IF YOU DON'T KNOW WHERE YOU'RE GOING, YOU'LL END UP SOMEWHERE ELSE: APPLICABILITY OF COMPARATIVE FAULT PRINCIPLES IN PURELY ECONOMIC LOSS CASES

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TABLE OF CONTENTS

I. INTRODUCTION

The economic loss doctrine generally provides that tort recovery in negligence actions is precluded when the damages are limited to pecuniary harm.[1] Courts have applied this rule with regularity in strict liability cases, defining such a loss as one resulting from a product failure without personal injury or damage to other property.[2] More recently, many courts have considered whether the economic loss doctrine applies in professional liability cases, construction litigation, and other tort suits in which the losses are purely economic.[3] The judicial decisions reflect an evolving

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1. Emily M. Usow, *Redefining the Professional Service Contract: The Evolution and Deconstruction of Florida's Economic Loss Rule*, 8 U. MIAMI BUS. L. REV. 1, 1 (1999).

2. *See infra* notes 9-15 and accompanying text.

3. *See infra* notes 25-86 and accompanying text.

body of law seeking to balance a party's right to pursue complete compensation for injuries with the potential of unlimited liability for financial losses.

Similarly, nearly every jurisdiction in the United States has adopted some form of comparative fault, either through judicial acceptance or legislative mandate, in an attempt to ameliorate the effects of contributory negligence as a complete bar to recovery.[4] However, unlike the economic loss rule, courts most often apply comparative fault principles in claims for damages based upon personal injuries, wrongful death, or harm to property.[5] Although the commissioners who drafted the Uniform Comparative Fault Act (UCFA)[6] did not articulate a specific position with respect to purely economic losses, their comments suggest that comparative fault may not apply when the only injury sustained is financial.[7] At least one state legislature and some courts, on the other hand, have addressed whether comparative fault or contributory negligence apply in economic loss cases.[8]

Part II of this Article first considers the modern cases reflecting judicial scrutiny of the economic loss doctrine. Part III then closely examines the applicability of comparative fault principles in various economic loss cases. Part IV concludes that the pecuniary loss cases not barred by the economic loss rule should also be considered under the applicable state law provisions for comparative or contributory fault. Neither the type of damages sought nor the status of the parties should preclude appropriate application of comparative or contributory fault principles when the evidence supports it. Rather, underlying fault issues should guide the courts in determining whether claims are barred or recoveries may be limited.

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4. *See infra* notes 97-103 and accompanying text.

5. *See* discussion *infra* Part II.

6. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 123 (1977). Although the UCFA sets forth well-recognized principles, only two states have adopted it as their own. *Id.*; *see also* IOWA CODE §§ 668.1-.16 (2001); WASH. REV. CODE. ANN. § 4.22.005-.925 (West 1988).

7. UNIF. COMPARATIVE FAULT ACT § 1, commissioner's cmt., 12 U.L.A. 127 (1977).

> [The UCFA] does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation from defamation. But failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.

Id.

8. *See* KAN. STAT. ANN. § 60-258a (1994) (addressing contributory negligence in economic loss cases); Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 351 (Ariz. Ct. App. 1996) (considering whether comparative fault applies to cases of economic loss); Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d 212, 225 (Conn. 1995) (considering whether comparative negligence applies to cases of economic loss).

II. THE ECONOMIC LOSS DOCTRINE

Financial losses may arise in any number of settings, including breach of contract, breach of warranty, negligence, breach of fiduciary duty, products and strict liability, intentional torts, and statutorily prescribed causes of action. Most often the harm will include out-of-pocket losses, costs of repairs, loss of the benefit of the bargain, lost profits, or lost business revenues.[9]

Courts generally have rejected strict liability for defective products when the only loss is economic.[10] For example, in *Koss Construction v. Caterpillar, Inc.*,[11] the plaintiff alleged damage to a piece of construction machinery when it caught fire, purportedly due to defective hydraulic hoses.[12] In affirming the order granting the

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9. *See* Elite Prof'ls, Inc. v. Carrier Corp., 827 P.2d 1195, 1202 (Kan. Ct. App. 1992) (explaining that economic loss refers to damages for inadequate value, costs of repair, replacement of the defective product, or consequent loss of profits); Gus' Catering, Inc. v. Menusoft Sys., 762 A.2d 804, 807-08 (Vt. 2000) (stating that loss of profits, customers, and time are economic losses); R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1793-94 (2000) (stating direct economic loss "is the difference between the value of the contract or product as promised, and the actual value as delivered" and can be measured by out-of-pocket loss, repair costs, and loss of the benefit of the bargain); Kelly M. Hnatt, Note, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181, 1187-88 (1988) (noting economic loss includes consequential economic loss, loss of expected proceeds, lost opportunities, and damages paid to the third parties).

10. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986) ("[A] manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself."); Long Mfg., N.C., Inc. v. Grady Tractor Co., 231 S.E.2d 105, 108 (Ga. Ct. App. 1976) (concluding strict liability in tort cannot be had solely for property damage to defective product); Koss Constr. v. Caterpillar, Inc., 960 P.2d 255, 260 (Kan. Ct. App. 1998) (stating a corporate purchaser cannot recover for breach of the implied warranty of merchantability against a computer manufacturer); Elite Prof'ls, Inc. v. Carrier Corp., 827 P.2d at 1202 (barring recovery because Elite was not making a claim for economic loss; rather it was seeking recovery for harm to property other than the refrigerator unit itself); Sharp Bros. Contracting Co. v. Am. Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo. 1986) (en banc) (denying recovery in strict liability where the only damage was to the crane); *see also* Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111, 118-21 (Supp. 1998) (discussing controversy over whether economic loss can be recovered in a strict liability action); Jay M. Feinman, *Economic Negligence Actions: A Remedy for Third Parties*, 32 TRIAL, June 1996, at 50, 50 (discussing possible claims based on negligence when the only loss is economic); W. Dudley McCarter, *Economic Loss Doctrine: Is Privity Required?*, 53 J. MO. B. Jan.-Feb. 1997, at 23, 23-25 (discussing the economic loss rule in Missouri); Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. MICH. J.L. REFORM 403, 420 (1999) (discussing the history and development of the economic loss doctrine). *But see* Pratt & Whitney Can., Inc. v. Sheehan, 852 P.2d 1173, 1181 (Alaska 1993) (adopting strict liability for defective products because strict liability would "insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than the injured persons who are powerless to protect themselves.").

11. Koss Constr. v. Caterpillar, Inc., 960 P.2d 255 (Kan. Ct. App. 1998).

12. *Id.* at 256.

defendant's motion for judgment on the pleadings, the court held a plaintiff could not sue for negligence or strict liability when the only loss consisted of damage to the product itself.[13] The court also disagreed with the plaintiff's argument that because the defective product was a hydraulic hose and the plaintiff was seeking damages for other parts of the machine, the plaintiff was claiming damages for "other property" and was therefore outside the rule.[14] The court concluded that damage to other property was not meant to include the circumstance in which a defective component part caused damage to another part in the same product.[15]

The economic loss doctrine has not been limited to product liability suits. A number of concerns expressed by courts and commentators have given rise to more widespread application of the economic loss rule.[16] One argument for its use is that the economic loss rule prevents the tortfeasor from exposure to limitless liability for economic loss.[17] Another justification is that parties to an agreement are expected to

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13. *Id.* at 260.

14. *Id.*

15. *Id.* (citing East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. at 867). In *Kristek v. Catron*, the Kansas Court of Appeals held that a defective part of a building can cause damage to "other property" cognizable in tort. Kristek v. Catron, 644 P.2d 480, 483 (Kan. Ct. App. 1982). *But see* Dakota Gasification Co. v. Pascoe Bldg. Sys., 91 F.3d 1094, 1101 (8th Cir. 1996) (predicting that, under North Dakota law, the economic loss doctrine precludes tort liability for damage to other nearby property where the risk is foreseeable); Calloway v. City of Reno, 993 P.2d 1259, 1268-69 (Nev. 2000) (holding that a building defect causing damage to another part of the building results in economic loss only).

16. *See generally* Daniel M. Bachi & Bard D. Rockenbach, *The Practical Limitations of the Economic Loss Rule*, 69 FLA. B.J., Nov. 1995, at 89 (stating that the economic loss rule has been extended "to preclude recovery of economic losses sustained as a result of the performance of contractual services, and to such losses sustained as a result of intentional acts unrelated to a contractual relationship"); Amanda K. Esquibel, *The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter than the Morals of the Market Place?*, 42 VILL. L. REV. 789, 793-94 (1997) (noting the economic loss rule has spread outside the area of products liability and into other areas of tort law, including fraud, tortious interference, defamation, conversion, and breach of fiduciary duty); Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J., Nov. 1995, at 34 (noting that the economic loss doctrine has been extended to actions for negligence, fraud, punitive damages, conversion, civil theft, and breach of fiduciary duty); Barton, *supra* note 9, at 1798-1802 (stating that the current trend is to expand the economic loss rule to apply in other contexts such as real property transactions); Jacquelyn K. Brunmeier, Note, *Death By Footnote: The Life and Times of Minnesota's Economic Loss Doctrine*, 19 WM. MITCHELL L. REV. 871 (1993) (discussing expansion and limitations of the economic loss doctrine); James G. Dodrill, II, Note, Interstate Securities Corp. v. Hayes Corp.*: Should the Economic Loss Doctrine Apply to Actions Against Fiduciaries?*, 47 U. MIAMI L. REV. 1193 (1993) (discussing the propriety of extending the economic loss doctrine to actions involving fiduciary relationships); Hnatt, *supra* note 9, at 1190-94 (advocating recovery for economic loss because the negligent defendant should be responsible for all foreseeable consequences of that negligence).

17. *See* Esquibel, *supra* note 16, at 794; Hnatt, *supra* note 9, at 1190-91; *see also* Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832, 834 (Mo. Ct. App. 1993) (holding that any extension of economic loss should be done on a case-by-case basis because of possible excessive and

protect themselves through contract negotiations.[18] Tort liability would tend to burden the parties entering into a contract with obligations to others not voluntarily assumed.[19]

With these and other reasons for implementing the economic loss doctrine, the rule has now evolved in many jurisdictions and in numerous areas of law to prohibit a plaintiff from recovery in a non-contractual setting—for example, tort, when there is no personal injury or harm to real or personal property.[20] Although courts have held the economic loss rule does not apply in intentional tort cases[21] or statutory claims,[22]

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unlimited liability); Calloway v. City of Reno, 993 P.2d at 1263 n.2, 1266 (Nev. 2000) (permitting plaintiffs to recover in tort because purely economic losses would result in open-ended liability, making it nearly impossible to predict all potential economic consequences of a given act).

18. All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865-66 (7th Cir. 1999); Gail Frances, Inc. v. Alaska Diesel Elec., Inc., 62 F. Supp. 2d 511, 517-18 (D.R.I. 1999); American Towers Owners Assoc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1190 (Utah 1996); *see also* Esquibel, *supra* note 16, at 793; Hnatt, *supra* note 9, at 1194.

In *Calloway v. City of Reno*, the Nevada Supreme Court distinguished contract law from tort law by stating:

> Contract law is designed to enforce the expectancy interests created by agreement between the parties and seeks to enforce standards of *quality*. . . . In contrast, tort law is designed to secure the protection of all citizens from the danger of physical harm to their persons or to their property and seeks to enforce standards of *conduct*.

Calloway v. City of Reno, 993 P.2d at 1265 (emphasis in original).

19. *See, e.g.*, Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d at 834 (denying liability for third party negligent performance of a contract because such liability would restrict the right to make contracts by burdening the contractual parties with obligations and liabilities they would not voluntarily assume).

20. *See, e.g.*, AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083 (8th Cir. 1998) (utilizing the economic loss rule to bar a fraud claim).

21. *See, e.g.*, Voyles v. Sandia Mortgage Corp., 724 N.E.2d 1276, 1284 (Ill. App. Ct. 2000) (holding that economic loss doctrine does not bar a claim of tortious interference). *But see* AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d at 1086-87 (concluding that Minnesota's economic loss rule would bar a fraud claim that is not based upon misrepresentation outside of, or collateral to, the parties' agreement). After the *AKA* decision, the Minnesota legislature enacted a statute providing that the economic loss rule does not bar claims for intentional misrepresentation. MINN. STAT. ANN. § 604.10(e) (West 2000); *see also* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 34 F. Supp. 2d 738, 743 (D. Minn. 1999) (citing MINN. STAT. § 604.10(e) (1998)); Suneel Arora, *Fraud and Negligent Misrepresentation Claims Under Minnesota's Economic Loss Doctrine After* AKA Distrib. Co. v. Whirlpool Corp., *137 F.3d 1083 (8th Cir. 1998) and the 1998 Legislative Amendments for Marvin Windows*, 25 WM. MITCHELL L. REV. 1501, 1533-43 (1999) (concluding the economic loss rule does not foreclose claims for fraud and misrepresentation because such claims are independent of any contract claim); Benjamin England, Comment, *Fraud, Freedom, and Fundamental Fairness: Getting Beyond the Economic Loss Rule*, 53 U. MIAMI L. REV. 505, 522 (1999) (declaring that a claim for a fraudulent inducement, although arising out of the same subject matter as a claim for liquidated damages, can proceed because a remedy in tort will not adversely affect either cause of action); Frank Nussbaum, *The Economic Loss Rule and Intentional Torts: A Shield or Sword?*, 8 ST. THOMAS L. REV. 473, 474 (1996) (suggesting courts should not alter or abolish causes of action for intentional torts by application of the economic loss doctrine unless there is a reasonable substitution for the tort

many other tort claims involving non-medical professional negligence give rise to only economic losses.[23] Similarly, claims for misrepresentation often involve loss of the benefit of a negotiated bargain.[24] Should economic loss rules preclude an injured party from obtaining tort relief simply because an agreement with the wrongdoer does or does not exist?

A. *Construction Litigation and Related Areas*

There has been substantial litigation concerning the economic loss rule in construction cases.[25] Courts have applied the economic loss doctrine to preclude recovery for financial losses involving construction projects, although no bright line has been established.[26] In a recent case from the State of Nevada, the state supreme

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action); Steven C. Tourek et al., *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875, 935-38 (1999) (stating causes of action for common law misrepresentation and fraud arising out of contract claims should not be barred or limited by the economic loss doctrine because this limitation is contrary to public policy and the provisions of the UCC); Barton, *supra* note 9, at 1802-12.

22. Comptech Int'l., Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219, 1221 (Fla. 1999) (holding that the economic loss rule does not eliminate a statutory cause of action); *see generally* Raymond W. Valori, *Continued Revision of the Economic Loss Rule: Statutory Causes of Action Not Barred*, Comptech International, Inc. v. Milam Commerce Park, Ltd., 74 FLA. B.J., Apr. 2000, at 81 (discussing *Comptech* and the implications of products liability, contract, and economic loss doctrines on statutory claims).

23. *See, e.g.*, Steiner Corp. v. Johnson & Higgins, 196 F.R.D. 653, 658 (D. Utah 2000) (holding that the economic loss rule does not shield actuaries from liability); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 711 N.Y.S.2d 391 (App. Div. 2000) (addressing a negligence case involving solely economic losses).

24. *See, e.g.*, GMH Assocs., Inc. v. Prudential Realty Group, 752 A.2d 889 (Pa. Super. Ct. 2000) (considering a fraud case in which damages consisted of loss of the benefit of the bargain).

25. *See* F. Malcolm Cunningham, Jr. & Amy L. Fisher, *The Economic Loss Rule: Deconstructing the Mixed Metaphor in Construction Cases*, 33 TORT & INS. L.J. 147, 148-49 (1997) (recognizing the futility in attempting to accurately define trends in the rule's application, as applying the rule is often dependent upon jurisdictional case law and subtle fact distinctions unique to the parties' litigation).

26. *See* Miller v. Big River Concrete, 14 S.W.3d 129, 132 (Mo. Ct. App. 2000) (holding plaintiffs could recover for economic loss because the defendant owed them a duty of care which established liability); Korte Constr. Co. v. Deaconess Manor Ass'n, 927 S.W.2d 395, 404-05 (Mo. Ct. App. 1996) (finding where the only damage complained of is economic loss, an action *ex contractu* affords the plaintiff complete relief, and a coterminous negligence action does not lie); Bus. Men's Assurance Co. of Am. v. Graham, 891 S.W.2d 438, 454 (Mo. Ct. App. 1994) (distinguishing claims involving common law duty of care as not precluded by economic loss doctrine); Fleischer v. Hellmuth, Obata & Kassabaum Inc., 870 S.W.2d 832, 837 (Mo. Ct. App. 1993) (stating that because no negligence was found against defendant and because there was no contractual duty of care, there is no protection against economic losses); Grgic v. Cochran, 689 S.W.2d 687, 690 (Mo. Ct. App. 1985) (precluding claims of defective construction from recovery because no claim lies under tort law); *see also* Rousseau v. K.N. Constr., Inc., 727 A.2d 190, 193 (R.I. 1999) (holding "when a cause of action

court discussed the application of the economic loss doctrine in a lawsuit brought by townhome owners against a real estate developer, contractor, subcontractors, and the city.[27] This class action lawsuit arose from alleged defects in a townhouse development in Reno, Nevada.[28] The plaintiffs complained "that their homes were built with defective roofing and siding that was responsible for extensive water damage from rain and snow."[29] The claims included breach of express and implied warranties, negligence, strict liability, fraud, and misrepresentation.[30] After some of the defendants settled, the district court granted the remaining defendants summary judgment.[31] On appeal, the Nevada Supreme Court upheld application of the economic loss doctrine since the defective construction created only economic loss.[32] Refusing to apply a foreseeability exception, the court stated that "foreseeability of damages plays no role with respect to the economic loss doctrine. Purely economic

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arises under a contract and a consumer lacks privity of contract with the offending party, an action in tort remains available, even if the damages are purely economic"); John Martin Co. v. Morse/Diesel Inc., 819 S.W.2d 428, 434-35 nn.1-3 (Tenn. 1991) (citing case law determining that economic losses cannot be recovered in tort absent privity of contract). There is also a substantial amount of commentary on the application of the economic loss doctrine in construction cases. *See, e.g.*, Sidney Barrett, *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891 (1989) (stating economic loss doctrine sufficiently protects the parties' interest because of builders' ability to protect themselves in the contracting process); Cunningham & Fisher, *supra* note 25, at 156-66; Constance Fain, *Architect and Engineer Liability*, 35 WASHBURN L.J. 32, 37-38 (1995) (finding no redress for construction contractors for economic harm caused by negligence or based on the lack of privity between the parties); Hnatt, *supra* note 9, at 1190 (finding a plaintiff who was engaged in commercial printing could not recover against a negligent contractor whose excavation disconnected the power supply upon which the plaintiff's presses relied); W. Dudley McCarter, *The Economic Loss Rule in Construction Litigation*, 18 CONSTRUCTION LAW 21 (July 1998) (contrasting the argument made by opponents of the economic loss doctrine, who believe a party should not be immune from claims of third parties so long as the claim is foreseeable, with the argument made by the doctrine's proponents, who contend contracting parties should not be exposed to potential claims by an indeterminate number of third parties that are unknown to, and have no privity with, the contracting parties); H. Hugh McConnell, *The "Other Property" Problem–Applying the Economic Loss Rule to Construction Contracting Claims*, 74 FLA. B.J., June 2000, at 87 (discussing the importance of distinguishing between existing structures and structures to be changed under the contract, and permitting a remedy in tort only for existing structures); Matthew Steffey, *Negligence, Contract and Architects' Liability for Economic Loss*, 82 KY. L.J. 659 (1993/1994) (discussing whether an architect should be liable when her mistakes increase a contractor's cost of construction); Michael Terwilliger, *Economic Loss in the Construction Context: Should Architects be Liable for the Commercial Expectations of Contractors?*, 31 VAL. U. L. REV. 257, 269-77 (1996) (dividing economic loss doctrine as a defense to third party actions into three groups: (1) where the party has privity of contract, (2) only as contract recovery, and (3) based on tort theory of foreseeability.)

27. Calloway v. City of Reno, 993 P.2d 1259, 1262 (Nev. 2000).
28. *Id.* at 1261.
29. *Id.* at 1261-62.
30. *Id.* at 1262.
31. *Id.*
32. *Id.* at 1269.

losses fall outside the purview of tort recovery, even if such losses are foreseeable. . . . [T]he doctrine's application turns on the type of damages at issue, and the policies underlying recovery in tort and contract."[33]

On the other hand, in *Moransais v. Heathman*,[34] the Florida Supreme Court counteracted a trend in the lower Florida courts of applying the economic loss doctrine in numerous circumstances to preclude tort recovery.[35] In *Moransais*, a homeowner brought a professional negligence action against engineers who inspected the house before purchase, alleging that they had failed to detect and disclose certain defects in the home's condition.[36] The trial court dismissed the claims against the engineers, relying upon a Florida intermediate appellate court decision holding the economic loss rule barred a tort action against an architect.[37] The intermediate appellate court affirmed the trial court as having applied Florida law correctly.[38]

The Florida Supreme Court began its analysis by recognizing that professionals, such as engineers, have a duty to perform requested services in accordance with an appropriate standard of care used by similar professionals in the community.[39] Finding engineers to be professionals within the meaning of Florida law, the court stated that they may be held liable if they were negligent in the performance of their services.[40] Thus, a common law theory of negligence could be asserted against the engineers for professional services.[41] Further, the court held the economic loss rule would not bar the plaintiffs' claims despite the fact there were no personal injuries or property damage, other than the defects in the home.[42] Acknowledging that its past decisions were not clear, the court recognized that applications of the economic loss rule by trial and appellate courts have gone beyond the supreme court's "original intent" espoused in *Florida Power & Light v. Westinghouse Electric Corp.*, Florida's seminal case on the applicability of the economic loss rule.[43] Although its reasoning in *Florida Power & Light* was still

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33. *Id.* at 1270. *But see* Hnatt, *supra* note 9, at 1204-06, 1209 (discussing foreseeability as a workable standard courts should apply in economic loss cases).

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

35. *Id.* at 983-84 (concluding that the economic loss rule does not preclude a negligence cause of action against a professional even though the damages are purely economic in nature); *see also* England, *supra* note 21, at 507 (citing Florida courts' use of the economic loss rule to preclude tort liability for negligence, fraud, conversion, civil theft, Florida RICO, and breach of fiduciary duty).

36. Moransais v. Heathman, 744 So. 2d at 974-75.

37. *Id.* at 975 (citing Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349 (Fla. Dist. Ct. App. 1992)).

38. *Id.* at 975.

39. *Id.* at 975-76.

40. *Id.* at 976.

41. *See id.* at 979.

42. *Id.* at 983-84.

43. *Id.* at 980; *see* Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987).

sound, the supreme court recognized its language in the opinion may have been "unnecessarily overexpansive" with respect to the economic loss rule.[44] The court stated:

> Today, we again emphasize that by recognizing that the economic loss rule may have some genuine, but limited, value in our damages law, we never intended to bar well-established common law causes of action, such as those for neglect in providing professional services. Rather, the rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis. . . . The rule, in any case, should not be invoked to bar well-established causes of action in tort, such as professional malpractice.[45]

Some cases appear to draw a line of distinction between those persons who hold professional licenses—engineers, architects and the like—and those persons who are builders, contractors, or subcontractors, who, although they may possess a wealth of experience, may not be held to the same professional standards as others.[46] Thus, the economic loss doctrine may result in tort claims barred against builders, contractors, and subcontractors, but not licensed professionals.[47]

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44. *See id.* at 981.

45. *Id.* at 983; *see also* Stone's Throw Condo. Ass'n. v. Sand Cove Apartments, Inc., 749 So. 2d 520, 522-23 (Fla. Dist. Ct. App. 1999) (remanding the case to the trial court to determine whether a special relationship existed to support a cause of action based upon negligence); Monroe v. Sarasota County Sch. Bd., 746 So. 2d 530, 539 (Fla. Dist. Ct. App. 1999) (holding that teachers/administrators are professionals as defined in *Moransais* but declining to expand traditional negligence law to allow recovery for economic injuries caused by their negligence).

46. *Compare* Moransais v. Heathman, 744 So. 2d at 973 (allowing recovery against an engineer for professional malpractice), *with* Redarowicz v. Ohlendorf, 441 N.E.2d 324 (Ill. 1982) (barring a homeowner's recovery against a builder).

47. *See* Tolan and Son, Inc. v. KLLM Architects, Inc., 719 N.E.2d 288, 291 (Ill. App. Ct. 1999) (holding architects and soil engineer were hired to build a structure, not provide information, so the economic loss doctrine barred claim against them); Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832, 837 (Mo. Ct. App. 1993) (holding architect owes no tort duty to construction manager). *Compare* Redarowicz v. Ohlendorf, 441 N.E.2d at 326 (holding the economic loss rule barred homeowner's recovery in tort from builder), Korte Constr. Co. v. Deaconess Manor Ass'n, 927 S.W.2d 395, 404-05 (Mo. Ct. App. 1996) (holding a contractor cannot be liable for professional negligence when the only damages complained of were economic), *and* Calloway v. City of Reno, 993 P.2d 1259, 1270 (Nev. 2000) (upholding district court's application of the economic loss rule to preclude a negligence claim against construction subcontractor), *with* Moransais v. Heathman, 744 So. 2d at 979 (limiting use of the economic loss rule and allowing recovery for professional malpractice against engineers), 2314 Lincoln Park West Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 352-53 (Ill. 1990) (holding plaintiff could not recover economic loss from architect in negligence cause of action), Miller v. Big River Concrete, 14 S.W.3d 129, 134 (Mo. Ct. App. 2000) (extending liability for economic loss to civil engineer because injury was foreseeable), Bus. Man's Assurance Co. of Am. v. Graham, 891 S.W.2d 438, 454 (Mo. Ct. App. 1994) (holding building owner

B. *Negligent Misrepresentation*

Many courts have also adopted the tort of negligent misrepresentation which permits economic loss recovery.[48] Oftentimes, these misrepresentation claims are based upon a party's failed expectations with respect to a transaction.[49] Analogous to an intentional fraud claim in a negligent misrepresentation case, the plaintiff must prove:

> (1) the defendant supplied information in the course of its business or because of some other pecuniary interest; (2) because of a failure by the defendant to exercise reasonable care or competence, the information was false; (3) the information was intentionally provided by defendant for the guidance of a limited group, including plaintiff, in a particular business transaction; and (4) in relying on the information, plaintiff suffered a pecuniary loss.[50]

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could recover damages for economic loss from architect), *and* Rousseau v. K.N. Constr., Inc., 727 A.2d 190, 193 (R.I. 1999) (concluding the economic loss doctrine is not applicable to consumer transactions with commercial entities).

48. *See, e.g.*, Aztlan Lodge No. 1, Free & Accepted Masons of Prescott v. Ruffner, 745 P.2d 611, 612 (Ariz. Ct. App. 1987) (holding plaintiffs' belief that they could freely sell their property, despite a valid counter-offer, fell under the theory of negligent misrepresentation based on broker's advice that a counter offer was not binding until the escrow had closed); Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d 230, 236 (Colo. 1995) (indicating liability for negligent misrepresentation may attach to an attorney stating opinions on client's behalf that contain material misstatements of fact in order to persuade a third party to buy municipal notes or bonds); Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d 212, 220, 222 (Conn. 1995) (holding that no special relationship is required in a claim of negligent misrepresentation, although reliance on misstatements must be alleged and proven as justified or reasonable); Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 337 (Fla. 1997) (holding a party can be liable to a recipient relying on false information negligently transmitted by the party); Bittel v. Farm Credit Serv., 962 P.2d 491, 500-01 (Kan. 1998) (distinguishing "negligent misrepresentation from a misrepresentation to perform an agreement" and holding defendants' oral statements relied upon by plaintiff were "conditional upon future compliance with loan requirements" and therefore not recoverable under a negligent misrepresentation theory); Quality Wig Co. v. J.C. Nichols Co., 728 S.W.2d 611, 619 (Mo. Ct. App. 1987) (holding plaintiff must demonstrate evidence of damages attributable to negligent misrepresentation in order to have a valid claim); John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428, 436 (Tenn. 1991) (maintaining that privity was not a prerequisite in actions for economic loss on a theory of negligent misrepresentation or negligent supervision, and a subcontractor could make a separate claim against a construction manager for economic loss despite a lack of privity, although courts are split on the issue).

49. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977).

50. Jacobs Mfg. Co. v. Sam Brown Co., 792 F. Supp. 1520, 1527 (W.D. Mo. 1992) (citing Frame v. Boatmen's Bank, 782 S.W.2d 117, 121 (Mo. Ct. App. 1989); Chubb Group of Ins. Cos. v. C.F. Murphy & Assoc., 656 S.W.2d 766, 783-84 (Mo. Ct. App. 1983)); *see also* RESTATEMENT (SECOND) OF TORTS § 552 (1977).

Courts have also addressed claims against professionals, such as accountants or lawyers, for negligent misrepresentation in providing information. *See* Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d at 236 (attorneys); Gerhardt v. Harris, 934 P.2d 976, 984-85 (Kan.

Thus, judicial recognition of the negligent misrepresentation tort, resulting in a pecuniary loss, would seem inconsistent with the parameters of the economic loss doctrine.

The Connecticut Supreme Court, responding to a defendant's argument that the economic loss rule should bar a tort claim for negligent misrepresentation when a contract exists, held that a remedy based on contract is independent of a remedy for negligent misrepresentation.[51] A party should not be denied the opportunity to pursue a tort claim because it might also have a contract. Nevertheless, courts have been cautious in permitting negligent misrepresentation claims to go forward in any breach of contract action because of the danger in expansively applying the claim.[52]

In *Freeman v. Ernst & Young*,[53] the Iowa Supreme Court identified a limiting distinction between cases in which a person in the business of supplying information for the guidance of others may be liable, and circumstances in which representations are made during commercial transactions when the parties are dealing at arm's length and liability may not exist.[54] Similarly, the Eighth Circuit Court of Appeals, in *AKA Distribution Co. v. Whirlpool Corp.*,[55] predicting what the Minnesota Supreme Court would hold, concluded that "in a suit between merchants, a fraud claim to recover economic losses must be independent of the Article 2 [Uniform Commercial

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1997) (attorneys); Mark Twain Kan. City Bank v. Jackson, Brouillette, Pohl & Kirley, P.C., 912 S.W.2d 536, 538 (Mo. Ct. App. 1995) (attorneys); H. Rosenblum, Inc. v. Adler, 461 A.2d 138, 153 (N.J. 1983) (accountants); ESCA Corp. v. KPMG Peat Marwick, 959 P.2d 651, 654 (Wash. 1998) (accountants).

51. Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d at 222. The court in *Williams Ford* also rejected an argument that the tort of negligent misrepresentation is inapplicable to circumstances involving sophisticated business parties. *Id.* at 221-22; *see also* Barton, *supra* note 9, at 1812-23 (discussing that negligent misrepresentation imposes a legal duty on those who supply information in the course of a business transaction in which they have a pecuniary interest).

52. *See* Gerhardt v. Harris, 934 P.2d at 985 (barring plaintiff's claim because allowing such a claim could make any breach of contract include a negligent misrepresentation claim); *see also* City of Warrensburg v. RCA Corp., 571 F. Supp. 743, 753 (W.D. Mo. 1983) (holding that under Missouri law there can be no cause of action for negligent misrepresentation of a maker's own intention to perform an agreement); Bittel v. Farm Credit Servs., 962 P.2d at 500 (holding that, although Kansas recognizes the negligent misrepresentation cause of action, the statements made by defendant, and relied upon by the plaintiffs, were not the type of misrepresentation contemplated by section 552 of the Restatement and not recoverable under a negligent misrepresentation theory).

53. Freeman v. Ernst & Young, 516 N.W.2d 835 (Iowa 1994).

54. *Id.* at 838; *see also* Barz v. Geneva Elevator Co., 12 F. Supp. 2d 943, 957-58 (N.D. Iowa 1998) (holding the defendants' transactions were not simply "arms length" transactions because the defendants had given plaintiff information that was part of, not incidental, to the purchase); Fry v. Mount, 554 N.W.2d 263, 265-66 (Iowa 1996) (holding employer-defendants were dealing at arms length with an at-will employee-plaintiff).

55. AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083 (8th Cir. 1998).

Code] contract or it is precluded by the economic loss rule."[56] On the other hand, privity with the person making the representation is not a prerequisite to assert the claim.[57] A third party whom the representor may expect to receive its materials could make the claim. For example, in *ESCA Corp. v. KPMG Peat Marwick*,[58] an accounting firm supplying audit information to the plaintiff's bank was found liable for the economic losses resulting, in part, from the firm's work.[59]

Despite broad acceptance of negligent misrepresentation as a viable tort theory, recoverable pecuniary losses may be limited, thus consistent with the economic loss rule's justification of minimizing the potential for unlimited exposure. Under the Restatement (Second) of Torts section 552B, only reliance or out-of-pocket damages are recoverable in negligent misrepresentation cases.[60] Several jurisdictions have followed the Restatement in this regard.[61] Those courts applying the Restatement

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56. *Id.* at 1087; *see also* Marvin Lumber and Cedar Co. v. PPG Indus., 34 F. Supp. 2d 738, 748-50; Barton, *supra* note 9, at 1838-43 (discussing the differences in analyzing negligent misrepresentation claims); Tourek et al., *supra* note 21 at 935 (discussing a case holding that held, "in dispute arising out of certain Article 2 transactions, the UCC and the Economic Loss Doctrine could only pursue fraud claims that were 'independent of the contract' and 'based upon a misrepresentation that was outside of or collateral to the contract.'").

57. *See* ESCA Corp. v. KPMG Peat Marwick, 959 P.2d 651, 652-53 (Wash. 1998) (providing a factual description of a suit in which a third party asserted a claim).

58. ESCA Corp. v. KPMG Peat Marwick, 959 P.2d 651 (Wash. 1998).

59. *Id.* at 654; *see also* Moransais v. Heathman, 744 So. 2d 973, 979 (Fla. 1999) (concluding engineers that performed work and provided report were negligent); Rousseau v. K.N. Constr., Inc., 727 A.2d 190, 193 (R.I. 1999) (determining when "a cause of action arises under a contract and a consumer lacks privity of contract with the offending party, an action in tort remains available, even if the damages are purely economic"); McCarter, *supra* note 10, at 27 (analyzing *Philadelphia Nat'l Bank v. Dow Chem. Co.*, 605 F. Supp. 60 (E.D. Pa. 1985), which discusses liability to a third party after supplying faulty mortar for contracted work). *But see* Ward v. Ernst & Young, 435 S.E.2d 628, 631 (Va. 1993) (declining to extend an exception to the requirement of privity of contract in an action for negligent performance of a contract against an accountant).

60. *See* RESTATEMENT (SECOND) OF TORTS § 552B (1989 & Supp. 2000).

61. *See* Camp v. Ruffin, 30 F.3d 37, 38 (5th Cir. 1994) (applying out-of-pocket damage rule in Texas with reference to the Restatement); Trytko v. Hubbell, Inc., 28 F.3d 715, 729 (7th Cir. 1994) (concluding the Restatement's out-of-pocket damage rule of Restatement applies in Indiana); W.K.T. Distrib. Co. v. Sharp Elects. Corp., 746 F.2d 1333, 1337 (8th Cir. 1984) (adopting the out-of-pocket damage rule without explicit citation to the Restatement); Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 617-18 (D. Mass. 1995) (relying on Restatement out-of-pocket rule for damages determination in Massachusetts); Rosales v. AT&T Info. Sys., Inc., 702 F. Supp. 1489, 1501 (D. Colo. 1988) (relying on Restatement out-of-pocket rule to limit damages in Colorado); Frame v. Boatmen's Bank, 824 S.W.2d 491, 496-97 (Mo. Ct. App. 1992) (relying on Restatement out-of-pocket rule in determining damages in Missouri); B.L. Jet Sales, Inc. v. Alton Packaging Corp., 724 S.W.2d 669, 673 (Mo. Ct. App. 1987) (relying on Restatement out-of-pocket rule in determining damages in Missouri negligent misrepresentation case); Allied Vista, Inc. v. Holt, 987 S.W.2d 138, 143 (Tex. Ct. App. 1999) (limiting damages to Restatement out-of-pocket rule for Texas negligent misrepresentation action).

have, therefore, placed a restraint on compensable financial losses in that benefit of the bargain damages are not permitted in negligent misrepresentation cases.[62]

C. *Professional Liability of Accountants and Attorneys*

Courts have also widely recognized claims based in tort for accounting malpractice, attorney malpractice, and other circumstances in which a professional or person in a special relationship with the victim, for example, a trustee, has perpetrated a wrong causing solely economic loss.[63] However, the economic loss doctrine has not uniformly been invoked in such circumstances, precluding recovery in tort.[64] For example, in *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*,[65] investors sued an accounting firm for losses resulting from the firm's preparation of financial statements.[66] According to the plaintiff, misstatements in the reports caused plaintiff to hold certain investments longer than plaintiff otherwise would have, resulting in substantial losses.[67] The state of Illinois has long applied the economic loss rule to deny tort recovery.[68] Here, the Illinois Supreme Court recognized that the doctrine would not limit the recovery of purely economic losses to contract when the alleged tortfeasor's duty arises outside of the contract.[69] The economic loss doctrine allows recovery in tort for the negligent breach of a duty.[70] Accordingly, the economic loss doctrine allowed the claim for accounting malpractice.[71] Interestingly, just two months before the decision in *Congregation of*

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62. *See* cases cited *supra* note 61.

63. *See* Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503, 514 (Ill. 1994) (discussing the application of the economic loss doctrine to the service industry).

64. *See id.* at 515.

65. Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503 (Ill. 1994).

66. *Id.* at 505.

67. *Id.* at 512.

68. *See id.* at 514; *see also* 2314 Lincoln Park West Condo. Ass'n v. Mann, Gin, Ebel, & Frazier, Ltd., 555 N.E.2d 346, 353 (Ill. 1990) (applying economic loss rule to a tort claim); Anderson Elec., Inc. v. Ledbetter Erection Corp., 503 N.E.2d 246, 249 (Ill. 1986) (extending the economic loss doctrine); Redarowicz v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982) (applying the economic loss rule to real estate context).

69. Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d at 514; *see also* Collins v. Reynard, 607 N.E.2d 1185, 1187 (Ill. 1992) (recognizing that a legal malpractice case may be couched in either contract or tort; the economic loss doctrine allowed the claim).

70. Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d at 514.

71. *Id.* at 515; *see also* Trs. of Archdiocese v. Coopers & Lybrand, 536 So. 2d 278, 281 (Fla. Dist. Ct. App. 1988) (holding accounting firm liable for negligence in handling archdiocese's account); Emily Usow, *Redefining the Professional Service Contract: The Evolution and*

the Passion, the United States District Court for the Northern District of Illinois held that the economic loss rule barred a negligence claim against an accounting firm that had served as a failed bank's auditor.[72]

In *Roberts v. Fearey*,[73] the Oregon Court of Appeals held the economic loss doctrine would preclude a claim brought by trust beneficiaries against a trustee's attorney for malpractice.[74] However, the focus was not so much on the nature of the damages, but upon the relationship between the attorney and the injured party.[75] Thus, under Oregon law, the plaintiff must plead some source of duty outside the common law of negligence when purely economic damages are being sought.[76] Such a duty arises only in special relationships.[77] The plaintiff must first show the existence of a special relationship in which the defendant has some obligation to pursue the plaintiff's economic interests.[78] Only then does an analysis of foreseeability come into play.[79] The Oregon court held that there was no attorney-client relationship with the beneficiary.[80] "[W]hen an attorney undertakes to represent a fiduciary, he or she represents only the fiduciary and does not, at the same time, maintain an attorney-client relationship with those to whom the fiduciary-client owes a duty."[81]

While the Oregon court held that no duty of care existed under the circumstances, other courts have held that the economic loss rule is inapplicable to claims of legal malpractice. For example, in *Clark v. Rowe*,[82] the plaintiff alleged she sustained losses in real estate investments that she attributed to the fault of her lawyer and banker.[83] The court stated that the economic loss rule does not apply to claims of

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Deconstruction of Florida's Economic Loss Rule, 8 U. MIAMI BUS. L. REV. 1, 13 (1999). The Illinois Supreme Court also stated that the economic loss doctrine "is inappropriate where a relationship results in something intangible," such as accountant-client and attorney-client relationships. Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d at 515. Judge Freeman, in the concurring opinion, agreed with the majority's decision, but diverged from the rather artificial distinction the majority drew between tangible and intangible results derived from the professional's relationship with their client. *Id.* at 520 (Freeman, J., concurring). Similarly, the dissent suggested the majority opinion will serve only to add confusion in the application of the economic loss doctrine in professional liability cases. *Id.* at 526-27 (Heiple, J., dissenting).

72. Resolution Trust Corp. v. KPMG Peat Marwick, 844 F. Supp. 431, 435 (N.D. Ill. 1994).
73. Roberts v. Fearey, 986 P.2d 690 (Or. Ct. App. 1999).
74. *Id.* at 696.
75. *Id.* at 692.
76. *Id.*
77. *Id.*
78. *Id.* at 692-93.
79. *Id.* at 693.
80. *Id.* at 696.
81. *Id.* at 694.
82. Clark v. Rowe, 701 N.E.2d 624 (Mass. 1998).
83. *Id.* at 625.

negligence by a fiduciary, such as a lawyer.[84] The economic loss rule usually acts as a bar only when the parties are in a position to bargain freely concerning the allocation of risk, and there is no special relationship.[85] Consequently, the economic loss rule did not bar the plaintiff's claim against her lawyer.[86]

D. *Trusts*

In trust law, losses are almost always economic in nature. The Restatement (Second) of Trusts section 205 provides as follows:

> If the trustee commits a breach of trust, he is chargeable with
> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
> (b) any profit made by him through the breach of trust; or
> (c) any profit which would have accrued to the trust estate if there had been no breach of trust.[87]

When more than one of these measures of damages is applicable, the plaintiff may choose the option that will be most beneficial.[88] The plaintiff is even entitled to an accounting before making the choice.[89]

The comments to section 205(a) state that if trust property is destroyed or lost because of a trustee's breach of trust, the trust beneficiary may recover the value of the property.[90] If the trust property's value depreciates due to a breach of trust, the trust may recover the amount of such depreciation.[91] The comments to clause (c) state:

> If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of

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84. *Id.* at 627.
85. *Id.* at 626.
86. *Id.* at 628; *see also* Resolution Trust Corp. v. Holland & Knight, 832 F. Supp. 1528, 1532 (S.D. Fla. 1993) (finding that, because both of plaintiff's malpractice claims constituted a tort action as well as a contract action, "the economic loss rule and the independent tort doctrine [were] inapplicable"); Collins v. Reynard, 607 N.E.2d 1185, 1186-87 (Ill. 1992) (holding that malpractice suits in law can fall under contract or tort law "and that recovery may be sought in the alternative").
87. RESTATEMENT (SECOND) OF TRUSTS § 205 (1959).
88. III WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS § 205, at 240 (4th ed. 1988). Professor Scott, similarly, states that when a "trustee has invested trust funds in securities that are not proper trust investments, the beneficiaries, may at their option, charge him with the amount of the trust funds so expended" plus interest, "or they may require him to account for the securities." *Id.* The trustee is liable for any loss resulting from the breach of trust, but any gain accrues to the trust. *Id.*
89. *Id.*
90. RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a.
91. *Id* § 205 cmt. c.

> trust. This rule is applicable where . . . the trustee in breach of trust fails to purchase property which it was his duty to purchase for the trust.[92]

To the same effect as the Restatement is *Scott on Trusts*:

> [W]here the trustee is authorized to purchase property for the trust, and in breach of trust he pays more than its fair value, he is chargeable with the amount that he paid in excess of the fair value, since this is the loss that results from the breach of trust. On the other hand, if it was a breach of trust to purchase the property, he is chargeable with any further loss resulting from a subsequent depreciation in value of the property since the beneficiaries can reject the purchase, whether or not the trustee paid more than the value of the property at the time of the sale.[93]

The economic loss doctrine thus does not preclude an action for trust losses due to a breach of fiduciary duty or breach of trust by one in a special position, for example, a trustee.

In a recent example concerning alleged fiduciary duties in a creditor-debtor circumstance, the Florida District Court of Appeal held in *Invo Florida, Inc. v. Somerset Venturer, Inc.*[94] that the economic loss rule did not prevent the plaintiff's breach of fiduciary duty claim.[95] Because a cause of action for breach of fiduciary duty was well established in Florida law, the tort claim was not extinguished even when the underlying losses were purely economic.[96]

III. COMPARATIVE FAULT IN ECONOMIC LOSS CASES

American courts, until the beginning of the twentieth century, and in some instances not until nearly the end, often followed the common law rule that any

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92. *Id.* § 205 cmt. i. In *Noel v. Pizza Management, Inc.*, the plaintiff suggested his damages for breach of fiduciary duty be calculated according to the S&P 500, claiming his investments would have "fared at least as well as the S&P 500." Noel v. Pizza Mgmt., Inc., 899 P.2d 1013, 1020 (Kan. 1995). Interestingly, the defendant introduced evidence of the plaintiff's personal investment record, showing the plaintiff had not done nearly as well as the S&P 500. *Id.* The Kansas Supreme Court held the trial court did not abuse its discretion by admitting Noel's personal financial records and investment history because the items were relevant to the proper measure of damages. *Id.*

93. FRATCHER, *supra* note 88, § 205, at 242.

94. Invo Florida, Inc., v. Somerset Venturer, Inc., 751 So. 2d 1263 (Fla. Dist. Ct. App. 2000).

95. *Id.* at 1267-68.

96. *Id.* at 1266-67; *see also* Medalie v. FSC Secs. Corp., 87 F. Supp. 2d 1295, 1304 (S.D. Fla. 2000) (holding that the economic loss rule bars plaintiff's breach of fiduciary duty claims); Crowell v. Morgan Stanley Dean Witter Servs., Inc., 87 F. Supp. 2d 1287, 1293 (S.D. Fla. 2000) (stating that plaintiff's claim for breach of fiduciary duty was not automatically barred by the economic loss rule); Esquibel, *supra* note 16, at 847-51.

negligence on the part of the plaintiff would preclude the plaintiff's recovery entirely.[97] Perhaps because of the potential unfairness under the contributory negligence rule, or for other social policy reasons, nearly every state has now adopted some form of comparative fault, either by common law or statute.[98] The State of Mississippi first passed legislation covering pure comparative fault in 1910.[99] Nebraska followed by enacting its first law in 1913.[100] The state of Wisconsin adopted comparative fault nearly twenty years later in 1931.[101] Although prior to 1970 only seven states had acted to mollify the strict common law rule of contributory negligence,[102] most of the remaining states had enacted some form of comparative fault by 1990.[103]

In one form or another, jurisdictions have adopted three well-recognized comparative fault theories.[104] Under the "slight/gross" theory, the jury must first determine whether both parties are separately, causally negligent and, only after

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97. *See, e.g.*, Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330, 1333 (Ala. 1993) (applying the doctrine of contributory negligence rather than adopting the doctrine of comparative negligence, thus precluding any recovery by the negligent plaintiff); Darnell Photographs Inc. v. Great Am. Ins. Co., 519 P.2d 1225, 1226 (Colo. Ct. App. 1974) (noting that the Colorado legislature recently enacted a comparative negligence statute); Scott v. Rizzo, 634 P.2d 1234, 1237-39 (N.M. 1981) (deciding that New Mexico should adopt the doctrine of comparative negligence); Corns v. Hall, 435 S.E.2d 88, 90-91 (N.C. Ct. App. 1993) (holding that, absent action by State General Assembly, the "[d]octrine of contributory negligence cannot be abandoned in favor of comparative fault"); *see also* Harrison v. Montgomery County Bd. of Educ., 456 A.2d 894, 897-98 (Md. 1983) (deciding that the court would not abandon the contributory negligence doctrine without legislative action); Campbell v. Baltimore Gas & Elec. Co., 619 A.2d 213, 219 (Md. Ct. Spec. App. 1993) (applying the doctrine of contributory negligence, thus precluding recovery by the negligent plaintiff).

98. *See generally* COMPARATIVE NEGLIGENCE MANUAL 3d (1995) (discussing state laws on contributory and comparative negligence). The Appendix sets out a table summarizing the status of comparative fault. *Id.* app. III, at 33. Only four states are identified as having no comparative fault law: Alabama, Maryland, North Carolina, and Virginia. *Id.* app. III, at 33-34.

99. MISS. CODE ANN. § 11-7-15 (1999); *see also* COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, app. III, at 33.

100. NEB. REV. STAT. ANN. § 25.21, 185 (Michie 1995); *see also* COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, app. III, at 34.

101. WIS. STAT. § 895.045 (1997); *see also* COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, app. III, at 35.

102. *See* ARK. CODE ANN. § 16-64-122 (Michie 1987 & Supp. 1999); HAW. REV. STAT. § 663-31 (1999); ME. REV. STAT. ANN. tit. 14, § 156 (West 1980 & Supp. 2000); MINN. STAT. § 604.01 (2000); MISS. CODE ANN. § 11-7-15 (1999); NEB. REV. STAT. § 25-21, 185 (1995); WIS. STAT. § 895.045 (1997).

103. *See* COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, app. III, at 33-35. Tennessee became the forty-sixth and most recent state to adopt comparative fault in 1992. McIntyre v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992) ("[I]t is time to abandon the outmoded and unjust common law doctrine of contributory negligence and adopt in its place a system of comparative fault.").

104. COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, app. III, at 33-35.

finding both causally negligent, the jury must decide whether the plaintiff's negligence was slight compared to that of the defendant.[105] Under a "modified" system, a plaintiff usually can recover—although in a diminished percentage—only when his or her fault is no greater than that of the defendant.[106] In a "pure" comparative fault state, the plaintiff may recover even when his negligence is greater than that of the defendant; the recovery is merely reduced by his percentage of fault.[107] These theories, in one form or another, seek to balance the harshness of the early common law with the policy of compensating injuries commensurate with personal responsibility.

Missouri, like several states, judicially eliminated contributory negligence by adopting comparative fault in 1983 in *Gustafson v. Benda*.[108] Although not adopting the UCFA as Missouri law, the Missouri Supreme Court "appended" the UCFA to the *Gustafson* opinion stating: "Insofar as possible this and future cases shall apply the doctrine of pure comparative fault in accordance with the Uniform Comparative Fault Act."[109] Three years later in *Lippard v. Houdaille Industries, Inc.*,[110] however, the Missouri Supreme Court held comparative fault principles do not apply in products liability cases.[111] In justifying its decision in *Lippard*, the court stated that, by appending the UCFA to its decision in *Gustafson*, it did not intend the UCFA to be followed literally.[112] Thereafter, the Missouri legislature enacted a statute ensuring the application of comparative fault principles in products liability suits.[113] Neither the Missouri Supreme Court nor the Missouri legislature has addressed, specifically, whether comparative fault principles apply when only economic losses

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105. *See, e.g.*, S.D. CODIFIED LAWS § 20-9-2 (Supp. 2000); *see also* COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, at 1-11 to -13, 61-1 to -7 ("[T]he fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant . . . the damages shall be reduced in proportion to the amount of plaintiff's contributory negligence.").

106. *See, e.g.*, KAN. STAT. ANN. § 60-258a (1994); *see also* COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, at 1-13 to -17, 35-1 to -18 ("[I]f such party's negligence was less than causal negligence of the party or parties against whom claim for recovery is made . . . the award of damages . . . shall be diminished in proportion to the amount of negligence attributed to the party.").

107. *See, e.g.*, MISS. CODE ANN. § 11-7-15 (1999); *see also* COMPARATIVE NEGLIGENCE MANUAL 3d, *supra* note 98, at 1-17 to -24, 43-1 to -7 (noting the plaintiff's contributory negligence will not bar recovery).

108. Gustafson v. Benda, 661 S.W.2d 11, 16 (Mo. 1983) (en banc) (citing the statutes and case law of "[t]hirty-two states, Puerto Rico, and the Virgin Islands," each of which have adopted comparative negligence or fault).

109. *Id.* at 15.

110. Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491 (Mo. 1986) (en banc).

111. *Id.* at 493.

112. *Id.* at 492-93.

113. MO. ANN. STAT. § 537.765 (West 2000); *see also* CONN. GEN. STAT. ANN. § 52-572(l) (1991) (stating that contributory negligence or comparative negligence do not bar recovery in a suit based on strict tort liability).

are claimed, although Missouri intermediate appellate court decisions have held contributory negligence, not comparative fault, will completely bar such claims.[114]

In contrast, the Kansas state legislature enacted comparative fault to apply in all actions accruing on or after July 1, 1974.[115] Under the Kansas law, the plaintiff is denied recovery if it is found fifty percent or more at fault.[116] Originally adopted to apply when there were personal injuries, death, and property damages, the legislature in 1987 extended the scope of the comparative fault statute to include economic losses.[117] This legislative action followed a decision by the Kansas Supreme Court that had narrowly held that the Kansas statute would not permit comparative fault in a purely economic loss case involving breaches of fiduciary duty by officers of a savings and loan institution.[118] The Kansas statute currently states in part: "The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or *economic loss* . . . ."[119]

Kansas may well be the only state that has adopted a form of comparative fault statute specifically permitting application of comparative fault with respect to economic losses.[120] Courts in many states, on the other hand, have been circumspect in extending comparative fault beyond personal injury, death, or property damage. For example, the Connecticut Supreme Court has held recently that economic loss damages are not subsumed within the meaning of property damage as found in the state's comparative fault statute.[121] Nevertheless, the court followed what it

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114. *See infra* notes 150-55, 186-91, and 204-11 and accompanying text.

115. KAN. STAT. ANN. §§ 60-258a to -258b (1994).

116. *Id.* § 60-258a.

117. William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law*, 37 U. KAN. L. REV. 1005, 1038 (1989).

118. Fed. Sav. & Loan Ins. Corp. v. Huff, 704 P.2d 372, 377 (Kan. 1985).

119. KAN. STAT. ANN. § 60-258a (1994) (emphasis added).

120. *See id. But see* FLA. STAT. ANN. § 768.81(4)(a) (West 1997 & Supp. 2001) (applying comparative fault in negligence actions, including professional malpractice); ME. REV. STAT. ANN. tit. 14, § 156 (West 1980 & Supp. 2001) (applying comparative fault when any person suffers "death or damage"); TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (Vernon 1997) (referring to personal injury, death, property damage or "other harm"). Other states' statutes typically provide for comparative fault when negligence results in death or in injury to person or property. *See, e.g.*, COLO. REV. STAT. § 13-21-111 (2000) (referring to death or an injury to a person or property); IDAHO CODE § 6-801 (Michie 1998) (applying comparative fault resulting in death or injury to person or property); MICH. STAT. ANN. § 27A.2949 (Michie Supp. 2000) (allowing plaintiff to recover for damages resulting in death or injury to person or property); OKLA. STAT. ANN. tit. 23 § 13 (West 1987) (applying comparative fault when negligence results in personal injuries, wrongful death, or injury to property).

121. Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d 212, 224 (Conn. 1995). *But see* Lippes v. Atl. Bank of N.Y., 419 N.Y.S.2d 505, 512-13 (App. Div. 1979) (stating injury to property is to be interpreted broadly and without restrictions).

considered to be the state's policies in determining that comparative fault applied with regard to economic losses.[122]

Although comparative fault principles applied in court decisions reflect a fairly developed body of law in areas of personal injury, wrongful death, and property damage cases, the same cannot be said for cases in which the damages are limited to economic losses. Questions arise whether the "client" can, or should, be held to a standard of reasonable conduct in attorney, accountant, or other professional liability cases. Also, should the recipient of an alleged *negligent* misrepresentation be responsible when its fault has caused at least some of the damage? As mentioned previously, the Kansas legislature specifically amended its comparative fault statute in 1987.[123] It now applies to cases involving purely economic losses.[124] Many other states have not so acted, thus leaving it to the judiciary to determine whether comparative fault or contributory negligence principles, or neither, may apply in purely economic loss cases.[125] This section of the Article examines some of the cases in which courts have ruled comparative fault does or does not apply and, if it applies, under what circumstances.[126]

A. *Accounting Malpractice*

One of the most litigated areas of liability for economic losses involves audit or accounting malpractice cases.[127] In these circumstances, the plaintiff may assert that the defendant failed to uncover irregularities or provided inaccurate information.[128] The accounting firm, on the other hand, may argue that the client acted in a manner

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122. Williams Ford, Inc. v. Hartford Courant Co. 657 A.2d at 225; *see also* Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 354 (Ariz. Ct. App. 1996) (holding that a statute apportioning fault in tort claims includes economic claims).

123. KAN. STAT. ANN. § 60-258a, at 112 (1994) (describing the history of the statute, including the 1987 amendment).

124. *Id.*

125. *See infra* Part III.A.-D.

126. Typically, comparative fault principles will not apply in intentional tort cases in which the losses are economic—fraud and intentional interference with contractual relations. *See* FLA. STAT. ANN. § 768.81(4)(b) (West 1997 & Supp. 2000); Florenzano v. Olson, 387 N.W.2d 168, 175 (Minn. 1986); Cartwright v. Equitable Life Assurance Soc'y of the United States, 914 P.2d 976, 998 (Mont. 1996); *see generally* Allan L. Schwartz, Annotation, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R. 5th 525 (1994) (providing an overview of statutes and case law relating to the subject).

127. *See* Robert A. Prentice, *Can Contributory Negligence Defense Contribute to a Diffusing of the Accountant's Liability Crisis?*, 13 WIS. INT'L L.J. 359, 359-60 (1995) (finding American accounting firms in litigation crisis facing up to $40 billion in unresolved claims).

128. *See, e.g.*, *id.* at 368 (discussing Justice Clarke's dissenting argument in *Craig v. Anyon*, 208 N.Y.S. 259, 269-70 (App. Div. 1925), in which he noted the accountant's negligence "failed to save plaintiffs from the consequences of [their own] failure and neglect, which was the very subject of the contract").

preventing the discovery of irregularities or otherwise gave the accountants false information.[129] Courts faced with these cases have not been consistent with respect to whether the client's conduct should be considered to lessen the accountant's fault.[130]

Some courts have adopted a rule that only certain types of conduct may entitle the accountant to claim comparative fault.[131] The rule is sometimes referred to as the "audit interference rule."[132] In a case decided by the United States District Court for the District of Kansas that involved a failed financial institution, the court addressed whether contributory negligence may apply in the case of auditor malpractice actions.[133] Although Kansas had adopted a comparative fault system, the facts of the case were governed by principles that existed prior to the enactment of the Kansas comparative fault statute with respect to economic losses.[134] The court held that there were genuine issues of material fact precluding summary judgment on the issue of contributory negligence as a matter of law.[135] However, under the court's view, contributory negligence—now comparative fault—in an auditing malpractice case would be of a type in which the client's negligence "contributes to the auditor's failure to report the truth because it is negligence outside of that which is reasonably foreseeable by auditors."[136] Similarly, in *World Radio Laboratories, Inc. v.*

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129. *See, e.g.*, Comeau v. Rupp, 810 F. Supp. 1172, 1183 (D. Kan. 1992) (referring to client-plaintiffs who had allegedly succumbed to imprudent lending practices); World Radio Labs., Inc. v. Coopers & Lybrand, 538 N.W.2d 501, 513 (Neb. Ct. App. 1995) (reciting facts in which the client-plaintiffs allegedly and deliberately withheld information—or should have known the information existed—ultimately resulting in an incorrectly audited financial statement).

130. *See infra* notes 132-59 and accompanying text.

131. *See* Fullmer v. Wohlfeiler & Beck, 905 F.2d 1394, 1398 (10th Cir. 1990) (stating that contributory negligence of the client can only be used as a defense when the client's contributory negligence contributed to the accountant's failure to perform the contract and to report the truth); *see also* Shapiro v. Glekel, 380 F. Supp. 1053, 1058 (S.D.N.Y. 1974) (announcing the rule that negligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth); Cereal Byproducts Co. v. Hall, 132 N.E.2d 27, 30 (Ill. App. Ct. 1956) (stating that, in the absence of any fact or circumstance of the client's contributory negligence contributing to the accountant's poor audit, the defense of contributory negligence is unavailable).

132. Scioto Mem'l Hosp. Ass'n v. Price Waterhouse, 659 N.E.2d 1268, 1272 (Ohio 1996).

133. *See* Comeau v. Rupp, 810 F. Supp. at 1181-84.

134. *Id.* at 1182 n.6.

135. *Id.* at 1184.

136. *Id.*; *see also* Thomas J. Cunningham, *Orphans of the Economic Loss Doctrine: Tort Liability of Information Providers and Preclusion of Comparative Negligence*, 8 DEPAUL BUS. L.J. 41, 57 (1995) (arguing for the application of contributory negligence when the economic loss doctrine applies to accounting cases); David A. Jaffee, *The Allocation of Fault in Auditor Liability Lawsuits Brought by Sophisticated Third Party Users of Financial Statements—A Plea for Proportionate Liability*, 54 U. PITT. L. REV. 1051, 1077 (1993) (arguing for proportionate liability to allocate damages in auditor liability suits); Robert A. Prentice, *supra* note 127, at 390-404 (arguing for the adoption of contributory negligence in accountant cases); Travis Morgan Dodd, Note, *Accounting Malpractice and Contributory Negligence: Justifying Disparate Treatment upon the Auditor's Unique*

Coopers & Lybrand,[137] the plaintiff brought an action against accountants based on their negligence in failing to discover that a major account payable was omitted from financial statements and failing to discover inadequacies in the client's internal controls.[138] The court, relying upon earlier decisions, held that the client's negligence is a defense only when the client's conduct has "contributed to the accountant's failure to perform the contract and to report the truth."[139]

Taking a different approach, in *Scioto Memorial Hospital Ass'n v. Price Waterhouse*,[140] the Supreme Court of Ohio had an opportunity to determine whether comparative fault would apply in an accounting malpractice case.[141] In *Price Waterhouse*, the plaintiff retained the accounting firm to advise it on the financial feasibility of construction of a residential retirement center.[142] Based upon its work, the plaintiff proceeded with construction and leasing.[143] When the facility became a financial disaster, the plaintiff sued the accounting firm, asserting that, had the accountants not been negligent, the project would not have been undertaken.[144] The accountants, on the other hand, claimed that the losses were due to residents backing out of leases after a fire delayed construction and for plaintiff's failure to have business interruption insurance in place.[145] Rather than adopting the "audit interference" rule, the court held that any negligence on the part of the client, "whether or not it directly interferes with the accountant's performance," may "reduce the client's recovery."[146] Nevertheless, although the trial court had failed to

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Role, 80 GEO. L.J. 909, 927-37 (1992) (suggesting a limited application of contributory negligence to accounting cases).

137. World Radio Labs., Inc. v. Coopers & Lybrand, 538 N.W.2d 501 (Neb. Ct. App. 1995).

138. *Id.* at 505-06.

139. *Id.* at 513; Lincoln Grain v. Coopers & Lybrand, 345 N.W.2d 300, 307 (Neb. 1984) (citing Shapiro v. Glekel, 380 F. Supp. 1053 (S.D.N.Y. 1974); Nat'l Sur. Corp. v. Lybrand, 9 N.Y.S.2d 554 (1939)); *see also* Fullmer v. Wohlfeiler & Beck, 905 F.2d 1394, 1399 (10th Cir. 1990) (holding accountant has a defense if client's negligence contributed to misstatements in auditor's reports); Jewelcor Jewelers & Distrib., Inc. v. Corr, 542 A.2d 72, 79 (Pa. Super. Ct. 1988) (holding the defense of contributory negligence in accounting litigation only applies when client contributed to failure to perform). In *Steiner Corp. v. Johnson & Higgins*, the Tenth Circuit Court of Appeals followed the reasoning of its earlier *Fullmer* decision and held that professionals—here actuaries—cannot assert as a defense the client's conduct in creating the circumstances for which it employs the professional. Steiner Corp. v. Johnson & Higgins, 135 F.3d 684, 691 (10th Cir. 1998). On remand, the district court held further that the economic loss rule did not shield the actuaries from liability. Steiner Corp. v. Johnson & Higgins, 196 F.R.D. 653, 658-59 (D. Utah 2000).

140. Scioto Mem'l Hosp. Ass'n v. Price Waterhouse, 659 N.E.2d 1268 (Ohio 1996).

141. *Id.*

142. *Id.* at 1270.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 1272.

instruct the jury on comparative fault, the error was not prejudicial in light of the plaintiff's acceptance of the court's remittitur of damages.[147]

Despite adoption of pure comparative fault, Missouri courts still apply contributory negligence as a complete bar to claims against accountants.[148] In *Miller v. Ernst & Young*,[149] the plaintiffs, members of the plan committee of a bankrupt estate, filed a cause of action against accountants who served as the bankrupt's auditors for twenty years.[150] Plaintiffs sought recovery based upon Ernst & Young's negligence in failing to properly audit the books and discover falsified records.[151] Although the court did not dismiss the allegations against Ernst & Young, it noted that contributory negligence remains an absolute defense in Missouri in a case involving only economic damages.[152] The court relied upon decisions indicating that, under Missouri law, comparative fault does not apply in economic loss cases.[153]

Finally, in *ESCA Corp. v. KPMG Peat Marwick*,[154] a negligent misrepresentation case, plaintiff ESCA and its bank, Seattle First National, sued ESCA's accounting firm, KPMG Peat Marwick, based on faulty audit information that KPMG Peat Marwick supplied to Seattle First National regarding ESCA.[155] Following the Washington comparative fault statute, the court held that the accounting firm's

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147. *Id.* at 1273. The Ohio Supreme Court later abrogated the remittitur ruling. Wightman v. Consol. Rail Corp., 715 N.E.2d 546, 555-56 (Ohio 1999). Numerous other courts have declined to follow the "audit interference" rule. *See* Federal Deposit Ins. Co. v. Deloitte & Touche, 834 F. Supp. 1129, 1145-46 (E.D. Ark. 1992); Federal Deposit Ins. Corp. v. Cherry, Bekaert & Holland, 742 F. Supp. 612, 615 (M.D. Fla. 1990); Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 353 (Ariz. 1996); Devco Premium Fin. Co. v. N. River Ins. Co., 450 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1984); Kemin Indus., Inc. v. KPMG Peat Marwick LLP, 578 N.W.2d 212, 221 (Iowa 1998); Capital Mortgage Corp. v. Coopers & Lybrand, 369 N.W.2d 922, 925 (Mich. Ct. App. 1985); Halla Nursery, Inc. v. Baumann-Furrie & Co., 454 N.W.2d 905, 909 (Minn. 1990).

148. Miller v. Ernst & Young, 892 S.W.2d 387, 388 n.1 (Mo. Ct. App. 1995).

149. Miller v. Ernst & Young, 892 S.W.2d 387 (Mo. Ct. App. 1995).

150. *Id.* at 388.

151. *Id.*

152. *Id.* at 388 n.1. In a federal court case arising under Missouri law, *Garnac Grain Co. v. Blackley*, the court initially stated that the plaintiff's contributory negligence did not bar a claim against accountants for economic loss. Garnac Grain Co. v. Blackley, 932 F.2d 1563, 1570 (8th Cir. 1991). The court subsequently withdrew its statement as overly broad. *Id.* at 1571. In remanding the case to the district court, the court of appeals left it to the district judge to determine if contributory negligence would bar the plaintiff's claim entirely. *Id.* Three years later, the Eighth Circuit Court of Appeals held "[c]ontributory negligence does not apply in Missouri to a negligence action involving only economic loss." Ehrhardt v. Penn Mut. Life Ins. Co., 21 F.3d 266, 270 (8th Cir. 1994) (citing Garnac Grain Co. v. Blackley, 932 F.2d at 1569-70) (involving a claim of negligent distribution of insurance proceeds).

153. Miller v. Ernst & Young, 892 S.W.2d at 388 n.1 (citing Chicago Title Ins. Co. v. Mertens, 878 S.W.2d 899, 902 (Mo. Ct. App. 1994)). The court in *Murphy v. City of Springfield* relied upon the UCFA comments, stating that Missouri courts are likely to not apply comparative fault broader than the UCFA. Murphy v. City of Springfield, 738 S.W.2d 521, 530 (Mo. Ct. App. 1987).

154. ESCA Corp. v. KPMG Peat Marwick, 959 P.2d 651 (Wash. 1998).

155. *Id.* at 652-53.

misrepresentation was negligence of the type contemplated by the statute.[156] Consequently, the court held that comparative fault would apply to the claim against the accounting firm supplying the information.[157]

B. *Legal Malpractice*

Although not new, actions against attorneys for breach of contract and malpractice have become more prevalent in recent years.[158] As with claims against accountants, whether the client's conduct should mitigate the loss or bar the recovery entirely is a question that has not been answered consistently.[159]

In *Pizel v. Zuspann*,[160] the Kansas Supreme Court addressed, for the first time, whether comparative fault should apply in a legal malpractice case in Kansas.[161] In *Pizel*, the trust beneficiaries sued the trust's attorneys for negligence.[162] Although the court held the claim accrued in 1981 before the Kansas statute was amended, the parties submitted the claim subject to comparative fault rules.[163] The court "conclude[d] that comparative fault principles apply to a legal malpractice action based upon negligence unless as a matter of law the client had no obligation to act on the client's own behalf."[164] Similarly, in *Pinkham v. Burgess*,[165] the court held that comparative fault applied in a legal malpractice case under the Maine comparative fault statute.[166] The court rejected an argument that the fiduciary nature of the

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156. *Id.* at 656.

157. *Id.*

158. *See generally* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583 (1996) (discussing the explosion of legal malpractice cases and alternatives to reduce the large number of actions).

159. *Compare* Pizel v. Zuspann, 795 P.2d 42, 52 (Kan. 1990) (ruling that comparative fault theory applies in a legal malpractice action as long as the client had a duty to act on the client's own behalf), *with* Jackson State Bank v. King, 844 P.2d 1093, 1096-97 (Wyo. 1993) (holding that in a legal malpractice suit based on claims of breach of contract and breach of fiduciary duty, comparative fault does not bar a plaintiff from recovery nor must a plaintiff's recovery be reduced by the percentage of plaintiff's fault).

160. Pizel v. Zuspann, 795 P.2d 42 (Kan. 1990).

161. *Id.* at 52.

162. *Id.* at 44.

163. *Id.* at 56.

164. *Id.* at 52; *see also* Pontiac Sch. Dist. v. Miller, Canfield, Paddock & Stone, 563 N.W.2d 693, 704 (Mich. Ct. App. 1997) (adopting the comparative negligence formulation of the Kansas Supreme Court in *Pizel*, and holding comparative negligence is a defense in a legal malpractice action unless as a matter of law the client had no obligation to act on the client's own behalf).

165. Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991).

166. *Id.* at 1073 (applying Maine law). The Maine comparative fault statute does not refer to injury to persons or property, but simply refers to a person suffering "damage." ME. REV. ST. ANN. tit. 14, § 156 (West Supp. 2000). The Texas statute refers to personal injury, death, property damage, or "other harm." *See* TEX. CIV. PROC. & REM. CODE ANN. § 33.011 (Vernon 1997).

attorney-client relationship precludes the application of comparative fault rules.[167] The court stated a client cannot ignore repeated indications that the attorney is inadequately performing over an extended period of time and must, at some point, act to protect her own interests.[168] In *McLister v. Epstein & Lawrence, P.C.*,[169] the Colorado Court of Appeals held that it was error to give a comparative fault instruction based upon the plaintiff's failure to obtain worker's compensation insurance.[170] Although comparative fault is a defense in Colorado, it "must relate to the injury alleged to have been caused by the attorney's negligence and must relate to the attorney's representation."[171] The failure to be insured was not causally related to the lawyer's handling of the case.[172]

In *Clark v. Rowe*,[173] the Massachusetts Supreme Judicial Court had before it the question whether comparative fault would apply in a legal malpractice suit.[174] In *Clark*, the plaintiff sued her lawyer for losses she sustained on real estate investments.[175] The plaintiff argued that comparative fault did not apply because her claim sounded in contract, not tort.[176] But the court disagreed, as even a contractual relationship with a professional carries with it an implied standard of care.[177] Thus, although the Massachusetts statute did not apply facially in the sense that financial loss is not injury to property, the court nevertheless held that comparative fault applies in a client's claim of malpractice by a lawyer.[178]

Taking the opposite approach, the Wyoming Supreme Court held that Wyoming's comparative negligence statute did not apply to a legal malpractice case.[179] The court concluded that because a dispute between a client and its attorney is based on contract,[180] the Wyoming comparative fault statute did not apply to contractual claims.[181] Comparative fault also did not apply to the client's cause of action for breach of fiduciary duty on the part of the lawyer.[182] The court determined

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167. Pinkham v. Burgess, 933 F.2d at 1073.
168. *Id.*
169. McLister v. Epstein & Lawrence, P.C., 934 P.2d 844 (Colo. Ct. App. 1996).
170. *Id.* at 846.
171. *Id.* (giving examples of evidence upon which an instruction might be based—for example, evidence that the client failed to supervise, review, or inquire about the representation, or refused to follow the attorney's advice).
172. *Id.*
173. Clark v. Rowe, 701 N.E.2d 624 (Mass. 1998).
174. *Id.* at 626.
175. *Id.*
176. *Id.* at 626-27.
177. *Id.* at 627.
178. *Id.* at 628.
179. Jackson State Bank v. King, 844 P.2d 1093, 1097 (Wyo. 1993).
180. *Id.*
181. *Id.* at 1096.
182. *Id.* at 1097.

that the comparative fault statute applied only to claims arising out of negligence and there was a distinction between the fiduciary breach claimed and a lawyer's negligence.[183]

In *Blackstock v. Kohn*,[184] plaintiffs sued their attorneys claiming malpractice with respect to the availability of tax benefits under a flood relief act.[185] The defendants allegedly provided incorrect advice, resulting in substantial tax penalties.[186] At trial, the defendants offered a jury instruction asserting that the plaintiffs' actions constituted contributory negligence and, thus, completely barred the claim for purely economic loss.[187] The court submitted the instruction, and the jury returned a verdict for the lawyers.[188] At the intermediate appeals level, the court held that under Missouri law, contributory negligence was a complete defense in cases involving economic loss and affirmed the jury's verdict.[189] On transfer, the Missouri Supreme Court held that the challenged instruction was not a contributory negligence instruction after all.[190] Instead, it was in the nature of an affirmative converse instruction and was supported by independent evidence.[191] Consequently, the court did not address the issue of whether the trial court should have submitted a comparative fault instruction or a contributory negligence instruction in a legal malpractice case.

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183. *Id.*; *see also* CONN. GEN. STAT. § 52-572h(k) (2000) ("This [comparative fault] section shall not apply to breaches of trust or of other fiduciary obligation.").

184. Blackstock v. Kohn, 994 S.W.2d 947 (Mo. 1999) (en banc).

185. *Id.* at 949-50.

186. *Id.* at 950.

187. *Id.* at 951.

188. *Id.*

189. Blackstock v. Kohn, 1998 Mo. App. LEXIS 1816 (Oct. 20, 1998). The court did not discuss three legal malpractice cases in which arguments concerning the client's fault were raised. *See* Williams v. Preman, 911 S.W.2d 288, 303 (Mo. Ct. App. 1995) (declining to decide whether comparative fault or contributory negligence applies in legal malpractice cases, but holding that a contributory negligence instruction was improper based on the evidence); Klemme v. Best, 941 S.W.2d 493, 496 (Mo. 1977) (overruling *Williams* by holding that clients can sue their attorney not only for malpractice, but other torts as well); London v. Weitzman, 884 S.W.2d 674, 678 (Mo. Ct. App. 1994) (holding that verdict finding plaintiff forty percent at fault supported by law and evidence); Bross v. Denny, 791 S.W.2d 416, 422-23 (Mo. Ct. App. 1990) (holding that there was no substantial evidence that plaintiff was negligent and that the defendant was the sole cause of damage). Instead, the intermediate appellate court in *Blackstock* relied upon cases involving accounting malpractice and negligent misrepresentation claims that had held comparative fault is not applied in economic loss cases. Blackstock v. Kohn, 1998 Mo. App. LEXIS 1816 (Oct. 20, 1998). *See also supra* notes 102-06, 136-41 and accompanying text.

190. Blackstock v. Kohn, 994 S.W.2d 947, 951 (Mo. 1999).

191. *Id.* at 951-52.

C. *Negligent Misrepresentation*

Under the Restatement (Second) of Torts, "[t]he recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying."[192] If adopted, this rule would effectively re-create contributory negligence as a complete defense. But currently, this would conflict with comparative fault laws of some states.[193] Nevertheless, the Restatement rule may not be totally at odds. Although a plaintiff's reasonable reliance is usually part of its burden,[194] the defendant normally carries the burden of proving contributory fault.[195] In either instance, it would seem if the plaintiff's conduct was not reasonable—either the reliance was "unreasonable" or the plaintiff was "negligent in relying"—then a court may bar or reduce recovery.

In *Estate of Braswell v. People's Credit Union*,[196] the plaintiff sued, claiming misrepresentation when insurance proceeds were not forthcoming to cover passbook loans.[197] Initially, the court determined that the state's comparative fault act did not apply to an action in which the loss alleged was pecuniary.[198] Although a majority of states adhere to using comparative fault principles for apportioning liability in negligent misrepresentation cases,[199] the Rhode Island Supreme Court adopted the minority view that neither comparative nor contributory negligence applies.[200] The court stated: "We therefore agree with and adopt the propositions that the application of comparative-fault principles would only create unnecessary confusion and complexity in business transactions and that the risk of falsity should fall upon the party making the representation."[201]

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192. RESTATEMENT (SECOND) OF TORTS § 552A (1977); *see also* Sonja Larsen, Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation*, 22 A.L.R. 5th 464 (1994) (discussing competing views on whether the doctrine of comparative negligence is appropriate in the context of negligent misrepresentation claims).

193. *See, e.g.*, KAN. STAT. ANN. § 60-258a (1994) (allowing award of damages to be diminished in proportion to amount of negligence).

194. *See, e.g.*, Murphy v. City of Springfield, 794 S.W.2d 275, 287 (Mo. Ct. App. 1990) (highlighting that in an action based on alleged misrepresentation in boring logs used in the preparation of a bid to construct bridges caissons, the plaintiff had the burden or proving it was reasonable for it to rely upon the boring logs).

195. *See* FED. R. CIV. P. 8(c) (indicating the rule that, in response to a pleading, a party shall set forth any matter constituting an avoidance or affirmative defense—contributory fault).

196. Estate of Braswell v. People's Credit Union, 602 A.2d 510 (R.I. 1992).

197. *Id.* at 511.

198. *Id.* at 512.

199. *Id.* at 513.

200. *Id.* at 515.

201. *Id.*; *see also* Cedar Falls Bldg. Ctr., Inc. v. Vietor, 365 N.W.2d 635, 639 (Iowa Ct. App. 1985) (applying contributory negligence).

Missouri courts also have not applied comparative fault in negligent misrepresentation cases.[202] *Murphy v. City of Springfield*[203] involved a public works contract for reconstruction of a bridge.[204] Plaintiff was a subcontractor that claimed it was misled into performing its work for a lower amount.[205] Finding the action was closely related to negligent misrepresentation, and that the loss did not occur from physical harm, comparative fault was not applicable.[206] In particular, the court looked to the comments in the UCFA suggesting that comparative fault principles do not apply in economic loss cases.[207] The trial court had initially submitted the case to the jury with comparative fault instructions, only to later reverse itself and enter judgment for the total amount of damages.[208] In effect, the court held that while comparative fault did not apply, neither did contributory negligence.[209] Thereafter, in *Chicago Title Insurance Co. v. Mertens*,[210] a case involving alleged negligent performance of a contract, the court stated, "[n]othing in the UCFA indicates that comparative fault should apply in a case involving only economic damages."[211] In *Fidelity National Title Insurance Co. v. Tri-Lakes Title Co.*,[212] the court likewise noted that, in cases involving economic loss, "torts such as negligent misrepresentation . . . or harm to reputation resulting from defamation, comparative fault principles are not applicable."[213]

On the other hand, in *Williams Ford, Inc. v. Hartford Courant Co.*,[214] the Supreme Court of Connecticut applied comparative fault principles in a negligent misrepresentation case.[215] In *Williams Ford*, an automobile dealer sued a newspaper in connection with the paper's sale of advertising space, alleging fraud, negligent misrepresentation, and violation of the state trade practices act.[216] In discussing the negligent misrepresentation claim, the court considered the applicability of the contributory negligence standard in Restatement (Second) of Torts section 552A, but held that the Connecticut comparative fault law would apply in negligence actions

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202. *See, e.g.*, Murphy v. City of Springfield, 738 S.W.2d 521 (Mo. Ct. App. 1987); Chicago Title Ins. Co. v. Mertens, 878 S.W.2d 899 (Mo. Ct. App. 1994); Fid. Nat'l Title Ins. Co. v. Tri-Lakes Title Co., 968 S.W.2d 727 (Mo. Ct. App. 1998).
203. Murphy v. City of Springfield, 738 S.W.2d 521 (Mo. Ct. App. 1987).
204. *Id.* at 523.
205. *Id.* at 525.
206. *Id.* at 530.
207. *Id.*
208. *See id.* at 529.
209. *See id.*
210. Chicago Title Ins. Co. v. Mertens, 878 S.W.2d 899 (Mo. Ct. App. 1994).
211. *Id.* at 902.
212. Fid. Nat'l Title Ins. Co. v. Tri-Lakes Title Co., 968 S.W.2d 727 (Mo. Ct. App. 1998).
213. *Id.* at 733 n.8.
214. Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d 212 (Conn. 1995).
215. *See id.*
216. *Id.* at 214.

when only commercial losses are sustained.[217] The court concluded that contributory negligence was not consistent with Connecticut's body of law to create an absolute bar to recovery to plaintiffs seeking damages for negligent misrepresentation.[218] Similarly, in *Gilchrist Timber Co. v. ITT Rayonier, Inc.*,[219] in which a purchaser of timberland sued the seller for misrepresentations with respect to zoning restrictions on the land, the Florida Supreme Court held that the state's statutory comparative fault provisions applied.[220] The court stated: "Clearly a recipient of information will not have to investigate every piece of information furnished; a recipient will only be responsible for investigating information that a reasonable person in the position of the recipient would be expected to investigate."[221] The seller asserted that the buyer failed to convey its intent to subdivide the land and also failed to verify the zoning classification in the appraisal furnished by the seller.[222] Thus, while full disclosure is the standard, "the recipient of an erroneous representation can hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error."[223]

D. *Other Cases*

Consider whether comparative fault or the economic loss rule should apply in what may be called a "derivative tort," such as negligent supervision. For example, if plaintiff suffers economic injury because defendant A interferes with a contract between plaintiff and third party C, and defendant A is an employee or agent of defendant B, may defendant B be held liable for the financial losses caused by defendant A on the theory that defendant B failed to properly supervise defendant A? Alternatively, what if defendant A negligently misrepresented facts to the plaintiff, and plaintiff sues defendant B because B did not keep a close watch over A? Will defendant B's conduct be compared to that of plaintiff? Generally, the tort of negligent supervision has been applied narrowly to circumstances involving extraordinary personal or bodily injury.[224] However, in *Smith v. Goodyear Tire &*

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217. *Id.* at 222, 225.

218. *Id.* at 225.

219. Gilchrest Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334 (Fla. 1997).

220. *Id.* at 339; *see also* Florenzano v. Olson, 387 N.W.2d 168, 175 (Minn. 1986) (holding that comparative negligence does not apply to intentional torts).

221. Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d at 339.

222. *Id.*

223. *Id.*

224. *See, e.g.*, Gibson v. Brewer, 952 S.W.2d 239, 243-44 (Mo. 1997) (alleging defendant failed to supervise employee who engaged in sexual misconduct with a minor child); A.R.H. v. W.H.S., 876 S.W.2d 687, 689 (Mo. Ct. App. 1994) (explaining that the proper inquiry for negligent supervision when a child is sexually assaulted hinges on what a reasonable person would do in the circumstances); RESTATEMENT (SECOND) OF TORTS § 317 (1965).

Rubber Co.,[225] the plaintiff, a tire franchisee, sued the defendant for negligent supervision of one of its employees who had intentionally failed to submit invoices of the franchisee to the franchisor's office.[226] The plaintiff asserted that the employee had interfered in its business relations or expectancies, and the defendant was negligent in failing to prevent the conduct.[227] The court did not reach the issue whether the economic loss doctrine would apply in the negligent supervision case, dismissing the plaintiff's claims on other grounds because there was no proof that the employer knew of the intentional conduct.[228]

If the economic loss rule was intended to preclude tort liability based upon negligence, then the negligent supervision claim in *Smith* perhaps should have been barred by the doctrine.[229] Courts are split on whether comparative fault should apply in the derivative tort situation when intentional and negligent conduct co-exist.[230]

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225. Smith v. Goodyear Tire & Rubber Co., 856 F. Supp. 1347 (W.D. Mo. 1994).

226. *Id.* at 1349, 1352.

227. *Id.* at 1351-52.

228. *Id.* at 1352-53; *see also* Wood v. City of Topeka, 90 F. Supp. 2d 1173, 1195 (D. Kan. 2000) (holding a claim of negligent supervision does not exist in typical employment-related litigation); Piper Jaffray Cos. v. Nat'l Union Fire Ins. Co., 967 F. Supp. 1148, 1157 (D. Minn. 1997) (concluding that negligent supervision claims may not be based upon purely economic losses); Deganhart v. Knights of Columbus, 420 S.E.2d 495, 497 (S.C. 1992) (holding no negligent supervision claim existed based on the evidence). *But see* Levinson v. Citizens Nat'l Bank, 644 N.E.2d 1264, 1269-70 (Ind. Ct. App. 1994) (finding cause of action stated for negligent supervision with respect to breach of trust case); Heller v. Patwil Homes, Inc., 713 A.2d 105, 109 (Pa. Super. Ct. 1998) (holding claim of negligent supervision exists where agent misrepresented facts). The *Heller* court also concluded that the employer's behavior in supervising an employee could not be compared to that of the plaintiff who suffered harm as a result of the employee's conduct. Heller v. Patwil Homes, Inc., 713 A.2d at 109.

229. *See* Smith v. Goodyear Tire & Rubber Co., 856 F. Supp. at 1352-53.

230. *See* Reichert v. Atler, 875 P.2d 384, 390 (N.M. Ct. App. 1992) (discussing cases addressing the question of whether fault can be apportioned between two or more defendants, where the conduct of some was negligent and the conduct of others resulted from intentional misconduct); Heller v. Patwil Homes, Inc., 713 A.2d at 109 (holding contributory fault inapplicable in negligent supervision cause). *But Cf.* McLister v. Epstein & Lawrence, P.C., 934 P.2d 844, 848 (Colo. Ct. App. 1996) (dismissing negligent supervision claim that alleged supervising lawyer improperly oversaw an associate attorney because plaintiff's case lacked expert testimony); John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428, 435 (Tenn. 1991) (stating that Restatement (Second) of Torts § 552 is the applicable standard for economic losses based upon negligent misrepresentation or negligent supervision). *Compare also* Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 291 (Ky. Ct. App. 1998) (comparing conduct of negligent tortfeasor with intentional wrongdoer), *with* Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 590 (Kan. 1991) (holding an employer liable "only to the extent harm is caused by the quality of the employee that the employer had reason to believe would be likely to cause harm."). This derivative tort may be contrasted to a tort of conspiracy or participation in a wrong. Typically, claims of conspiracy or participation in a wrong involve an element of knowledge and intent to commit harm, opposed to mere negligence. *See, e.g.*, Gillespie v. Seymour, 796 P.2d 1060, 1062 (Kan. Ct. App. 1990) (dismissing plaintiff beneficiaries' claim for malpractice, finding defendant accountants lacked knowledge their accountings would be

The principal or supervisor may not be able to claim that the plaintiff's fault should be compared when the employee's act was intentional, but the plaintiff ought not be able to escape comparative fault principles when it otherwise would face them with respect to the claims between the plaintiff and employee.[231]

In recent years, courts have also addressed whether a claim may exist for tortious breach of contract, which is different from asserting negligent performance of contractual obligations.[232] Generally, for such a claim to exist, there must be facts indicating an independent actionable tort.[233] For example, in *Dillard Department Stores, Inc. v. Beckwith*,[234] the plaintiff sued Dillard Department Stores for tortious constructive discharge.[235] Affirming the trial court's judgment in favor of the plaintiff, the Nevada Supreme Court continued to recognize a public policy exception to the at-will employment doctrine, despite a change in Nevada law.[236] The court held that Dillard's conduct was a violation of Nevada public policy and that the plaintiff, who had been an exemplary employee, left her job because of the store's conduct.[237] Similarly, in *Smith v. Bates Technical College*,[238] the Washington Supreme Court recognized that the tort of wrongful discharge applies not only to at-will employees, but also to those who are terminable only for cause.[239] The court considered that tort relief may compensate more fully for the loss suffered, in contrast to contractual remedies.[240]

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made available or relied upon by plaintiff); Schott v. Beussink, 950 S.W.2d 621, 627 (Mo. Ct. App. 1997) (dismissing plaintiff's civil conspiracy claim because plaintiff failed to plead sufficient facts to support elements of the claim).

231. Heller v. Patwill Homes, Inc., 713 A.2d at 109.

232. *See, e.g.*, Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227, 229 (Mo. Ct. App. 1995) (deciding issue of alleged breach of contract). Many of the claims for "tortious breach of contract" arise in employment and insurance circumstances. *See, e.g.*, Lewis v. Aetna United States Healthcare, Inc., 78 F. Supp. 2d 1202 (N.D. Okla. 1999) (breach of insurance contract); Stanton v. State Farm Fire & Cas. Co., Inc., 78 F. Supp. 2d 1029 (D.S.D. 1999) (same); Blue Diamond, Inc. v. Liberty Mut. Ins. Co., 21 F. Supp. 2d 631 (S.D. Miss. 1998) (same); Hart v. Prudential Prop. & Cas. Ins. Co., 848 F. Supp. 900 (D. Nev. 1994) (same); Smith v. Bates Technical Coll., 991 P.2d 1135 (Wash. 2000) (breach of employment contract).

233. *See* Harzfeld's, Inc. v. Otis Elevator Co., 114 F. Supp. 480, 484 (W.D. Mo. 1953).

234. Dillard Dep't Stores v. Beckwith, 989 P.2d 882 (Nev. 2000).

235. *Id.* at 884.

236. *Id.* at 885.

237. *Id.* at 886.

238. Smith v. Bates Technical Coll., 991 P.2d 1135, 1140 (Wash. 2000).

239. *Id.* at 1143.

240. *Id.* at 1142-43. *But see* Berg v. Norand Corp., 169 F.3d 1140, 1147-48 (8th Cir. 1999) (holding under Iowa law that there is no claim for negligent misrepresentation due to alleged wrongful termination of employee-at-will); Balmer v. Hawkeye Steel, 604 N.W.2d 639, 643 (Iowa 2000) (refusing to recognize a wrongful termination claim based upon constructive discharge alone); Tatge v. Chambers & Owen, Inc., 579 N.W.2d 217, 220, 227 (Wis. 1998) (holding there is no tort action for breach of contract and former employee's discharge for refusing to sign non-competition agreement did

Because contract claims may not be available, for example, at-will employment, the only avenue for the plaintiff to achieve complete recompense may be a tort action. On the other hand, economic loss may be the only damage sustained—lost wages or other benefits. If not barred by the economic loss rule, should the plaintiff's conduct be considered when damages and responsibility are evaluated? Contract law has long identified concepts such as mitigation or waiver that, in effect, allow the trier of fact to consider the claimant's conduct. Although the plaintiff's negligence or fault is not an issue in the typical breach of contract case, if a tort claim were held to exist, states recognizing comparative fault would likely apply those principles.[241]

IV. CONCLUSION

The economic loss doctrine, precluding financial damages in non-personal injury tort cases, has been expanding in recent years to various claims involving professionals, construction litigation, and instances involving misrepresentation.[242] Courts have not been consistent in how the doctrine is applied and under what circumstances.[243] Adding to the inconsistency is the application of comparative fault principles in purely economic loss cases.[244] Ultimately, when a court does not apply the economic loss rule barring the claim, it is likely to follow the state's policies and decisions applying comparative fault or contributory negligence principles. However, there is no convincing rationale to preclude comparative fault principles—applying contributory negligence or following neither concept—simply because of the type of damage claimed or status of the parties. Comparative negligence is fault driven. Courts faced with applying comparative fault in economic loss cases should not refrain from instructing on comparative fault or create exceptions that would not otherwise apply in personal injury, death, or property damage cases.

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not give rise to wrongful discharge claim); VanLente v. Univ. of Wyoming Research Corp., 975 P.2d 594, 597 (Wyo. 1999) (refusing to recognize contract remedy for breach of an implied covenant of good faith and fair dealing for an at-will employee).

241. For a discussion of comparative fault in the context of insurance bad faith, *see* Douglas Brothers, *The Defense of Comparative Bad Faith: A Practitioner's Viewpoint*, 72 TEX. L. REV. 1565 (1994); William Powers, *What a Comparative Bad Faith Defense Tells Us About Bad Faith Insurance Litigation*, 72 TEX. L. REV. 1571 (1994); Ellen Smith Pryor, *Comparative Fault and Insurance Bad Faith*, 72 TEX. L. REV. 1505 (1994).

242. Silverstein, *supra* note 10, at 404-05.

243. *See, e.g.*, Calloway v. City of Reno, 993 P.2d 1259, 1273 (Nev. 2000) (upholding application of the economic loss doctrine and denying plaintiffs' recovery in a claim that involved purely economic loss); Moransais v. Heathman, 744 So. 2d 973, 979 (Fla. 1999) (holding that the economic loss doctrine did not preclude recovery in a claim that involved no personal injury or property damage).

244. *See, e.g.*, KAN. STAT. ANN. § 60-258a (1994) (allowing the use of comparative fault in economic loss cases).