

<p>COLORADO COURT OF APPEALS Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80202</p>	<p>DATE FILED: December 7, 2023 2:54 PM FILING ID: 49DB258EE1F67 CASE NUMBER: 2023CA897</p>
<p>Appeal from Denver County District Court Case Nos. 2020CV031008 and 2020CV031009 Hons. Marie Avery Moses and Martin Egelhoff</p>	
<p>Plaintiff-Appellee-Cross-Appellant: ANTERO TREATMENT LLC, v. Defendant-Appellant-Cross-Appellee: VEOLIA WATER TECHNOLOGIES, INC.</p>	
<p>Plaintiff-Appellant-Cross-Appellee: VEOLIA WATER TECHNOLOGIES, INC., v. Defendants-Appellees-Cross-Appellants: ANTERO TREATMENT LLC, ANTERO RESOURCES CORPORATION; and ANTERO MIDSTREAM PARTNERS LP</p>	<p>▲ COURT USE ONLY ▲</p>
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<p align="center">BRIEF OF <i>AMICI CURIAE</i> COLORADO DEFENSE LAWYERS ASSOCIATION, DRI CENTER FOR LAW AND PUBLIC POLICY AND COLORADO CIVIL JUSTICE LEAGUE</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of Colo. App. R. 21(k), 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limit set forth in Colo. App. R. 29(d).

It contains **4,707** words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in Colo. App. R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colo. App. R. 29, 32, and 53.

Dated: December 7, 2023

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INTRODUCTION

This case raises, among other things, important questions about the application of the economic loss rule in Colorado. Since its adoption by the Colorado Supreme Court in 2001, the economic loss rule has worked to ensure that tort law does not subsume contract law. Contracts allow for parties, negotiating at arm's length, to allocate risk, impose mutual obligations, and define remedies in a way that allows for the parties to operate with some level of confidence as to how the other will behave. This is especially true for commercially sophisticated parties working on large projects. Because protecting contractual expectations is paramount, a clearly defined and consistently applied economic loss rule will provide certainty to parties conducting business in this state and allow for those parties to confidently and predictably allocate the risks of business transactions. Such a rule must encompass intentional torts and must apply to a network of contracts as soon as the first contractual relationship in the network is established.

STATEMENT OF INTEREST

The Colorado Defense Lawyers Association (CDLA), the Defense Research Institute (DRI) Center for Law and Public Policy, and Colorado Civil Justice League (CCJL) desire to be heard on the issue. A Motion for Leave to File Amicus Brief has been filed for the Court's consideration under C.A.R. 29. *Amici* have an interest in

ensuring that defendants in civil cases can rely on the consistent application of the economic loss rule in Colorado.

CDLA, a nonprofit association, seeks to support and serve the interests of lawyers involved in the defense of civil litigation. CDLA has roughly 800 members, across the State of Colorado. CDLA members actively support the preservation of civil jury trials and the promotion of fairness and integrity in the civil justice system.

A significant number of CDLA's members represent corporations, insurance companies, and individuals being defended under a policy of insurance. CDLA members are particularly concerned with ensuring defendants in civil cases can appropriately determine the scope of potential liability and damages in cases about only economic loss. Consequently, CDLA is keenly interested in the proper application of the economic loss rule in Colorado, which helps provide parties with the opportunity to avoid or limit litigation by defining which damages are controlled by contract law and which are controlled by tort law. A clear distinction between the two fields of law also simplifies litigation and decreases its costs. In filing this Amicus Brief, the CDLA wishes to emphasize the important policy considerations involved beyond the facts here.

The DRI Center for Law and Public Policy is the public policy “think tank” and advocacy voice of DRI, Inc.—an international organization of around 16,000

attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an amicus curiae in the U.S. Supreme Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

Colorado Civil Justice League is a voluntary non-profit organization dedicated to improving Colorado's civil justice system through a combination of public education and outreach, legal advocacy and legislative initiative. It is a diverse coalition of large and small businesses, trade associations, individual citizens and private attorneys. Founded in 2000, CCJL has been actively involved in legislative reform of Colorado's civil liability system and has submitted amicus curiae briefs to this Court on several occasions.

ARGUMENT

The economic loss rule prevents recovery of damages under tort theories when the duty breached is contractual and the harm incurred results from the failure of the purpose of the contract. *Town of Alma v. AZCO Contr., Inc.*, 10 P.3d 1256, 1261

(Colo. 2000). As tort law expanded through the course of the Twentieth Century, courts developed and applied the economic loss rule to maintain the distinction between the fields of contract and tort law.

For over two decades in Colorado, the economic loss rule has maintained that separation by focusing on the source of the allegedly violated duty. Once contractual terms are negotiated and the parties allocate risks of non-performance to a mutually agreeable extent, that contract and subsequent related contracts govern the relationship between the parties, even if tort law imposes the same duties as the contract. A duty's source is unconnected from the violating conduct; it logically follows that the economic loss rule can apply to intentional torts, including fraud. If an existing contractual obligation covers allegedly fraudulent conduct, the economic loss rule acts as a bar. In fraud cases, determining whether the allegedly fraudulent conduct occurred before or after the formation of a contract is often determinative.

Colorado also recognizes that certain business ventures, like construction projects, are governed by "networks" of contracts, and that the economic loss rule applies to duties arising from that network. Under Colorado precedent, these networks are essentially treated as a single contract for purposes of determining the source of the allegedly violated duties. In cases alleging both breach of contract and fraudulent conduct, determining the date of the formation of the network is essential.

Logically, the network is established at the time of the formation of the first contract related to the project. Such a rule flows from a consistent application of judicial precedent and fosters an environment that best allows parties to negotiate and allocate risk within contracts.

I. The Economic Loss Rule Seeks to Maintain the Boundary Between Contract and Tort Law and Allow Parties to a Contract to Reliably Allocate the Risk of Nonperformance.

The Colorado Supreme Court adopted the economic loss rule in the seminal case *Town of Alma*, 10 P.3d at 1264. In doing so, it articulated the economic loss rule’s purpose as, broadly speaking, “to maintain the boundary between contract law and tort law.” *Id.* at 1259; *see also Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1269 (Colo. 2000). The Supreme Court, discussing a history of the development of strict products liability, noted that as the field of tort law expanded, “a need developed to prevent tort law from ‘swallowing’ the law of contracts.” *Id.* at 1260. Thus, California became the first state to adopt the economic loss rule in *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965). *Id.* The economic loss rule subsequently spread across jurisdictions, including the United States Supreme Court. *Id.* at 1261. In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, the United States Supreme Court identified the heart of the issue: the ability to allocate risk. 476 U.S. 858, 871–72 (1986) (“Since a commercial situation generally does not involve large disparities

in bargaining power, we see no reason to intrude into the parties' allocation of the risk.”).

The allocation of risk is integral to any contract. Most often, it determines the price a party is willing to pay for goods and services, although it can manifest in other ways, such as liquidated damages provisions, warranties, fee shifting provisions, or indemnification clauses. *See Town of Alma*, 10 P.2d at 1262. This ability is the core of contract law. *See Detroit Edison Co. v. Nabco, Inc.*, 35 F.3d 236, 239 (6th Cir. 1994) (“The essence of contract law is the bargain: parties of equivalent bargaining power negotiate the terms of the transaction and each is then entitled to the benefit of the bargain.”). In *Grynberg v. Agri Tech*, a companion case to *Town of Alma*, the Colorado Supreme Court succinctly explained that actions to recover pure economic damages based on disappointed expectations is the exclusive province of contract law. *Grynberg*, 10 P.3d at 1270 (citing *Detroit Edison Co.*, 35 F.3d at 239). Thus, in adopting the economic loss rule, the Supreme Court highlighted its key purpose of ensuring predictability in commercial transactions by holding parties to their bargains without fear of unanticipated tort liability arising, effectively negating parties' efforts to build cost considerations into the contract. *Town of Alma*, 10 P.3d at 1262.

A. Consistent with the Policy Supporting the Economic Loss Rule, Colorado Has Consistently Applied the Independent Duty Test to Determine its Applicability.

To preserve this wall between tort and contract, the Colorado Supreme Court identified the source of the breached duty as the key determinant of whether an action lies in tort or contract. *Town of Alma*, 10 P.3d at 1262. In fact, the Supreme Court noted that a more accurate name for the economic loss rule in Colorado would be the “Independent Duty Rule.” *Id.* at 1262 fn. 8. Colorado Courts look to three factors to determine whether the violated duty is independent of the contract: (1) whether the relief sought in tort is the same as the contractual relief; (2) whether there is a recognized duty of care in tort; and (3) whether the tort duty differs in any way from the contractual duty. *Mid-Century Ins. Co. v. HIVE Constr.*, 531 P.3d 427, 433 (Colo. App. 2023). This last factor, consistent with the rule’s policy, is often determinative. *See id.* (“Even if the duty allegedly breached is separately recognized under tort law, it is not ‘independent’ of the contract for purposes of the economic loss rule if it addresses the same obligations created by the contract.”); *see also BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004).

Thus, the policy reasons behind the adoption of the economic loss rule require that if the duty breached is contained within the contract itself it is not an independent duty, and a tort action cannot lie, whether or not tort law imposes a similar or

identical duty. *See Grynberg*, 10 P.3d at 1270 (noting that the plaintiffs in that case failed to explain how their proposed independent common law duty “would impose a different duty of care on Respondents than that already provided for by the contract.”). This is an especially important rule in construction contracts. *See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992 (Wash. 1994) (“If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract.”).

B. The Economic Loss Rule Applies to All Duties in Interrelated Networks of Contracts Concerning Construction Projects.

The Colorado Supreme Court then expanded the economic loss rule to apply to parties that are part of a network of contracts. *See BRW*, 99 P.3d at 72. The Court identified three key policy reasons for the economic loss rule:

“(1) to maintain a distinction between contract and tort law; (2) to enforce expectancy interests of the parties so that they can reliably allocate risks and costs during their bargaining; and (3) to encourage the parties to build cost considerations into the contract because they will not be able to recover economic damages in tort.”

Id. In the context of sophisticated commercial parties working on complex projects, the Court noted that the policies applied to projects, not individual contracts. *See id.*

In the network of contracts that define large construction projects, the parties “do have the opportunity to bargain and define their rights and remedies, or to decline to enter into the contractual relationship if they are not satisfied with it.” *Id.* Applying the economic loss rule to such networks encourages parties within that network “to protect itself from risks, holds the parties to the terms of their bargain, enforces their expectancy interests, and maintains the boundary between contract and tort law.” *Id.* Again, the Supreme Court found that when the tort duty alleged to be breached is contained within the network, no tort action lies. *Id.* at 74.

In Colorado, the application of the economic loss rule turns on the source of the breached duty, not conduct. *See Engeman Enters., LLC v. Tolin Mech Sys. Co.*, 320 P.3d 364, 372 (Colo. App. 2013). In other words, if the acts or omissions breaching the contract also breach the tort duty, then the tort is not independent and the economic loss rule bars the tort claim. The economic loss rule therefore bars a claim even where the alleged duty breached is separately recognized under tort law, as it is not independent of the contract if it addresses the same obligations created by the contract. *Mid-Century*, 531 P.3d at 433. This is just as true for a network of contracts as for a single, discrete contract. *See BRW*, 99 P.3d at 74.

II. Colorado Law Allows for the Application of the Economic Loss Rule to Bar Claims for Intentional Torts Such as Fraud.

In light of the Court's focus on whether a duty arises independently of a contract, parties naturally began to wonder whether the economic loss rule barred intentional torts as well as negligence. On balance, Colorado Courts have answered that question overwhelmingly in the affirmative. *See Mid-Century*, 531 P.3d at 436 (collecting cases).

A. The Application of the Economic Loss Rule Does Not Turn on the Breaching Conduct.

As noted above, the Colorado Supreme Court has held that the only test for determining the application of the economic loss rule is the independent duty test, which looks only to the source of the duty. Whether conduct was intentional or not is immaterial to the analysis. *See Engeman*, 320 P.3d at 372. This is the exact conclusion that the Court of Appeals reached in *Hamon Contrs., Inc. v. Carter & Burgess, Inc.* In that case, the Court of Appeals considered whether claims for fraudulent concealment and fraudulent misrepresentation were barred by the economic loss rule. *Hamon Contrs., Inc. v. Burgess, Inc.*, 229 P.3d 282, 287-89 (Colo. App. 2009). The *Hamon* Court held “[t]he economic loss rule can apply to fraud or other intentional tort claims based on post-contractual conduct.” *Id.* at 289.

In reaching that conclusion, it specifically noted that the question in any economic loss rule case is

“whether the duty allegedly violated exists independently of the contract. With respect to fraud claims specifically, this depends on whether the alleged fraud arises from duties *implicated by a party’s performance of the contractual terms* or whether the alleged fraud concerns a matter extrinsic to the contract. Where the alleged fraud arises from duties implicated by a party’s performance of contractual terms, the claim is barred by the economic loss rule.”

Id. (emphasis added). In other words, if the fraud concerns a failure to perform the contract, it is subject to the economic loss rule. *See id.* at 295 (“Simply put, whether a party negligently breaches a contractual duty or fraudulently does so, the duty allegedly breached is not independent of the contract.”). This applies to implied duties, such as the duty of good faith and fair dealing, as well. *See, e.g., Dream Finders Homes LLC v. Weyerhaeuser NR Co.*, 506 P.3d 108 (Colo. App. 2021) *cert. denied*, 2022 Colo. LEXIS 863, 2022 WL 4238209 (Colo. September 12, 2022) (rule barred post-contractual fraud claim because the duty to not make misrepresentations or engage in fraud was subsumed within the contract’s implied duty of good faith and fair dealing); *Top Rail Ranch Estates, LLC v. Walker*, 327 P.3d 321, 329 (Colo. App. 2014) (rule barred fraud claims that duplicated a claim for breach of the duty of good faith and fair dealing); *Engeman Enters., LLC v. Tolin Mech. Sys. Co.*, 320 P.3d 364 (Colo. App. 2013) (rule barred a claim alleging willful

and wanton conduct where there was no duty independent of the contract, "consistent with the principle that the economic loss rule turns not on the nature of the defendant's conduct, but on the nature of the duties owed by the defendant"); *Former TCHR, LLC v. First Hand Mgmt. LLC*, 317 P.3d 1226, 1231-32 (Colo. App. 2012) (rule barred post-contractual fraud claims where breached duties were described by the contract or subsumed within the implied covenant of good faith and fair dealing). Since a party can plead almost any failure of performance as a fraud claim,¹ application of the economic loss rule to intentional torts allows for contracting parties to precisely negotiate all of their obligations.

B. No Court in Colorado Has Overruled or Otherwise Abrogated the Well-Defined Independent Duty Test.

It is clearly established in Colorado that the economic loss rule can act as a bar to intentional tort claims, including fraud, at least when the conduct occurred after the formation of the contract and breached an express or implied term of the contract. That said, one panel of the Court of Appeals has suggested that dictum in a recent Supreme Court decision has changed the law, but no other Court has adopted that position. *See Mid-Century*, 531 P.3d at 434-36.

¹ In Colorado, if a party makes a promise they have no intent of fulfilling, they may be liable for fraud. *See Ballow v. Phico Ins. Co.*, 875 P.2d 1354, 1362 (Colo. 1993). As intent is one of the most fact-heavy issues in any case, it is not difficult to place any failed performance before a jury as a potential fraud.

In *Bermel v. BlueRadios, Inc.*, the Colorado Supreme Court held, on separation of powers grounds, that, as a judicially created rule, the economic loss rule could not preclude claims for statutory theft. *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1157-59 (Colo. 2019). In a footnote of its discussion of the economic loss rule, the majority noted “that the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation.” *Id.* at 1154 fn. 6. Since the majority disposed of the matter on the separation of powers issue, this statement is dictum, and did not overrule any prior holdings. See *Mid-Century*, 531 P.3d at 434-35.

One panel of the Court of Appeals relied on *Bermel* to suggest in dicta that the economic loss rule in Colorado is inapplicable in most cases to intentional torts. See *McWhinney Centerra Lifestyle Ctr. LLC v. Poag & McEwen Lifestyle Centers-Centerra, LLC*, 486 P.3d 439, 453 (Colo. App. 2021). But this interpretation of the *Bermel* footnote was subsequently rejected by two other panels of the Court of Appeals. See *Dream Finders*, 506 P.3d at 122; see also *Mid-Century*, 531 P.3d at 435-36. As *Dream Finders* noted, no Colorado case has ever held that the economic loss rule can never apply to claims for fraud or other intentional torts. *Dream Finders*, 506 P.3d at 122. Likewise, *Mid-Century* noted that no case, including *McWhinney*, has rejected the three factors for determining application of the

economic loss rule that Colorado Courts have employed for nearly two decades. *Mid-Century*, 531 P.3d at 434-36. Those factors focus only on the source of the duty, not conduct. *See Engeman*, 320 P.3d at 372. Both *Dream Finders* and *Mid-Century* ultimately held that, on the facts of the respective cases, the economic loss rule barred fraud claims and claims based on willful and wonton conduct. *See Dream Finders*, 506 P.3d at 122; *Mid-Century*, 531 P.3d at 436. Notably, *Dream Finders* placed whether the economic loss rule barred recovery for intentional fraud before the Supreme Court, who denied the petition for certiorari. *Dream Finders Homes LLC v. Weyerhaeuser NR Co.*, 2022 Colo. LEXIS 863, 2022 WL 4238209 (Colo. September 12, 2022). Thus, so long as the tort duty breached is not independent of the parties' contract, Colorado law still allows for the application of the economic loss rule to bar the tort claims. *See Mid-Century*, 531 P.3d at 436.

C. The Continued Application of the Independent Duty Test, Whatever the Nature of the Conduct Represents the Best Application of the Policies Behind the Economic Loss Rule in Colorado.

As *Mid-Century* noted, the test for determining whether a duty is independent of a contract is well established; it requires applying the economic loss rule when the losses are purely economic, and the duty breached is a duty owed under a contract. *Id.* This is the same conclusion reached by Justice Gabriel in his dissent in *Bermel*. After rejecting the majority's determination that separation of powers

precluded application of the economic loss rule, Justice Gabriel continued the analysis using the well-established factors. *Bermel*, 440 P.3d at 1162 (Gabriel, J. dissenting). He ultimately concluded that the economic loss rule should bar the civil theft claim because the same conduct (obtaining control without authorization and with the intent to deprive) was covered by the applicable contract. *Id.* Thus, the duty imposed by the civil theft statute was not independent of the contractual duty. *Id.*

Justice Gabriel correctly noted his conclusion the economic loss rule would bar civil theft claims in the absence of the majority's separation of powers holding adheres to the stated purpose of the economic loss rule. *Id.* at 1163. After all, "a great many contract claims arise from a scenario in which one contracting party pays the other for goods or services and the other does not perform." *Id.* Without the application of the economic loss rule, the payor "could virtually always assert a civil theft claim (the payee allegedly stole the payor's money), allowing it to seek treble damages and attorney fees not otherwise available under the parties' contract." *Id.* This, Justice Gabriel noted, "would result in precisely the kind of unanticipated liability (i.e., liability beyond the risks and costs that the parties allocated in their contract) that [the Court] deemed inappropriate in *Town of Alma*[.]" *Id.* As noted, *supra*, Justice Gabriel's reasoning applies equally to claims of fraud.

The interplay between the civil theft statute and the economic loss rule is unique as it represents a collision between a judicially made rule and a statutory cause of action. The Colorado Supreme Court has determined that the judicially made rule must yield in that scenario. But the interplay between common law causes of action and a judicially made rule presents no separation of powers issues. Without those issues, whether the economic loss rule applies to bar a tort claim is determined by whether the tort duty breached is independent of the contract, using the tested factors articulated by both the Court of Appeals and Supreme Court, exemplified by the analysis of *Dream Finder* and *Mid-Century*, and supported by the very reasons articulated in *Town of Alma* for the adoption of the economic loss rule.

III. The Application of the Economic Loss Rule Must Account for all Duties Created by Each Agreement in a Network of Contracts, Starting from the Initial Contract that Commences the Project.

In *Dream Finders*, the Court of Appeals explicitly noted that the date on which a contract is entered into can determine whether the economic loss rule applies. *See Dream Finders*, 506 P.3d at 120 (“The economic loss rule does not apply to claims arising from a defendant’s pre-contractual conduct because, at that time, there was no contract that could have subsumed identical tort duties. In contrast, fraud occurring during the parties’ performance of their contract is post-contractual and may be barred by the economic loss rule.”) (citations omitted). This principle, simple

in its application to a single contract, applies to networks of contracts as well; the law finds no distinction between a single contract and a network of contracts for a single project. *See BRW*, 99 P.3d at 74. In the context of large construction projects, the faithful application of the independent duty rule considers the duties created by the entire network of contracts, beginning at the time the parties established a contractual relationship.

A. Under Colorado Precedent, Breach of a Contractual Duty Cannot Give Rise to Tort Liability.

The crux of the relevant analysis is not whether an independent duty exists at the common law, but whether the duty breached is independent of the contractual duties negotiated by the parties. *Mid-Century*, 531 P.3d at 433; *Dream Finders*, 506 P.3d at 122 (“To determine whether Weyerhaeuser owed ... independent tort duties, we must compare the tort duties and the contractual duties that Weyerhaeuser owed[.]”). There is no dispute that all persons have a common law duty to not make pre-contractual fraudulent or negligent representations. *Id.* at 121. If the parties are strangers to each other at the time of the fraudulent conduct, logically, no contractual duties exist, and the economic loss rule is therefore inapplicable. *See Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603, 607 (Colo. 2016). Thus, the economic loss rule cannot bar fraud that occurred before the creation of a contractual relationship.

Once the parties enter a contract, they have bargained for certain duties as expressed in the contract, have allocated risks, and bargained for remedies. *See BRW*, 99 P.3d at 75. A failure to perform the bargained-for duty is a breach of the contract. The economic loss rule says that it matters not if the failure to perform also breaches an established common law duty, the remedy lies in contract, not tort. When dealing with a network of contracts related to a single project, a party's breach of a duty created anywhere within the network can trigger the application of the economic loss rule. *Id.*

B. A Network of Contracts Related to a Construction Project Begins Creating Duties Once the Owner Commences the Project.

A network of contracts, like single contracts, has a beginning. In order to determine whether a duty exists within a network of contracts, a court must determine when that network commenced. At some point, all parties were legal strangers to each other, whose interactions were governed only by the duties imposed on all people by tort law. If one party fraudulently induces another party to enter into a contract that it has no intention of performing, then Colorado law is clear that the induced party may bring an action for fraud and breach of contract. *See Van Rees*, 373 P.3d at 607. But once a contract is entered into, any failure to perform the duties outlined by that contract is remedied solely by contract law. *See Harmon*, 229 P.3d

at 289; *Dream Finders*, 506 P.3d at 120. This includes any duties contained within the network of contracts. *See BRW*, 99 P.3d at 74.

Consistent with these principles, the independent duty rule must logically also consider duties added into the network via amendments or change orders, additional contracts entered into related to the project, and promises and duties incorporated into the network of contracts by reference. The District Court in this case, contrary to precedent, looked only at a single contract when it determined the alleged misrepresentations occurred prior to the contract formation. But the policies supporting application of the economic loss rule are not limited by the existence of a single contract. *See BRW*, 99 P.3d at 74. The District Court's reasoning was flawed because failed to acknowledge the parties had already entered into the several prior contracts related to the projects. Thus, the network of contracts was already established. Amendments and change orders to existing contracts are logically no less of a part of a network of contracts than contracts entered into with subcontractors, which have been held to be part of the network. *Id.* Once a party has entered into a contract within that network, all conduct it subsequently engages in within that network must be considered post-contractual, otherwise the distinction between a single contract and a network of contracts is rendered meaningless.

CONCLUSION

The economic loss rule serves many purposes, chief among them to provide parties with the ability to engage in business and allocate risk with the confidence that they will not risk incurring tort liability for engaging in a business transaction. Application of the rule can preclude liability for intentional torts such as fraud, so long as a contractual duty, whether express or implied, covering the conduct exists at the time of the conduct. When dealing with the network of contracts typical of large construction projects, the most logical point where a party's conduct occurs after the imposition of a duty of good faith and fair dealing within that network is to after the first the creation of the first contract that brought the party into the network.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2023, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* COLORADO DEFENSE LAWYERS ASSOCIATION AND DRI CENTER FOR LAW AND PUBLIC POLICY** was filed with the Colorado Court of Appeals and served on all counsel of record via electronic mail.

s/ Nicole Marion _____

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