product itself and is not damage to "other property."[21] Other courts, however, have held that the individual parts of the construction are all "other property."[22]

Alaska has attempted to draw a distinction between property damage, which is recoverable in tort, and economic loss, which is not recoverable in tort. In *Cloud v. Kit Manufacturing Co.*,[23] the Clouds purchased a mobile home which was manufactured by Kit Manufacturing Co.[24] The rug padding provided with the purchase of the mobile home caught fire and destroyed the mobile home and its contents.[25] The Alaska Supreme Court held that, although it is difficult to determine the difference between property damage and economic loss, because the fire was the result of a "sudden and calamitous occurrence," the loss to the property and the belongings were property damage and

19. *Id*.
20. *Id*. at 882.
21. *See* Grams v. Milk Prods., Inc., 699 N.W.2d 167, 174 (Wis. 2005) ("If the 'product' at issue is a defective component in a larger 'system,' the other components are not regarded as 'other property'. . . .").
22. *See* Dean v. Barrett Homes, Inc., 8 A.3d 766, 776 (N.J. 2010) (holding that the economic loss rule did not bar plaintiff's claims for negligence because the exterior vinyl siding is not an "integral part of the structure itself" but was "distinct from the house"); Harris v. Suniga, 180 P.3d 12, 17 (Or. 2008) (holding that plaintiff's claim for negligence caused by dry rot of an apartment building was damage to "other property" and not barred by the economic loss doctrine); Am. Stores Props., Inc. v. Spotts, Stevens & McCoy, Inc., 648 F. Supp. 2d 707, 716 (E.D. Pa. 2009) (holding that a retaining wall was not "other property" in the context of the construction of a distribution center and therefore the negligence claims regarding its failure were barred by the economic loss doctrine); Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC, 221 P.3d 234, 244 (Utah 2009) (holding that the foundation and roofs of a townhome are integrated products and therefore damage to them is not considered damage to "other property").
23. 563 P.2d 248 (Alaska 1977).
24. *Id*. at 249.
25. *Id*.

therefore recoverable in tort.[26] The Alaska Supreme Court has further held that when a defective component part causes damage to another component part, this does not constitute damage to "other property" and is therefore not recoverable in tort.[27]

In *Shooshanian v. Wagner*,[28] the Alaska Supreme Court again addressed the distinction between property damage versus economic loss. In that case, the Shooshanians brought a strict liability claim to recover replacement costs against a contractor who insulated walls with a toxic spray that caused allergic reactions among the family.[29] The court focused its attention on whether or not there was a dangerous defect, and held that the Shooshanians could recover for the replacement costs for the property damage due to the harmful effects of the product that made the product "dangerously defective."[30]

Independent Duty Exception

Sometimes the duties parties have to each other go beyond the four corners of the contract. Some courts have allowed an exception to the economic loss doctrine by focusing on the source of the duty of care and allowing parties to recover economic losses in tort when a tort duty exists independent from a duty that may be specified in a contract.[31] The South Carolina Supreme Court articulated it well by stating:

> [t]he question, thus, is not whether the damages are physical or economic. Rather the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed. A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty

26. *Id.* at 251.
27. N. Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 330 (Alaska 1981).
28. 672 P.2d 455 (Alaska 1983).
29. *Id.* at 457.
30. *Id.* at 464.
31. *See* Town of Alma v. AZCO Constr., Inc., 10 P.3d 1256, 1262 (Colo. 2000) ("The key to determining the availability of a contract or tort action lies in determining the source of the duty that forms the basis of the action."); Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270, 288 (Pa. 2005) (agreeing that recovery for purely economic loss is dependent upon the source of the duty owed to the plaintiff); *see also* Craig K. Lawler, *Foreseeability and the Economic Loss Rule–Part II*, 33 COLO. LAW. 71, 71 (arguing that the "source of the duty" approach is something of a "magic bullet").

> arising independently of any contract duties between the parties however, may support a tort action.[32]

Based on this exception, state courts have identified various causes of action unbarred by the economic loss doctrine, including fraud,[33] conversion,[34] and negligent misrepresentation.[35]

When parties bring a claim for negligence, however, further analysis is required to determine whether the exception applies. First, the court will determine whether a duty exists in the contract itself or by statute, regulation, the parties' preexisting relationship, or case law.[36] If a duty does not arise under those sources, the courts will consider various factors.[37] The foreseeability of the harm factor tends to carry great weight. Recovery is often permissible for economic losses solely because the harm was foreseeable.[38]

The Alaska Supreme Court first addressed this exception in the economic loss context in *Mattingly v. Sheldon Jackson College*.[39] Sheldon Jackson College needed a drainpipe cleaned and called Mattingly's

32. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 88 (S.C. 1995).

33. *See* Cunningham v. PFL Life Ins. Co., 42 F. Supp. 2d 872, 887 (N.D. Iowa 1999) (holding that the economic loss doctrine did not bar fraud claim); Highland Crusader Offshore Partners, L.P. v. LifeCare Holdings, Inc., 2008 WL 3925272, at *15 (N.D. Tex. Aug. 27, 2008) (denying a motion to dismiss claims for fraud and fraudulent misrepresentation because a duty to disclose would arise regardless of whether the parties had a contractual relationship); Eastwood v. Horse Harbor Found., Inc., 241 P.3d 1256, 1263 (Wash. 2010) (allowing plaintiffs to sue to recover purely economic loss for fraud, but barring negligence claims); Kaloti Enters., Inc. v. Kellogg Sales Co., 699 N.W.2d 205, 219 (Wis. 2005) (holding that fraud in the inducement is not barred by the economic loss doctrine).

34. Alex Hofrichter, P.A. v. Zuckerman & Venditti, P.A., 710 So. 2d 127, 129 (Fla. Dist. Ct. App. 1998) (holding that a claim for conversion and civil theft is not barred by the economic loss doctrine due to its independent action from the contract).

35. Lawler, *supra* note 31, at 71.

36. *McGrew v. State,* 106 P.3d 319, 322 (Alaska 2005).

37. *See* D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 555 (Alaska 1981) (utilizing factors to determine whether defendant was negligent); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (adopting a factor test to determine whether an independent duty exists to parties not in privity of contract).

38. *See* A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 402 (Fla. 1973) ("[A] third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity."); Kristek v. Catron, 644 P.2d 480, 483 (Kan. Ct. App. 1982) ("[A] purchaser of a residence may recover property damage caused by negligence of its builder despite the lack of any contractual relationship with the builder.").

39. 743 P.2d 356, 358 (Alaska 1987).

company to perform the work.[40] The college had excavated and braced a trench to gain access to the drainpipe and, while Mattingly's employees were working on the pipe, the trench collapsed causing injury to his employees.[41] Mattingly brought a claim for negligence seeking recovery for his economic losses.[42] The Alaska Supreme Court relied on the analysis provided by the New Jersey Supreme Court in *People Express Airlines, Inc. v. Consolidated Rail Corp.*,[43] which stated:

> that a defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct. A defendant failing to adhere to this duty of care may be found liable for such economic damages proximately caused by its breach of duty.[44]

On that basis, the Alaska Supreme Court held that the contractor had set forth sufficient facts to state a claim for negligent economic loss and that the superior court should not have dismissed the case.[45]

Although the foreseeability of the harm factor is important in determining an independent duty,[46] Alaska courts have stated that it is not dispositive, and thus other factors must be considered.[47] Different jurisdictions tend to offer slightly different factors, but *Biakanja v. Irving*[48] is still recognized as establishing the foundational factors that most courts consider when determining whether an independent duty exists to parties not in privity of contract.[49] The factors include:

40. *Id.*
41. *Id.*
42. *Id.*
43. 495 A.2d 107 (N.J. 1985).
44. *Id.* at 263.
45. *Mattingly*, 743 P.2d at 361.
46. *See* R.E. v. State, 878 P.2d 1341, 1346 (Alaska 1994) (identifying foreseeability as the most important of the established factors in determining duty under Alaskan law); Div. of Corr., Dept. of Health & Soc. Services, v. Neakok, 721 P.2d 1121, 1125 (Alaska 1986) (citation omitted) ("The most important single criterion for imposing a duty of care is foreseeability.").
47. *See, e.g.*, *Geotek Alaska, Inc. v. Jacobs Eng'g Grp., Inc.*, 354 P.3d 368, 377 (Alaska 2015) (holding that foreseeability of the harm is not itself enough to create a duty in tort); *Mesiar v. Heckman*, 964 P.2d 445, 450 (Alaska 1998) (holding that no duty existed despite plaintiff's injury being foreseeable).
48. 320 P.2d 16 (Cal. 1958).
49. Pegeen Mulhern, *Marine Pollution, Fishers, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses*, 18 B.C. ENVTL. AFF. L. REV. 85, 96–97 (1990).

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[50]

Other states, including Alaska, have adopted this exception and utilize similar factors which include the following

> [t]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.[51]

Alaska courts have used the factors in several different cases, which are important to note in deciphering whether an independent duty exists.

The first case where the Alaska courts utilized the independent duty factors in the economic loss context was *Mesiar v. Heckman*.[52] In that case, Heckman brought a claim for economic losses due to negligent use of sonar to count the salmon run that resulted in reduced fishing limits, causing economic losses to commercial fisheries.[53] Because the parties were not in privity of contract, no statute, regulation, or preexisting relationship created a duty; therefore the court used the *D.S.W.* factors to determine whether a tort recovery was possible under the independent duty exception.[54] The first factor the court considered, per *Mattingly*, was foreseeability of the harm.[55] The court agreed that Heckman correctly asserted that negligently using the sonar counting process could foreseeably cause harm to Yukon River fisheries.[56] However, in the court's analysis regarding whether Heckman could proceed in his claim, it determined that practically any decision made by the Alaska Department of Fish and Game has adverse effects on parties, and that

50. *Biakanja*, 320 P.2d at 19.
51. D.S.W. v. Fairbanks North Star Borough School District, 628 P.2d 554, 555 (Alaska 1981) (citing Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. App. 1976)).
52. 964 P.2d 445 (Alaska 1998).
53. *Id.* at 448.
54. *Id.* at 450.
55. *Id.*
56. *Id.*

imposing liability for those decisions would expose the State to litigation in nearly every decision it makes.[57]

Next, the court considered the moral blame factor. While arguably almost all negligence claims are morally blameworthy, the court discussed that cases that create risk of death or serious injury typically fulfill this requirement.[58] As the harm was primarily economic, moral blameworthiness was not a prominent factor.[59] In determining whether the policy of preventing future harm was a factor creating a duty, the court mirrored the reasoning it used in analyzing the foreseeable harm factor and dismissed this as a factor in favor of Heckman.[60]

The court then determined the extent of the burden to the defendant and consequences to the community of imposing a duty.[61] Again the court discussed that allowing Heckman to recover would open the floodgates of litigation against state agencies for negligent management decisions.[62] Finally, the court looked at the availability of insurance and concluded that the State would most likely be unable to find or afford insurance.[63] Thus, although two of the factors weighed in favor of Heckman, the court concluded that the factors did not warrant a finding of duty and thereby held that the State did not owe an independent duty of care to Heckman.[64]

After *Mesiar*, the Alaska Supreme Court stressed the importance of the *D.S.W.* factors in *Geotek Alaska, Inc. v. Jacobs Engineering Group, Inc.*,[65] where it analyzed whether a general contractor owed an independent duty of care to a sub-subcontractor to ensure the subcontractor made payment.[66] Geotek, the sub-subcontractor, argued that Jacobs' awareness that Geotek may not have been paid by the subcontractor made it a foreseeable plaintiff that could incur economic losses, which should be recoverable under *Mattingly*.[67] However, the court clarified its holding in *Mattingly* and stated:

> *Mattingly* did not create a new duty in tort, let alone one so broad as to provide a negligence cause of action for any foreseeable economic harm caused by another's lack of due care. *Mattingly*

57. *Id.*
58. *Id.* at 451.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 452.
64. *Id.*
65. 354 P.3d 368 (Alaska 2015).
66. *Id.* at 368.
67. *Id.* at 377.

> simply expanded liability in tort to include purely economic losses . . . .[68]

Although the court did not go through the individual factors because the parties did not analyze them, the court noted that most factors cut against the existence of an independent duty.[69] The court briefly stated that the negligence did not create any risk of death or physical injury and therefore had little blameworthiness, and that the plaintiff did not provide any public policy justifications for allowing recovery.[70]

In a recent federal district court case applying Alaska law, the court applied the *D.S.W.* factors to a construction project.[71] The Municipality of Anchorage (MOA) brought claims to recover economic losses against Integrated Concepts and Research Corporation alleging negligence, professional negligence, and negligent misrepresentation in regards to the construction project.[72] In analyzing MOA's negligence claim, the court utilized the *D.S.W.* factors.[73]

First, the court considered whether the harm was foreseeable and concluded that it knew, or should have known, that its action could have affected MOA.[74] Second, the certainty of the harm weighed in favor of the defendant, because of disagreement among the parties as to whether injury occurred at all.[75] Third, the court found that the connection between the damages and the negligence was too remote because many other intervening individuals were involved in the project.[76] Fourth, the court found moral blame weighed in favor of the defendant because the risk of personal injury or harm was not significant.[77] Fifth, the prevention of future harm favored the defendant because the parties had the ability to protect against future harm by contracting or refusing to work together.[78] Sixth, the court considered the burden on the defendant and the community if a duty existed.[79] Relying on *Geotek*, where the court stated that imposing a duty would subject contractors to additional liability with whom they are not in privity of contract, the court held this

68. *Id.*
69. *Id.* at 379.
70. *Id.*
71. Municipality of Anchorage v. Integrated Concepts & Research Corp., 2016 WL 6471010 (D. Alaska Oct. 31, 2016).
72. *Id.* at *1.
73. *Id.* at *7–*8.
74. *Id.* at *7.
75. *Id.*
76. *Id.* at *8.
77. *Id.*
78. *Id.*
79. *Id.*

factor in favor of the defendant as well.[80] Last, the court found MOA's rejection of additional insurance weighed in favor of defendant.[81] Although the most important factor, foreseeability, fell in favor of the plaintiff, the court held that the defendant was entitled to summary judgment since all other factors fell in its favor.[82]

Alaska and other jurisdictions have also created an exception for duties that are outside of the duties found within a contract. These courts allow recovery in tort when an independent duty exists based on various factual and policy considerations. In addition to the independent duty exception, Alaska courts have recognized an exception to the economic loss doctrine for design professionals, to which this Article now turns.

Professional Negligence and the Design Professional Exception

Although courts have allowed an exception for an independent duty, courts have more recently moved in the opposite direction in the professional context, believing that parties should be held to their contracts so as to better allocate risk and provide greater certainty and predictability.[83] Therefore, courts are limiting the reach of this exception or eliminating it altogether. However, unlike the independent duty exception, courts under professional malpractice cases do not consider the factual and policy factors in deciding whether to allow an exception.

In the last two decades of the twentieth century, courts across the country have expanded the economic loss doctrine into professional malpractice. As with the case law on the independent duty exception, courts offer various interpretations of what types of claims are barred and which types of professionals are covered. For example, the Illinois Supreme Court has held that the economic loss doctrine does not bar tort

80. *Id.*
81. *Id.*
82. *Id.*
83. *See* Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 992 (Wash. 1994) ("If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity."); Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228, 1235 (Wyo. 1996) ("In deference to the abilities of sophisticated businessmen to provide contractual remedies in their business dealings, [another] court held that the contractor's claims against the architect must fail under the economic loss doctrine.").

claims against lawyers and accountants,[84] but it does bar tort claims against architects and engineers.[85]

One scholar has articulated that the discrepancy between the two types of professions is that architects and engineers document their duties in a contract typically in relation to a structure they plan to build, while lawyers and accountants will have less predictable duties.[86] A contract is thus unable to capture the "extracontractual duty" that lawyers and accountants often have.[87]

Other states take an all or nothing approach on whether professional claims are barred. For example, Minnesota utilizes the economic loss doctrine to bar claims for recovery in commercial transactions, but allows recovery in tort for negligently performing professional services.[88] Other courts have made a blanket assertion that the economic loss doctrine does not apply at all to malpractice cases.[89]

Alaska first considered whether a claim for professional negligence may be brought based on purely economic losses in *St. Denis v. Department of Housing and Urban Development*.[90] In that case, the plaintiff purchased a home and later discovered a faulty roof, a problem not disclosed at the time of purchase.[91] The plaintiff brought a claim against the government for the cost of repairs incurred to fix the roof.[92] The court held that the plaintiff could not bring a professional negligence claim for

84. *See* Collins v. Reynard, 607 N.E.2d 1185, 1189 (Ill. 1992) (Miller, C.J., concurring) ("[I]t is singularly inappropriate to attempt to apply the economic loss . . . doctrine to attorney malpractice actions."); Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503, 515 (Ill. 1994) (holding that the economic loss doctrine does not bar tort claims for accountant malpractice).

85. *See* 2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346 (Ill. 1990) (holding that a claim for purely economic loss was not recoverable in an architectural malpractice case); Fireman's Fund Ins. Co. v. SEC Donohue, Inc., 679 N.E.2d 1197 (Ill. 1997) (holding that the economic loss doctrine bars recovery in tort for engineering malpractice).

86. Mark C. Friedlander & Andrea B. Friedlander, *Malpractice and the Moorman Doctrine's "Exception of the Month"*, 86 ILL. B.J. 600, 602–03 (1998).

87. *Id.*

88. Steven Lesser & Amy Koltnow, *Liability of Construction Design Professionals and the Economic Loss Rule, Brief*, 29 A.B.A. WINTER BRIEF 50, 51 (2000).

89. *See* Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85 (S.C. 1995) (holding that a contractor could recover against an engineer for purely economic loss); Clark v. Rowe, 701 N.E.2d 624, 627 (Mass. 1998) (holding the economic loss doctrine inapplicable in legal malpractice cases); Resolution Tr. Corp. v. Holland & Knight, 832 F. Supp. 1528, 1532 (S.D. Fla. 1993) (holding that the economic loss rule was not applicable to a malpractice case).

90. 900 F. Supp. 1194 (D. Alaska 1995).

91. *Id.* at 1195.

92. *Id.*

real property when she only incurred economic loss, stating that if the Alaska courts will not permit an extra contractual remedy for economic loss in a products liability claim, then the court will not permit recovery for economic loss in a real estate transaction.[93]

Alaska courts have come to a somewhat different conclusion in the professional design context. The Alaska Supreme Court has stated that design professionals have a tort duty "to exercise reasonable care, or the ordinary skill of the profession, for the protection of anyone lawfully upon the premises whose injury is reasonably foreseeable as the result of negligent design, plans, orders, or directions."[94] In addition, the Alaska courts have allowed parties to sue design professionals in tort for purely economic losses due to a professional's malpractice when no privity exists.[95] However, a party who has significant control over the design professional, such as owners, are not considered design professionals and therefore parties must recover under a contract theory.[96] Although Alaska has not addressed whether individuals can recover for economic losses in tort when the parties are in privity of contract, other states have allowed the parties to recover in tort because a special relationship exists.[97]

Various courts across the nation have different interpretations of what types of professionals may be sued in tort for purely economic loss. Alaska has allowed an exception to the rule for an independent duty and for design professionals, but has not allowed an exception for other professionals, as other state courts have permitted.

93. *Id*. at 1200.

94. *Moloso v. State,* 644 P.2d 205, 217 (Alaska 1982) (holding that a party could bring a negligence claim against Engineering Science of Alaska for negligence based on substandard work).

95. *See* Clark v. City of Seward, 659 P.2d 1227, 1229–31 (Alaska 1983) (allowing a city to pursue a counterclaim against an engineer that it had previously hired but subsequently replaced with another engineer).

96. State, Dep't of Nat. Res. v. Transamerica Premier Ins. Co., 856 P.2d 766, 772 (Alaska 1993).

97. *See* Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 88 (S.C. 1995) ("In most instances, a negligence action will not lie when the parties are in privity of contract. When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action."); *see also* Carl J. Circo, *Placing the Commercial and Economic Loss Problem in the Construction Industry Context*, 41 J. MARSHALL L. REV. 39, 77 (2007) ("Clients [of design professionals] may assert malpractice claims either in contract or in tort, and they often proceed under both theories.").

III. ALASKA NEEDS TO REVISE ITS APPROACH TO PROFESSIONAL MALPRACTICE

As discussed in Part II, Alaska adopted the economic loss doctrine for product liability claims, thereby preventing individuals from bringing tort claims for purely economic losses. However, throughout the last few decades Alaska has provided exceptions to this overarching rule. These exceptions have created inconsistencies in the professional negligence context, and should be revised so as to provide better guidance and more consistent treatment of similarly situated parties.

As mentioned above, Alaska follows the independent duty exception for economic loss. Thus, an individual can bring a claim for economic losses when there is an independent duty outside of the duties found in a contract. Similarly, design professionals owe a duty in tort outside of a contract in a professional context. These exceptions are important in that they are the only venue for recovery for third parties who are not in privity of contract.

These two exceptions to the economic loss rule are one and the same. The independent duty doctrine states "[a] defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages . . . [plaintiffs] with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct."[98] The design professional exception states "[i]t is the duty of an engineer or architect to exercise reasonable care . . . for the protection of anyone lawfully upon the premises whose injury is reasonably foreseeable as the result of negligent design, plans, orders, or directions."[99] Both require individuals to avoid harm, and act reasonably to a foreseeable plaintiff.

In that sense, it seems that a court's analysis for a negligence claim against design professionals is essentially applying the independent duty rule, but foregoing the application of the lengthy *D.S.W.* factor test. The real inconsistency lies in the fact that Alaska courts do not apply this same analysis to non-design professionals. Instead, non-design professionals such as real estate agents, attorneys, and corporate directors are protected by the economic loss doctrine and do not have claims brought against them for purely economic loss in tort.[100] Although Alaska has not

98. Mattingly v. Sheldon Jackson Coll., 743 P.2d 356, 360 (Alaska 1987).

99. *Moloso*, 644 P.2d at 217.

100. *See* Lee Houston & Assoc., Ltd. v. Racine, 806 P.2d 848, 855 (Alaska 1991) (holding that a six-year statute of limitations applied to the case because plaintiff's claim against a real estate agent is found in contract and not in tort because a professional service relationship is based in contract); Van Horn Lodge, Inc. v. White, 627 P.2d 641 (Alaska 1981) (holding that a negligence claim alleging breach of duty of the attorney-client relationship followed the statute of limitations for

addressed whether a party can bring a claim against a non-design professional utilizing the independent duty exception, in *Lee Houston & Associates v. Racine*,[101] the Alaska Supreme Court held that professional negligence claims are found in contract but not in tort, thereby closing any opportunity for this argument.[102] This inconsistency results in more liability to design professionals and no liability to non-design professionals.

No clear policy rationale exists for the differentiation. However, Alaska courts can take two approaches in remedying this disparity of treatment. First, courts should recognize that, while the *D.S.W.* factors affect design and non-design professionals differently, case-by-case analysis still leaves room for imposing independent duties to both. Using future harm and moral blameworthiness factors will typically favor plaintiffs against design professionals, but in cases with non-design professionals, the factors will likely favor the non-design professionals. Both factors evaluate the harm and the risk of death or physical injury.[103] Design professionals are responsible for the overall structure of a building, and small details such as drawing plans that utilize the wrong screws could have detrimental effects on the safety of a building resulting in serious injury or death. On the other hand, the harm caused by non-design professionals typically will be economic in nature since attorneys and accountants provide advice and their negligence typically does not result in a risk of death or physical injury.

Although these two factors vary in their outcome, there are still five other factors the courts must consider when determining whether an independent duty exists. Other factors such as foreseeability of the harm to the plaintiff and degree of certainty that the plaintiff suffered injury need to be evaluated on a case-by-case basis, and thus, it is impossible to make an overall assumption as to whether design professionals and non-design professionals would come to different conclusions.

The other approach the Alaska courts could take on this issue is to hold that a special relationship exists with design professionals. As mentioned previously, Alaska courts utilize the *D.S.W.* factors only after

tort and not contract), *overruled by Lee Houston*, 806 P.2d 848; Bibo v. Jeffrey's Rest., 770 P.2d. 290, 296 (Alaska 1989) (holding that a breach of fiduciary duty by a corporate director is a breach of implied contract).

101. 806 P.2d 848.

102. *Id*. at 848. However, the court has not addressed whether third parties not in privity of contract can bring tort claims against non-design professionals under this theory. *Id.*

103. *See* Geotek Alaska, Inc. v. Jacobs Eng'g Grp., Inc., 354 P.3d 368, 379 (Alaska 2015) (internal citations omitted) ("First, as contrasted to negligence creating a risk of death or physical injury, we have ascribed little blameworthiness to ordinary negligence that merely causes economic harm.").

they have established that no duty exists in statute, regulation, the parties' preexisting relationship, or in case law.[104] Thus, design professionals arguably owe a separate duty based on a special relationship between the engineers and other parties such as subcontractors, thereby forging the *D.S.W.* factor analysis. This argument is flawed, however, as one can argue that project owners are not held liable though they have a "special relationship" with subcontractors.[105] Similarly, as Justice Burke argued in his dissent in *Lee Houston*, the relationships between attorneys and clients are special relationships that create a duty imposed by society going beyond the contract, and hence should be resolved in tort instead of contract.[106]

Because of the flaws in adopting a "special relationship" rule, Alaska courts should apply the same test to both design professionals and non-design professionals. Currently, parties can recover against design professionals, exposing them to unlimited liability. Although the language of the design professional exception requires the harm to the plaintiff be foreseeable, the foreseeability factor is not dispositive and other factors must be considered.[107] The Alaska Supreme Court in *Mesiar* even stated that the foreseeability of economic harm is not enough and denied plaintiff's claim arguing that any decision made by the State could cause a foreseeable plaintiff economic harm.[108] In that sense, there is little difference between the State in *Mesiar* and design professionals. Engineers and architects can make negligent decisions causing all parties economic harm, yet they are on the hook for all foreseeable plaintiffs while parties like the State are not.

In a similar sense, protecting non-design professionals against liability negates the purpose of the independent duty exception. The independent duty exception allows parties to recover when a duty exists outside of the contract. Although the Alaska Supreme Court in *Lee Houston* focused on the issue of statute of limitations, it made a blanket assertion that professional negligence claims are sound in contract and not in tort and did not apply the *D.S.W.* factor analysis in coming to this

104. McGrew v. State, 106 P.3d 319, 322 (Alaska 2005) ("In deciding whether a defendant owes a plaintiff a duty of reasonable care, we first determine whether a duty is imposed by statute, regulation, contract, undertaking, the parties' preexisting relationship, or existing case law.").

105. *See Lee Houston*, 806 P.2d 848, 854–55 (holding that there was contract liability for parties in professional service relationships, but not liability in tort).

106. *Id*. at 856–57 (Burke, J., dissenting).

107. *See Geotek*, 354 P.3d at 377–78 (holding that foreseeability of the harm is not enough by itself to create a duty in tort); *Mesiar v. Heckman*, 964 P.2d 445, 450, 452 (Alaska 1998) (holding that no duty existed despite plaintiff's injury being foreseeable).

108. *Mesiar*, 964 P.2d at 450.

conclusion.[109] Courts may also find that non-design professionals are liable after applying the *D.S.W.* factors.[110] Thus, the courts should apply the *D.S.W.* factors to all professional negligence cases and determine whether an independent duty exists outside of the contract, as opposed to imposing liability on design professionals alone without individualized analysis of the factors.

IV. CONCLUSION

Overall, the economic loss doctrine helps to limit recovery in strict liability and negligence claims and provide consistency for contracting parties. However, allowing various exceptions to the rule creates problems among contracting parties, particularly in the professional negligence context. The Alaska courts have adopted several exceptions to the economic loss doctrine including the independent duty exception and the design professional exception. The design professional exception causes increasing liability to design professionals and cuts off liability completely to non-design professionals causing inconsistent results to similar parties. If the Alaska courts want to continue to follow the independent duty doctrine, they should apply the exception across all professions and utilize the factors to limit liability to design professionals and expose non-design professionals to liability when it meets the balancing factor test.

109. *Lee Houston*, 806 P.2d at 856.

110. Other courts have utilized the same factors to reach the conclusion that non-design professionals are liable. *See* Fickett v. Superior Court of Pima Cty., 558 P.2d 988, 990 (Ariz. App. 1976) (holding an attorney liable to a third party after applying the *Biakanja* factors).