The Long and Winding Road of Economic Loss Doctrine in Calloway v. City of Reno

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The long and winding road that is Calloway v. City of Reno began on October 30, 1989, when 164 townhouse owners in the Huffaker Hills development in Reno, Nevada, filed a class action lawsuit in the Second Judicial District Court of Washoe County. The homeowners alleged that their homes were built with defective framing, causing extensive rain and snow damage. Although the original suit named Offenhauser Development Company, Highland Construction, Inc., and Sparks Roofing and Siding as defendants, a series of amended complaints added the City of Reno and various other subcontractors to the litigation. The homeowners made their claim against the City for negligent inspection of the houses, and filed against the subcontractors under warranty and tort.

The homeowners settled their claims against Offenhauser and Highland, and the court dismissed the claims of sixty-five of the homeowners based on statutes of repose. The court also dismissed all the strict liability and negligence claims made by the plaintiffs, citing the doctrine of pure economic loss.

The homeowners then appealed to the Nevada Supreme Court, which, on May 22, 1997, held that the district court improperly applied the economic loss doctrine to the negligence claims. The City of Reno and the subcontractors petitioned the court for a rehearing which the court granted, withdrawing its

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1 The full title of the case is Charles Calloway and Marlene Iacometti, on behalf of themselves and other property owners of Huffaker Hills Units 3 and 4 Homeowners’ Association vs. City of Reno, P & H Construction, Clarence Poehland, John Carl Construction Company, Highland Construction, Inc., and Offenhauser Development Company. This case note, for obvious reasons, will hereafter use Calloway v. Reno.

2 Calloway v. Reno, 939 P.2d 1020 (Nev. 1997). This is the first opinion that the Supreme Court offered on the case. It is designated in the body of this text as Calloway I.
opinion on December 3, 1998. On February 29, 2000, the court issued a new ruling, affirming the original district court holding on economic loss doctrine and rejecting the homeowners' negligence and strict liability claims.

In Calloway I the court held that Nevada plaintiffs could sue in tort for grievances that were described as strictly economic in nature. By withdrawing that opinion and replacing it with Calloway II, the court held that economic loss doctrine precluded negligence claims in construction defect cases. In doing so, the court removed an important remedy for aggrieved homeowners and threw another line of cases involving municipal liability for negligent inspection into question.

On April 20, 2000, the homeowners petitioned for yet another rehearing, and the Nevada Supreme Court's denial of that request finally brought the Calloway odyssey to an end. This lengthy litigation leaves Nevada construction defect law in turmoil. The law prior to Calloway was uncertain, at best. Contractors, designers, subcontractors, and homeowners all hung in limbo as the Nevada Supreme Court took conflicting directions in its economic loss rulings.

This note will examine the Nevada Supreme Court's treatment of the economic loss doctrine in construction defect cases, and contrast its Calloway decisions with trends toward greater consumer protection in both Nevada law and the case law of other states. This note argues that Calloway II relied incorrectly upon the rule of economic loss. Applying economic loss doctrine to physical property damages in construction defect cases ignores the modern reality that homes are more like mass manufactured products than one-of-a-kind entities.

I. HISTORICAL DEVELOPMENT OF ECONOMIC LOSS DOCTRINE

When and how to invoke the economic loss doctrine is a particularly pressing problem for Nevada. The recent and sizable influx of residents into the state has caused an explosion in home construction in Nevada. In 1996, 20,000 new homes were sold in Las Vegas, approximately fifty-five per day,
with 50 percent of those homes being planned developments. In 1997, almost 19,000 single family and 11,200 multi-unit residences were being built on 1996 permits. This demand in the housing market has contributed to an almost inevitable trend towards hastily - and sometimes shoddily - built housing.

During this building boom, the case of Calloway v. Reno wound its way through the Nevada courts over a period of eleven years, with the final result in the case hinging on the Nevada Supreme Court's approach to the economic loss rule and its applicability to Nevada's unique home-building environment.

A. The Economic Loss Doctrine

The economic loss doctrine arose in the nineteenth century as a means to resolve conflicts, perceived or real, between contract and tort theories. At that time, contract law was thought to enforce expectancy interests created by a specific agreement between parties who were said to be in privity. Tort law, on the other hand, was designed to protect all citizens from physical harm to person or property without regard for contractual duty. Tort law imposed a duty arising out of law, while the duty of contract law was limited to the potential liability specifically agreed upon by the contracting parties.

At its inception, the economic loss doctrine prohibited the recovery of damages in tort for product defects when the defect had not caused personal injury or damages to property other than the manufacturer's work itself. When only the work product itself was damaged as a result of its defective nature, the damage was defined as "economic" rather than as "property damage," and was not recoverable in tort. Economic losses also included the diminution in value of an item due to its defective nature and the consequent loss of use or lost profits.

In the privity view, as expressed in the South Carolina case of Carolina Winds v. Joe Harden, loss in a construction defect case was not caused by a contractor's failure to conform to a standard of care imposed by law, but rather to a standard imposed by contract. Carolina Winds involved homeowners in a planned community who sued their contractor and subcontractors for negligent construction and breach of the implied warranty of fitness for intended

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20 Id. at 16.
21 Id. at 15. See also Aas v. San Diego, 12 P.3d 1125, 1157 (Cal. 2000) (Mosk, J., dissenting) ("It appears, moreover, that cutting corners is a prevailing problem in the development industry.").
23 Id. at 892.
24 Id. at 901.
25 Id. at 901-02.
26 Id.
27 Id. at 896.
28 Id. at 895.
use.\textsuperscript{30} The South Carolina Court of Appeals denied relief against the contractor on the warranty claim, holding that warranty claims arise from the sale and must be pursued only against defendants with whom the plaintiff is in privity of contract.\textsuperscript{31} The court also denied the negligence claim, citing the doctrine of economic loss.\textsuperscript{32} The court found that the plaintiffs were, in effect, asking the defendant to be held liable for property damage that might cause physical damage at a later date.\textsuperscript{33} The court held that allowing a tort claim for property damage on the grounds that property damage might cause physical harm in the future would not fulfill the tort requirement of actual damage.\textsuperscript{34} This would, in the court’s opinion, present difficulties in determining the amount of damage that had yet to occurred, and would require a potential defendant to become an insurer of all risks.\textsuperscript{35}

Courts have also held that tort liability without privity would result in essentially unlimited liability for negligent acts. In \textit{Ultramares Corp. v. Touche, Niven and Co.}, Judge Cardozo distinguished between the duties owed those with whom an accountant was in privity of contract and those owed to third parties:

The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling . . . . To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud . . . . \textit{A different question develops when we ask whether they owed a duty to these to make it without negligence.} If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.\textsuperscript{36}

In \textit{Stevenson v. East Ohio Gas Co.},\textsuperscript{37} the Ohio Court of Appeals refused to grant lost wages to a factory worker who sued the party whose negligence caused a factory to burn.\textsuperscript{38} The court held that recovery of these consequential economic losses was restricted to those with whom the tortfeasor was in privity of contract.\textsuperscript{39}

Courts applying the economic loss doctrine often cite foreseeability of damages as a primary reason to apply the doctrine. This position invokes the well-known contract principle of \textit{Hadley v. Baxendale}, that a contractor is liable only for those damages that can be reasonably foreseen by the parties.\textsuperscript{40} Since it is virtually impossible to predict the economic consequences of a given act, many courts hold that allowing recovery for consequential losses, such as

\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.} at 901.
\textsuperscript{32} \textit{See generally id.} at 901-05.
\textsuperscript{33} \textit{Id.} at 905-06.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} at 905.
\textsuperscript{36} 174 N.E. 441, 444 (N.Y. 1931) (emphasis added).
\textsuperscript{37} The heading of the case report lists the plaintiff as Stevison, but the body of the decision refers to the plaintiff as Stevinson. \textit{Economic Loss} and citing court cases refer to the plaintiff as Stevenson.
\textsuperscript{38} Stevenson v. East Ohio Gas Co., 73 N.E.2d 200, 203 (Ohio 1946).
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Hadley v Baxendale}, 9 Ex. 341, 156 Eng. Rep. 145 (1854).
lost wages and opportunities, would result in unacceptable, open-ended liability.\textsuperscript{41}

Against this backdrop, the economic loss doctrine arose largely in reaction to the holding in \textit{Macpherson v. Buick Motor Company}, in which a New York court held Buick liable to third party purchasers for damage caused by a defective automobile wheel.\textsuperscript{42} Judge Cardozo held that a manufacturer may be held liable in tort for any damage caused by an article that would be dangerous if defectively made.\textsuperscript{43} Courts reacted to what was perceived as \textit{Macpherson}'s expansion of tort liability to third parties by restricting that liability to personal injury and requiring foreseeability.\textsuperscript{44} However a recent trend towards greater protection for consumers has invigorated challenges to the rule of economic loss in construction defect cases. Courts have cited a changing demographic landscape, where homes are frequently mass manufactured and consumers are less able to protect themselves, as reasons to allow tort liability in some construction defect cases.

In South Carolina, the \textit{Carolina Winds} case was overruled by \textit{Kennedy v. Columbia Lumber and Manufacturing}.\textsuperscript{45} There, the Supreme Court of South Carolina held that \textit{Carolina Winds} was "repugnant to South Carolina's policy of protecting the new home buyer," and refused to protect builders that built defective housing based on "the imposition of traditional and technical legal distinctions."\textsuperscript{46}

State courts in New York and Texas joined the trend towards citing public policy reasons for rejecting the technical restrictions of economic loss.\textsuperscript{47} These courts found inequity in allowing recovery for personal injury while denying such a recovery for physical damage to property, including the defective product itself.

In \textit{Dudley v. Drott Manufacturing}, a crane collapsed due to defective bolts in the crane.\textsuperscript{48} Under traditional economic loss theory, recovery would not be allowed in tort because the crane had injured only itself. The court expressed its support for protection of consumers, citing the technological nature of today's society, and held that manufacturers were in a superior position to recognize and cure defects.\textsuperscript{49} The court rejected the defendant's argument that recovery was available only if the crane damaged other property, but not for damage to the crane itself.\textsuperscript{50}

Considerations of public policy, wrote the court,

\textsuperscript{41} See Barrett, \textit{supra} note 22, at 898.
\textsuperscript{42} 111 N.E. 1050 (N.Y. 1916).
\textsuperscript{43} \textit{Id.} at 1053.
\textsuperscript{44} See Barrett, \textit{supra} note 22, at 906-09. Barrett points out that \textit{Macpherson}'s elimination of the lack of privity defense did not actually extend liability beyond existing tort principles and, as such, should not have been interpreted to impose liability for a type of loss that was not previously recoverable.
\textsuperscript{45} 384 S.E.2d 730, 734 (S.C. 1989).
\textsuperscript{46} \textit{Id.} at 735.
\textsuperscript{47} See \textit{Dudley v. Drott Manufacturing}, 66 A.D.2d 368 (N.Y. 1979); see also \textit{Nobility Homes v. Shivers}, 557 S.W.2d 77 (Tex. 1977).
\textsuperscript{48} 66 A.D.2d 368 (N.Y. 1979).
\textsuperscript{49} \textit{Id.} at 372.
\textsuperscript{50} \textit{Id.} at 371.
would favor recovery for damage to the crane as much as they would for the damage to other property.\(^{51}\)

The Supreme Court of Texas rejected privity as a prerequisite to seeking recovery of economic loss in a case that directly addressed the special circumstances of home construction. In *Nobility Homes v. Shivers*, John Shivers bought a mobile home from a retailer that he alleged was negligently constructed.\(^{52}\) He sued the manufacturer, Nobility Homes, rather than the retailer with whom he was in privity of contract.\(^{53}\) The court did not find that the defect made the home unreasonably dangerous or that it caused physical harm to Shivers, but still held Nobility Homes liable for economic loss in common law negligence, despite the lack of privity.\(^{54}\) The *Nobility Homes* Court held that:

> Economic loss can be as disastrous as physical injury . . . . Today, a consumer, without regard to privity, can recover against a manufacturer whose defective product causes the consumer to suffer the slightest physical injury. It would be inconsistent to demand privity as a prerequisite to the same consumer's recovery against a manufacturer whose defective product causes the consumer to lose his entire life savings.\(^{55}\)

**B. California and Economic Loss**

Perhaps no state's judiciary has been more active in economic loss theory than that of California. It is said that anything that happens in California inevitably migrates to Nevada, and, in fact, California construction defect attorneys are currently relocating to Nevada to join the lawsuit explosion.\(^{56}\) The *Calloway II* opinion purports to follow the California case of *Seely v. White Motors*.\(^{57}\) Given that *Seely* is the leading California case on the subject,\(^{58}\) it is instructive to examine *Seely* and its progeny to better understand the *Calloway* holding.

In *Seely*, California joined the previously mentioned state courts in eliminating the privity distinction and took this development one step further by holding that damage to the defective product itself, without other property damage, was recoverable in tort.\(^{59}\) In *Seely*, the plaintiff sued the manufacturer of a truck he had purchased for business use.\(^{60}\) He complained that the truck "galloped," causing an accident in which the truck was damaged but no person or

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51 Id.
52 557 S.W.2d 77 (Tex. 1977).
53 Id. at 78.
54 Id. at 81.
55 Id.
57 *Calloway II*, 993 P.2d at 1264 (citing *Seely v. White Motors*, 403 P.2d 145 (Cal. 1965)).
59 *Seely*, 403 P.2d at 152.
60 Id. at 147-48.
other property was injured. He sued for damages unrelated to the accident, as well as for the money he had paid towards the purchase price of the truck and for profits lost due to the truck’s malfunction.

The court found for the plaintiff on his breach of warranty claims, but held that the truck’s “galloping” had not caused the accident. Reiterating the economic loss doctrine proposition that, in actions for negligence, liability is limited to damages for actual physical injury, the court dismissed the plaintiff’s claim for consequential damages.

The court then departed from the previously established doctrine that recovery is limited to damage of property other than the defective product itself. The court adopted the plaintiff’s contention that strict liability in tort should be applied to physical injury to his property, as well as personal injury. In arriving at that conclusion, the court reasoned that “physical injury to property is so akin to personal injury that there is no reason to distinguish them.”

California courts have generally (though not universally) followed the Seely position that recovery for property damage – even that done to the defective product itself – is not precluded by the economic loss doctrine. In Huang v. Garner, the court drew a distinction between defects in the product that had not caused any physical damage and those that had. The cost of repairing insufficient shear walls and insufficient fire retardation was economic damage, but physical damage to property and personal injury was not economic loss.

In Transwestern Pipeline v. Monsanto, plaintiff claimed that defendant had sent natural gas containing PCB’s through plaintiff’s pipes. The court distinguished between potential and actual damage, and held that plaintiff had suffered only economic damages because, while plaintiff did incur expense in cleaning the pipes, the “pipes still piped, the pumps still pumped, and the meters still metered as well as they had before.” However, the court made it clear that, had plaintiff Transwestern suffered actual damage to the pipe from defendant Monsanto’s actions, the loss would have been recoverable in tort. Other cases following Seely’s view on tort liability for damage to the defective product itself include: Sacramento Regional Transit v. Grumman, Aris Helipad.

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61 Id. at 147.
62 Id. at 148.
63 Id.
64 Id. at 151.
65 Id. at 152.
66 Id.
68 Id.
70 Id. at 524.
71 See id. at 523-24.
72 158 Cal. App. 3d. 289, 293 (Cal Ct. App. 1984): “Liability is imposed not only where the defective product causes personal injury, but also where the defective product causes physical damages to property . . . The damaged property may consist of the product itself.” The court did refuse to grant damages to plaintiff but did not deny the Seely damage rule; it instead held that the defective bus parts complained of had caused no actual damage and the issue was thus best dealt with in warranty. Id.
In contrast, the California Fourth District Court of Appeals held in Zamora v. Shell Oil that Seely and its progeny preclude a negligence cause of action based solely on damage caused to the defective product. While the Seely Court did deny the plaintiff recovery for damage to his truck, that denial was not because economic loss doctrine forbade such a recovery. After specifically holding that strict liability in tort should be extended to govern physical injury to plaintiff's property, the court wrote, "[i]n this case . . . there was no proof that the defect caused physical damage to the truck." Given that the court was willing to grant recovery for damage to the truck if that damage had been caused by a defect in the truck, the Zamora court's holding was an illogical reading of Seely, though it was a conclusion shared by the Nevada Supreme Court in Calloway II.

Further adding to the confusion, the United States Supreme Court quoted Seely in East River Steamship v. Transamerica Delaval when it denied recovery for damage to turbines that caused damage only to the turbines themselves. The Court claimed that Seely's holding denied tort liability if the defective product caused only monetary harm. However, the East River Court failed to recognize that Seely distinguished between the damage caused by failure of the product to do what the manufacturer intended and the failure of the product to fulfill the economic role that the purchaser desired. The Seely holding did not completely deny tort liability if the product caused only economic harm; rather, it denied tort liability only for harm that could not reasonably be imputed to the manufacturer.

This misinterpretation of Seely was addressed in Stearman v. Centex. In Stearman, the plaintiffs sought recovery for damages caused to their homes by defective foundations that were laid by the defendant. The California Fourth District Court of Appeals (the same court that decided Zamora) addressed the
defendant’s assertion that the claims were barred by the economic loss rule of Seely. The Steerman court held that the defendant’s position was unsupported by Seely. The court ruled that Seely distinguished between tort recovery for physical injury and warranty recovery for economic loss, and that the defendant was “just plain wrong in contending the physical damage to plaintiffs’ real property caused by defective construction of the foundation is only ‘an injury to the product itself’ and thus barred by the economic loss rule of Seely.”

Most recently, the California Supreme Court affirmed that Seely allowed for recovery in negligence for damage caused to an object by a manufacturing defect in that object. It also affirmed the Steerman court’s expansion of Seely to cover damage to one part of a product caused by another part of the same product.

C. Nevada Addresses Economic Loss

The clear trend toward finding additional consumer protection, an approach exemplified by California and a number of other states, was endorsed by the Nevada Legislature in 1995 with the passage of Nevada Revised Statute 40.600 et seq. The statute mandates mediation of construction defect disputes and clarifies and broadens damages a plaintiff/homeowner can recover should mediation fail. The statute also allows for damages that are clearly economic loss, including attorney’s fees, relocation costs, and loss of residence during repair. However, the statute does not specify that such economic loss can be recovered in tort, leaving the theory of relief to be decided by the Nevada courts.

In Nevada, economic loss doctrine was first explicitly invoked in Local Joint Executive Board of Las Vegas v. Stern, wherein members of various unions sued the architects of the original MGM Grand Hotel after the hotel was closed following a devastating fire. The unions alleged that the architect’s negligence caused the fire that forced the plaintiffs into unemployment, and sued for lost wages and lost union dues resulting from their unemployment.

In affirming the district court’s dismissal of the case, the Nevada Supreme Court cited Stevenson, holding that, absent privity of contract, a plaintiff cannot

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84 Id. at 614.
85 Id.
86 Id. at 617.
87 Id. at 618.
88 Aas, 12 P.3d at 1135.
89 Id.
90 Id. at 1147-49. Aas mentions Council of Co-owners v. Whiting, 517 A.2d 336 (Md. 1986); Oates v. Jag, Inc., 333 S.E.2d 222 (N.C. 1985); and Moransis v. Heathman, 744 So.2d 973 (Fla. 1999) as cases following California’s approach.
93 For conflicting views on Calloway’s fidelity to Nev. Rev. Stat. § 40, see Beasley, supra note 16, and Menter et al., supra note 56, at 18.
94 651 P.2d 637 (Nev. 1982).
95 Id.
recover for strictly economic loss. The court found that the purpose of the economic loss rule was to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, “particularly in a commercial or professional setting.”

The court restated the central holding of Stern in a 1986 case, Central Bit Supply v. Waldrop Drilling. Under circumstances strongly reminiscent of Hadley v. Baxendale, Central Bit sought recovery for a defective drill bit that broke during the drilling of a well. The plaintiff sued on theories of warranty, negligence, and strict liability to recover replacement costs of the drill, as well as for consequential damages incurred because of the bit’s failure, including wages, lost time, and the travel necessary to procure a new bit. The trial court found for the plaintiff on all three theories, and assessed consequential damages of $20,535. The Nevada Supreme Court upheld the verdict on the warranty theory, but took the opportunity to reiterate that a plaintiff may not recover economic loss under theories of strict liability or negligence.

In Stern and Central Bit, the Nevada Supreme Court used privity and foreseeability to invoke economic loss doctrine in order to prevent the extension of liability for consequential damages into virtually unlimited territory. In Stern, there was no privity of contract between plaintiff and defendant; as a result, the defendant could not be held liable for consequential damages from the MGM fire. In Central Bit, liability was limited because of the unforeseeable nature of damages, although the court found that privity existed.

The court addressed the distinction between the legal duty owed in tort and the specific contractual obligations of warranty in Charlie Brown Construction v. Boulder City. Brown and co-plaintiff Delta Corp. were subcontractors who alleged that Boulder City was negligent in failing to enforce a statute that the plaintiffs claimed required a payment bond to be posted by contractors in public projects. The bond was not posted and the contractor went bankrupt after the project was completed, leaving the subcontractors unpaid.

The district court entered summary judgment for the City, but the Nevada Supreme Court reversed, acknowledging that a municipality is not normally held liable for failure to enforce an ordinance or statute (e.g., payment bond). However, the court distinguished the City’s duty in this case, holding that the ordinance created a special relationship between the City and the subcontractors that created a self-imposed duty on the City to protect the subcontractors from the harm that the statute was specifically enacted to prevent.

96 Id. at 411.
97 Id.
99 Id.
100 Id.
101 Id. at 36.
102 Id.
103 797 P.2d 946 (Nev. 1990).
104 Id. at 947.
105 Id.
106 Id. at 950.
107 Id. at 950-51.
The court distinguished the case from *Stern* and *Central Bit* by noting that Brown and Delta were directly injured parties. It also addressed the City's claim that the subcontractors suffered only economic loss. The court held that, unlike in *Central Bit* and *Stern*, the plaintiffs were attempting to recover direct damages, rather than consequential damages, and cited *Stern* for the proposition that the economic loss rule was designed to shield a defendant from unlimited liability. The court held that the economic loss rule is "bound up in foreseeability" and the City's passage of a statute to protect against those losses precluded the City from claiming that they were unforeseeable. The court did not reject the economic loss rule; rather, it held that the rule did not apply in this particular case. The Nevada Supreme Court's reversal of the district court was notable, however, for its willingness to find the City liable for negligence arising by non-performance of an affirmative duty.

The Nevada Supreme Court also wrestled with the property damage dilemma in *National Union v. Pratt & Whitney*. National Union was an insurance company that insured a private airplane which subsequently crashed, resulting in the destruction of the airplane but no personal injury. Thereafter, National Union instituted a subrogation action against Pratt and Whitney, alleging that the company negligently manufactured a defective engine that caused the crash. National Union contended that the engine damaged property other than itself (namely the rest of the airplane) and, as such, tort liability was justified.

The district court rejected National Union's argument, concluding that economic loss doctrine required a finding of summary judgment for the defendant. The Nevada Supreme Court upheld the trial court's decision, holding that when a product "injures itself" recovery can best be accomplished in contract remedies or by insurance, rather than tort.

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108 Id. at 952-53.
109 Id. (citing *Stern*, 651 P.2d at 638).
110 Id. at 953.
111 This Case Note argues that *Calloway* should be reheard and reversed because economic loss doctrine should not be applied to direct damages in construction defect cases. In addition, *Calloway* should also be reversed because of the Court's failure to hold the City of Reno liable for negligent inspection. The court held that, to be liable for negligence, plaintiffs must have alleged that the City failed to perform an affirmative duty, as in *Charlie Brown*. The plaintiffs did allege just that and the Court's opinion notes that fact. *Calloway v. Reno*, 993 P.2d 1259, 1262 (Nev. 2000). The Court's failure to address the issue could be interpreted to mean that the City is immune from lawsuit for allowing a building to be entered into the stream of commerce despite actual knowledge that it is not up to code. Under that scenario, the Court overruled *Charlie Brown* and, without mention, three other Nevada cases that hold municipalities and governmental agencies liable for certifying a building, despite knowledge that it was negligently constructed. See *Tahoe Village v. Douglas County*, 799 P.2d 556 (Nev. 1990); *Lotter v. Clark County*, 739 P.2d 1320 (Nev. 1990); *Butler v. Bogdanovich*, 705 P.2d 662 (Nev. 1985); see also *Calloway II*, 993 P.2d at 1279 (Rose, C.J. dissenting).
113 Id.
114 Id. at 602.
115 Id. at 603.
116 Id. at 602.
117 Id. at 603.
plane engine was an integrated part of the product, just as the defective turbine was held to be part of the ship by the *East River* Court.\(^\text{118}\)

The court explained this holding by distinguishing *National Union* from the 1983 ruling in *Oak Grove v. Bell and Gossett*.\(^\text{119}\) In that case, Oak Grove Investors purchased an apartment complex from another group and, shortly after the purchase, discovered water damage from the plumbing and heating system.\(^\text{120}\) Alleging negligent design, manufacture, and installation, Oak Grove filed suit against the manufacturer of the component part that caused the problem.\(^\text{121}\)

The district court granted summary judgment to the defendants on numerous grounds, none of which invoked economic loss doctrine, and the Nevada Supreme Court reversed.\(^\text{122}\) Bell and Gossett raised economic loss as a ground on which to reject the appeal, and the court responded.\(^\text{123}\) As guidance to the district court on remand, the court noted that the defective plumbing and heating system had caused damage throughout the complex.\(^\text{124}\) Because property damage was involved — and Oak Grove was not trying to recover strictly economic loss — economic loss doctrine was inapplicable.\(^\text{125}\)

The court held in *National Union* that the *Oak Grove* property damage was different than the damage to National Union’s airplane, because the apartment complex damaged in *Oak Grove* “consisted of a number of apartment units that were self-contained and constructed for the separate occupancy of the end users.”\(^\text{126}\) The court invoked *East River*’s position that all but the simplest machines are made up of component parts, and that allowing tort recovery for damage to such products would obliterate the distinction between tort and warranty.\(^\text{127}\) In explaining this distinction, the court took a position in dictum that would later encourage the *Calloway* plaintiffs: “[w]e deem it safe to conclude, however, that economic loss doctrine was never intended to apply to construction projects that reflect the products and efforts of so many different manufacturers, laborers, crafts, supervisors, and inspectors in the creation of an essentially permanent place of habitation.”\(^\text{128}\)

In dissent, Justice Rose espoused a position similar to *Stearman*, that property damage is recoverable in tort whether the property is “other property” or the defective product itself.\(^\text{129}\) The dissent asserted that economic loss included “lost profits, lost productivity, lost wages, business expectations and other losses that flow from the loss of the things damaged by the defective product.”\(^\text{130}\) However, the dissent asserted that economic loss does not include

\(^{118}\) Id. at 604.

\(^{119}\) 668 P.2d 1075 (Nev. 1983).

\(^{120}\) Id.

\(^{121}\) Id. at 1077.

\(^{122}\) Id.

\(^{123}\) Id. at 1080.

\(^{124}\) Id.

\(^{125}\) Id. at 1080-81.

\(^{126}\) *National Union*, 815 P.2d at 603.

\(^{127}\) Id. at 604.

\(^{128}\) Id. at 603.

\(^{129}\) Id. at 607 (Rose, C.J., dissenting).

\(^{130}\) Id.
property damage. Justice Rose made no distinction between whether the property was "other property" or the defective product itself. He asserted that Stern and Oak Grove made a clear distinction between economic loss and property damage, and argued that making a distinction based on whether the product was integrated with other personal property would lead to absurd results.

By the mid-1990s, Nevada case law made it clear that the Nevada Court would invoke economic loss doctrine to bar recovery for consequential damages, whether privity of contract existed (Central Bit) or not (Stern). In National Union, the court invoked economic loss doctrine to bar recovery for property damage in tort to any property but the actual deficient product, but refused to apply the doctrine when damage caused by one small part of an apartment complex was done to other property. In addition, the court suggested in dicta that it would generally not apply economic loss doctrine to construction defect cases.

II. THE COURT DECIDES CALLOWAY

It was to this confused environment that the homeowners in Calloway brought their appeal to the Nevada Supreme Court. The court had intimated that economic loss did not apply to construction defect cases, and the only pure construction defect case previously heard (Oak Grove) affirmed that judgment. The appellants in Calloway sought to recover for physical property damage that was allegedly caused by the negligent framing of their homes, rather than for consequential damages that the court had refused to grant in the past. The appellants, in order to fix their homes and avoid further damage, had been forced to settle with the developer and contractor for less than their claim was worth. Since there were no other entities with which the homeowners had privity of contract, the invocation of economic loss theory would leave the homeowners with no recourse for full recovery, despite the presence of solvent and culpable subcontractors.

The Nevada Supreme Court reversed the district court's ruling of summary judgment and remanded. The court once again noted the finding, which held that "[t]he primary purpose of the (economic loss) rule is to shield a defendant from unlimited liability for all of the economic conse-

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131 Id.
132 Id.
133 Id. Chief Justice Rose wrote in dissent that "Such a rule would mean that a plaintiff could recover for the loss of a million dollar airplane so long as the defect which destroyed the plane also caused plaintiff to stub a toe." Id. (Rose, C.J., dissenting).
134 Id. at 608 ("Although unnecessary to the analysis of this case, the majority opinion states that the economic loss doctrine was never intended to apply to construction projects.") (Rose, C.J., dissenting) (emphasis added).
135 See Calloway II, 993 P.2d at 1277. Chief Justice Rose describes the Court's prior decisions as "neither consistent nor uniformly well reasoned."
136 Id. at 1261-62.
137 Id. at 572.
138 Id.
139 Calloway I, 939 P.2d at 1020.
quences of a negligent act . . . .”140 In Calloway I, the court held that allowing the appellants recovery for property damage did not violate the economic loss rule because the defendant was subject only to liability that was readily foreseeable.141 Additionally, the court limited the ruling to allow recovery only to homeowners buying newly constructed homes who were unable to pursue traditional contract remedies.142

The ruling gave homeowners protection from shoddy work and from contractors who disappeared or filed bankruptcy upon completion of a project and before latent defects could be discovered.143 In this respect, Calloway I was a logical extension of the national trend towards greater consumer protection presaged by Kennedy in South Carolina and Stearman in California, and joined by Nevada with the passage of Nevada Revised Statutes 40.600 et seq.

However, this apparent consumer victory was short lived. The Nevada Supreme Court granted the City and subcontractors’ petition for rehearing.144 On February 29, 2000, the court replaced its original opinion with a verdict that a Calloway attorney characterized as “a 180 degree about-face.”145 The court withdrew its’ Calloway I opinion, affirming the original district court ruling and asserting that, despite its own National Union dictum, economic loss doctrine did indeed apply to construction defect cases.146 The court embraced the East River interpretation of the Seely holding, that mere economic harm caused by a defective product cannot be recovered in tort.147

The purpose of the ruling, according to the Nevada Supreme Court, was to “preserve the law of warranty.”148 However, the plaintiffs in Calloway had not sought to overturn warranty law. Rather, they had attempted to exercise their warranty option first, and sued in tort only because warranty remedies were insufficient to make the plaintiffs whole.149 In addition, the rule stated by Justice Rose in Calloway I specifically required warranty remedies to be pursued and exhausted before tort could be considered.150

The court used the Seely decision selectively. It cited the Seely economic loss language, but did not acknowledge that the holding was based on the finding that, despite physical injury to property being akin to personal injury, the product in question showed no defect that caused the physical damage to property.151 The Seely Court wrote that “[c]ourts of this state have fully examined the economic loss rule, drawn the line of demarcation between such loss and physical injury to property, including to the defective product itself, and

140 Id. at 1025.
141 Id.
142 Id. at 1026.
143 Id. at 1025.
144 Calloway II, 993 P.2d at 1259.
145 Diana Sahagun, High Court Ruling Limits Homeowners’ Options, LAS VEGAS SUN, April 2, 2000.
146 Calloway II, 993 P.2d at 1266.
147 Id.
148 Id.
149 Calloway I, 993 P.2d at 1025.
150 Id. at 1026.
151 Seely, 403 P.2d at 145.
allowed recovery of strict liability damages in the latter instance."\textsuperscript{152} Given
that holding, and the subsequent California decisions based upon it, the Nevada
Supreme Court misrepresented California construction defect law.

The court further differentiated between tort and contract by viewing con-
tract law as designed to enforce standards of quality while tort law was viewed
as designed to protect safety.\textsuperscript{153} This narrow reading of the purposes driving
tort law ignores the idea that, in applying penalties for failure to make a safe
product, tort law also contributes to product quality.\textsuperscript{154} Under the facts of Cal-
loway, even assuming the defectively framed homes had caused solely eco-
nomic damage, it can hardly be denied that liability for defective framing
would help assure safety by improving standards of construction.

In asserting the economic loss rule, the court leaned heavily on the corner-
stones of the rule: the need to protect a manufacturer from unlimited liability
and the need for manufacturers to be able to foresee their potential liability.
The court wrote that "[p]ermitting plaintiffs to recover in tort for purely eco-
nomic losses would result in open-ended liability, since it is virtually impos-
bable to predict all the economic consequences of a given act."\textsuperscript{155}

This may be true in some situations, but it was not true in Calloway. The
plaintiffs did not ask for unlimited liability against the subcontractors. Rather,
they asked only direct damages for the loss caused by the subcontractors’ negli-
gent work.\textsuperscript{156} The Court’s insistence on finding a distinction between tort and
contract, based on limits to liability, posits a false dilemma. Just as contract
theory has its \textit{Hadley v. Baxendale} to limit liability, tort law has its own version
of limited liability, as expounded in \textit{Palsgraf v. Long Island RR}.
\textsuperscript{157} \textit{Palsgraf}
limits liability for negligence to reasonably foreseeable consequences, precisely
what proponents of economic loss in construction defect cases advocate, and
opponents insist is impossible in tort.\textsuperscript{158}

Clearly, the losses in Calloway were foreseeable. The subcontractors
knew that people would move into the homes they framed, and that defective
framing could cause damage to the homes. The cost of fixing water damage to
the homes is also fairly easy to estimate. In excluding tort liability, \textit{Calloway II}
perpetuates a mechanistic intonation of rule without regard for the facts of the
case or the plight of the damaged parties.

The court also attempted to distinguish damages in \textit{Oak Grove, National
Union}, and \textit{Calloway} to support their revised decision in \textit{Calloway II}. The
court began by rejecting its own construction defect dictum from \textit{National
Union} by insisting that the \textit{National Union} case had nothing to do with con-
struction.\textsuperscript{159} The court held in \textit{National Union} that economic loss was suitable
for inclusion within the economic loss rule because it was not a construction

\begin{itemize}
\item \textsuperscript{152} \textit{Id}.
\item \textsuperscript{153} \textit{Calloway II}, 993 P.2d at 1265.
\item \textsuperscript{154} \textit{See Aas}, 12 P.3d at 1153-54 (George, C.J., dissenting).
\item \textsuperscript{155} \textit{Calloway II}, 993 P.2d at 1266.
\item \textsuperscript{156} \textit{Calloway I}, 939 P.2d at 1025-26.
\item \textsuperscript{157} \textit{Palsgraf v. Long Island R.R.}, 162 N.E. 99 (N.Y. 1928).
\item \textsuperscript{158} \textit{Id}. at 104.
\item \textsuperscript{159} \textit{Calloway II}, 993 P.2d at 1265.
\end{itemize}
On the other hand, the court held that it did not invoke economic loss in *Oak Grove* because "it did not involve a single integrated product that injured itself."  

The Court's inconsistency on the subject of economic loss is understandable, given the narrow distinctions upon which the economic loss rule is predicated. In *National Union*, the damage was to a crane caused by defective bolts on the crane. In *Oak Grove*, it was to apartments caused by a heating and plumbing system common to all units, but owned by none. In *Calloway*, the damage was to numerous, freestanding homes in a planned development. The out-of-state cases include cars injured by a component part, manufactured homes injured by a defective foundation, and other homes with defective components.  

The decisions on economic loss frequently hinge on the court's interpretation of whether the defective part was an integrated part of the product and whether the damage was the result of the product "injuring itself" or being injured by another distinct part. In *Calloway*, the argument hinged on whether damage to the homes caused by defective framing could be imputed to the subcontractor, or if only the builder and/or developer could be held responsible for the entire product, e.g., the home.  

The confusion inherent for builders, developers, subcontractors, and homeowners is easily seen, as is the potential for absurdity created through attempts to make economic loss doctrine fit modern construction realities. Consider a situation in which an upstairs condominium in a duplex is defectively framed. Water damage destroys both condominium homes and contract remedy is unavailable, due to contractor bankruptcy. Under the economic loss rule, the framing subcontractor would likely be liable for damage to the home that was not negligently framed (because it did not "injure itself" — the damage was done by an external force) and not liable for the home in which the shoddy work was actually done. To further exacerbate the absurdity of this result, if both homes were defectively framed, then the downstairs unit's owner is no longer able to seek a remedy against the subcontractor. This means that the subcontractor has less liability by doing more negligent work!  

In order to alleviate the confusion and ameliorate the obvious unfairness of the economic loss doctrine, the Nevada Supreme Court should take the next opportunity to reject the economic loss rule in construction defect cases. It should allow recovery of direct damage from negligent builders in warranty or tort at the option of the homeowner.  

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160 *National Union*, 815 P.2d at 603. It can be argued that *National Union* was indeed a case analogous with construction issues. The similarity between the component part of an airplane and the way that homes are currently constructed, by numerous subcontractors doing the framing, masonry, carpentry and various other tasks, is obvious.  

161 *Calloway II*, 993 P.2d at 1268.
III. "We'd All Love to See the Plans": A Framework for Reform

While consumers need a fair resolution to the tension between tort and contract remedies for construction defects, "we'd all love to see the plans." Moreover, it is important that the resolution be based on the right plan.

In a future case, the court could reverse Calloway on grounds as basic as argument by analogy to Oak Grove. In Oak Grove, the plumbing system caused damage to numerous units and the court held that the plumbing system harmed "other property" – the units themselves. In Calloway II, the majority misapprehends the nature of townhomes, finding that the framing was an integral component of the various homes, meaning that the homes damaged only themselves and not other property. However, in townhouses, the framing is not only integral to the homes but it is also common to all yet owned by none, as was the case with the plumbing in Oak Grove. The court could reasonably rule for the plaintiffs without disturbing (or clarifying) current Nevada economic loss doctrine. However, such a narrow ruling would simply leave this battle to be fought on another field, with all parties to construction transactions left in limbo during the interim. Public policy concerns dictate that some method of relief be established for litigants such as the Calloway plaintiffs. Failing to do so encourages negligent construction that can cause serious injury and financial ruin to homeowners.

On the other hand, the concerns expressed by the majority in Calloway II appear legitimate. A poorly crafted rule could indeed allow for recovery in virtually all circumstances for consequential damages and bring to fruition East River's famous prediction, that contract law could drown in a sea of tort. In Calloway I, the court decided for the plaintiffs on narrowly crafted grounds. There, the court hastened to point out that it was not overturning the economic loss doctrine for other tort scenarios, but solely in "situations in which relief is sought by original purchasers of newly constructed homes who cannot pursue traditional contract remedies...."

The majority in the second Calloway opinion properly criticized this plan as resulting in "outcome determinative decisions that may have no analytical

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162 The Beatles, Revolution (Apple Records 1968).
163 There does seem to be some disagreement within the court on this point. In Calloway II, the majority wrote "[O]ak Grove did not involve a single integrated product that 'injured itself.'" Calloway II, 993 P.2d at 1268. However, Justice Maupin wrote of Oak Grove, "Thus, a completed entity that 'injured itself' caused 'property damage,' taking the case out of the economic loss doctrine." Id. at 1274 (Maupin, J., concurring in part, dissenting in part).
164 Id. at 1269.
165 Aas, 24 Cal. 4th at 668-69; Steerman, 78 Cal. App. 4th at 615 (repairs to the home estimated at $260,000).
166 See Santor v. Karagheusian, Inc, 207 A.2d 305, 310-11 (N.J. 1965), where the court held that a purchaser of defective carpet could sue in tort for economic loss even when plaintiff's only claim was for the loss of value of the carpeting. See also J'aire v. Gregory, 24 Cal. 3d 799 (1979) (plaintiff sued when a contractor negligently delayed construction, causing plaintiff to incur business losses).
167 East River, 476 U.S. at 866.
168 Calloway I, 939 P.2d at 1026.
consistency.\(^{169}\) The Rose plan, while providing equitable relief to aggrieved plaintiffs, would muddy the economic loss doctrine's use in Nevada even further, leaving future plaintiffs unsure of where the line is drawn.\(^{170}\) It would also leave unresolved the issues of whether a product that injures itself falls under economic loss doctrine, and whether a plaintiff can recover before actual damage occurs. Under current Nevada economic loss doctrine, plaintiffs that have not yet experienced property damage due to defective construction must wait until they actually suffer injury or physical property damage in order to recover for negligent construction.\(^{171}\) Waiting for such damage to occur could itself be catastrophic for homeowner and contractor alike.\(^{172}\)

Any plan to roll back the draconian restrictions of the economic loss doctrine must take into account primary conflicts presented by the tension between contract and tort recovery theories. A proper plan should forbid tort recovery for consequential damages in order to avoid contract remedies being subsumed by tort law. It should allow for recovery for physical damage to a home caused by a negligently constructed portion of the home and for recovery of repair costs for negligent construction that has not yet caused damage, but poses a potential danger to the homeowner.

In California, the leading case of Biakanja v. Irving imposes tort liability upon suppliers of negligently made goods and services that are reasonably certain to place life and limb in peril, even where the only foreseeable risk is damage to tangible property.\(^{173}\) In addition, liability may be found without regard to privity between the parties.\(^{174}\) The liability determination is made as a matter of policy and involves the balancing of six factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm; (3) the degree of certainty of injury; (4) the closeness of connection between the defendant's conduct and the injury; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.\(^{175}\)

Within California's approach, the foreseeability concerns of the Calloway majority are addressed in points (1) and (2). In addition, concerns about limiting liability are addressed in point (4). Finally, point (6) would help alleviate the current problems that arise from the need under the present policy to wait for actual, physical damage to occur before rectifying problems due to defective construction. At first blush, therefore, California's Biakanja approach portends to provide an acceptable solution to this issue.

Unfortunately, direct application of the Biakanja doctrine in Nevada would threaten to open the floodgates of tort litigation. In the subsequent California decision of J'aire v. Gregory, a contractor entered into an agreement with the county of Sonoma to do airport construction work, including improve-

\(^{169}\) Calloway II, 993 P.2d at 1266 n.3.
\(^{170}\) It should here be noted that the plan criticized by the Calloway II majority is more universal than the one that gained court acceptance in Calloway I. Chief Justice Rose's expands his position in Calloway II to allow a choice of contract and tort remedies to all construction defect plaintiffs.
\(^{171}\) Calloway II, 993 P.2d at 1279 (Rose, C.J., dissenting).
\(^{172}\) See Aas, 24 Cal. 4th at 673.
\(^{173}\) 320 P.2d 16, 18 (Cal. 1958).
\(^{174}\) Id.
\(^{175}\) Id. at 19.
ments to a restaurant operated at the airport by a private party in a lease arrangement. The lessee sued for lost profits and loss of business, arguing that the construction shut down his restaurant for an unreasonable period of time due to the contractor's negligent failure to finish in a timely manner.

The J'aire Court allowed recovery for these strictly consequential damages based on the Biakanja factors. It held that, when negligent conduct does damage to property, the plaintiff may recover for lost profits. A plaintiff may do so even when only injury to prospective economic advantage is involved.

Under the Biakanja/J'aire doctrine, issues that are clearly economic in nature, arising within a contractual relationship between the parties in privity, would be decided in tort. This doctrine would swallow up the limited liability concerns expressed by the Calloway majority. In J'aire, the contractor was held liable for the interruption of heat and air conditioning services that were promised to the lessee in the lease agreement. Theoretically, following the J'aire approach, a contractor would have to be aware of all contractual obligations of the owner with any lessees in order to determine the contractor's potential liability.

A better, more subjective method for assessing tort liability in construction defect cases comes from the South Carolina case of Kennedy v. Columbia Lumber, which ushered in a construction defect law regime in that state that is based on the builder's activity itself, rather than on the consequences of the activity. In Kennedy, respondent Columbia Lumber supplied building materials to a construction company for use in building a home. The construction company experienced financial difficulties, and Columbia took a deed in lieu of foreclosure, and subsequently sold the house. When a defective foundation caused cracks in the house, the buyer, Kennedy, sued Columbia.

The South Carolina Supreme Court upheld a directed verdict for Columbia on the grounds that Columbia was only a materials supplier turned lender, and that neither material suppliers nor lenders were liable for construction defects. The court then used the case as an opportunity to generally examine construction defect liability in South Carolina. It noted that the state's law had evolved over the years to adjust to changing economic realities, and opined that it was once again time for a new approach. The court overruled Carolina Winds and established both implied warranty liability and tort liability for non-seller builders.

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176 598 P.2d at 62 (Cal. 1979).
177 Id.
178 Id. at 803-04.
179 Id.
180 Id.
181 Kennedy, 384 S.E.2d at 737.
182 Id. at 732.
183 Id. at 732-33.
184 Id. at 733.
185 Id. at 733-34.
186 Id. at 735.
187 Id. at 736.
188 Id. at 737.
The *Kennedy* Court disagreed with *Carolina Winds*, which held that parties in privity are restricted to warranty remedies. Instead, the *Kennedy* Court held that a builder may not escape warranty liability simply because it was not also the seller.\(^{189}\) The court noted that it had been a participant in chipping away at the privity defense and wrote that its *Kennedy* decision should "still all whispers of its continued existence."\(^{190}\)

Further, the *Kennedy* Court examined the economic loss doctrine's applicability to tort liability. The court found that the prototypical economic loss scenario, in which a purchaser had tort remedies only when the product is defective and causes physical harm, generated difficulty because the scenario focuses on consequence rather than action.\(^{191}\) This allowed equally blameworthy builders to be treated differently based solely on whether the harm was discovered early enough to avoid physical harm.\(^{192}\)

The *Kennedy* Court chose to allow contract and/or tort remedies based on the activity of the builder, rather than on the consequence of the builder's actions.\(^{193}\) It held that builders owe a legal duty to an original purchaser to protect against diminution in the expected value of the building, and that a violation of a building code is a breach of the builder's legal duty for which the builder can be held liable in tort.\(^{194}\) The court left no doubt that it was removing economic loss doctrine as a defense for non-seller home builders in South Carolina:

> We are persuaded that building a house which one knows or should know will later be sold by a party to an innocent buyer is an act adequate to constitute placing that house into the stream of commerce. Any builder who violates such a duty should justly be held accountable for the losses that his breach caused, *whether they be physical harm or the diminution of value of the house*.\(^{195}\)

In conclusion, the *Kennedy* Court established three instances in which builders could be held liable in tort to a home buyer. The builder is liable if the builder violates an applicable building code, deviates from industry standards, or has constructed housing that "he knows or should know will pose serious risks of physical harm."\(^{196}\) The court's plan holds builders responsible in tort when they violate legal duties, but retains economic loss doctrine in situations where the only duty breached is contractual.\(^{197}\)

The application of this plan would have allowed for relief in *Calloway*. The builder would have been liable for framing that failed to meet building codes and deviated from industry standards. It would have allowed the homeowners to recover for the damage done by the rain and snow, and to have their homes repaired so as to prevent possible physical harm resulting from leakage. Furthermore, it would avoid the *Carolina Winds* court's fear that builders

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\(^{189}\) *Id.* at 736.

\(^{190}\) *Id.*

\(^{191}\) *Id.*

\(^{192}\) *Id.*

\(^{193}\) *Id.* at 737.

\(^{194}\) *Id.* at 736.

\(^{195}\) *Id.* (emphasis added).

\(^{196}\) *Id.* at 738.

\(^{197}\) *Id.* at 737.
would be subject to nebulous damages of an indeterminate amount based on possible physical harm that has not yet occurred.

IV. CONCLUSION

Nevada continues to be the fastest growing state in the nation. The incentive for builders to build quickly creates an inevitable temptation to cut corners. A system of jurisprudence that allows builders knowledgeable in home construction to escape liability for negligent performance, while placing the onus on the unknowledgeable home buyer, impedes the public policy that homes should be safe and fulfill their purpose.

The economic loss doctrine is a judicial creation that Nevada can adopt or reject, depending on what is deemed to best serve Nevada. It can hardly be thought that what “best serves Nevada” is a system that leaves homeowners without remedy to obvious wrong. A mechanistic reading of the economic loss doctrine better serves tradition than it does the modern interests and exigencies of Nevada. That formalistic reading should be rejected in favor of recovery for direct damage in home construction defect cases.

The Nevada Supreme Court failed to provide this important consumer protection in its Calloway holding. However, the sharply divided final opinion and the original Calloway I opinion send a clear message that the court is still open to change in this area of the law. Since the Calloway II ruling, the Nevada Supreme Court has expanded from five to seven members. This modified court dynamic might result in a different decision if the court were to apply economic loss doctrine on slightly different facts. In the long and winding road that is construction defect economic loss doctrine, a change could – and should – come. The Nevada Supreme Court need only “let it be.”

\[198\] Id. at 1279 (Rose, C.J., dissenting).
\[199\] See generally Menter et al., supra note 56, at 21.
\[200\] Id.