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of the

State of California

SUPREME COURT
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SOUTHERN CALIFORNIA GAS LEAK CASES

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE, CASE NO. B283606

RESPONDENT SOUTHERN CALIFORNIA GAS COMPANY'S RESPONSE TO BRIEFS OF *AMICI CURIAE*

JAMES J. DRAGNA (SBN 91492)
DAVID L. SCHRADER (SBN 149638)
YARDENA R. ZWANG-WEISSMAN (SBN 247111)
MORGAN, LEWIS & BOCKIUS, LLP
300 South Grand Avenue, Suite 2200
Los Angeles, California 90071-3132
(213) 612-2500 Telephone
(213) 612-2501 Facsimile
jim.dragna@morganlewis.com
david.schrader@morganlewis.com
yardena.zwang-weissman@morganlewis.com

*KATHLEEN M. SULLIVAN (SBN 242261)
DANIEL H. BROMBERG (SBN 242659)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065
(650) 801-5000 Telephone
(650) 801-5100 Facsimile
kathleensullivan@quinnemanuel.com
danbromberg@quinnemanuel.com

Attorneys for Respondent Southern California Gas Company

COUNSEL PRESS · (213) 680-2300

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INTRODUCTION

The four amicus briefs filed in support of the Plaintiffs do not accurately describe the economic loss doctrine under current California law, and fail to make any persuasive policy argument for the radical change to that law they advocate. This Court should reject their arguments and instead rely on the correct and practical arguments made by the amici who have filed in support of Respondent Southern California Gas Company ("SoCalGas").[1]

The Plaintiffs' four amici argue that California law imposes a sweeping duty of care that extends even to preventing purely economic loss, subject to only a narrow no-duty exception where a harm arises from a contract or transaction. That turns the economic loss doctrine on its head. The decisions of this Court in fact hold

[1] The amici filing briefs in support of SoCalGas and affirmance are (1) the U.S. and California Chambers of Commerce and American Insurance and Property Casualty Insurers Associations ("Chamber"), (2) Southern California Edison, Pacific Gas & Electric, Southwest Gas, Edison Electric Institute and American Gas Association ("Utilities"), (3) American Pipeline, Association of Oil Pipe Lines and Western States Petroleum Association ("American Pipeline"), and (4) the Civil Justice Association of California ("CJAC"). A fifth amicus brief filed by California Tort Law Scholars In Support Of Affirmance ("Restatement Scholars") also supports affirmance on a different ground discussed below.

that claims for pure economic loss in negligence are generally barred, subject only to a narrow "special relationship" exception. Plaintiffs' amici fail to even mention this Court's repeated holdings that a duty to prevent purely economic loss to third parties is "'the exception, not the rule, in negligence law.'" (*Centinela Freeman Emergency Medical Associates v. Health Net of Cal., Inc.* (2016) 1 Cal.5th 994, 1013 ("*Centinela*"), quoting *Quelimane Co. v. Steward Title Guaranty Co.* (1998) 19 Cal.4th 26, 58 ("*Quelimane*").)

Plaintiffs' amici likewise fail to reconcile their position with the Restatement, the overwhelming weight of authority in other jurisdictions, or the vast number of cases recognizing that the economic loss doctrine applies to cases like this one where there is no contract or other transaction that could give rise to a "special relationship." Indeed, to the extent Plaintiffs' amici cite any case law addressing the economic loss doctrine, they rely upon cases that have been widely rejected or cases that allow fishermen to recover for injuries to fisheries under a narrow exception to federal maritime law's economic loss doctrine—a scenario that is not remotely

presented here.

In addition to failing to offer any persuasive authority supporting their position, Plaintiffs' amici fail to offer any persuasive policy rationale for allowing pure economic loss claims like Plaintiffs' here to proceed. They argue that claims for purely economic loss generally must be permitted in order to make injured parties whole and to ensure adequate deterrence. They fail to acknowledge, however, that tort law often fails to compensate for intangible harms or that existing liability for personal injury and property damage already creates substantial deterrent effect. They likewise downplay the danger of overdeterrence posed by allowing claims for purely economic loss, and understate the burden that litigating such claims would impose on the courts.

Plaintiffs' amici also err in urging this Court to replace the well-settled economic loss doctrine with new tests that purport to guard against unlimited, rippling liability by other means, such as case-by-case analysis of the duty to avoid purely economic loss, or a so-called "particular foreseeability" test. These new tests would

depart from settled law and the overwhelming weight of authority outside this State. They would also disrupt the State's economy and be highly impractical to implement. Plaintiffs' amici fail to show why such new law should be made by this Court rather than the Legislature, which has been active in modifying the economic loss doctrine where it deems appropriate.

For these reasons, and those offered by SoCalGas' answer brief and the amici supporting SoCalGas, the Court of Appeal's decision should be affirmed.

ARGUMENT

I. THE COURT SHOULD REJECT THE ARGUMENTS OF PLAINTIFFS' CALIFORNIA TORT LAW PROFESSORS

A. Plaintiffs' Law Professors Mischaracterize California Law

According to Plaintiffs' law professors, California law generally presumes a duty of care to avoid all losses from negligence, even purely economic losses, and presumes the absence of such a duty only in the narrow "realm of transaction-based cases." (Br. 18; see *id.* at pp. 15-18.) That premise is demonstrably false, for this Court's precedents make clear that as a general rule

pure economic loss is *not* recoverable in negligence cases. Plaintiffs' law professors simply ignore this Court's statement in *Centinela* that "recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions *is the exception, not the rule, in negligence law.*" (*Centinela, supra,* 1 Cal.5th at p. 1013, quoting *Quelimane,* 19 Cal.4th at p. 58, italics added.)

Plaintiffs' law professors likewise ignore or mischaracterize this Court's other articulations of the economic loss doctrine. They conspicuously fail to mention this Court's decision in *Fifield Manor v. Finston* (1960) 54 Cal.2d 632 ("*Fifield*"), which was not a "transaction-based" case. *Fifield* held that an actor has no duty of care to avoid purely economic losses to a third party (there, the financial interests of a nursing home) when it negligently injures an individual in a car accident, even when downstream economic losses are foreseeable. (*Fifield, supra,* 54 Cal.2d at pp. 636-637.)

Plaintiffs' law professors also mischaracterize *Quelimane* (Br. 17-18)—another case in which this Court held there was no duty to

prevent purely economic losses to strangers—as a "transaction-based" case. In *Quelimane,* a would-be property seller alleged that its property declined in value and was harder to market because the defendant title insurance companies would not sell title insurance to potential buyers. (19 Cal.4th at p. 36.) This Court rejected the claim, ruling that the insurance companies had no duty to protect the purely financial interests of the sellers. (*Id.* at pp. 58–60.) Plaintiffs' law professors assert that *Quelimane* involved a "transaction-based economic loss" because the plaintiff's ability to contract with potential home buyers was hampered. The title insurance companies in *Quelimane,* however, were strangers both to the plaintiffs, who were the attempted sellers of the property, and to the buyers to whom the companies refused to issue insurance. Thus, contrary to amici's assertion, the plaintiffs' claim in *Quelimane* was not transaction-based.

Thus, Plaintiffs' law professors are incorrect to assert (Br. 13) that under California law "a duty of care is owed in non-transaction-based economic loss cases." (See generally Utilities Br. 9-13.)

B. Plaintiffs' Law Professors Err In Proposing A New "Particular Foreseeability" Test

Plaintiffs' law professors propose replacing the economic loss doctrine with a "particular foreseeability" test that would presumptively impose upon defendants an unlimited duty to avoid all economic losses to third parties, and would instead attempt to solve the problem of potentially unlimited liability by applying a "particular foreseeability" test at the proximate causation stage. (Br. 12, 27–29.) According to Plaintiffs' law professors (Br. 11), a loss is "particularly foreseeable" where it harms a "special interest" that is "not shared by the general community"—a vague standard that they do not otherwise define. This Court should reject their proposal as both unsupported and unworkable.

1. The "Particular Foreseeability" Test Lacks Any Supporting Authority

In advancing their new "particular foreseeability" test, Plaintiffs' law professors admittedly cite not a single California case or case applying California law that employs this test. Plaintiffs' law professors are also wrong in asserting (Br. 23, 25) that the proposed "particular foreseeability" test is "consistent with the Restatement

(Third) of Torts" and "builds on [] existing case law." The "particular foreseeability" test contradicts the Restatement and the overwhelming weight of authority from outside of California. It is instead built upon a three-decade old case that is widely recognized as an outlier and expressly rejected by the Restatement, and cases concerning commercial fishermen and fisheries that fall outside the economic loss doctrine for reasons distinctive to maritime law.

To begin with, contrary to Plaintiffs' law professors' assertion, the Restatement does not support the proposed "particular foreseeability" test. The eight sections on unintentional infliction of economic loss in the Restatement (Third) of Torts: Liability for Economic Harm never once use the term "particular foreseeability" in discussing duty, or proximate cause, or otherwise. To the contrary, as the Restatement Scholars confirm (Br. 11–16), the Restatement provides that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another" (Rest.3d, Torts, Econ. Harm, § 1), and recognizes that this principle applies in non-transaction based cases where a party causes purely economic

loss to a stranger (see *id.*, § 7, illus. 4). Indeed, the Restatement cites this Court's decision *Fifield* as an example of this general no-duty rule and uses it as the basis for one of its illustrations. (Rest.3d, Torts, Econ. Harm § 7, Reporter's Note A [discussing illustration 2].)

Plaintiffs' law professors also misplace reliance (Br. 20) on the nearly universally ignored 1985 New Jersey Supreme Court decision in *People Express Airlines, Inc. v. Consolidated Rail Corp.* (N.J. 1985) 495 A.2d 107. *People Express* is a "lonely outpost" that has never been cited by a California court and has been rejected by "the highest courts in other states" with "a striking degree of unanimity" since the decision was issued. (Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort* (2006) 48 Ariz. L. Rev. 857, 858.) For example, *People Express* was explicitly rejected in *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.* (N.Y. 2001) 750 N.E.2d 1097, 1103 ("*532 Madison Avenue*"). The Restatement likewise expressly rejects *People Express*:

> The rule stated here [that there is no recovery for purely economic losses resulting from physical injury to a third party] is often associated with *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (Holmes, J.), but

> appeared in many earlier cases as well. [citations]. Contrary positions have been taken only occasionally in the case law. *See People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985).

(Rest.3d, Torts, Econ. Harm § 7, Reporter's Note A.)

Plaintiffs' law professors fare no better in citing (Br. 20–22) a line of cases involving commercial fishermen and fisheries, including *Union Oil v. Oppen* (9th Cir. 1974) 501 F.2d 558 ("*Union Oil*") and *Curd v. Mosaic Fertilizer, LLC* (Fla. 2010) 39 So.3d 1216 ("*Curd*"). This line of cases recognized a special, limited duty to commercial fishermen and fisheries, despite the general rule that one need not act to protect the economic interests of other kinds of businesses, because commercial fisherman have a special, historical, quasi-property interest in marine life that is different in kind from the interest of the general business community in the continued patronage of their customers. Plaintiffs in such cases have successfully argued that this interest "qualifies as a property right," and so courts are willing to recognize that "commercial fisherman fall into a recognized exception to th[e] general [no-duty] rule." (*Curd, supra* 39 So.3d at p. 1224; see also *Union Oil, supra,* 501 F.2d at

p. 567 [noting that "the familiar principle that seaman are the favorites of admiralty and their economic interests ... give rise to a special right comparable to that of a master to sue for loss of the services of his servant, or the right of husband or father to sue for the loss of services of wife or child"].) Commercial fisheries have a similar interest as well in riparian rights to fishing in specific geographic areas. (See *Shaughnessy v. PPG Indus., Inc.* (W.D. La. 1992) 795 F.Supp. 193, 196; *Masonite Corp. v. Steede* (Miss. 1945) 23 So.2d 756, 758; *Hampton v. North Carolina Pulp Co.* (N.C. 1943) 27 S.E.2d 538, 546–547.) Thus, *Union Oil, Curd,* and other fishermen and fisheries cases do not recognize a "particular foreseeability" test or analyze the recoverability of economic loss based solely on proximate cause, as the proposed test would do.

2. The "Particular Foreseeability" Test Is Unworkable And Would Have Harmful Practical Consequences

Adoption of Plaintiffs' law professors' "particular foreseeability" test would also be extraordinarily impractical and harmful. Where does a "particular foreseeability" test draw the line when communities are harmed by wide-scale disasters? At an

arbitrary five-mile radius? As to what types of businesses that might be affected? According to Plaintiffs' law professors' test, so long as a negligent act led to an economic harm considered by any one judge to be "particularly foreseeable," there would be a corresponding duty to prevent it. Their test thus would vastly expand potential liability and create overdeterrence through its vagueness and uncertainty.

For example, under such a test, banks would be subject to suit by adversely affected businesses when they negligently refuse to approve loans, municipalities when they negligently fail to plow the snow fast enough, and so on, because their actions are likely to cause particularly foreseeable economic losses to certain businesses in their communities. Or suppose that an anchor tenant in a shopping center decided to relocate because a drunk driver crashed into its storefront, or temporarily closed shop when someone's drone hit a power line causing an outage. Would the negligent driver or drone operator then be subject to lawsuits from every smaller business in the shopping center that lost money when the anchor tenant closed

temporarily? Or what about the bridge hypothetical (see *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 440, fn. 11 ("*Bily*"))—which, notably, not one of Plaintiffs' amici even mentions? Does the mere fact that the driver was negligent in causing the accident mean that he is liable for all the "particularly foreseeable" economic losses of the hourly workers in the cars behind him who are late to their shift? Or to all the businesses on the other side of the bridge that are cut off from their customers? The answer to all these questions is "no"—not because the harms fall outside the zone of "particular foreseeability," but because there is no general duty to avoid economic losses to others.

Plaintiffs' law professors cannot justify such far-reaching consequences by suggesting that, once a duty to *someone* has been breached, anyone else who suffered losses can piggyback on their claim, even if no duty was owed to them. California courts have held that, under "[w]ell-settled principles of negligence," in determining whether a duty of care is owed, courts ask whether there is a "duty owed directly to the plaintiff." (*Wooden v. Raveling*

(Ct. App. 1998) 61 Cal.App.4th 1035, 1038, quoting *Burgess v. Superior Court* (2011) 2 Cal.4th 1064, 1073; see also Benson, *The Problem with Pure Economic Loss* (2009) 60 S.C. L. Rev 823, 878 [negligence plaintiffs cannot "attempt[] to piggyback" on a duty owed to someone else].) Plaintiffs' law professors offer no reason to depart from this rule.

Moreover, Plaintiffs' "particular foreseeability" test would if anything have a perverse effect. It would protect as "particularly foreseeable" large companies like People Express, which have access to first-party insurance to protect against economic interruption. But it would fail to protect many smaller enterprises with fewer resources to insure against economic loss—especially mobile or itinerant business actors like taxi drivers, ice cream vendors or door-to-door salesmen, whose presence in any one location is not "particularly foreseeable."

Finally, Plaintiffs' law professors test would increase judicial burdens by replacing duty analysis with an exclusive focus on proximate cause. Duty analysis is categorical; proximate cause

analysis is necessarily fact-intensive. As the Restatement Scholars explain (Br. 13), "[d]uty rules perform a gate-keeping function" because they "enable trial courts to decide on the pleadings what negligence claims are actionable." Inquiring into "particular foreseeability" rather than duty would thus require factual development and deprive courts of the ability to dispose of meritless economic loss claims quickly and effectively at the outset of a case.

C. The Proposed "Particular Foreseeability" Test Would Not Affect The Outcome Here

Even if Plaintiffs' law professors' "particular foreseeability" test were adopted, SoCalGas would prevail under it on the record here. According to Plaintiffs' law professors (Br. 11), a loss is "particularly foreseeable" only where it harms a "special interest" that is "not shared by the general community." In *Union Oil,* for instance, the Ninth Circuit held that fishermen could recover for purely economic losses, in part, because they suffered an injury as a result of an oil spill that was of a "special nature," different in kind from those suffered by the business community as a whole. (501 F.3d at p. 570). But in so holding, the Ninth Circuit explicitly

recognized that it was applying a narrow exception to the general rule that there is no duty to prevent purely economic loss, which would not save the claims of ordinary businesses:

> [I]t must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fisherman, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969.... Nothing said in this opinion is intended to suggest, for example, that every decline in commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which defendants may be responsible.

(*Ibid.*; see also *Burgess v. The M/V Tamano* (D. Me. 1973) 370 F.Supp. 247, 251 [permitting claims by fisherman and claim diggers but not businesses hurt by decline in tourist trade].)

This case falls squarely within the general rule because Plaintiffs seek to recover for "every decline in commercial activity of every business in the [Porter Ranch] area following the occurrences of [2015]." Indeed, if there ever was a general, non-special interest, this is it. The new test proposed by Plaintiffs' law professors thus would not change the outcome here and therefore need not be considered.

II. THE COURT SHOULD REJECT THE ARGUMENTS OF THE TOLL BROTHERS

Although Toll Brothers is not a party to the current suit, it is an interested party and its arguments should be assessed accordingly. Like Plaintiffs, Toll Brothers seeks to recover from SoCalGas in the same Coordination Proceeding for economic losses allegedly caused by the Aliso Canyon gas leak to real estate development in Porter Ranch. Not surprisingly, Toll Brothers supports Plaintiffs, and discusses at length (Br. 16–20) SoCalGas' alleged negligence based on allegations in its own complaint and other extrajudicial materials that are not part of the record in this case and therefore not properly before the Court.

Even setting aside this problem, Toll Brothers' arguments fail on their merits. Toll Brothers argues (Br. 11–23) that economic losses should be presumed nonrecoverable only in the contractual context in order "to avoid 'tortification' of contracts" (Br. 13). It thus mischaracterizes this Court's precedent and ignores the concerns about limitless and disproportionate liability, litigation cost and excessive deterrence that have led to the application of the economic

loss doctrine in the transaction and non-transaction context alike.

A. Toll Brothers Mischaracterizes California Law

Toll Brothers attempts to paint the Court of Appeal's decision as a "radical expansion of the economic loss rule" that would make California an "outlier in tort jurisprudence" and "bar recovery in virtually all cases involving purely economic loss." (Br. 9.) These statements are simply untrue.

First, contrary to Toll Brothers' assertion, SoCalGas is not seeking to bar recovery "in virtually all cases involving purely economic loss." To the contrary, SoCalGas recognizes that purely economic losses may be recovered for negligence in cases like *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, where the *Biakanja* factors are satisfied. (Ans. Br. 42.) In addition, the economic loss doctrine that this Court has long recognized applies only to bar negligence and strict liability causes of action, not other tort claims. Purely economic losses may be recovered, for example, for intentional interference with prospective economic advantage, or for misrepresentation, defamation, public nuisance, unjust enrichment or fraud—so long as the specific elements for those causes of action

are met. (See *Bily, supra,* 3 Cal.4th at pp. 415–416 [dismissing negligence claim seeking purely economic losses but permitting claim for intentional misrepresentation]. See generally Dobbs, *An Introduction to Non-Statutory Economic Loss Claims* (2006) 48 Ariz. L. Rev. 713, 721–722 [discussing defamation].) The economic loss doctrine thus serves only the limited purpose of avoiding the creation of a general, free-ranging "duty" to avoid harming a stranger's purely economic interests where no other cognizable cause of action could be brought.

Second, applying the economic loss doctrine here would not be an "expansion" of that rule at all. To make this argument, Toll Brothers argues that California courts have previously applied the economic loss doctrine only to claims that contractual obligations were negligently performed—*i.e.,* to transaction-based cases. (Br. 11-14.) That is not true. As this Court has explained, "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." (*Centinela, supra,* 1 Cal.5th at p.

1013.) That general rule holds whether the defendant negligently performed a contract, as in *J'Aire,* or negligently caused a car accident, as in *Fifield,* or negligently transported bombs, as in *Adams v. Southern Pacific Transportation Co.* (1975) 50 Cal.App.3d 37. Toll Brothers does not dispute that this Court applied the economic loss doctrine to bar recovery in a stranger case in *Fifield;* rather, it fails to address this Court's ruling at all.

Third, Toll Brothers' assertion (Br. 9) that the decision below is an "outlier in tort jurisprudence" is fanciful. To the contrary, as the Restatement Scholars explain (Restatement Scholars' Amicus Br. 11–16, 30–31), there is a widely-recognized "general principle of no duty when an actor causes pure economic loss," which California follows and was followed in the decision below. Indeed, SoCalGas's answer cited numerous cases from other jurisdictions barring claims for purely economic losses outside the contractual context in cases just like this. (Ans. Br. 62–68; see also Chamber Br. 21–22, fn. 6 [listing additional cases].) As these cases demonstrate, courts routinely apply the economic loss doctrine to bar recovery for purely

economic losses to strangers, for example when a defendant's negligence causes an office tower to partially collapse, forcing the closure of fifteen city blocks (see *532 Madison Avenue, supra,* 750 N.E.2d 1097), or when a truck driver's negligence damages a bridge, closing it for weeks (see *Aikens v. Debow* (W. Va. 2000) 541 S.E.2d 576). Toll Brothers ignores these decisions.

B. Toll Brothers Fails To Offer Any Persuasive Policy Grounds For Restricting The Economic Loss Doctrine

Toll Brothers invokes *Rowland v. Christian* (1968) 69 Cal.2d 108, and purports to engage in a "robust duty and policy analysis." (Br. 11–12.) But Toll Brothers ignores the concerns underlying the economic loss doctrine.

Toll Brothers recites (Br. 15–16) that one of the "aims of tort law" is to provide compensation for injured parties and that businesses may not be made whole if the economic loss doctrine bars their claims. That is tautological: if SoCalGas owes Plaintiffs no duty to avoid purely economic loss, Plaintiffs cannot bring a claim for, and thus cannot recover, purely economic losses from SoCalGas, at least based on negligence. And in fact, negligence law