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No. 40974-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

KEY DEVELOPMENT INVESTMENT, LLC and TRINITY GLASS
INTERNATIONAL, INC.

Respondent,

v.

PORT OF TACOMA,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

On September 21, 2010, this Court granted discretionary review on the issue of “the application of the economic loss rule to third party beneficiaries” under RAP 2.3(b)(4).

Subsequently, the Supreme Court decided two cases that may impact this Court’s review. *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010) and *Affiliated FM Insurance Company v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010) were decided on November 4, 2010. The Port of Tacoma will therefore address these cases herein.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Trinity’s motion for reconsideration .

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Trinity a third-party beneficiary of the contract between Key and the Port of Tacoma? (Assignment of Error No. 1)
2. Do any independent tort duties run from the Port of Tacoma, a potential buyer of commercial real property, to Trinity, the tenant of the seller of said commercial property? (Assignment of Error No. 1)
3. Did *Eastwood* and *Affiliated* overrule, or leave intact, Washington law formerly known as the economic loss rule? (Assignment of Error No. 1)

IV. STATEMENT OF THE CASE

Key Development Investment, LLC (“Key”), owned property in the Frederickson Industrial Area of Pierce County. CP 156. In 2007, Trinity Glass International, Inc. (“Trinity”), was leasing some of said property from Key but “was not fully using it.” *Id.* On April 24, 2007, Key listed the property for lease with Colliers International, and although Key did not list the property for sale with Colliers, “the word was out that the property could also be purchased.” CP 156; CP 55. Key has never listed the Frederickson property for sale. CP 78; CP 80-81; CP 83.

In their amended complaint, Key and Trinity are described as “affiliates, sharing common ownership.” CP 37. Key and Trinity are owned by members of the Ham family. CP 52. Trinity is “a closely held family corporation” (CP 48), owned by Ki Ham and Jong Ham. CP 52. Key does not have employees. Trinity employed Alex Lee and Chong So to manage Trinity, Key, and other business ventures of the Ham family. CP 48. Alex Lee was vice president and chief financial officer. CP 68; CP 94. Chong So was in-house counsel. CP 43.

Chong So explained how the initial concept of a potential sale by Key of its property to the Port of Tacoma was conceived:

CB Richard Ellis is a commercial real estate brokerage firm with offices in Pierce County. In September 2007 Bob Hacker approached Key about the possibility of selling the

Property to the Port, which had indicated an interest in moving Port tenants to Frederickson. Mr. Hacker indicated that he would also approach the Port about the possibility of buying the property.

CP 156. *See also* CP 60 and CP 80.

Bob Hacker of CB Richard Ellis received oral permission from Alex Lee to approach the Port of Tacoma (“Port”) regarding the potential sale of the Frederickson property to the Port. CP 58-59. Hacker testified that he then initiated contact with Jay Stewart, a Port Real Estate Division Property Manager (CP 59; CP 61; CR 66), “pitching” these ideas to the Port:

That this property has -- it's on the market for lease; it's got substantial vacancy; it has the type of infrastructure the tenants of the Port could use, such as rail, heavy power, zoning; could this be a good fit for the Port on an acquisition to help facilitate tenants relocating out of the Port.

CP 61-62. *See also* CP 67-68.

On September 21, 2007, at the request of Chong So, Jay Stewart signed an agreement to keep discussions about the Port's possible purchase of Key's property confidential. CP 156; CP 206. The Port initially considered the purchase of Key's property as a “potential . . . straight investment,” which was how the proposed transaction was presented to Stewart by the CB Richard Ellis brokers. CP 70-71; CP 73.

On November 27, 2007, Key received an unsolicited, unsigned and

non-binding letter of intent directed to Alex Lee from Harvey Widman & Assigns addressing a possible purchase of the property for \$32.8 million.¹ CP 84; CP 157. Chong So authorized the CB Ellis brokers “to disclose to the Port that Key had received an offer for \$32.8 million for the Property and to tell the Port that Key’s asking price to the Port for the Property was \$35 million.” CP 157.

Key’s principals and agents were sophisticated businessmen (CP 57, CP 357, CP 515) including Trinity’s house counsel, Chong So, who was an experienced real estate attorney. CP 103-104, CP 515. Between January 9, 2008, and March 24, of 2008, John Bauder of CB Richard Ellis, working with and directed by Chong So and Alex Lee, exchanged electronic communications and multiple draft letters of intent with Jay Stewart, all of which contained multiple contingencies affecting the potential purchase being negotiated. CP 7; CP 75; CP 80; CP 156, ¶5; CP 218; CP 300; CP 357-448.

On March 24, 2008, a letter of intent titled “Intent to Purchase and Right of Entry” (“Contract”) was executed by Alex Lee who signed as

¹ Mr. Widman explained what happened: he initially offered \$27 million to Key for its property, which offer was orally rejected. He followed up with a non-binding letter of intent in the sum of \$32.8 million, but “Key did not respond in any way to my November 27 letter of intent by signing it or by attempting further negotiations, and I considered it a dead issue within a matter of a few weeks.” CP 343-344.

Vice President of Key Development, LLC.² CP 91-94. This document memorialized a contract to negotiate between Key and the Port with **certain provisions benefitting Trinity**. *Id.* This Contract to negotiate required a non-refundable \$10,000 payment by the Port to Key, which the Port paid. CP 91, 95.

The Contract includes the following provisions:

8. Contingency Period:

Buyer and Seller shall have 30 days from mutual execution of this Agreement to negotiate and execute a PSA that includes a mutually agreed schedule for Trinity Glass to vacate their premises. Should Buyer and Seller not execute a PSA as provided above, the transaction contemplated by this Agreement shall be terminated, and Buyer and Seller shall have no further obligations to each other with respect to the Property.

Buyer shall be granted Ninety (90) days from full execution of this Agreement to satisfy itself, in its (sic) sole discretion regarding the legal and physical condition of the subject Property and to obtain Port Commission approval of purchase of the Property. If at the end of the Contingency Period, Buyer elects to remove its contingencies, the earnest money shall become non-refundable converted to cash, deposited in escrow, and shall become applicable to the Purchase Price and non-refundable. If Buyer elects not to remove contingencies, as provided, Buyer's earnest money deposit shall be returned and this transaction shall be cancelled.

The Contract further provides in part:

Except for the provisions of Sections 9 and 15 above, this letter does not constitute a binding contract between the parties; rather it is intended to outline the general terms

² The contract was dated March 19, 2008, and signed by Stewart of the Port on March 21, 2008. CP 94.

and conditions under which Buyer and Seller would be willing to enter into a purchase and sale agreement for the subject property. It is not intended to include all of the terms and conditions, which will be incorporated into the final documents, and those documents, when executed, shall constitute the entire agreement of the parties.

By signing below, Buyer and Seller agree to the terms and conditions defined above and agree to negotiate in good faith to reach a mutually acceptable Purchase and Sale Agreement.

CP 94 (emphasis added).

The Contract by its express terms expired after 30 days and confirmed that other than the forfeiture of the \$10,000 paid by the Port, neither party would have “any further obligations to each other with regard to the Property.” CP 91. The Contract also provided that any purchase and sale agreement (“PSA”) would necessarily include other contingencies, including a further period for the Port to determine in its sole discretion whether or not to purchase the property, and would require approval of the elected Port Commission. CP 91-94.

The parties failed to execute a PSA, but on the evening of the 30th day (April 23, 2008), the Port received via email a new proposal from Key’s representative John Bauder that was substantially different than the terms of the Contract, which email was answered by Port representative Jay Stewart the following morning. CP 130.

Key and Trinity subsequently sued the Port alleging breaches of

contract and tort duties. CP 37-44. Key claimed that the Port's failure to purchase the property, or to state its true intentions, caused Key to lose \$12.5 million, which is the gross estimated difference between the \$35 million price Key hoped to get from the sale and a later alleged estimated value of \$22.5 million resulting from the economic downturn of 2008-2009. CP 97-99, CP 106. Trinity claimed that it lost an estimated amount in excess of \$4.4 million (CP 100-101) because it had hoped to escape its lease with Key, alleging in the amended complaint: "In case of a new lease or a sale of the property, the existing lease would be terminated." CP 38.

Under Claim 1 of their First Amended Complaint, the plural Plaintiffs (Key and Trinity) made the same claim that the Port intentionally interfered with "Plaintiffs' existing business expectancies . . . causing damage to Plaintiffs." CP 41. In addition, they alleged that the Port made fraudulent or negligent misrepresentations upon which the "Plaintiffs were justified in their detrimental reliance"; that the Port "breached the parties' confidentiality agreement by disclosing confidential information about the proposed transaction to third parties without Plaintiffs' permission"; and that the Port breached an "Intent to Purchase and Right of Entry agreement" ("Contract") executed by "Plaintiffs and

the Port”; and that they were directly and consequentially damaged.³ *Id.*

The case was assigned to the Honorable Stephanie Arend of the Pierce County Superior Court.

The Port filed a motion for summary judgment on claim 1, seeking dismissal of all claims of Key/Trinity, and of the tort claims on the basis of application of the economic loss rule; and the lack of evidence of essential elements of the alleged torts. CP 5-32.

In their response to the Port’s motion, Key and Trinity argued that “Key’s tort claims for misrepresentation, nondisclosure and tortious interference . . . are not based on the[] contractual provisions in the Intent to Purchase[.]” CP 177. *See also* CP 174-175; CP 181-183. Rather, they argued that their “tort claims are based on the Port’s breach of its alleged common law duties of truthfulness and full disclosure, not on the Port’s breach of its agreement[.]” CP 181. Trinity pled the identical tort and breach of contract claims as did Key, and their pleadings consistently referred to the “Plaintiffs” as if the two entities were, in fact, only one entity. Suddenly, in response to the Port’s motion, Plaintiffs asserted in a single sentence, “There was no contract between the Port and Trinity, so

³ It is without dispute that the signatories to the agreement were the Port and Key. The only interpretation that therefore could be given to Plaintiffs’ claims is that Trinity was a third party beneficiary to the agreement.

the economic loss rule therefore could not affect Trinity's tort claims against the Port." CP 176.

On May 28, 2010, the trial court granted the Port's motion for summary judgment in part, finding that (1) the Intent to Purchase and Right of Entry signed by Alex Lee on March 24, 2008, was a contract (CP 1043); (2) Plaintiffs and the Port had the opportunity to allocate risk, which triggered the economic loss rule; (3) Plaintiffs' loss was purely economic, as distinguished from personal injury or injury to property; (4) **no exception to the economic loss ruled applied**;⁴ and (5) the Plaintiffs were limited to their contractual remedies. CP 1040-1041. The trial court did not grant the Port's motion to dismiss the **contract claims of either plaintiff**. CP 1044 - CP 1046.

Trinity thereafter filed a motion for reconsideration, stating:

Plaintiff Trinity Glass International, Inc., ("Trinity") moves for partial reconsideration of the Court's Order May 28, 2010, "dismissing Plaintiffs' [plural] tort claims as a matter of law because the economic loss rule limits Plaintiffs [plural] to their contract remedies." Trinity had no contract with defendant and the economic loss rule therefore does not affect Trinity's tort claims.

CP 1047. The Port responded to Trinity's motion arguing, "The

⁴ As has always been the law, there is an exception to the application of the economic loss rule if an injury traces back to a breach of tort duty arising independently of the terms of a contract. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 US 858, 106 S.Ct 2295, 90 L.Ed.2d 865 (1986); see *Eastwood*, 170 Wn.2d at 392.

Court correctly dismissed the tort claims of the “Plaintiffs [plural]” because Trinity was a third party beneficiary of the Agreement between Key and the Port.” CP 1052.

The trial court entered an order granting Trinity’s motion for reconsideration on June 18, 2010, stating:

The motion of plaintiff Trinity Glass International, Inc., for reconsideration of the Court’s Order on Cross Motions for Summary Judgment, dated May 28, 2010, to the extent it dismissed Trinity’s tort claims, is GRANTED. Trinity’s tort claims shall not be dismissed under the economic loss rule.

CP 1088.

The Port timely filed a notice of discretionary review to seeking review by this Court of the June 18, 2010 Order. CP 1094-1097. The Court’s Commissioner issued a ruling granting review on September 21, 2010, stating:

This court concludes that the trial court appropriately certified the issue of the application of the economic loss rule to third party beneficiaries for discretionary review under RAP 2.3(b)(4). Accordingly, it is hereby ORDERED that the Port’s motion for discretionary review is granted.

V. SUMMARY OF ARGUMENT

Trinity (together with Key) sued the Port for breach of contract and independent tort. However, all of Trinity’s and Key’s claims, whether asserted under contract or tort, emanate solely from a contractual

relationship between Key and the Port. Trinity was not a primary party to, nor a signatory on, that Contract. Instead, Trinity's status was that of a third party beneficiary of the Contract entered into between Key and the Port. As such, Trinity has no greater rights than Key.⁵

All of Key/Trinity's claims are economic in nature. None involve material damage or injury to persons or property, actual or potential. No issues of public safety are involved. No statutes are involved. In the absence of an independent tort duty established by principles of "logic, common sense, justice, policy and precedent," this Court should affirm the trial court's May 28, 2010 ruling that Key and Trinity were both limited to their contractual remedies because there were "no exceptions to the economic loss rule," which was, effectively, a determination that the Port owed no independent tort duties to Key/Trinity.

The trial court erred when it reinstated Trinity's tort claims based upon Trinity's contention that it had no contract with the Port. This Court should reverse the trial court's June 18, 2010 order which reinstated Trinity's tort claims. This case should proceed to trial based solely upon Key/Trinity's claims of breach of contract.

⁵ In its ruling of May 28, 2010, dismissing the tort claims of Key and Trinity; and its ruling on June 18, 2010, reinstating tort claims pursuant to Trinity's motion for reconsideration, the trial court left intact Trinity's contract claims against the Port for trial in this litigation. CP 1044-1046, CP 1088-1089.

VI. ARGUMENT

The long-standing rule of law continues to be that in disputes between contracting parties, a party will be held to contract remedies regardless of how one characterizes one's claims unless the injury alleged traces back to a breach of a tort duty that arises independently of the terms of the contract between the parties. *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 833, 881 P.2d 986 (1994); *Alejandro v. Bull*, 159 Wn.2d 674, 688, 153 P.3d 864 (2007); *Affiliated*, 170 Wn.2d at 450. Here, the only relationship between the parties arises out of the Contract entered into between Key and the Port. Likewise, the harms alleged by Key and Trinity (regardless of the label used to describe the claims) flow solely from the Contract between Key and the Port. The label used by a plaintiff does not change a contract claim into a tort claim; and when parties' difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the plaintiff may wish to use in describing it. *Snyder v. Lovercheck*, 992 P.2d 452, 461, 917 P.2d 1072, 1088 (Wyo.1999) quoting *Beeson v. Erickson*, 22 Kan.App.2d 452, 461, 917 P.2d 901 (1996). Washington law has consistently followed these principles. *Alejandro*, 159 Wn.2d at 683.

Subsequent to this Court's grant of review on Trinity's claim

against the Port, the Washington State Supreme Court rendered two opinions that support the application of the economic loss rule to Key/Trinity's claims in this case and further support the Port's position that in fact the economic loss rule applies equally to Trinity as to Key. *Eastwood*, 170 Wn.2d 380, and *Affiliated*, 170 Wn.2d 442, essentially renamed the economic loss rule but **did not reverse** its prior decisions in economic loss cases such as *Berschauer/Phillips*, 124 Wn..2d at 821, *Alejandre*, 159 Wn.2d 674. The Supreme Court continues to recognize that there are instances in which an independent tort duty may be established in a "particular" or "specific set of circumstances" when warranted under the balancing light of "mixed considerations of logic, common sense, justice, policy and precedent," and this is a question of law.

A. Trinity was a third party beneficiary of the Contract between the Port and Key.

The question upon which this Court granted review was whether the Port owed a tort duty to Trinity. The Port owed no such duty as Trinity was a third party beneficiary of the Key/Port contract and any remedies it possessed were contractual.

"The creation of a third party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended

beneficiary at the time they enter into the contract.” *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots, West Coast and Pacific Region Inland Division, Branch 6*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979).

This requires that the court, “**not examine the minds of the parties, searching for evidence of their motives or desires**. Rather, [it] must look to the terms of the contract **to determine whether performance under the contract would necessarily and directly benefit the petitioners.**”

Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 808, 43 P.3d 526 (2002) (quoting *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 362, 662 P.2d 385 (1983)) (emphasis added).

Paragraph 8 of the Contract between Key and the Port provides:

Buyer and Seller shall have 30 days from mutual execution of this Agreement to negotiate and execute a PSA that includes a mutually agreed schedule for Trinity Glass to vacate their premises. Should Buyer and Seller not execute a PSA as provided above, the transaction contemplated by this Agreement shall be terminated[.]

CP 91.

Paragraph 9 of the Contract between Key and the Port also imposes an obligation on the Port to try to “establish a mutually acceptable schedule for Trinity Glass to vacate the warehouse and office space.”

CP 93.

Paragraph 12 of the Contract between Key and the Port provides:

Seller acknowledges all existing rental agreements with Trinity Glass International, Inc., shall be terminated upon closing of this sale, and **a new short term rental agreement shall be entered into between the buyer and Trinity Glass International, Inc. under terms and conditions acceptable by all parties to include Buyer, Seller and Trinity Glass International, Inc.**

CP 94 (emphasis added).

As stated in Key/Trinity's amended complaint:

Trinity was not fully utilizing the Property, however, and as a result, both Trinity and Key were seeking a new tenant (or tenants) and were also willing to sell the Property. **In case of a new lease or sale of the Property, the existing lease would be terminated.**

CP 37-38 (emphasis added).

The Key/Port Contract indicated that Key would terminate Trinity's lease obligations in the event of a sale of its property to the Port, a direct benefit to Trinity. CP 94. The Port also agreed that if the sale went through, it would enter into a short-term rental agreement with Trinity under terms acceptable to Trinity, which also would have conferred a benefit to Trinity. CP 94. The Contract between Key and the Port thus would have "necessarily and directly" benefited Trinity. *See Vikingstad v. Baggott*, 46 Wn.2d 494, 497, 282 P.2d 824 (1955) ("So long as the contract necessarily and directly benefits the third person, it is immaterial that this protection was afforded him, not as an end in itself,

but for the sole purpose of securing to the promisee some consequent benefit or immunity.”).

Trinity was a third party beneficiary of the Contract between Key and the Port. In fact, Trinity pled that its damages arose as a result of the Port’s alleged breach of the Contract, thereby causing both Plaintiffs to suffer economic damages. CP 41, ¶¶ 16, 17. Since it is without question that Trinity had no contract with the Port, Trinity could only be pleading breach of contract as a third party beneficiary. There was no other legal basis for Trinity to allege breach of contract as set forth in its First Amended Complaint.⁶

B. The economic loss rule/independent duty doctrine applies to third party beneficiaries.

1. Third party beneficiaries have the right to sue for breach of contract.

In Washington, third party beneficiaries have the right to maintain an action for breach of contract and can enforce a contract provision to the same extent that the parties can enforce it. *Grand Lodge of Scandinavian Fraternity of America, Dist. No.7*, 2 Wn.2d 561, 569, 98 P.2d 971 (1940) (“We are committed to the rule that when one person, for valuable

⁶ Only in response to the Port’s motion for summary judgment did Trinity for the first time assert that Trinity did not have a contract with the Port, arguing that the economic loss rule therefore did not apply to Trinity. CP 176. However, absent a contract claim, Trinity has no viable claim as the Port owed no independent tort duty to Trinity.

consideration, contracts with another to perform some act for the benefit of the third person, the third person who would enjoy the benefit of the act may maintain an action for the breach of such contract.”); *Kinne v. Lampson*, 58 Wn.2d 563, 567, 364 P.2d 510 (1961) (“In this state a third party beneficiary may enforce a contract,” and a third party beneficiary can enforce a contract provision to the same extent that the parties to the contract can enforce it).

There is no question but that Trinity would have rights extended to it under the Contract as a third party beneficiary of that Contract.

Application of the economic loss rule would not impact those contract claims.

2. Washington courts have applied the economic loss rule to parties without contractual privity, and no Washington court has ever held that it does not apply to third party beneficiaries.

In *Berschauer/Phillips*, our Supreme Court unequivocally held that the economic loss rule applies to plaintiffs who are not in privity with the defendant but who claim economic losses from the breach of a contract between the defendant and a third party. The same facts are present in this case: Alex Lee signed the Contract with the Port in his capacity of Vice President of Key (CP 94), so Trinity was not “in privity” with the Port, but Trinity claims economic loss from an alleged breach of the Contract

between the Port and Key. Under *Berschauer/Phillips*, the economic loss rule/independent duty doctrine rule applies to third party beneficiaries.

In *Baddeley v. Seek*, 138 Wn. App. 333, 336, 156 P.3d 959 (2007),

the Court wrote:

Since the Baddeleys did not contract with STI, **and are not third party beneficiaries of the contractor-STI contract**, they have no contract based claim. Thus, the economic loss rule has no part in this appeal. (Emphasis added.)

In his concurring opinion in *Alejandre*, Justice Chambers noted that, “[o]ver the years, the economic loss rule has been applied in cases where there was no privity of contract between the parties.” *Alejandre*, 159 Wn.2d at 695 fn 2, 153 P.3d 864.

In *Affiliated*, the Court stated:

the concurrence/dissent argues that harm is never an economic loss within the meaning of the economic loss rule unless the plaintiff and the defendant had a contract or unless the parties were contractors on the same construction job. See concurrence/dissent at ----, ----. But in *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 745 P.2d 1284 (1987), an economic loss case, **neither condition was present**. The defendant was the builder-seller of a condominium complex, and the plaintiff was the homeowners association, which represented many subsequent purchasers **who were not in contractual privity with the defendant**. *Id.* at 411, 745 P.2d 1284. The concurrence/dissent has no answer for *Stuart*. **Other jurisdictions have also found an economic loss even when the parties were not in contractual privity**. See, e.g., *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis.2d 395, 413, 573 N.W.2d 842 (1998) (“[W]e conclude that the economic loss doctrine precludes a

commercial purchaser from recovering in tort from a manufacturer for solely economic losses, regardless of whether privity of contract exists between the parties.”).

Affiliated, 170 Wn.2d at 448, fn 1, 243 P.3d 521 (emphasis added).

Indeed, other jurisdictions have specifically applied the economic loss rule to third party beneficiaries. *See, e.g., The Ocean Ritz of Daytona Condominium v. GGV Associates, Ltd.*, 710 So.2d 702 (Fla. 1998); (affirming application of economic loss rule to bar a negligence action by a third- party beneficiary when the plaintiff sought to recover only economic damages); *Town of Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1264 and fn 12 (Colo. 2000) (scope of the economic loss rule “includes third party contract beneficiaries who may have a cause of action for breach of contractual duties”). (*Alma* was cited with favor in *Eastwood*. 170 Wn.2d at 394, 241 P.3d 1256.)

In *Jackson v. City of Seattle*, 158 Wn. App. 647, 244 P.3d (2010), Division I of the Court of Appeals decided its first “economic loss” case following *Eastwood* and *Affiliated*. In *Jackson*, homeowners sued construction contractors who had installed a waterline for the previous homeowners. The *Jackson* plaintiffs alleged that the contractors had negligently installed the waterline, which eventually caused a landslide that damaged their home and landscaping. *Jackson*, 158 Wn. App. at 649.

The trial court ruled that the contractors owed no duty to the homeowners.

Id.

Division I did not agree, finding that the contractors owed the homeowners the common law duty of care recognized in *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007) (“Under the modern, Restatement approach, a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence. Restatement (Second) of Torts §§ 385, 394, 396 (1965).”).

The *Jackson* contractors argued that the economic loss rule barred the homeowner’s negligence action, and the homeowner responded that the economic loss rule had no application because he did not have a contract with the contractors. *Jackson*, 158 Wn. App. at 658, Division I wrote:

In a case involving a claim of negligent misrepresentation by homebuyers against an appraiser hired by their lender, this court stated that it is error to apply the economic loss rule where no contractual relationship exists between the parties. *Borish v. Russell*, 155 Wash.App. 892, 901, 904, 230 P.3d 646 (2010). Citing *Borish*, *Jackson* contends the economic loss rule has no application in this case because he did not have a contract with Trenchless or with QPS.

The idea that there must be privity between the parties before the economic loss rule comes into play would seem to be at odds with the leading case of *Berschauer/Phillips*. In that case, the court made the economic loss rule the foundation of its decision to deny a tort remedy to a general contractor even though the damages, costly delays in the construction of a school project, were allegedly caused by negligent preparation of architectural plans and negligent inspection of the work by individuals **with whom the contractor did not have a direct contractual relationship. The court denied the contractor's tort claims because the damages caused by the construction delays were only economic losses. Notwithstanding *Borish*, **we conclude it is appropriate to consider the economic loss rule here, even though Trenchless and QPS did not directly contract with Jackson.****

Id. (emphasis added.)

Under *Berschauer/Phillips*, *Baddeley*, *Stuart*, *Affiliated*, and *Jackson*, the economic loss rule/independent duty doctrine rule applies where, as here, a plaintiff who is not a party to a contract claims economic losses from breach of a contract between the defendant and a third party, and there are no independent tort duties running from the defendant to the plaintiff.⁷

C. *Eastwood* and *Affiliated* leave intact Washington law formerly known as the “economic loss rule.”

⁷ In the trial court Key and Trinity argued that the Port owed them independent duties sounding in tort. CP 181. In its ruling on the cross-motions for summary judgment, the trial court considered Key/Trinity's arguments and rejected them. See CP 1040-1042. Effectively, the trial court found that the Port owed no duties independent of the Agreement to either of the plaintiffs.

1. The Supreme Court did not overrule the prior line of decisions in which the courts have determined as a matter of law that a tort remedy was not available in an action in which a contract was the core basis of the litigation.

Eastwood and *Affiliated* were decided on November 4, 2010. In issuing these opinions, the Washington State Supreme Court purposely recognized that its prior decisions applying the economic loss rule remained viable. In *Affiliated*, 170 Wn.2d at 450, the Supreme Court noted: “Our decisions in this case and in *Eastwood* leave **intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances.**” (emphasis added.)

Similarly, in *Eastwood*, 170 Wn.2d at 389, the Court acknowledged:

Where this court has stated that the economic loss rule applies, what we have meant is that considerations of commonsense, justice, policy and precedent in a particular set of circumstances led us to the legal conclusion that the defendant did not owe a duty.

Prior to *Eastwood* and *Affiliated*, the familiar principles of the economic loss rule were set out principally in *Berschauer/Phillips* and *Alejandre*.

The economic loss rule marks the fundamental boundary between **the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on**

others.

Berschauer/Phillip, 124 Wn.2d at 821. (emphasis added.)

In *Berschauer/Phillips*, a general contractor sued the architect, the structural engineering company and the construction inspector, claiming that as a result of their negligence, the contractor spent more money than expected and experienced delays in construction, with \$3.8 million in losses. *Id.* at 819. The Supreme Court reasoned that if a tort duty to avoid increased costs of doing business were imposed on design professionals, the construction industry could not rely on risk allocations in contracts. No tort duty was imposed: the general contractor was limited to contract remedies. *Id.* at 833.

The *Eastwood* Court wrote that *Berschauer/Phillips* “might have been different if a structure had collapsed.” *Eastwood*, 170 Wn.2d at 391. This is because “the safety-insurance policy of tort law” (*Eastwood*, 170 Wn.2d at 412 (quoting *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, at 420-421, 745 P.2d 1284 (1987))) would have been implicated if there had been property damage or personal injury. As in *Berschauer/Phillips*, there was no property damage or personal injury here. Trinity seeks damages for alleged economic loss only.

In *Alejandre*, house buyers sued the seller for fraudulent or negligent misrepresentation, fraudulent concealment, and common law

fraud after they discovered that the house had a defective septic system. The Court distinguished “economic losses” from “physical harm or property damage to property other than the defective product or property.” *Alejandre*, 159 Wn.2d at 685. The Court then noted that “purely economic damages” were at issue in *Alejandre* and that the parties’ relationship was “governed by contract.” *Id.* Because the plaintiffs established “[n]o exception to the economic loss rule,” they were limited to their contract remedies. *Id.* at 685-686.

Discussing *Alejandre*, the *Eastwood* Court explained that “the property contracted for purchase was defective and not what the contracting party expected to receive as the benefit of the bargain made.” *Eastwood*, 170 Wn.2d at 405. Put another way, the “expectation-bargain protection policy of warranty law” (*Eastwood*, 170 Wn.2d at 412 (quoting *Stuart*, 109 Wn.2d at 420-421)) was most applicable to the claim in *Alejandre*.

Thus, the *Alejandre* Court held that the economic loss rule applied and precluded the buyer’s negligent misrepresentation claim. *Alejandre*, 159 Wn.2d at 688. This was true “regardless of whether the specific risk of loss at issue was expressly allocated in the parties’ contract.” *Id.*

In this case, the only relationship between the Port of Tacoma and Trinity was that of a signatory to a contract and the third-party beneficiary

of that contract. There was no physical damage or personal injury involved here: thus, the only claim that Trinity has arises from its contractual relationship with the Port. Trinity is limited to contractual remedies.

2. The criteria for establishing an independent tort duty is stated succinctly in *Eastwood* and does not support the establishment of an independent tort duty owed by the Port to Trinity under the particular circumstances of this case.

In *Eastwood* and *Affiliated*, our Supreme Court ruled that a court must examine a particular set of circumstances and make a determination as a matter of law whether an independent tort duty exists by applying mixed considerations of logic, common sense, justice, policy and precedent:

The court determines whether there is an independent tort duty of care, and “[t]he existence of a duty is a question of law and depends on **mixed considerations of logic, common sense, justice, policy and precedent.**” *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001 (internal quotation marks omitted) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994)); see also *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, No. 82738-9, slip op. 7-8, 2010 Wash. LEXIS 926, at *7-10. Where this court has stated that the economic loss rule applies, what we have meant is that considerations of common sense, justice, policy, and precedent **in a particular set of circumstances** led us to the legal conclusion that the defendant did not owe a duty. **When no independent tort duty exists, tort does not provide a remedy.** (emphasis added.)

Eastwood, 170 Wn.2d at 389.

It has long been the policy and precedent of this state that “[w]hether a legal duty exists depends upon the **relationship** of the parties and the **foreseeability** of the risk involved.” *Webstad v. Stortini*, 83 Wn. App. 857, 865 fn 5, 924 P.2d 940 (1996) (emphasis added).

When viewed from the perspective of logic, common sense, justice, policy and precedent, there was simply no independent tort duty owed by the Port to Trinity. Such a duty is not established merely because a party pleads it. There is absolutely no legal precedent establishing such a duty, and it is fundamentally clear that the Port, to the extent that it was negotiating for the purchase of the property, was doing so with individuals purporting to be acting as agents of a seller, not a tenant. The Port was not attempting to establish a relationship with the tenant. It had been approached and solicited by parties purporting to have the authority to sell the property.

3. The facts of *Eastwood* and *Affiliated* do not support the establishment of an independent tort duty owed by the Port to Trinity under the particular circumstances of this case.

(a) *Eastwood* is distinguishable from the instant case.

In *Eastwood*, Eastwood owned a horse farm which she leased to a nonprofit organization (Horse Harbor Foundation, Inc.) that cared for

abused and abandoned horses. The lease included covenants requiring Horse Harbor to “maintain the farm and to return it to Eastwood in good condition.” *Id.* In fact, “Eastwood accepted a rental rate below fair market value in exchange for Horse Harbor's pledge to maintain the property.”

Eastwood, 170 Wn.2d at 383. However,

“there was a broad, persistent, and systemic failure” to maintain the leasehold, according to the trial court. Clerk's Papers (CP) at 131. After moving 15 to 16 horses to the farm, Horse Harbor permitted manure and urine to accumulate, and the Kitsap County Health District cited Horse Harbor for unlawful burning of solid waste and improper management of horse manure. Horse Harbor also failed to keep the farm and its improvements properly drained, resulting in pools of standing water and accumulating mud. Other maintenance problems included broken fencing, a damaged riding arena floor, and the horses chewing wood surfaces.

Id.

Eventually, Eastwood sued not only for breach of the lease, but also for commission of waste and “negligent breach of a duty to not cause physical damage to the leasehold.” *Id.* The trial court found that Horse Harbor had committed waste and breached the lease covenant to maintain the leasehold. *Id.* “At no point did the court or the parties raise the economic loss rule.” *Id.* On appeal, Horse Harbor did not cite the economic loss rule. *Id.*

The Court of Appeals did not address Eastwood's claim for waste or cite the waste statute, RCW 64.12.020, which

gives a lessor a right of action for damages if the lessee commits waste. *See Eastwood*, 2008 WL 1801332. On its own motion and without argument, the court cited *Alejandre v. Bull*, 159 Wash. 2d 674, 153 P. 3d 864 (2007), our most recent case discussing the economic loss rule, a doctrine that has attempted to describe the dividing line between the law of torts and the law of contracts.

The Court of Appeals characterized Eastwood's claims as economic losses because they “result[ed] from [Horse Harbor's] actions that led to damages and breach of the lease agreement.” *Eastwood*, 2008 WL 1801332, at *2. Based on these circumstances, the court held the economic loss rule applied and limited Eastwood to recovery only for breach of lease, and Warren and the Dalings could not be individually liable for the damages. *Id.* at *2-*3. The Court of Appeals denied Eastwood's motion for reconsideration.

Id. at 384-385.

The Supreme Court granted review, in pertinent part, on the following issue:

When a lessee breaches a lease covenant requiring the lessee to repair and maintain the leased property, is the lessor limited to contract remedies, or may the lessor also recover for the tort of waste?

The *Eastwood* Court turned to a description of the “duty to not cause waste” penned by “[a]n early American authority” (John N. Taylor, *A Treatise on the American Law of Landlord and Tenant* § 343, at 261 (6th ed. 1873), who stated that “the duty to not cause waste [i]s an obligation the tenant owes even if the lease covenants say nothing about the issue[.]” *Eastwood*, 170 Wn.2d at 398. The Court added, “This duty

not to cause waste has long been recognized in Washington. *See McLeod v. Ellis*, 2 Wash. 117, 120, 26 P. 76 (1891).” *Id.*

The Court held: “the duty to not cause waste is a tort duty that arises independently of a lease agreement and an aggrieved lessor may pursue damages concurrently under theories of tort and breach of lease.” *Id.*

In *Eastwood*, the defendant, as a lessee, had an independent common law duty not to cause waste to the leasehold, and the plaintiff lessor had a statutory cause of action for breach of that duty. In this case, there is no statutory right of action for any of the torts alleged by Trinity. More importantly, there is no common law or statutory duty of care running from a potential purchaser of real property to the seller or to the seller’s tenant. There was no relationship between the Port and Trinity that gave rise to any tort duty.

(b) *Affiliated* is distinguishable from the instant case.

In *Affiliated*, the Seattle Monorail blue train caught fire, causing millions of dollars in losses to SMS, which had contracted with the City of Seattle to operate and maintain the system. *Affiliated*, 170 Wn.2d at 444.

Its contract with Seattle granted SMS

the concession right and privilege to maintain and exclusively operate the Monorail System including the facilities, personal property and equipment, together with

the right to use and occupy the areas described in this section[.]

Id. at 445.

The Court found that SMS had “legally protected interests in the monorail” (*Affiliated*, 170 Wn.2d at 461), consisting of not only the right to maintain and exclusively operate the Monorail System, but also the right to use and occupy the areas described in its contract with the City of Seattle. *Affiliated*, 170 Wn.2d at 458-459.

Its contract with the City of Seattle required SMS “to carry an insurance ‘policy for fire and extended coverage, upset, collision and overturn, vandalism, malicious mischief, and other perils commonly included in the special coverage form,’ with Seattle designated as the loss payee.” *Affiliated*, 170 Wn.2d at 445. After the fire, SMS and Seattle amended their contract “to allocate the costs and responsibilities for repairing the fire and smoke damage to the monorail,” and SMS's insurer, AFM, paid \$3,267,861 to SMS and was subrogated to SMS's rights against LTK.” *Id.* at 446.

LTK Consulting Services was an engineering firm that had contracted with the Seattle several years before the fire “to examine the Monorail system and recommend repairs.” *Id.* AFM sued LTK, alleging negligence “in changing the electrical ground system for the Blue and Red

Trains.” *Id.* LTK assumed “for purposes of argument ‘that it recommended changes to Seattle, that those changes were implemented, and that their implementation resulted in a condition where the fault that occurred as a result of the drive shaft disintegration was not prevented.’” *Id.*

However,

LTK argued that SMS's losses were purely economic and that it was not liable in tort for economic losses, at least in this circumstance where it was not in contractual privity with SMS. The losses were purely economic, in LTK's view, because they stemmed from business interruptions and SMS's contractual obligations to repair the City's monorail trains, and SMS did not have a property interest in the Seattle Monorail.

Id.

The “question presented” was set out by the Supreme Court:

The question presented is whether SMS, which does not own the Seattle Monorail, can bring a tort action against LTK Consulting Services, Inc., an engineering firm that worked on monorail maintenance before the fire, for negligently causing the fire.

Affiliated, 170 Wn.2d at 444.

The Supreme Court discussed at length the process for a court to determine whether, as a matter of law, “the defendant was under an independent tort duty,” noting that “the issues are not only whether a person ‘owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed.’” *Affiliated*, 170 Wn.2d at 449 fn 2 (quoting

Keller v. City of Spokane, 146 Wn.2d 237, 243, 44 P.3d 845 (2002).

The *Affiliated* Court wrote that “engineers' common law duty of care has long been acknowledged in this state,” and held “the measure of reasonable care for an engineer undertaking engineering services is the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances.” *Affiliated*, 170 Wn.2d at 455.

LTK argued that it owed no duty to SMS, a third party, and that SMS “was in a position to negotiate better contract terms with Seattle, but SMS accepted the risk that Seattle could hire an engineer whose negligence would cause extensive property damage to the monorail and business losses.” *Id.* The Court wrote:

As LTK has framed it, the issue is whether the duty of care assumed by an engineering firm extends to the business expectancies of a company with a commercial interest in the property on which the engineering firm worked. However, the question here is whether an engineer's duty of care extends to safety risks of physical damage to the property on which the engineer works. We hold it does. As we have already observed, the harm in this case exemplifies the safety-insurance concerns that are at the foundation of tort law. A fire broke out suddenly on the Seattle Monorail's blue train, endangering people and causing extensive physical damage to property. Given the safety interest that justifies imposing a duty of care on engineers, LTK was obligated to act as a reasonably prudent engineer would with respect to safety risks of physical damage.

Id.

Thus, the Court found that LTK owed an independent duty of care that extended to physical damage on property on which the engineers had worked. The Court also found that SMS had a property interest in the monorail system through its contract with Seattle, which gave rise to a business expectancy of income from operating the monorail. *See Affiliated*, 170 Wn.2d at 457. (“The simultaneous realization of risk of harm to SMS’s business expectancy is irrelevant.”) The Court concluded that AFM properly sought damages for the harm to the to property interests of SMS. *Affiliated*, 170 Wn.2d at 460.

In this case, although Trinity had a “property interest” in Key’s property--that of a lessee to use and occupy Key’s property, no expectation of income arose from Trinity’s lease, and the Port’s actions caused no physical damage to Key’s property. There is neither a statutory nor a common law duty of care running from a prospective purchaser of real property to the seller’s tenant. The facts in this case are therefore significantly distinguishable from those in *Affiliated*.

D. Applying the *Eastwood/Affiliated* analysis to the facts of this case entitles the Port to dismissal of the tenant’s (Trinity’s) tort claims.

Existence of a tort duty depends, in part, upon the relationship of the parties. *Webstad*, 83 Wn. App. at 865 fn 5. In this case, the third-

party beneficiary is the tenant of a seller of commercial real estate and the defendant is a potential buyer of that property. The only “relationship” between the Port and Trinity was the fact that Trinity was a third-party beneficiary of the Contract between the Port and Key. This is a contractual relationship. Our search has revealed no Washington case that has ever found an independent tort duty running from a potential purchaser of real estate to the tenant of the seller. “When no independent tort duty exists, tort does not provide a remedy.” *Eastwood*, 170 Wn.2d at 389.

If a third-party beneficiary has no tort claims independent of the contract, then that third-party beneficiary, like any other plaintiff, is limited to its contract remedies. *Eastwood*, 170 Wn.2d at 393 (“the economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract”).

1. The proponent has the burden of establishing the existence of a duty.

In addition to the breaches of contract claims, Trinity claims that the Port owed it a duty of care that the Port violated with respect to Trinity’s business expectancies (CP 40) and fraudulent or negligent misrepresentations (CP 41). The proponent has the burden of establishing

the existence of a duty. *Hutchins v. 1001 Fourth Av. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360 (1991).

2. The existence or absence of an independent tort duty is a question of law for the courts to decide.

Mere allegation of a tort does not establish an independent tort duty; rather, the burden is upon Key/Trinity to establish as a matter of law that with application of “mixed considerations of logic, common sense, justice, policy and precedent” in “a particular set of circumstances,” an independent tort duty existed. *Eastwood*, 170 Wn.2d at 389.

In *Eastwood*, the Court stated: “[t]he existence of an independent duty is a question of law for the courts to decide.”

Eastwood, 170 Wn.2d at 389 (emphasis added.) Similarly, the Court reiterated that a Court decides whether a defendant was under an independent tort duty “as a matter of law.” *Affiliated*, 170 Wn.2d at 449.

This matter is before this Court for review of a summary judgment ruling. A motion for summary judgment presents a question of law that is reviewed de novo. *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

3. In the particular circumstances before this Court, Trinity cannot claim a duty by the Port to it regarding business expectancies.

Like Key, Trinity alleged that the Port made intentional or

negligent misrepresentations and intentionally interfered with its business expectancies. Trinity's tort claims are based solely on the fact that Key's representatives in the negotiations with the Port regarding the possible purchase of Key's property were also employees of Trinity.⁸

Other than as a third party beneficiary, Trinity had no relationship with the Port during the Port's negotiations with Key. There is no basis for imposition of a tort duty running from a potential purchaser of real property to the tenant of the property owner. This Court set out the elements of "intentional interference with contract or expectancy" in *Havsy v. Flynn*, 88 Wn. App. 514, 518-519, 945 P.2d 221 (1997):

(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and; (5) resultant damage.

Havsy, 88 Wn. App. at 518-519 (citing *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997); *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992)).

⁸ Trinity argued below that the Port presented no authority for the proposition that communications made to representatives of two entities without any expressions of limitations of exclusivity between them should be, as a matter of law, viewed as representations to only one. CP 1081.

Trinity identified the facts supporting its interference with business expectancies claim in its amended complaint:

In November, 2007, **Key** received a proposal and letter of intent from Harvey R. Widman and Assigns to purchase the Property for \$32.8 million. In December, 2007, **Key** received a proposal and letter of intent from MetalTech, Inc., to lease a portion of the Property. In March, 2008, MetalTech submitted a signed Lease Proposal for a lease of a portion of the Property, to commence on April 1, 2008. And in March, 2008, **Key** received a lease proposal and a draft lease from mkConstructs, to lease another portion of the Property, beginning on May 1, 2008. These business expectancies were highly favorable to Plaintiffs, considering their terms and considering the fact that they would result in termination of the existing Trinity leases.

CP 38-39 (emphasis added).

Trinity explained the basis of its claim that the Port intentionally interfered with its business expectancies: “Key had listed the Property for lease and Trinity had a reasonable expectation that this effort would be successful.” CP 1079. Trinity admitted that it was “not claiming that it had ‘business relationships’ with the potential lessees (MetalTech or mkConstructs) or with other prospective tenants or buyers. Nor did it need to make such a claim.” CP 1079-1080. Trinity is wrong. A plaintiff claiming intentional interference with business expectancies must show “that the defendant intentionally interfered with **his** business relationship[.]” *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (emphasis added). “A valid business expectancy includes

any prospective contractual or business relationship that would be of pecuniary value,' including a party's prospective customers." *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 360, 144 P.3d 276 (2006) (quoting *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (citing Restatement (Second) of Torts § 766B cmt. c (1979)). There must be "a **relationship between parties contemplating a contract**, with at least a reasonable expectancy of fruition." *Id.* (quoting *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971)) (emphasis added).

Comment c to Section 766B of the Restatement (Second) of Torts identifies the "type[s] of relation[s]" protected:

The relations protected against intentional interference by the rule stated in this Section include **any prospective contractual relations**, except those leading to contracts to marry (see § 698), if the potential contract would be of pecuniary value to the plaintiff. Included are **interferences with the prospect of obtaining employment or employees, the opportunity of selling or buying land or chattels or services, and any other relations leading to potentially profitable contracts. Interference with the exercise by a third party of an option to renew or extend a contract with the plaintiff is also included.** Also included is interference with a continuing business or other customary relationship not amounting to a formal contract. In many respects, a contract terminable at will is closely analogous to the relationship covered by this Section.

(emphasis added).

Trinity has admitted there was **no** relationship between Trinity and

the potential lessees of Key's property and there was certainly no contemplation of a contract between Trinity and potential lessees of Key's property. It was Key -- not Trinity -- who was attempting to sell or lease its property. Trinity wanted to terminate its existing contract with Key, not renew or extend it. Any lease resulting from Key's property listing would have been between Key and the third parties. As a matter of law, Trinity's theory establishes that it had neither a relationship with the Port, nor a relationship with any prospective tenants of the property owner, Key.

As a separate entity, Trinity has no claim for interference with Key's business expectancies. *See Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992) (setting out elements of tort; plaintiff must show intentional interference inducing or causing a breach or termination of **its own** business expectancy); *Pleas*, 112 Wn.2d at 804 ("Thus, a cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to **plaintiff's** contractual or business relationships.") (emphasis added).

Trinity had no "valid business expectancy" arising from the proposals made to Key for the purchase or lease of Key's property, even if it would have benefitted financially from termination of its lease with Key. The Port owed **Trinity** no duty not to interfere with **Key's** business

expectancies.

4. In the particular circumstances before this Court, Trinity cannot establish that the Port owed it a duty regarding negligent misrepresentation.

In its motion for reconsideration, Trinity took the position that it did not have a contractual relationship with the Port, but that it was entitled to rely upon the Port's representations made to its employees, even though its employees were only acting in their capacity as agents for Key. Carried to its logical conclusion, Trinity's argument would expand liability for negligent misrepresentation far beyond any recognized boundaries. Trinity's position is, effectively, (1) anyone making statements to an attorney or agent regarding only one of the attorney's clients or the agent's principals would be making those representations to all of those multiple clients or principals, and (2) the speaker would therefore be subject to liability for any misrepresentations to all of the clients or principals. This is not the law.

In deference to legitimate fears of indeterminate liability to third persons, the Restatement narrows the scope of an action for negligent misrepresentations. Liability does not extend to every person who ultimately becomes aware of the misstatement. Instead, because of the "important social policy of encouraging the flow of commercial information upon which the operation of the economy rests," **the defendant must be "manifestly aware of the use to which the information was to be put and intended to supply it for that purpose."** Restatement (Second) of Torts § 552, comment a (1977) Liability for negligent

misrepresentations is thus limited to cases where (1) the defendant has knowledge of the specific injured party's reliance; or (2) the plaintiff is a member of a group that the defendant seeks to influence; or (3) the defendant has special reason to know that some member of a limited group will rely on the information.

Haberman v. WPPSS, 109 Wn.2d 107, 161-62, 744 P.2d 1032 (1987), 750 P.2d 254 (1988) (emphasis added).

None of these circumstances imposing liability for negligent misrepresentations apply as between the Port and Trinity. Trinity did not have the ability to sell the property, nor did it have the ability to lease the property to other third parties. The Port was negotiating with Key, the owner of the property. Trinity did not “rely” on any representations made during the Key/Port negotiations, for Trinity had no authority to take any action or make any decisions based on the Port’s representations. The Port had no reason to negotiate with Key’s tenant, nor did it have any need to influence Key’s tenant in order to achieve a purchase from Key.

Our Supreme Court “explicitly adopted the Restatement (Second) of Torts (1977) (Restatement) as the standard governing claims of negligent misrepresentation in *Haberman* [.]” *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 731, 853 P.2d 913 (1993).

Restatement (Second) of Torts ¶ 552 limits liability of a speaker for negligent misrepresentations to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

“[O]ne who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care **only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.**” Restatement (Second) Torts ¶ 552, comment a. (emphasis added).

Trinity was not a party for whose benefit and guidance the Port intended to supply information regarding the potential commercial transaction between Key and the Port. The Port and Trinity were not involved in any transaction. The Port intended the information communicated to the representatives of Key to be used for the purpose of arriving at an agreement with Key regarding the potential sale of Key’s property. Trinity’s claim that the Port made “misrepresentations to Trinity” during discussions and negotiations leading up to the Contract between Key and Port has no factual or legal basis.

Moreover, “To establish a claim of negligent misrepresentation, a plaintiff must show that the defendant negligently supplied false information the defendant knew, or should have known, would guide the plaintiff in making a business decision, and that the plaintiff justifiably relied on the false information.” *Van Dinter v. Orr*, 157 Wn.2d 329, 333, 138 P.3d 608 (2006). A plaintiff claiming negligent representation must establish each element by clear, cogent, and convincing evidence. *Bloor v. Fritz*, 143 Wn. App. 718, 734, 180 P.3d 805 (2008). Trinity could not make such a showing.

Additionally, the existence of a duty to speak at all is a question of law. *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988); *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984). “There is no general requirement under Washington law of full disclosure of all relevant facts in every business relationship.” *General Ins. Co. of America v. Fort Lauderdale Partnership*, 749 F.Supp. 1483, 1491 (W.D.Wash. 1990). This Court should rule as a matter of law that the Port owed no duty to disclose material facts to Trinity.

5. In the particular circumstances before this Court, Trinity cannot establish that the Port owed it a duty regarding intentional misrepresentation.

A plaintiff claiming fraudulent misrepresentation must establish by clear, cogent, and convincing evidence that there are no genuine issues of

material fact with respect to all of the following nine elements:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

West Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 206, 48 P.3d 997 (2002) (citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996)). Failure to establish the existence of genuine issues of material fact with respect to any one of the nine elements of fraud, summary dismissal of their intentional misrepresentation claim is proper. *Stiley*, 130 Wn.2d at 505. Trinity cannot make such a showing.

(a) Trinity was not a third party whom the Port had reason to expect would be influenced in the transaction between the Port and Key.

As discussed in the preceding section, any “representations” made by Port employees before, during, and after the 30-day operation of the Contract between Key and the Port were made to representatives of Key, the property owner, not to representatives of Trinity, which was merely Key’s tenant.

The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, **is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other,**

and that it will influence his conduct in the transaction or type of transaction involved.

Haberman, 109 Wn.2d at 167 (quoting Restatement (Second) of Torts § 533) (emphasis added).

The Port was aware that Trinity was a lessee of Key, and that through Alex Lee and Chong So, Trinity knew the terms of the negotiations between Key and the Port. However, Trinity had no role to play in “the transaction” between the Port and Key, nor did Trinity have any role to play in any sale or lease of Key’s property to another party. The Port thus neither intended nor had any reason to expect that its communications to Key would influence Trinity’s conduct in any way.

Citing Restatement (Second) of Torts § 551, Key/Trinity argued below that the Port not only made affirmative intentional misrepresentations, but also failed to disclose material facts. CP 145 - 147. However, the duty of reasonable care to disclose as set out in Section 551 runs from “one party to a business transaction to the other[.]” The Port was not involved in a business transaction with Trinity. The Port was involved in discussions and negotiations with Key regarding a possible transaction with Key.

(b) Statements of intent to do something in the future are not statements of existing fact.

A representation of an existing fact must exist independently of (1)

any future acts or actions on the part of the party making the statement; (2) the occurrence of any other particular event in the future; and (3) the particular future uses of the person to whom the statement is made. *North Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 232, 628 P.2d 482 (1981). A promise of future performance is **not** a representation of existing fact and will not support a fraud claim. *Stiley*, 130 Wn.2d at 505, 506, 925 P.2d 194 (1996). Trinity failed to establish that the Port owed it a duty because the statements upon which Trinity bases its fraudulent misrepresentation claim were merely statements regarding future events.

6. The original ruling of the trial court considered and rejected Key/Trinity's independent tort duty arguments.

In Key/Trinity's written and oral arguments, the principles of what is now known as the "independent duty doctrine" were discussed at length. *See* CP 174-175; CP 181-183. On the application of the economic loss rule, they argued:

Even assuming that the Port's agreement in the Intent to Purchase to negotiate in good faith to reach a mutually acceptable Purchase and Sale Agreement is an enforceable contract, the agreement would still not bar Key's tort claims for the Port's misrepresentations and nondisclosures prior to execution of the Intent to Purchase because *Key's tort claims are not embodied in, and did not arise only from, that contract. Plaintiffs' tort claims are based on the Port's breach of its common law duties of truthfulness and full disclosure[.]*

CP 181 (*italics in original*) (emphasis added).

In its ruling on the cross-motions for summary judgment, the trial court considered Key/Trinity's arguments and **rejected** them. *See* CP 1040-1042. Effectively, the trial court found that the Port owed no duties independent of the Contract to either of the plaintiffs.

The trial court's ruling, while predating *Eastwood*, was reached after considering Key/Trinity's arguments, which mirrored the "independent duty doctrine" adopted in *Eastwood*. Thus, the trial court has already ruled that no independent tort duties ran from the Port of Tacoma to Key or to Trinity.

In its order of May 28, 2010, the trial court correctly ruled:

The key inquiry is the nature of the loss and the manner in which it occurs. *Alejandre v. Bull*, 159 Wn.2d 674, 684, 153 P.3d 864 (2007). Here, the loss is purely an economic one, as distinguished from personal injury or injury to other property. Therefore, no exception applies to the economic loss rule and the parties are limited to contractual remedies.

Accordingly, the Court grants Defendant's Motion for Summary Judgment, dismissing Plaintiffs' tort claims as a matter of law because the economic loss rule limits Plaintiffs to their contract remedies. Plaintiffs' Motion for Partial Summary Judgment to establish Defendant liable for tort claims is denied.

CONCLUSION

The relationship between the parties in this action arises out of a

contractual agreement entered into between Key and the Port. All of the damages alleged are strictly contractual in nature. None of the alleged damages involve injuries to persons or property, actual or potential.

Trinity, as a tenant of Key, has attempted to piggyback claims with Key by alleging a relationship that it subsequently has denied existed. The only relationship between Trinity and the Port is that of a third party beneficiary by virtue of the Contract between the Port and Key. Trinity's attempt to establish an independent tort duty by asserting standing through its relationship to Key, and thereby to the Port, is legally unsound. Trinity's attempt to create a tort duty by relying upon Key's allegations that Key relied upon alleged misrepresentations made by the Port to purchase Key's property, is equally unsound and factually erroneous.

Not only did Trinity lack standing to rely upon Key's allegations of misrepresentations by the Port to Key, said allegations are completely contradicted by the very document signed by Key on March 24, 2008, and every rough draft of said document exchanged between the Port and Key during the preceding 2½ months, acknowledging that the Port was not unconditionally committed to buy Key's property.

Applying logic and common sense to the relationship between the parties, and the circumstances of this case, results in a conclusion that there were no independent tort duties owed by the Port to Trinity.

Based upon long-standing, and recently affirmed legal standards regarding the application of the economic loss rule, the Port respectfully requests that this Court overturn the trial court's order on reconsideration and hold that as a third-party beneficiary to the Contract entered into between Key and the Port, Trinity's remedies are limited to those of a contractual nature as a matter of law.

Respectfully submitted this 21st day of March, 2011.

KRILICH, LA PORTE, WEST & LOCKNER, P.S.

By  _____

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<p>PORT OF TACOMA, Appellant, v. KEY DEVELOPMENT INVESTMENT LLC and TRINITY GLASS INTERNATIONAL, INC., Respondents.</p>	<p>NO. 40974-7-II DECLARATION OF SERVICE OF APPELLANT'S OPENING BRIEF</p>
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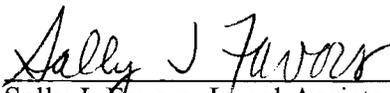
Sally J. Favors hereby declares as follows:

Per the agreement of the parties for service via electronic mail, on March 21, 2011, I emailed a true and accurate copy of the Appellant's Opening Brief to the attorneys for the respondents as follows:

Hall Baetz (hallbaetz@comcast.net);
D. Bruce Lamka (brucelamka@gmail.com);
Roger A. Leishman (rogerleishman@dwt.com); and
Carly A. Summers (carlysummers@dwt.com).

I certify and declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 21st day of March, 2011, in Tacoma, Washington.


Sally J. Favors, Legal Assistant to
Dennis J. La Porte, Attorney at
Law, WSBA #2971