No. S246669

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,
Respondent to Petition for Review,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent to Petition for Writ of Mandate.

FIRST AMERICAN WHOLESALE
LENDING CORPORATION et al.,
Real Parties in Interest, Petitioners.

After a Decision by the Court of Appeal,
Second Appellate District, Division Five, Case No. B283606

The Superior Court of Los Angeles County,
Judicial Council Coordination Proceeding No. 4861,
The Hon. John Shepard Wiley, Jr., Judge

PETITIONERS' OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

Does a gas company that negligently caused the largest methane gas leak in United States history, and which forced residents in the surrounding community to evacuate their homes for several months, owe a duty of care to the community's businesses for the economic losses caused by the gas company's misconduct?

INTRODUCTION

Southern California Gas Company's ("SoCalGas") negligence caused a catastrophic gas leak near the community of Porter Ranch, California. The noxious fumes forced many of the community's tens of thousands of residents to evacuate their homes, depriving neighborhood businesses of patrons for several months. Applying an incorrect standard, the Court of Appeal erroneously concluded that SoCalGas owed no duty of care to businesses in the affected area ("Business Plaintiffs") because the economic losses they suffered did not arise from any contractual relationship with SoCalGas.

The Court of Appeal should have begun its analysis with California Civil Code section 1714(a), which mandates that all Californians owe each other a duty to act with reasonable care in the management of their property or person. The Court of Appeal then should have analyzed the factors first articulated in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*), to determine if SoCalGas's misconduct somehow warranted an exception to section 1714(a)'s bedrock duty rule. (*Id.* at pp. 118–19.) Application of these so-called *Rowland* factors here demonstrates that neither foreseeability issues nor policy reasons warrant an exception from section 1714(a) and the general rule that SoCalGas had a duty to act with reasonable care to prevent the economic injuries Business Plaintiffs suffered.

Rather than start with section 1714(a) and the *Rowland* factors, the Court of Appeal instead applied the so-called "economic loss" doctrine to this case. According to the Court of Appeal, that doctrine bars the recovery of economic injury in tort unless that injury arises from a contract between SoCalGas and another person or entity.

But this Court's precedents and the fundamental policies behind the economic loss doctrine point to exactly the opposite conclusion: the economic loss doctrine bars the recovery of economic injury in tort only when that injury arises from a contract or warranty. This Court has never barred the recovery of economic losses in an environmental disaster such as this where the injury does not arise from a contract or warranty. And for good reason: the economic loss doctrine was created to deal with circumstances where businesses contract with one another, or with their consumers, and thereby agree upon a private ordering of their relationships. Courts respect that private ordering, and have determined that tort law generally ought not interfere in those private business relationships. Business Plaintiffs' injuries here do not arise from a contractual relationship with SoCalGas. Indeed, their only relevant "relationship" to SoCalGas is one of geographic proximity, operating in the vicinity of the gas storage facility. The very fact that Business Plaintiffs' losses here do not arise from a contract is the reason why the law of tort should, and does, apply. The parties never contracted out of the basic duty of care they owed to one another under section 1714(a).

Even if the economic loss doctrine does apply to this case (it does not), the Court of Appeal nonetheless erred by not following this Court's standard when it determined that Business Plaintiffs did not meet the special relationship exception to the economic loss doctrine. As this Court first directed in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), the special relationship exception to the economic loss doctrine turns on a six-

factor *balancing* test. The Court of Appeal, however, did not balance the six so-called *Biakanja* factors. Instead, it narrowly construed the first factor—the extent to which a defendant's transaction was meant to affect the plaintiff—to mean that the defendant must have entered into a contract for the special relationship exception to be satisfied. Finding this factor to be dispositive, the Court of Appeal saw no need to consider the five other *Biakanja* factors. This, too, was clear error.

The Court of Appeal's approach, if upheld, would force these local small businesses to absorb the costs of SoCalGas's catastrophe. The Court of Appeal's sole policy justification for this outcome was a glancing reference to the danger of "unlimited responsibility for intangible injury." However, recognizing a duty in this case would not have such drastic effects. First, for these small businesses that survive on the smallest of margins and the patronage of local residents, the alleged economic injuries are very much tangible. Second, recognizing a duty would not create "unlimited responsibility" because the proposed class is precisely limited to businesses within the geographic boundaries of the evacuation zone, and so by definition there is no risk of "unlimited responsibility." Moreover, by concluding that a duty exists does not mean that SoCalGas will be liable; it remains to be proven whether SoCalGas breached its duty of care or whether that breach proximately caused Plaintiffs' injuries.

This Court has rejected unfounded or exaggerated concerns about the risks of unlimited liability before. Its response to those concerns sums up Plaintiffs' position here: "The Court of Appeal majority below . . . claimed that potential liability, if recognized here, would have no end. . . . [But] if a duty is not imposed under the facts of this case, then where does it begin?" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 784 (*Cabral*), original italics.)

STATEMENT OF FACTS

I. SoCalGas negligently caused the largest methane gas leak in U.S. history leading to the evacuation of much of the community.

A. SoCalGas operates the Aliso Canyon Facility, which stores natural gas in a huge underground reservoir.

Defendant SoCalGas operates the Aliso Canyon Storage Facility ("Aliso Canyon Facility" or "Facility"), located in the hills just north of Porter Ranch in Los Angeles. (Exhibits in Support of Writ of Prohibition, Mandate, or Other Appropriate Relief Appellants' Appendix ["EP"], 1 EP 165, ¶ 2; *Southern California Gas Leak Cases* (2017) 18 Cal.App.5th 581, 583 (*Gas Leak*).)

The Facility is one of the largest gas storage facilities in the nation, and stores natural gas in an underground reservoir that can hold 80 billion cubic feet of natural gas. (1 EP 170, ¶ 27; 1 EP 165, ¶ 2.) The reservoir extends below the community of Porter Ranch. (1 EP 170, ¶ 24.) To get the gas in and out of the Facility's reservoir, SoCalGas uses 115 high-pressure injection wells. (1 EP 170, ¶¶ 24–26.)

B. SoCalGas violated industry standards—and then lied about those violations.

SoCalGas failed to operate and maintain the Facility in accordance with industry standards. (1 EP 177–178, ¶¶ 58–59.) SoCalGas was aware that many of the valves on the wells were leaking (1 EP 176–177, ¶¶ 53–56), but removed or never installed safety valves on most of the wells in the Facility. (1 EP 177-178, ¶ 58.)

The well that caused the catastrophe at issue here is a case in point. SoCalGas removed the safety valve in 1979 from that well, SS-25. (*Ibid.*) Yet it continued to report to the government regulator that it had "replaced" the safety valve, and that the SS-25 well had an operable safety valve.

(*Ibid.*) After the blowout, SoCalGas finally admitted it had removed the safety valve more than three decades earlier. (*Ibid.*)

SoCalGas failed to take other reasonable measures to protect against a well blow-out and resulting massive gas leak. Injection wells contain an exterior casing and interior tubing. Gas is meant to be pumped through the well's interior tubing, so that if the tubing springs a leak, the exterior casing, normally filled with a protective brine, will act as a safety or secondary barrier. (*Ibid.*) But SoCalGas pumped gas through both the interior tubing and the exterior casing at high pressure. (*Ibid.*) The only protection against a leak, therefore, was the bare exterior casing. Moreover, SoCalGas did not cement the SS-25 well's casing all the way to the well's surface, so the casing was exposed to elements, increasing corrosion. (1 EP 178, ¶ 59.)

C. Predictably, when gas began leaking uncontrollably, gas "spread an oily mist over nearby neighborhoods."

Due to this negligence, well SS-25 blew on October 23, 2015 and continued to emit large amounts of natural gas for over four months. (1 EP 171, ¶ 33.) Unable to activate a safety valve, SoCalGas could not stop the blowout and the resulting uncontrolled gas leak. (1 EP 174, ¶ 44). Finally, on February 18, 2016, the government certified the alleged plugging of the well. (1 EP 175, ¶ 49.)

The escaping natural gas "spread an oily mist over nearby neighborhoods, intruding upon and damaging yards, homes, vehicles, communal spaces, and other property." (1 EP 171, ¶ 34.) Residents and individuals who worked near the Facility complained about odors and experienced acute respiratory and central nervous system symptoms. (1 EP 176, ¶ 51.)

II. Business Plaintiffs suffered tangible economic injuries due to the six month evacuation of local residents.

A. Los Angeles County ordered SoCalGas to relocate residents within a five-mile radius of the Facility.

In response to reports of respiratory and central nervous system symptoms, Los Angeles County ordered SoCalGas to relocate residents who lived within a five-mile radius of the leak. (1 EP 172-173, ¶ 40.) The County's Board of Education also decided to relocate public school students and staff at two nearby public schools inside this five-mile radius for the rest of the 2015-2016 school year. (1 EP 173, ¶ 41.)

As a result, approximately 15,000 residents were evacuated for several months. (1 EP 178-179, ¶¶ 63-64.)

B. Plaintiffs are local businesses dependent on the patronage of local residents and so lost income when approximately 15,000 residents were evacuated.

The Business Plaintiffs are small businesses located within five miles of the blowout, the same area that the County ordered evacuated, and each lost income due to the blowout and ensuing evacuation. (1 EP 179-182, ¶¶ 65-79.) On behalf of a class of about 400 local businesses within the evacuation zone, the Plaintiffs sued SoCalGas and its parent company for strict liability, negligence, negligent interference with prospective economic advantage, and violations of the Unfair Competition Law. (1 EP 186, 188-196, ¶¶ 103-104, 111-162.) Plaintiffs seek to recover for the income they lost due to the gas blowout. (1 EP 165-166, ¶ 4.)

PROCEDURAL HISTORY

I. SoCalGas demurred, arguing that the economic loss doctrine barred Plaintiffs' tort claims.

SoCalGas demurred to Plaintiffs' first three causes of action: strict liability, negligence, and negligent interference with prospective economic

advantage. (1 EP 128-131; *Gas Leak, supra*, 18 Cal.App.5th at p. 585.) It argued that the economic loss doctrine barred those causes of action because it owed no duty to the Business Plaintiffs. According to SoCalGas, the only way to recover for economic loss is to demonstrate the existence between the plaintiff and defendant of a "special relationship" pursuant to *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 (*J'Aire*), by satisfying the *Biakanja* factors. Among the factors absent from this case, SoCalGas argued, was the existence of a "transaction" that affected the plaintiff, the first *Biakanja* factor. (1 EP 139-142; *Gas Leak, supra*, 18 Cal.App.5th at p. 585.)

II. The Superior Court overruled the demurrer.

The Superior Court overruled the demurrer. In an incisive order, it explained why "[t]raditional tort theory supports" the Plaintiffs' claims. (2 EP 386; *In re Coordination Proceedings Special Title (Rule 3.550) Southern California Gas Leak CA* (Super. Ct. L.A. County, May 8, 2017, No. JCCP 4861) 2017 WL 2361919, at *3 ("Trial Court Order").)

But, as the trial court observed, the law was "in a state of some uncertainty." (2 EP 388; Trial Court Order, *supra*, 2017 WL 2361919, at *5.) The "challenge," it stated, was this Court's decision in *J'Aire*, which approved the recovery of economic loss where the defendant and another party had a "contract" that was "intended to affect the plaintiff." (*Ibid.*)

The trial court was guided by this Court's analysis in *J'Aire* of a prior case, *Adams v. Southern Pacific Transportation Co.* (1975) 50 Cal.App.3d 37 (*Adams*). In *Adams*, a trainload of military bombs exploded, causing the destruction of the factory that employed the *Adams* plaintiffs. The workers sued Southern Pacific for their lost income due to not being able to work at the destroyed factory. The court of appeal in *Adams* held that plaintiffs' suit was barred because they were seeking to recover purely economic losses.

As the trial court here noted, however, *J'Aire* "disapproved" of the court of appeal's decision in *Adams*. (2 EP 388; Trial Court Order, *supra*, 2017 WL 2361919, at *6, quoting *J'Aire*, *supra*, 24 Cal.3d at p. 807.) The trial court interpreted *J'Aire*'s disapproval of *Adams* to mean that California law allows recovery for purely economic loss when that loss does not arise from a contract or warranty. The trial court observed that the facts of *Adams*—a negligently caused explosion causing economic loss to workers at a nearby factory—were somewhat analogous to the facts of this case, where a negligently caused natural gas leak caused economic loss to neighborhood businesses. (*See* 2 EP 388-389; Trial Court Order, *supra*, 2017 WL 2361919, at *6.)

The trial court certified its order for immediate appellate review under Code of Civil Procedure Section 166.1.

III. On writ review in a divided opinion, the Second District ordered that the demurrer be sustained.

In response to the SoCalGas's petition for writ review, the Court of Appeal issued an alternative writ. The Superior Court elected not to overrule the demurrer.

A. The Majority Opinion held that SoCalGas owed no duty to Business Plaintiffs.

A majority of the Court of Appeal panel thereafter issued a peremptory writ, holding that SoCalGas owed no duty of care to prevent the economic injuries suffered by Business Plaintiffs. It identified a "general rule that precludes business plaintiffs from recovering for pure economic losses under a negligence theory . . . ." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 595.) According to the Court of Appeal, this blanket "no-duty" rule has only one exception: where the plaintiff's economic loss arises out of a contractual transaction between the defendant and another person, courts may recognize that the defendant has a "special relationship"

with the plaintiff. (*Id.*, at p. 594 [citing *J'Aire*, *supra*, 24 Cal.3d at p. 806].) It is only a special relationship that can give rise to a duty not to inflict economic loss. But, because the Court of Appeal found that a special relationship requires a contract between the defendant and another party, and because such a contract was absent here, SoCalGas did not owe Plaintiffs a duty of care. As a result, all Plaintiffs were barred from recovering in tort for their economic losses caused by SoCalGas's misconduct.

B. The Dissent argued that a duty may be owed, and that writ relief was not appropriate.

Justice Baker dissented, stating that writ relief was not appropriate. (*Gas Leak*, *supra,* 18 Cal.App.5th at p. 595 (dis. opn. of Baker, J.).) A "more developed record" was "important to arrive at an appropriate disposition of this case." (*Id.* at p. 596.)

On the merits, according to Justice Baker, it was "quite possible" that some businesses "in a five-mile radius" from the Facility "are situated such that Southern California Gas Company owed them a duty of care." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).) This was because "some businesses in the immediate geographic area of the gas leak could have a special dependence on that area such that harm to them would be foreseeable to Southern California Gas Company . . . ." (*Ibid.*)

Justice Baker argued that litigation in the trial court should proceed to allow the Plaintiffs to prove that kind of special dependence. "Because the majority's opinion resolves the business plaintiffs' litigation on the demurrer record, however, it has no ability to approach the question of duty with a scalpel, and unfortunately resolves it instead with a meat axe." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).)

STANDARD OF REVIEW

"Duty is a question of law for the court, to be reviewed de novo on appeal." (*Kesner v. Super. Ct.* (2016) 1 Cal.5th 1132, 1142 (*Kesner*) [quoting *Cabral, supra*, 51 Cal.4th at p. 770].)

ARGUMENT

Plaintiffs' argument proceeds in four parts. First, they explain why Civil Code section 1714(a) and the *Rowland* factors—and not the economic loss doctrine—is the correct framework to determine whether SoCalGas owed Plaintiffs a duty of care. (See *infra* Argument § I.) They then apply the *Rowland* factors to this case to show that the Court should not recognize an exception to the general duty of care embodied in section 1714(a)—i.e., that SoCalGas did indeed owe Business Plaintiffs a duty of care. (See *infra* Argument § II.) Next, Plaintiffs explain why, even *if* the economic loss doctrine were the correct legal standard for determining duty here, SoCalGas would still owe a duty of care to Business Plaintiffs under the so-called *Biakanja* factors. (See *infra* Argument § III.) Finally, Plaintiffs briefly discuss why remand for further proceedings would be appropriate should this Court conclude that it is premature to rule on a duty of care on the pleadings. (See *infra* Argument § IV.)

I. The correct analysis to apply here is Civil Code section 1714(a) and *Rowland*—not the economic loss doctrine.

The central question in this case is what framework should be used to analyze the question of duty. Below, Plaintiffs first summarize the usual framework that this Court uses to answer duty questions: the framework provided by section 1714 of the Civil Code and *Rowland*. Plaintiffs then turn to the economic loss doctrine, briefly explaining how it is used to analyze duty questions and then discussing in depth why it is the wrong framework to use here.

A. Civil Code section 1714 and *Rowland* supplies the correct framework to analyze duty.

"[T]he basic policy of this state" on the duty of care is "set forth by the Legislature in section 1714 of the Civil Code . . . ." (*Rowland*, *supra*, 69 Cal.2d at pp. 118–19.) Under that provision, "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has . . . brought the injury upon himself or herself." (Civ. Code, § 1714(a).)

In deference to this "broad principle enacted by the Legislature," this Court has recognized that a duty of reasonable care is the "'general rule,'" and a lack of duty is "'an exception.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1143, [quoting *Cabral*, *supra*, 51 Cal.4th at p. 771].) When a question of duty is presented, therefore, this Court asks not "whether a *new duty* should be created, but whether an *exception* to Civil Code section 1714 . . . should be created." (*Cabral*, *supra*, 51 Cal.4th at p. 783, original italics.)

This general rule of duty holds true even when a plaintiff has suffered purely economic injury, as opposed to physical injury to the person or to physical property. This conclusion follows simply from the language the Legislature used in Civil Code Section 1714(a). As this Court observed in *J'Aire*, where the plaintiff had suffered purely economic injury, the language of Civil Code section 1714(a) "does not distinguish among injuries to one's person, one's property, or one's financial interests." (*J'Aire*, *supra*, 24 Cal.3d at p. 806, fn. 3.) As a result, this Court held, section 1714's general duty applies not only to "injury to one's person or property," but also to "[d]amages for loss of profits or earnings . . . ." (*Ibid.*)

When determining whether to create an exception to the general duty embodied in section 1714(a), this Court has consistently used "the *Rowland*

factors." (*Cabral, supra*, 51 Cal.4th at p. 772; *see also id.* at p. 771 [citing cases].) These factors are "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved." (*Rowland, supra*, 69 Cal.2d at p. 113.) Rather than apply these *Rowland* factors, the Court of Appeal required Plaintiffs to show that "a transaction between the defendant and another was intended to directly affect" them (*Gas Leak, supra*, 18 Cal.App.5th at p. 583), a requirement that plainly is not among the *Rowland* factors. For when *Rowland* applies, "there *is* no transaction." (*QDOS, Inc. v. Signature Fin., LLC* (2017) 17 Cal.App.5th 990, 999, italics added.)

The *Rowland* factors aid courts in performing what is ultimately a "line-drawing" exercise "based on policy considerations." (*Kesner, supra*, 1 Cal.5th at p. 1143.) Under *Rowland*, the underlying question is whether "public policy concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result." (*Ibid.*)

Plaintiffs discuss below why, under section 1714(a) and *Rowland*, SoCalGas owed a duty to Plaintiffs. (See *infra* Argument § II.) Before doing so, however, Plaintiffs next turn to the competing framework offered by SoCalGas—the economic loss doctrine—and explain why it is not the correct framework to apply here.

B. Because Plaintiffs' losses do not arise from contract or warranty, the economic loss doctrine does not govern.

SoCalGas maintains that, under the economic loss doctrine, it owed no duty of care to Plaintiffs.[1] But the economic loss doctrine simply does not apply.

Here, where Plaintiffs' losses do not arise from a contract or warranty, both precedent and policy dictate that the economic loss doctrine is the wrong framework to use to determine the duty question.

1. The economic loss doctrine applies only to cases where, unlike here, injury arises from contract or warranty.

This Court's jurisprudence shows that the economic loss doctrine comes into play only when the plaintiff's injury implicates a contractual obligation. Thus, application of the economic loss doctrine turns on the *cause* of the injury (whether it arises from contract or warranty) rather than the *type* of the injury (whether it is economic or non-economic).

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[1] While Plaintiffs will use the term "economic loss doctrine" as shorthand to refer to any rule that may bar the recovery of economic damages, the term is one that this Court has often declined to use. (*See Gas Leak*, *supra*, 18 Cal.App.5th at p. 591 [so noting].) That reluctance may stem from what the term falsely implies—namely, that California law normally bars the recovery of economic damages in tort simply because they *are* economic damages. That implication is false, since, as *J'Aire* observed almost forty years ago, Civil Code section 1714(a) does not exclude economic injury from the general rule that injury resulting from negligence leads to liability. (*J'Aire*, *supra*, 24 Cal.3d at p. 806; *see also supra* Argument § I.A.) For this very reason, several jurisdictions either have commented that the terms "economic loss doctrine" or "economic loss rule" can be misleading or have used it merely as a specialized term of art. (*See, e.g.*, *Town of Alma v. AZCO Constr., Inc.* (Colo. 2000) 10 P.3d 1256, 1262–63; *David v. Hett* (Kan. 2011) 270 P.3d 1102, 1108–09; *Hermansen v. Tasulis* (Utah 2002) 48 P.3d 235, 240; *Eastwood v. Horse Harbor Foundation, Inc.* (Wash. 2010) 241 P.3d 1256, 1261–62.)

a. The economic loss doctrine's purpose is to separate tort law from contract law.

The most detailed discussion of the economic loss doctrine can be found in *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979 (*Robinson Helicopter*). There, this Court articulated the doctrine's purpose: it "'prevent[s] the law of contract and the law of tort from dissolving one into the other.'" (*Id.* at p. 988, citation omitted.) Thus, the doctrine provides that "'[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses.'" (*Ibid.*, citation omitted.) Importantly, however, this Court observed that those "'economic expectations'" are already "protected by commercial and contract law." (*Ibid.*, citation omitted.) A hallmark of the economic loss doctrine, then, is the presence of a contract.

Crucially, *Robinson Helicopter* noted that the economic loss doctrine does not apply whenever there are purely economic damages. Specifically, the Court rejected the "proposition that the economic loss rule should be broadly construed to bar tort recovery in every case where only economic damages occur." (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 997, fn. 7.) Application of the economic loss doctrine turns not on the nature of the plaintiff's damage, but, rather, on whether the defendant's wrong and the plaintiff's injury should be governed by contract or by tort. (See *id.* at p. 991.) Hence, this Court in *Robinson Helicopter* allowed a fraud claim to proceed even though the plaintiff and defendant had a contractual relationship, because the alleged misconduct arose from a duty "independent of [the defendant] Dana's breach of contract." (*Ibid.*) This is the rule for negligence as well as fraud. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 551.)