

Amici curiae respectfully submit this brief pursuant to Maryland Rule 8-511 in support of the Maryland Court of Special Appeals' application of the Economic Loss Rule.

STATEMENT OF INTEREST

Amici curiae are comprised of four national and three regional associations representing the interests of thousands of design professionals from across the country, including Maryland, who provide professional engineering, architecture, and land surveying services in the development of the built environment in which we live. The services provided by these design professionals include the preparation of plans and specifications for public infrastructure, commercial development, and residential projects, "allowing Americans to drink clean water, enjoy a healthy life, take advantage of new technologies, and travel safely and efficiently."¹

The American Council of Engineering Companies of Maryland ("ACEC-MD") is a nonprofit association representing over 90 consulting engineering firms located throughout the state that serve the public and private sectors. Member firms employ over 6,500 employees and are responsible for the design of most of the area's infrastructure, including environmental and building construction. Founded in 1957, the organization promotes the business interests of the consulting engineering profession in Maryland and the surrounding region.

¹ About ACEC, <http://www.acec.org/about/> (last visited June 29, 2016).

Founded in 1968, the American Council of Engineering Companies of Virginia (“ACEC-VA”) is the largest engineering firm association in Virginia. It represents the business interests of more than 90 consulting engineering firms which employ more than 4,000 employees. ACEC-VA actively advocates on behalf of its membership, and is a leader in promoting industry excellence and professionalism.

Founded in 1909, the American Council of Engineering Companies (“ACEC”) is the oldest and largest national trade association of the engineering industry, representing thousands of firms throughout the country engaged in infrastructure and facilities development that advances America’s prosperity, health and safety. ACEC is a federation of 51 state and regional member organizations, including ACEC-MD and ACEC-VA. ACEC member firms employ more than 600,000 engineers, architects, surveyors, scientists, other specialists, and staff responsible for more than \$200 billion of private and public works annually.

Founded in 1852, the American Society of Civil Engineers (“ASCE”) is an educational and scientific society representing more than 150,000 members worldwide, including some 110,000 engineers and comprising hundreds of technical and geographic organizations, chapters, and committees. Its objective is to advance the science and profession of engineering to enhance the welfare of humanity. The ASCE facilitates education in the science of engineering by publishing technical and professional papers, books, standards, codes, and other

works; by conducting educational conferences, seminars, and other forums related to the engineering field; and by promoting professionalism, leadership, career growth, and environmental stewardship within the profession to protect public health and safety, and improve quality of life.

Founded in 1857, the American Institute of Architects (“AIA”) consistently works to create more valuable, healthy, secure, and sustainable buildings, neighborhoods, and communities. Through nearly 300 state and local chapters, including several chapters in Maryland, the AIA advocates for public policies that promote economic vitality and public well-being. Members adhere to a code of ethics and conduct to ensure the highest professional standards. The AIA provides members with tools and resources, including the widely-used AIA contract documents, to assist them in their careers and business as well as engaging civic and government leaders and the public to find solutions to pressing issues facing our communities, institutions, nation and world.

Founded in 1938, the Maryland Society of Professional Engineers, Inc. (“MDSPE”) is a society of approximately 500 professional engineers in Maryland dedicated to the promotion and protection of the professional engineer as a social and economic influence vital to the health, safety and welfare of the community, the state of Maryland, the United States of America and all mankind. MDSPE’s objectives include cultivating public appreciation for the work of professional engineers, developing civic consciousness of the engineering profession,

promoting the public health, safety, and welfare, and advancing the professional, social, and economic interests of professional engineers.

The National Society of Professional Engineers (“NSPE”) is a multidisciplinary individual membership association of more than 31,000 professional engineers and engineering interns working in construction, government, education, industry, and private practice. NSPE, in partnership with its state and territorial societies, serves as the recognized and authoritative expert in engineering licensure, ethics, and professional practice. NSPE promotes engineering licensure and assists individuals in obtaining licensure, and protects and enhances the value of licensure and the opportunities for the licensed engineer. NSPE’s many activities include the publication of standard contract documents and other forms, along with the ACEC and ASCE under the umbrella of the Engineers Joint Contract Documents Committee (“EJCDC”), which are widely used in the design and construction of engineered facilities and structures throughout Maryland and the United States.

Amici curiae have a significant interest and stake in the outcome of this appeal. If this Court were to adopt the position advocated by Appellant Balfour Beatty Infrastructure, Inc. (“BBII”), it would greatly and unnecessarily expand the scope of potential liability for design professionals, and by extension many other construction industry participants, as well as undermine the ability of design professionals to enter into contracts in order to define their business relationships and apportion risk and responsibility for purely economic damages.

SUMMARY OF THE ARGUMENT

The construction industry is “vitaly enmeshed in our economy and dependent on settled expectations.”² The Economic Loss Rule promotes certainty by “prevent[ing] parties from recovering in tort to extricate themselves from prior freely negotiated agreements.”³ Maryland courts have long applied the Economic Loss Rule to construction claims, recognizing the importance of settled expectations to the construction industry.⁴

BBII attacks the sanctity of contract and critical boundaries between contract law and tort law, weakening the ability of all members of the construction industry to assess and allocate risk fairly. BBII’s arguments would disrupt carefully-negotiated contractual allocation of risks and responsibilities between and among design professionals, owners, contractors, subcontractors, suppliers and others involved in construction projects. BBII’s approach, which rejects the fundamental boundaries between tort and contract law, would have major disruptive effects on the construction industry in Maryland.

² Stuart v. Coldwell Banker Commercial Grp., Inc., 109 Wash. 2d 406, 421 (1987).

³ R. Joseph Barton, Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims, Wm. & Mary L. Rev. 1789, 1797 (2000).

⁴ Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 308 Md. 18 (Md. 1986); Morris v. Osrose Wood Preserving, 340 Md. 519 (Md. 1994); Heritage Harbour LLC v. John J. Reynolds, Inc., 143 Md. App. 698 (Md. Ct. Spec. App. 2002); Chambco v. Urban Masonry Corp., 101 Md. App. 664 (Md. Ct. Spec. App. 1994), vacated on other grounds, 338 Md. 447 (Md. 1994).

Amici curiae address the public policy considerations underpinning Maryland's long-established, and prudent, application of the Economic Loss Rule to bar claims for economic loss damages in the absence of contractual privity. First, the Economic Loss Rule is based on sound public policy, encouraging parties to allocate risk and responsibility to reflect the commercial realities of a construction project. The Court should reject BBII's efforts to disrupt freedom of contract in the construction industry.

Second, the Economic Loss Rule in Maryland requires privity or a "privity equivalent" to recover economic loss damages to guard against the potentially limitless risk exposure, for purely commercial or economic damages, that would result in the absence of such a requirement. There is no "privity equivalent" between a contractor and an engineer where the engineer is separately retained by the owner, except in the rare circumstance where the contracts on the project establish such a relationship. To find otherwise would expose design professionals to limitless claims for economic loss damages, and increase the cost of both public and private procurement.

Amici curiae request that the Court affirm the judgment of the Court of Special Appeals that Maryland courts recognize the importance of contracts to establish predictability and certainty in the allocation of risk in the construction industry.

STATEMENT OF THE CASE, STATEMENT OF FACTS, AND STANDARD OF REVIEW

Amici curiae incorporate by reference Appellee Rummel Klepper & Kahl, LLP's ("RK&K") Statement of the Case, Statement of Facts, and Standard of Review.

QUESTIONS PRESENTED

1. Whether the Court of Special Appeals correctly applied the Economic Loss Rule to bar a government contractor's claims against an engineer separately retained by the government for professional negligence?

2. Whether the Court of Special Appeals correctly applied the Economic Loss Rule to bar a government contractor's claims against an engineer separately retained by the government under Restatement of Torts (2d) § 552?

3. Whether the Court of Special Appeals correctly applied the Economic Loss Rule to bar a government contractor's claims against an engineer separately retained by the government for negligent misrepresentation?

ARGUMENT

I. **The Economic Loss Rule Serves The Public Policy Of Maintaining A Boundary Between Contract Law And Tort Law**

The construction industry relies on contracts to allocate risk and responsibility between and among project participants, and on courts to enforce the project participants' bargained-for expectations. "The 'contract' is the foundation of virtually every relationship in the construction industry"⁵:

...when two participants assess the risks involved in their contractual arrangement, they do not necessarily do so in a bilateral vacuum. Their assessments take place in the context of a web of connected

⁵ Smith, Currie & Hancock's Common Sense Construction Law 37 (Neal J. Sweeney et al. eds., 1997).

commercial relationships that should reflect the roles of the multiple project participants. Participants price their services based on the risks they assume, and they know that the pricing and negotiation process requires that each participant have a fair opportunity to assess its costs before agreeing to commercial terms.⁶

All parties to a construction project can evaluate the risks allocated to them; price those risks; negotiate to modify or limit those risks; and pass on the project if agreement cannot be reached on a price to assume those risks.

“[C]onstruction projects are founded in contract law, not tort law, and the contractual legal rules, including bargained-for certainty, should be honored.”⁷

“Contract law is designed to enforce the expectancy interests created by

⁶ Carl J. Circo, Placing the Commercial and Economic Loss Problem in the Construction Industry Context, J. Marshall L. Rev. 39, 101-102 (2007); see also, Jeremiah D. Lambert & Lawrence White, Handbook of Modern Construction Law 63 (1982)(“Construction is an inherently complex process. It requires the coordination of many participants and is largely shaped by the contractual relationships among them.”); see also, BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 72 (Colo. 2004)(“In such a contract chain, the parties do have the opportunity to bargain and define their rights and remedies, or to decline to enter into the contractual relationship if they are not satisfied with it. Even though a subcontractor may not have the opportunity to directly negotiate with the engineer or architect, it has the opportunity to allocate the risks of following specified design plans when it enters into a contract with a party involved in the network of contracts. In this situation, application of the economic loss rule encourages a subcontractor to protect itself from risks, holds the parties to the terms of their bargain, enforces their expectancy interests, and maintains the boundary between contract and tort law.”)

⁷ A. Holt Gwyn, Construction Damages and Remedies, Chapter 9: The Economic Loss Rule, American Bar Association Forum on the Construction Industry (2d ed., 2013); see also, BRW, 99 P.3d at 75 (“[W]hen parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override tort principles”).

agreement between private parties” and “seeks to enforce standards of quality as defined in the contract.”⁸ By contrast, “[t]ort standards are imposed by law without reference to any private agreement” and, as such, economic interests “are not interests that tort law traditionally has protected.”⁹ “This view represents the weight of precedent, and modern courts have affirmed it as a conscious policy decision.”¹⁰

The Economic Loss Rule “maintain[s] the distinction between those claims properly brought under contract theory and those which fall within tort principles,”¹¹ constraining attempts to blur the line between these legal concepts so that “contract law [does not] drown in a sea of tort.”¹² Put another way, “the economic loss rule is a judicial response to what some commentators have characterized as an assault on privity and a cancerlike invasion by torts into the contractual setting.”¹³

⁸ Sidney R. Barrett, Jr., Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C. L. Rev. 891, 901 (1989).

⁹ Barrett, supra, at 901.

¹⁰ Id. at 902; Aguilar v. RP MRP Wash. Harbour, LLC, 98 A.3d 979 (D.C. 2014)(explaining the “majority of jurisdictions that have adopted the economic loss doctrine”).

¹¹ Rissler & McMurry Co. v. Sheridan Area Water Supply, 929 P.2d 1228, 1235 (Wyo. 1996).

¹² East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986)(internal citations omitted).

¹³ A. Holt Gwyn, Chapter 8: Tort Damages, American Bar Association Forum on the Construction Industry (2d ed., 2013) (citing Murray H. Wright & Edward E.

In the construction industry, parties fairly allocate risk by contract:

The parties involved on a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required – owner, architect, engineer, general contractor, subcontractor, materials supplier – and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and defects.¹⁴

Contract law “is well suited to commercial controversies...because parties may set the terms of their own agreements.”¹⁵

Contracts serve “to define the practical and legal responsibilities of the contracting parties (often in cumbersome technical language that itself reflects generations of litigation and judicial precedent), and to shift common-law risks and liabilities in favor of the party with the greater amount of negotiating leverage.”¹⁶

Organizations representing all construction industry participants recognize the

Nicholas, III, The Collision of Tort and Contract in the Construction Industry, 21 U. Rich. L. Rev. 457 (1987)).

¹⁴ Barrett, supra, at 941 (citing Bernard Johnson, Inc. v. Continental Constructors, Inc., 630 S.W.2d 365, 371 (Tex. Civ. App. 1982) and Blake Constr. Co. v. Alley, 233 Va. 31, 35 (1987); see also, Am. Towers Owners Ass’n v. CCI Mech., Inc., 930 P.2d 1182, 1190 (Utah 1996)(“Construction projects are characterized by detailed and comprehensive contracts that form the foundation of the industry’s operations. Contracting parties are free to adjust their respective obligations to satisfy their mutual expectations.”).

¹⁵ East River, 476 U.S. at 873; see also, E. Allan Farnsworth, Contracts, § 1.2 (4th ed. 2004)(“In a market economy, the terms of...direct bilateral exchanges are arrived at voluntarily by the parties themselves through [the] process of bargaining. Each party to an exchange seeks to maximize its own economic advantage on terms tolerable to the other party.”)

¹⁶ Lambert & White, supra, at 27-28.

importance of allocating risk by contract, as evinced by the different contract forms used in the construction industry, including the AIA documents¹⁷, the EJCDC documents¹⁸, and the ConsensusDocs¹⁹.

The organizations which produce these different contract forms may not agree on how risks should be allocated; however, all endorse the importance of using contracts to allocate the risks on a construction project to those best able to manage and control the risk:

¹⁷ “The standard form contracts drafted by the AIA are widely used. One author has stated that the AIA documents are the most widely used standard form contracts in the construction industry.” Coll. of Notre Dame of Md., Inc. v. Morabito Consultants, Inc., 132 Md. App. 158, 174-175 (Md. Ct. Spec. App. 2000)(citations omitted).

¹⁸ The EJCDC documents are published by ACEC, ASCE, and NSPE. “EJCDC has existed since 1975 to develop and update fair and objective standard documents that represent the latest and best thinking in contractual relations between all parties involved in engineering design and construction projects. EJCDC represents a major portion of the professional groups engaged in the practice of providing engineering and construction services for engineer-led constructed projects, and includes the participation of more than 15 other professional engineering design, construction, owner, legal, and risk management organizations.” <http://www.ejcdc.org/> (last visited June 29, 2016).

¹⁹ ConsensusDOCS are “written and endorsed by 27 leading construction organizations,” including groups that represent the interests of general contractors (the Association of General Contractors), owners (Construction Owners Association of America), and subcontractors (American Subcontractors Association). The Consensus Grows as Three More Organizations Endorse ConsensusDOCS – 27 Endorsers to Industry Standard Contracts (Aug. 17, 2010), <https://www.consensusdocs.org/News/ViewArticle?article=three-more-organizations-endorse-consensusdocs-to-bring-coalition-to-27> (last visited June 29, 2016).

- The AIA Documents Committee “strive[s] for balanced and fair documents by...allocating risks and responsibilities to the party best able to control them...”²⁰
- “EJCDC strives to identify, acknowledge, and fairly allocate risks, using a balanced approach that assigns a specific risk to the party best able to manage and control that risk.”²¹
- ConsensusDocs touts that its “contracts and forms are designed to fairly and appropriately allocate risks to the Party in the best position to manage and control the risk.”²²

Each set of contract documents includes limitations, waivers, and disclaimers for various types of risk, and parties routinely negotiate to revise these contract documents to address project-specific risks. None of these documents contemplate the contractor’s assertion of claims against a not-in-privity design professional or purport to establish a “privity equivalent”; rather, most state that there are no third-party beneficiaries to each of the bilateral contracts. In other words, industry standard contract documents do not permit claims absent privity.

²⁰ Documents Committee Mission, <http://www.aia.org/contractdocs/documents-committee/mission/> (last visited June 29, 2016).

²¹ *Commentary on the EJCDC Engineering Services Documents* (2014), http://www.asce.org/uploadedFiles/Publications/Books_and_Standards/Content_Pieces/E-001-2014.pdf (last visited June 29, 2016).

²² ConsensusDocs Guidebook, <http://www.consensusdocs.org/guidebook> (last visited June 29, 2016).

Casting aside contract law in favor of tort law, as advocated by BBII, would undermine the contract as the foundation of the construction industry. BBII's position would allow parties to use tort law to circumvent bargained-for allocation of risk secured during contract negotiations. BBII takes the position that a freely-negotiated contract with an owner, which includes an implied warranty of the sufficiency and adequacy of the design documents furnished by the owner, is insufficient to protect – and does not protect – a contractor's bargained-for expectancy interests; therefore, it should be permitted to pursue tort claims against the design professional, RK&K. If BBII did not adequately price or negotiate the terms of its contract with the City of Baltimore ("City") to protect its economic interests, then BBII has only itself to blame.²³ Contract law is better suited to remedy disappointed economic expectations than tort law.²⁴

²³ BBII does not, and cannot, argue that it lacks a remedy under its contract with the owner to recover the economic loss damages it seeks from RK&K. See discussion of the United States v. Spearin, 248 U.S. 132 (1918), *infra*, Section II.A.2. BBII's reason for pursuing RK&K reflects merely a preference to avoid contracted-for notice provisions and dispute resolution procedures.

²⁴ See, generally, LAN/STV v. Martin K. Eby Constr. Co., 435 S.W.3d 234, 248 (Tex. 2014)(following The American Law Institute's Tentative Draft No. 2 to the Restatement of the Law Third (Draft 2 of Torts: Liability for Economic Harm), which "may be cited as representing the Institute's position until the official text is published," for the proposition that "[w]here contracts might readily have been used to allocate the risk of a loss...a duty to avoid the loss is unlikely to be recognized in tort"); Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 740 (Ind. 2010)(adopting the logic of The American Law Institute to conclude "there is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through

The Economic Loss Rule protects the freedom to allocate economic risk by contract and encourages the party best suited to manage risk to assume, allocate, or insure against that risk by preserving the distinction between tort law and contract law.²⁵ As one court succinctly put it, “[t]he economic loss doctrine helps ensure that contract claims are resolved by contract law.”²⁶ Where parties have the ability to bargain for shifts in risk prior to contracting and where “settled expectations” are critical, contract law principles should override tort law principles as a matter of policy.

II. The Economic Loss Rule Serves The Public Policy Of Preventing Limitless Liability For Commercial Risk.

A. The Web Of Contracts On A Construction Project Establishes Whether There Is Privity, Or A “Privity Equivalent,” Between A Contractor And A Design Professional.

The Economic Loss Rule acts “to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably

a network or chain of contracts”); Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 248 (3d Cir. 2010)(stating “contract law is better suited to resolve disputes between parties where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities with equal bargaining power and that could have been the subject of their negotiations”).

²⁵ 1325 North Van Buren v. T-3 Grp., 16 N.W.2d 822, 831 (Wis. 2006).

²⁶ Dinsmore Instrument Co. v. Bombardier, Inc., 199 F.3d 318, 320 (6th Cir. 1999).

calculable.”²⁷ The privity or “privity equivalent” requirement of the Economic Loss Rule serves a gatekeeper function to avoid limitless liability:

Too many courts eagerly adopt the rationale that interdependence in a construction project creates special relationships that justify a duty of care under tort law. *The fact is that the relationships involved may well be special in an entirely different sense.* The relationships among participants in a construction project often reflect deliberate risk allocation strategies that affect how the participants establish their fees, calculate their costs and profits, and insure and otherwise manage their risk. *Courts should not easily impose on one participant a tort duty to protect another participant from commercial loss. The critical distinction in these cases is not whether the harm is purely economic rather than at least partial; the key question is whether the claim seeks to upset the commercial risk allocation determined by the project’s contractual structure.*²⁸

(Emphasis added.) Unless privity or a “privity equivalent” relationship between a contractor and an engineer is established by contract, the Court should decline to entertain tort claims between the two.

1. Contractors May Negotiate For Privity, Or A “Privity Equivalent,” With The Design Professional Who Prepared The Plans And Specifications.

Allowing tort claims, absent privity or a contract-based “privity equivalent,” would undermine the parties’ bargained-for expectations:

The contractor who is reluctant to look exclusively to the owner's net worth if the design services prove defective or erroneous should not expect a court to reallocate any part of the commercial risk to the design professional. *The contractor could negotiate with the owner for third-party beneficiary status under the design services agreement or*

²⁷ Terracon Consultants W., Inc. v. Mandalay Resort Grp., 206 P.3d 81, 86-87 (Nev. 2009)(citation omitted).

²⁸ Circo, supra, at 110.

*it could propose some other consensual form of direct access against the design professional. This would permit the owner and its design professional to assess and price the proposed risk transfer. As any contractor's attorney knows, this approach would almost invariably lead to discussions about insurance, contractual liability limits, and other risk management techniques. A court viewing the circumstances with hindsight will usually have no basis for guessing how these commercial participants might have resolved the tricky risk allocation issues if the general contractor had elected to put them on the negotiating table.*²⁹

(Emphasis added.) Courts should not “blue pencil” the allocation of risk assumed by a contractor under contract with an owner, as any reallocation would merely be a “guess” as to what the parties would have done “if the general contractor had

²⁹ Circo, supra, at 113-114.

elected to put them on the negotiating table.”³⁰ If a contractor wants the right to pursue claims directly against an engineer, it may bargain for such rights.³¹

³⁰ Maryland courts recognize limited exceptions to the Economic Loss Rule where policy concerns trump a strict application of the Economic Loss Rule. BBII’s primary policy argument seems to be based on perceived expediency:

- “So the contract is still ongoing...and we were working through the contractual process with the city. But that does not preclude us...from pursuing an alternative theory in tort...against the one that actually created the design.” (Trial Hearing Transcript, 12:9-16.)
- “...there is an administrative process on the breach of contract action that we need to work through. It’s going to take time.” (Trial Hearing Transcript, 13:8-10.)
- “We have a contract action that we can pursue with the city, and we have a means to do that. And we have a right to pursue that.” (Trial Hearing Transcript, 17:3-5.)

If perceived expediency of resolution alone were sufficient to circumvent the parties’ bargained-for dispute resolution procedures, there would be no principled basis for establishing the boundary between contract law and tort law – such an exception would swallow the Economic Loss Rule.

³¹ The Court of Special Appeals observed the current trend in the construction industry of creating a direct relationship between the general contractor and engineer:

We recognize the current trend in the construction industry to move away from the traditional design-bid-build project delivery method toward more integrated delivery methods that embrace a direct contractual relationship between the A/E and the contractor. See 1 Bruner & O’Connor Construction Law § 2:12 (2015) (acknowledging the dramatic increase in public use of the design-build project delivery method that “maximizes the cooperative and early involvement of design and construction professionals working together as part of a project team.”); see also Patrick M. Miller, “2011 Construction Review: Design-Build,” 3 Construction Briefings (March 2012) (acknowledging the intensifying debate surrounding design and construction delivery methods and the gaining popularity of “integrated project delivery,” including design-build, which contemplates designers and

Tort law, however, is not intended to serve as a remedy for a contractor's after-the-fact disappointment in the terms and conditions of its bargain with an owner:

Were we to recognize a cause of action under section 552, however, *parties could essentially sidestep contractual duties by bringing a cause of action in tort to recover the very benefits they were unable to obtain in contractual negotiations.* Moreover, we see no principled reason why the application of section 552 would not extend liability beyond contractors and subcontractors to an unlimited number of materialmen and workmen who suffer economic injury as a result of a design professional's alleged negligence, which is precisely the type of situation the economic loss rule was designed to prevent. Therefore, to maintain the fundamental boundary between tort and contract law, we hold that when parties have contracted, as in the construction industry, to protect against economic liability, contract principles override the tort principles enunciated in section 552 of the Restatement (Second) of Torts and, thus, economic losses are not recoverable.³²

constructors working together from the project's conception); see also Sean Devenney and Gregg Bundschuh, "Is the Line Blurring Between General and Professional Liability," 29 ABA Construction Lawyer 15 (Spring 2009) (noting that the "blurred lines between constructor duties and design duties raise significant questions in the construction insurance market given the traditional line between professional liability coverage for designers and commercial general liability for different aspects of work on a construction project.").

Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 226 Md. App. 420, 428, fn. 3 (Md. Ct. Spec. App. 2016).

³² SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc., 28 P.3d 669, 683-684 (Utah 2001); see, also, Rissler, 929 P.2d at 1235 (Wyo. 1996) ("...we will not allow Section 552 to be used as a method to sidestep contractual duties or to provide a scapegoat for self-inflicted damages....We believe that this ruling not only encourages the parties to negotiate the limits of liability in a contractual situation, but it holds the parties to the terms of their agreement.").

(Emphasis added.) The Economic Loss Rule appropriately limits a contractor's rights to the remedies in its contract.³³ As one commentator put it, "[c]ourts evaluating negligent misrepresentation claims in construction industry cases must not allow a project participant to use that doctrine as a subterfuge 'to recover benefits it was unable to obtain in contract negotiations.'"³⁴ Having negotiated a contract with an owner, "the contractor's principal reliance must be on the presentation of the plans by the owner, with whom the contractor is to reach an agreement, not the architect, a contractual stranger."³⁵

BBII does not allege that it negotiated rights as a third-party beneficiary of the contract between the City and RK&K, or any other rights as a "privity equivalent." If BBII did not insist on such protections in its negotiations with the City, then its appeal to this Court is predicated on disappointment in its own failure to seek and/or obtain such contractual protections. This type of legal maneuvering

³³ See William Powers, Jr. & Margaret Niver, Negligence, Breach of Contract, and the "Economic Loss" Rule, 23 TEX. TECH L. REV. 477, 481 (1992)(quoted favorably in LAN/STV, 435 S.W.3d at 239 (Tex. 2014) related to policy reasons enforcement of the Economic Loss Rule).

³⁴ Circo, supra, at 114-115 (quoting Nat'l. Steel Erection v. J.A. Jones Constr. Co., 899 F. Supp. 268, 274 (N.D. W. Va. 1995)("The parties involved in a construction project resort to contracts and contract law to protect their economic expectations. Their respective rights and duties are defined by the various contracts they enter. Protection against economic losses caused by another's failure to properly perform is but one provision the contractor may require in striking his bargain. Any duty on the architect is purely a creature of contract.")).

³⁵ LAN/STV, 435 S.W.3d at 247 (Tex. 2014).

renders worthless the contracts the parties have signed between and among themselves, including provisions which may limit their respective liability. The Economic Loss Rule has been applied in the construction industry to prevent exactly this type of attack on the freedom to contract.

BBII takes the position that its contract does not “fully” allocate risks between the parties³⁶ to pursue claims against a not-in-privity engineer. BBII’s argument that a contractor should be permitted to pursue negligent misrepresentation claims directly against a design professional (in the absence of privity) would impair “the ‘right of the parties to make their own bargain as to economic risk’.”³⁷

³⁶ Sweeney, et al., supra, at 47.

³⁷ Barrett, supra, at 941 (quoting Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. 1978), overruled on other grounds). For a discussion on Maryland law, see Calomiris v. Woods, 353 Md. 425, 445 (Md. 1999)(citations omitted):

It is a fundamental principle of contract law that it is “improper for the court to rewrite the terms of a contract, or draw a new contract for the parties, when the terms thereof are clear and unambiguous, simply to avoid hardships.” Contracts play a critical role in allocating the risks and benefits of our economy, and courts generally should not disturb an unambiguous allocation of those risks in order to avoid adverse consequences for one party. In the absence of fraud, duress, mistake, or some countervailing public policy, courts should enforce the terms of unambiguous written contracts without regard to the consequences of that enforcement.

2. Design Professionals Are Permitted To Limit Their Liability For Economic Damages By Contract And To Rely On Maryland Courts To Enforce Those Limitations.

Contract law allows parties to limit their liability to avoid unending and uncertain liability for economic loss. Under BBII's aspirational view of what Maryland law should be,³⁸ a design professional – *unlike all other participants on a construction project* – should not be permitted to allocate risk by contract to guard against purely economic damages.³⁹ Instead, BBII envisions a judicial system in

³⁸ BBII acknowledges that no Maryland court has ever permitted a general contractor to pursue negligent misrepresentation claims against a not-in-privity design professional. (Brief of Petitioner, p. 6.) BBII's reliance on Walpert, Smullian & Blumenthal, P.A. v. Katz, 361 Md. 645 (Md. 2000) and 100 Inv. Ltd. P'ship v. Columbia Town Center Title Co., 430 Md. 197 (Md. 2013) are misplaced for two reasons. First, unlike the professionals in Walpert and 100 Investments, a design professional's specific duties on a construction project arise by contract; therefore, any "privity equivalent" would have to be established by the parties' web of contracts. Second, as discussed above, the construction industry is unique in participants' ability to fairly and equitably allocate risk by contract.

³⁹ "The Pennsylvania Supreme Court expressly limited its holding in Bilt-Rite to apply to design professionals, and did not include generic manufacturers, even those involved in sophisticated work." Integrity Carpet Cleaning, Inc. v. Bullen Cos., 2011 U.S. Dist. LEXIS 806, *14 (E.D. Pa. Jan. 5, 2011)(applying Bilt-Rite exception narrowly to design professionals). While Pennsylvania courts have been burdened with cases brought by plaintiffs seeking to expand the application of the Bilt-Rite decision to non-design professionals, those claims have been rejected. Excavation Techs., Inc. v. Columbia Gas Co., 604 Pa. 50, 53 (Pa. 2009)(rejecting negligent misrepresentation claims against non-professionals in the absence of privity); Am. Stores Props., Inc. v. Spotts, Inc., 648 F. Supp. 2d 707, 717 (E.D. Pa. 2009); Teledyne Techs. Inc. v. Universal Stainless & Alloy Prods., 2006 Pa. Dist. & Cnty. Dec. LEXIS 568 (Pa. County Ct. 2006); E.J. DeSeta, Inc. v. Goldner/accord Ballpark, L.P., 2006 Phila. Ct. Com. Pl. LEXIS 4 (Pa. C.P. 2006); Samuel Grossi & Sons v. United States Fid. & Guar. Co., 2005 Phila. Ct. Com. Pl. LEXIS 283 (Pa. C.P. 2005). In Pennsylvania, it is only design professionals who are unable to limit their liability for economic loss damages.

which a design professional should be exposed to tort claims for economic loss damages asserted by the virtually limitless number of contractors, subcontractors, workers, and suppliers (not to mention similar claims by prospective contractors, subcontractors, workers, and suppliers who rely on plans and specifications in the preparation of an unsuccessful bid to perform work on the project).⁴⁰ A majority of other courts have rejected similar pleas to expand the liability of design professionals for economic loss damages.⁴¹ The liability of design professionals

⁴⁰ Martha Crandall Coleman, Liability of Design Professionals for Negligent Design and Project Management, 33 Tort & Ins. L.J. 923, 936-37 (1998) (“...if a duty of care to plaintiffs is imposed on defendant [design professional] in the absence of privity, defendant [design professional] could be exposed to liability to an unlimited number of persons” (quoting Fleischer v. Hellmuth, Obata & Kassabaum, 870 S.W.2d 832, 837 (Mo. Ct. App. 1993))).

⁴¹ BRW, 99 P.3d 66 (Colo. 2004); City Express, Inc. v. Express Partners, 959 P.2d 836 (Haw. 1998); Indianapolis-Marion County Pub. Library, 929 N.E.2d 722 (Ind. 2010); Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Ass'n, 54 Ohio St. 3d 1, 3 (Ohio 1990); Terracon, 125 Nev. 66 (Nev. 2009); LAN/STV, 435 S.W.3d 234 (Tex. 2014); SME Indus., 28 P.3d 669 (Utah 2001); Blake Constr. Co., 233 Va. 31 (Va. 1987); Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist., 124 Wn.2d 816 (Wash. 1994); Excel Constr., Inc. v. HKM Eng'g, Inc., 2010 WY 34, 228 P.3d 40 (Wyo. 2010). BBI asserts that “[m]ost states hold that a design professional, like any other professionals, owes a duty to those who the designer knows will reasonably rely upon the services the designer provides,” citing Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc., 110 So. 3d 399, (Fla. 2013) for this proposition. (Brief of Petitioner, p. 26.) Tiara Condo does not consider, much less address, the position of “most states.” To the contrary, instead of identifying any principled basis for permitting a negligent misrepresentation exception to the Economic Loss Rule, the Supreme Court of Florida – ruling in a case in which there was privity between the plaintiff and defendant – simply abandoned entirely its previous application of the Economic Loss Rule to the construction industry.

would extend far beyond the terms of the contracts they negotiated if not-in-privity contractors were allowed to pursue tort claims against them.

The ramifications of a negligent misrepresentation exception to the Economic Loss Rule may also have unintended consequences. Under the Spearin doctrine, an owner impliedly warrants the sufficiency and adequacy of the plans and specifications the owner provides to the general contractor.⁴² As any owner of a complex construction project knows, the general contractor will retain subcontractors to build the project. Such subcontractors generally cannot invoke Spearin in a tort action for purely economic damages directly against the owner due to the lack of privity between the subcontractor and the owner. If privity is not required in an action for negligent misrepresentation, however, then Maryland subcontractors could seek to rely on the implied Spearin warranty in a claim directly against the owner, including in claims against the government on public projects. In such a situation, the specifically bargained-for allocation of risk and responsibility would be ignored – including any limitations that may exist in the contractual chain of privity – in favor of generic tort law principles. Application of the Economic Loss Rule avoids the risk of unintended, and virtually limitless, liability for economic loss damages.

⁴² Spearin, 248 U.S. 132 (applied in Maryland in Reinhardt Constr. Co. v. Mayor and City Council of Balt., 157 Md. 420 (Md. 1929), Hummaker v. Schleigh, 157 Md. 652 (Md. 1929), and Dewey-Jordan, Inc. v. Md.-Nat'l. Capital Park and Planning Comm'n., 258 Md. 490 (Md. 1970)).

B. The Construction Industry Relies On Contract Law To Avoid Increased Public Procurement Costs.

Courts recognize that, when parties who contract directly with the government are exposed to third-party liability for economic loss damages, the cost of assuming that risk will be passed on to the government in the form of increased procurement costs: “The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.”⁴³ If the Court were to adopt a negligent misrepresentation exception to Maryland’s Economic Loss Rule, the cost of design professionals’ exposure to not-in-privity contractors will be passed on to the State, and citizens of Maryland, in the form of increased fees.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Special Appeals. If the decision of the Court of Special Appeals is reversed, great harm, unnecessary added expense, and uncertainty would befall the construction industry in Maryland.

⁴³ Boyle v. United Techs. Corp., 487 U.S. 500, 507 (U.S. 1988); see, also, Columbia Venture, LLC v. Dewberry & Davis, LLC, 604 F.3d 824, 831 (4th Cir. 2010)(considering the economic impact associated with permitting a third-party claim for economic loss damages brought against a design professional hired by the government).